

Administrative Law

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I. INTRODUCTION AND OVERVIEW

This Article surveys administrative law developments in appellate cases from June 1, 2006 through May 31, 2007. Only cases from the Georgia Supreme Court and the Georgia Court of Appeals have been reviewed. As compared to prior years, the number of cases in which administrative law principles played a significant role showed no upward spike. There are many other topics that concern elements of administrative law, but this Article does not address cases containing those specific subject matter topics. There is likely some duplication of cases among the subject matter topics, but only the administrative law elements are emphasized in this Article.

This Article begins with cases that concern standing to initiate certain types of proceedings and then turns to the defenses and immunities discussed in administrative law cases. Standards of review and the effects of agency actions come next, and the last substantive topic discussed is the ever-present question of a direct or discretionary appeal. This Article finishes up with a recounting of the acts enacted by the Georgia General Assembly in its 2007 regular session that affect the composition and powers of administrative agencies.

II. STANDING TO INITIATE PROCEEDINGS

During this year's survey period, Georgia courts addressed the issue of standing in two cases, one of which was also discussed in last year's

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article.¹ In *Massey v. Butts County*,² the Georgia Supreme Court held that the plaintiff lacked standing to challenge the zoning decision because he failed to demonstrate special damages.³ 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. The plaintiff alleged that a barn constructed on the neighbor's property violated the County's zoning ordinance. The trial court granted the neighbor's motion to dismiss for lack of standing, and the court of appeals affirmed.⁴

On appeal to the supreme court, the court recognized two lines of cases that addressed whether a property owner must show special damages to challenge a zoning action on a neighboring property within the same municipality.⁵ The plaintiff relied upon a string of cases that originated in *Snow v. Johnston*,⁶ in which the supreme court held that a property owner has standing to seek injunctive relief from a zoning action and does not need to show special damages when he or she resides in a municipality with a zoning ordinance that restricts property use to residential purposes.⁷ The defendants, however, cited *Tate v. Stephens*,⁸ in which the supreme court held that a property owner must demonstrate special damages in order to seek injunctive relief from a zoning determination.⁹

In 1946 the General Assembly passed comprehensive zoning and planning legislation for municipalities, which provided for judicial review of a municipality's board of zoning adjustments decision to "[a]ny person

1. See Martin M. Wilson & Jennifer A. Blackburn, *Administrative Law*, 58 MERCER L. REV. 1, 2 (2006) (discussing *Massey v. Butts County*, 275 Ga. App. 478, 621 S.E.2d 479 (2005)).

2. 281 Ga. 244, 637 S.E.2d 385 (2006).

3. *Id.* at 245, 637 S.E.2d at 386.

4. *Id.*

5. *Id.*

6. 197 Ga. 146, 28 S.E.2d 270 (1943).

7. *Massey*, 281 Ga. at 245-46, 637 S.E.2d at 387 (citing *Snow*, 197 Ga. at 152, 28 S.E.2d at 275). In *Massey* appellants asserted that *Snow* is controlling because it is the older precedent. *Id.* at 246 n.2, 637 S.E.2d at 387 n.2. To support this assertion, they cited *Sowell v. Sowell*, 212 Ga. 351, 92 S.E.2d 524 (1956), in which the court determined that unless overruled, the earliest decision on a subject prevails. *Massey*, 281 Ga. at 246 n.2, 637 S.E.2d at 387 n.2 (citing *Sowell*, 212 Ga. at 353, 28 S.E.2d at 526). The supreme court, however, dismissed the appellants' assertion and the holding in *Sowell* because the court has since determined that the "more persuasive" rule is the one that appears later in time. *Massey*, 281 Ga. at 246, 637 S.E.2d at 387 (quoting *Houston v. Lowes of Savannah*, 235 Ga. 201, 203, 219 S.E.2d 115, 116 (1975)).

8. 245 Ga. 519, 265 S.E.2d 811 (1980).

9. *Massey*, 281 Ga. at 246, 637 S.E.2d at 387 (citing *Tate*, 245 Ga. at 521, 265 S.E.2d at 813).

or persons who may have a substantial interest in any decision of the board of adjustment.”¹⁰ Subsequently, the General Assembly also allowed “[a]ny person or persons severally or jointly aggrieved” the right to appeal the decisions of the board of zoning appeals.¹¹ While the legislature’s “substantial interest-aggrieved citizen” test was only statutorily applicable to judicial appeals from decisions of local boards of adjustment or zoning appeals, the supreme court adopted this standard for judicial appeals from zoning decisions rendered by all local governing authorities.¹² Because *Snow* was decided prior to the 1946 zoning legislation, the court in *Massey* held that it was no longer controlling precedent.¹³ Therefore, the supreme court held that *Tate*, which was decided after the zoning legislation was enacted, controlled and required the plaintiff to establish a substantial interest in the zoning decision and show special damages in order to have standing to appeal.¹⁴

In a matter of first impression, the court of appeals determined that a devisee’s inchoate interest in real property may constitute a “substantial interest” and therefore allow standing to challenge a zoning decision on neighboring property.¹⁵ In *Hollberg v. Spalding County*,¹⁶ the appellant challenged the Spalding County Board of Commissioners’ grant of a special exception permit to rezone an adjacent parcel.¹⁷ In order to challenge a zoning decision, a neighboring property owner must establish standing under the “substantial interest-aggrieved citizen” test, which requires (1) evidence of a substantial interest in the zoning decision and (2) evidence of special damages not common to all similarly situated property owners.¹⁸ The neighboring property, the property under which the appellant sought to establish standing, was devised to the appellant as a life estate in his mother’s will. However, when the board of commissioners approved the special exception permit on

10. 1946 Ga. Laws 191, 198 (codified at GA. CODE ANN. § 69-827 (Harrison 1976) (repealed 1976)). See *Massey*, 281 Ga. at 248, 637 S.E.2d at 388-89, for the court’s discussion explaining the demise of the statutory footing for the substantial interest-aggrieved citizen test but the preservation of its judicial expansion.

11. 1964 Ga. Laws 259, 260 (codified at GA. CODE ANN. § 69-1211.1 (Harrison 1976) (repealed 1976)).

12. *Massey*, 281 Ga. at 247, 637 S.E.2d at 387 (citing *Brock v. Hall County*, 239 Ga. 160, 161, 236 S.E.2d 90, 91 (1977)).

13. *Id.* at 247-48, 637 S.E.2d at 388.

14. *Id.* at 247, 637 S.E.2d at 388.

15. *Hollberg v. Spalding County*, 281 Ga. App. 768, 773, 637 S.E.2d 163, 169 (2006).

16. 281 Ga. App. 768, 637 S.E.2d 163 (2006).

17. *Id.* at 769, 637 S.E.2d at 166.

18. *Id.* at 770, 637 S.E.2d at 167.

September 23, 2004, the will was not yet settled. The appellees argued that the appellant did not have standing to challenge the special exception because the appellant did not hold title to the property at the time the special exception was granted.¹⁹ In deciding if the appellant established standing, the court applied the substantial interest-aggrieved citizen test.²⁰

For the first prong of the test, the appellant asserted that he had a substantial interest in the zoning decision by virtue of being a devisee in his mother's will, which included the property adjacent to the rezoned property.²¹ The court noted, "Whether a devisee of real property has a substantial interest in a zoning decision so as to satisfy the first prong of the test is a matter of first impression in [Georgia]."²² The court further noted that the probate rules establish that "'upon the death of the owner of realty the devisees have an inchoate title in the realty, which is perfected when the executor assents to the devise."²³ The court finally noted that this assent "'relates back to the date of death of the testator."²⁴ Thus, the devise of the life estate, vested to the appellant, relates back to the date of his mother's death, which was prior to the approval of the special exception.²⁵ Therefore, the court held that the appellant's inchoate title was sufficient to give him a substantial interest in the grant of the special exception.²⁶

The second prong of the test required the appellant to show that "his property will suffer special damage as a result of the decision complained of rather than merely some damage which is common to all property owners similarly situated."²⁷ Expert testimony in the record provided that the value of the land appreciated considerably since the date the special exception was granted.²⁸ Based on these findings, the court affirmed the trial court's holding that the appellant failed to establish standing under the substantial interest-aggrieved citizen test.²⁹

19. *Id.* at 768-72, 637 S.E.2d at 165-68.

20. *Id.* at 772-75, 637 S.E.2d at 168-70.

21. *Id.* at 772, 637 S.E.2d at 168.

22. *Id.*

23. *Id.* at 772-73, 637 S.E.2d at 168 (quoting *Williams v. Williams*, 236 Ga. 133, 135, 223 S.E.2d 109, 110 (1976)).

24. *Id.* at 773, 637 S.E.2d at 168-69 (quoting *Allan v. Allan*, 236 Ga. 199, 201, 223 S.E.2d 445, 448 (1976)).

25. *Id.*, 637 S.E.2d at 169.

26. *Id.*

27. *Id.* (quoting *Brand v. Wilson*, 252 Ga. 416, 417, 314 S.E.2d 192, 194 (1984)).

28. *Id.* at 775, 637 S.E.2d at 170.

29. *Id.*

III. AGENCY DEFENSES AND IMMUNITIES

The next three cases examine various agency defenses and immunities. In *Decatur County v. Bainbridge Post Searchlight, Inc.*,³⁰ the supreme court held that the attorney-client privilege exception to the Georgia Open Records Act³¹ (“ORA”) did not protect the commissioners’ executive session from a newspaper’s open records request.³² The Bainbridge Post Searchlight (the “newspaper”) challenged the commissioners’ denial of its open records request for responses to grand jury presentments that were reviewed in an executive session of the commissioners’ regularly scheduled meeting.³³

Official Code of Georgia Annotated (“O.C.G.A.”) section 50-14-1(b)³⁴ states that “[e]xcept as otherwise provided by law, all meetings [conducted by a public agency] shall be open to the public.”³⁵ However, O.C.G.A. section 50-14-2(1)³⁶ provides an exception for the attorney-client privilege, stating that a meeting “may be closed in order to consult and meet with legal counsel pertaining to pending or potential litigation.”³⁷ The court warned that the attorney-client privilege exception must be narrowly construed in order to uphold the legislative intent of the ORA, which is to require public agencies to conduct open meetings.³⁸ Because there was no “pending or potential litigation,” but only proposed grand jury presentments, the supreme court affirmed the trial court’s holding that the attorney-client privilege did not apply to the executive session.³⁹

In a forceful dissent authored by Justice Melton and joined by Justice Benham, Justice Melton rejected the majority’s holding that the information at issue was not protected by the attorney-client privilege.⁴⁰ Unlike the majority, the dissent did not classify the presentments as “proposed.”⁴¹ The presentments were prepared by the grand jury and presented to the commissioners for review and response. The responses would likely be used to determine the charges the grand jury

30. 280 Ga. 706, 632 S.E.2d 113 (2006).

31. O.C.G.A. §§ 50-14-1 to -6 (2006).

32. *Decatur County*, 280 Ga. at 708, 632 S.E.2d at 116.

33. *Id.* at 706, 632 S.E.2d at 115.

34. O.C.G.A. § 50-14-1(b) (2006).

35. *Id.*

36. O.C.G.A. § 50-14-2(1) (2006).

37. *Id.*

38. *Decatur County*, 280 Ga. at 707, 632 S.E.2d at 116.

39. *Id.* at 708, 632 S.E.2d at 116 (quoting O.C.G.A. § 50-14-2(1)).

40. *Id.* at 709, 632 S.E.2d at 117 (Melton, J., dissenting).

41. *Id.*

would pursue against the commissioners.⁴² The acts of reviewing and responding to the presentments were “directly analogous to discovery in a pending suit.”⁴³ Accordingly, the dissent argued that the attorney-client privilege protected the presentments and allowed for a closed meeting.⁴⁴

In *Reece v. Turner*,⁴⁵ the court examined whether the appellants, as employees of the Cobb County public school system, were entitled to official immunity as provided in the Georgia constitution.⁴⁶ The appellee filed a damages claim against the appellants—all of whom were employees in supervising roles at Pebblebrook High School (“Pebblebrook”)—as a result of a nonparty’s, Virgil Spaur, sexual molestation of the appellee.⁴⁷ The court of appeals held that the appellants were entitled to official immunity on the damages claim, thereby reversing the trial court’s holding.⁴⁸

Georgia law provides that a public officer may be personally liable only for a “ministerial act” negligently performed or a “discretionary act” performed with malice or intent to injure.⁴⁹ The appellee presented no evidence that the appellants acted with either actual malice or an actual intent to cause injury.⁵⁰ Therefore, the court held that unless the appellee was able to establish that the appellants were performing ministerial acts and not discretionary acts, the doctrine of official immunity applied and barred the appellee’s claim.⁵¹ 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.”⁵² 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.”⁵³

42. *Id.*

43. *Id.*

44. *Id.*

45. 284 Ga. App. 282, 643 S.E.2d 814 (2007).

46. GA. CONST. art. I, § 2, para. 9(e).

47. *Reece*, 284 Ga. App. at 283, 643 S.E.2d at 816.

48. *Id.* at 288, 643 S.E.2d at 819.

49. *Id.* at 285, 643 S.E.2d at 816-17 (citing *Harper v. Patterson*, 270 Ga. App. 437, 440, 606 S.E.2d 887, 891 (2004)).

50. *Id.*, 643 S.E.2d at 817.

51. *Id.*

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

53. *Id.* (quoting *Happoldt*, 256 Ga. App. at 98, 567 S.E.2d at 382).

The appellee claimed that the appellants negligently failed to supervise her, as a student, and Spaur, as an employee, in a manner sufficient to protect her from molestation.⁵⁴ The court's well established precedent provided that "the making of decisions regarding the supervision of students and school personnel is a discretionary function requiring personal deliberation and judgment."⁵⁵ As such, the court of appeals reversed the trial court's decision and held that the appellee's claim was barred by official immunity.⁵⁶

In *Live Oak Consulting, Inc. v. Department of Community Health*,⁵⁷ the court of appeals examined the application of the Georgia Administrative Procedure Act⁵⁸ ("GAPA") and the protection of sovereign immunity for state agencies. Live Oak Consulting, Inc. ("Live Oak") brought an action against the Department of Community Health (the "Department"), seeking a declaratory judgment against the Department. The action challenged the Department's interpretation of its rules concerning contributions to state health insurance benefit plans. The Department filed a motion for protective order, asserting that sovereign immunity precluded the superior court's jurisdiction and that discovery should be stayed. The trial court granted the Department's motion for protective order to stay discovery, determining that sovereign immunity barred the claim. On appeal, Live Oak contended that the trial court improperly decided the matter pursuant to O.C.G.A. section 50-13-10⁵⁹ of GAPA.⁶⁰

The doctrine of sovereign immunity requires a trial court to address a declaratory judgment action pursuant to GAPA.⁶¹ The court warned, "In no uncertain terms[,] [O.C.G.A. section] 50-13-10 governs declaratory judgment regarding the validity of administrative rules."⁶² The plain language of the statute provides, "The validity of any rule . . . may be determined in an action for declaratory judgment when it is alleged that the rule . . . or its threatened application interferes with or impairs the

54. *Reece*, 284 Ga. App. at 285, 643 S.E.2d at 817.

55. *Id.* (citing *Harper*, 270 Ga. App. at 440, 606 S.E.2d at 891); *see also* *Leake v. Murphy*, 274 Ga. App. 219, 225, 617 S.E.2d 575, 580 (2005), *overruled on other grounds by* *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E.2d 54 (2007); *Chamlee v. Henry County Bd. of Educ.*, 239 Ga. App. 183, 184, 521 S.E.2d 78, 80 (1999); *Perkins v. Morgan County Sch. Dist.*, 222 Ga. App. 831, 835-36, 476 S.E.2d 592, 596 (1996).

56. *Reece*, 284 Ga. App. at 288, 643 S.E.2d at 819.

57. 281 Ga. App. 791, 637 S.E.2d 455 (2006).

58. O.C.G.A. §§ 50-13-1 to -44 (2006).

59. O.C.G.A. § 50-13-10 (2006).

60. *Live Oak Consulting*, 281 Ga. App. at 791-94, 637 S.E.2d at 456-58.

61. *Id.* at 794-95, 637 S.E.2d at 458-59.

62. *Id.* at 795, 637 S.E.2d at 459 (quoting *Dep't of Transp. v. Peach Hill Props.*, 280 Ga. 624, 625, 631 S.E.2d 660, 661 (2006)).

legal rights of the petitioner.”⁶³ The statute also provides specific procedural guidelines for filing such an action, which include a requirement that the action be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner.⁶⁴ These statutory provisions clearly provide the prescribed terms and conditions under which the state consents to be sued based on a challenge to an agency’s rule or regulation.⁶⁵

Nevertheless, Live Oak argued that the “may be determined” language in the statute is evidence that the statute is only one of several methods by which one may challenge the validity of an agency rule.⁶⁶ The court disagreed and observed that “[u]nder the doctrine of sovereign immunity, the state cannot be sued without its consent.”⁶⁷ Furthermore, the Georgia constitution “provides that the State’s immunity ‘can only be waived by an Act of the General Assembly which *specifically* provides that sovereign immunity is thereby waived and the extent of such waiver.’”⁶⁸ Accordingly, the court of appeals affirmed the trial court’s grant of the Department’s motion for protective order, holding that the trial court properly applied GAPA to the action and correctly concluded that sovereign immunity protects the state agency from a declaratory judgment action.⁶⁹

The next case mandates strict compliance with statutory filing provisions for actions against state agencies. In *Gladowski v. Department of Family & Children Services*,⁷⁰ the court of appeals affirmed the superior court’s finding that the petition for judicial review was not timely filed.⁷¹ Sylvia Gladowski filed an appeal from a Department of Family and Children Services (the “Department”) ruling that determined Gladowski improperly transferred assets to qualify for Medicaid coverage.⁷² Under O.C.G.A. section 49-4-153(c),⁷³ an aggrieved party may obtain judicial review of a final decision of a department “by filing a petition within 30 days after the service of the final decision of the

63. O.C.G.A. § 50-13-10(a).

64. *Id.* § 50-13-10(b).

65. *Live Oak Consulting*, 281 Ga. App. at 795, 637 S.E.2d at 459.

66. *Id.* at 795-96, 637 S.E.2d at 459.

67. *Id.* at 796, 637 S.E.2d at 459 (quoting *State Bd. of Educ. v. Drury*, 263 Ga. 429, 430, 437 S.E.2d 290, 292 (1993)).

68. *Id.* (emphasis added by court) (quoting *Atlanta v. Barnes*, 276 Ga. 449, 452, 578 S.E.2d 110, 113 (2003)).

69. *Id.*, 637 S.E.2d at 459-60.

70. 281 Ga. App. 299, 635 S.E.2d 886 (2006).

71. *Id.* at 302, 635 S.E.2d at 889.

72. *Id.* at 299-300, 635 S.E.2d at 887-88.

73. O.C.G.A. § 49-4-153(c) (2006).

commissioner.⁷⁴ The court of appeals determined that the date of service is the date the final decision was mailed by the agency, not the date it was received.⁷⁵ “When an appeal of an adverse decision by an administrative agency is filed beyond the time allowed by law the superior court has no jurisdiction to take any action other than to dismiss the case.”⁷⁶ Because Gladowski filed outside of the thirty-day statutory period, the court held that the superior court properly dismissed her claim.⁷⁷

Similarly, in *Perdue v. Athens Technical College*,⁷⁸ the court of appeals demanded strict compliance with statutory *ante litem* notice requirements.⁷⁹ The court held that the appellant failed to properly comply with the notice provisions of O.C.G.A. section 50-21-26(a)⁸⁰ and was thereby barred from pursuing the claim against the state.⁸¹ While the appellant provided *ante litem* notice to the proper party by certified letter, the letter did not set forth the specific amount of the claim as required under O.C.G.A. section 50-21-26(a)(5)(E).⁸² In reaching its decision, the court noted that in *Howard v. State*,⁸³ when the plaintiff provided *ante litem* notice to the insurance agent, but not directly to the state entity, the notice was “obviously deficient.”⁸⁴ The court in *Perdue* further noted that in *Dempsey v. Board of Regents*,⁸⁵ the court held the notice deficient because it was not based on the claimant’s knowledge and belief, and it was not delivered properly.⁸⁶ Based on the substantial body of case law requiring strict compliance with *ante litem* notice provisions, the court in *Perdue* held that the appellant’s failure to properly state the amount of the claim was a fatal omission, the *ante litem* notice was deficient, and the claim was barred.⁸⁷

74. *Id.*

75. *Gladowski*, 281 Ga. App. at 300, 635 S.E.2d at 888.

76. *Id.* at 302-03, 635 S.E.2d at 889 (quoting *Miller v. Ga. Real Estate Comm’n*, 136 Ga. App. 718, 719, 222 S.E.2d 183, 183 (1975)).

77. *Id.* at 303, 635 S.E.2d at 889.

78. 283 Ga. App. 404, 641 S.E.2d 631 (2007).

79. *Id.* at 407, 641 S.E.2d at 633.

80. O.C.G.A. § 50-21-26(a) (2006).

81. *Perdue*, 283 Ga. App. at 408, 641 S.E.2d at 634.

82. *Id.* at 406, 641 S.E.2d at 633 (applying O.C.G.A. § 50-21-26(a)(5)(E)).

83. 226 Ga. App. 543, 487 S.E.2d 112 (1997).

84. *Perdue*, 283 Ga. App. at 406, 641 S.E.2d at 633 (quoting *Howard*, 283 Ga. App. at 544, 487 S.E.2d at 114).

85. 256 Ga. App. 291, 568 S.E.2d 154 (2002).

86. *Perdue*, 283 Ga. App. at 407, 641 S.E.2d at 633 (citing *Dempsey*, 256 Ga. App. at 293, 568 S.E.2d at 156).

87. *Id.* at 408, 641 S.E.2d at 634.

IV. STANDARDS OF REVIEW FOR AGENCY DECISIONS

In *Farrar v. Georgia Board of Examiners of Psychologists*,⁸⁸ a novel twist on the “any evidence rule” was presented to the court of appeals. Farrar had received six months probation in a disciplinary proceeding before an administrative law judge (“ALJ”). The State Board of Examiners of Psychologists (the “Board”) reviewed the findings and the punishment levied by the ALJ, and it increased the punishment.⁸⁹

Subsequent to the final agency decision, Farrar appealed to the superior court and specifically questioned whether sufficient evidence supported the increase in his punishment. The superior court was not sympathetic, and it affirmed the Board’s decision.⁹⁰

Upon filing an appeal to the court of appeals, a strange procedural twist developed. The transcripts from both the hearing held before the ALJ and the subsequent hearing before the Board were not in the record transmitted to the court of appeals, and the clerk of the superior court apparently told the clerk of the court of appeals that no transcripts were in the superior court clerk’s possession.⁹¹ The appellate court interpreted the situation to mean that the superior court had issued an order without the entire record of the evidence before it.⁹² Thus, the court of appeals vacated and remanded the case with direction to reconsider the appeal made previously by Farrar.⁹³ Apparently, for purposes of review, the any evidence standard requires a reviewing court to consider *all* the evidence.

*Piedmont Healthcare, Inc. v. Georgia Department of Human Resources*⁹⁴ presented the court of appeals with a good appellate case for the discussion of a summary determination under administrative rules. Piedmont Healthcare, Inc. (“Piedmont”) wished to consolidate its Atlanta and Fayette County facilities under a single hospital permit. The Office of Regulatory Services (“ORS”) denied Piedmont’s application for consolidation.⁹⁵

Piedmont appealed and obtained a hearing before an ALJ. Piedmont and the ORS both moved for summary determination, which is roughly an administrative equivalent to filing a motion for summary judgment.

88. 280 Ga. App. 455, 634 S.E.2d 79 (2006).

89. *Id.* at 455, 634 S.E.2d at 80.

90. *Id.*

91. *Id.* at 456, 634 S.E.2d at 80.

92. *Id.*, 634 S.E.2d at 81.

93. *Id.* at 456-57, 634 S.E.2d at 81.

94. 282 Ga. App. 302, 638 S.E.2d 447 (2006).

95. *Id.* at 302, 638 S.E.2d at 448.

The ALJ determined that a hearing was unnecessary because no questions of fact remained and awarded a summary determination to the ORS.⁹⁶

Upon Piedmont's appeal for a final agency decision by the Department of Human Resources ("DHR"), the DHR affirmed the ALJ's decision. Subsequently, Piedmont brought the matter to superior court, and it was affirmed.⁹⁷

Bringing the issue before the court of appeals, Piedmont argued that questions of fact remained, and therefore summary determination should not have been issued. Piedmont argued that a hearing should have been held in order to introduce and resolve issues of fact.⁹⁸ In much the same fashion as an appellate review of a grant of summary judgment, the court of appeals proceeded to review the law and evidence to assess whether factual issues remained.⁹⁹ To Piedmont's detriment, the court ruled that the so-called evidence Piedmont would have presented at the hearing was really just a statement that Piedmont could have introduced additional facts.¹⁰⁰ However, Piedmont had moved for summary determination, and although Piedmont claimed to have additional facts that it could have introduced at a hearing, the facts were not included in its motion.¹⁰¹

When the ORS originally reviewed Piedmont's permit application, it ruled that Piedmont did not meet the proximity requirement of a single permit because of the distance between the two facilities and the resulting difficulty that the facilities would have in sharing resources. In subsequent rulings, the ALJ and appeals reviewer also found that the two facilities were simply not in close proximity.¹⁰² Ultimately, the court of appeals deferred to the ORS's conclusions because, the court noted, courts must show deference to an agency's interpretation.¹⁰³ Concluding that no issues of material fact existed, the court of appeals affirmed the summary determination.¹⁰⁴

Agency deference was also an issue in *Department of Community Health v. Pruitt Corp.*¹⁰⁵ Pruitt Corporation ("Pruitt") had purchased

96. *Id.* at 303, 638 S.E.2d at 448. The administrative rule allowing the summary determination is GA. COMP. R. & REGS. r. 616-1-2-.15 (2004).

97. *Piedmont Healthcare*, 282 Ga. App. at 303, 638 S.E.2d at 448.

98. *Id.* at 305, 638 S.E.2d at 449.

99. *Id.*

100. *Id.* at 306, 638 S.E.2d at 450.

101. *Id.*

102. *Id.*

103. *Id.* at 306-07, 638 S.E.2d at 450-51.

104. *Id.* at 307, 638 S.E.2d at 451.

105. 284 Ga. App. 888, 645 S.E.2d 13 (2007).

a nursing facility from Integrated Health Services (“IHS”). The nursing facility participated in the Medicaid program. It used the per diem rate, a special manner of calculating the amounts to be paid by the Medicaid program to a nursing facility. The calculation, as applied to a nursing facility having different owners within the same fiscal year, depended upon the submission of cost reports for the intervals of ownership.¹⁰⁶

Because Pruitt had only owned the nursing facility for two months when it filed its initial cost report, the Department of Community Health (the “Department”) relied on IHS’s cost reports. This reliance produced an applicable per diem rate substantially lower than that determined by Pruitt during its two months or by IHS for the preceding ten months of ownership during the fiscal year. In interpreting its own policy and procedures manual, the Department actually used IHS’s cost report from the preceding full fiscal year, as it was the “last approved cost report” under the Department’s interpretation.¹⁰⁷

Pruitt obtained an administrative review of the per diem rate computation, and the ALJ reversed. The ALJ concluded that “last approved cost report” was an ambiguous phrase, and therefore, Pruitt should receive the benefit of a favorable interpretation. The Department sought a final agency decision from the commissioner, who reversed the ALJ’s ruling. The commissioner opined that last approved cost report permissibly equated the term “approved” with the term “audited.” Because the Department only conducted audits after the end of the fiscal year, it correctly figured the per diem rate based on the audited cost report from the last full year of ownership by IHS.¹⁰⁸

Pruitt continued the proceedings by taking the matter to the superior court. The superior court reversed the commissioner’s decision and agreed with the ALJ. The Department then took the matter to the court of appeals.¹⁰⁹

The appellate court examined the final agency decision rendered by the commissioner and held that the superior court had erred.¹¹⁰ Using the standard in O.C.G.A. section 50-13-19(h)(5),¹¹¹ the court concluded that the evidence (albeit conflicting) supported the commissioner’s decision, and therefore the decision was not clearly erroneous.¹¹² By restoring the decision of the ALJ, the superior court had not given

106. *Id.* at 888-89, 645 S.E.2d at 14.

107. *Id.*, 645 S.E.2d at 14-15.

108. *Id.* at 888-90, 645 S.E.2d at 14-15.

109. *Id.* at 890, 645 S.E.2d at 15.

110. *Id.* at 892, 645 S.E.2d at 17.

111. O.C.G.A. § 50-13-19(h)(5) (2006).

112. *See Pruitt*, 284 Ga. App. at 892, 645 S.E.2d at 16-17.

proper deference to the Department's interpretation of its own policies and procedures manual.¹¹³ Because the Department's interpretation was not unreasonable, the court of appeals reversed the superior court's judgment.¹¹⁴

The last case in this section is *City of Roswell v. Fellowship Christian School, Inc.*¹¹⁵ Fellowship Christian School, Inc. ("Fellowship") wished to build school facilities and included a new football stadium in its application for a conditional use permit. The planning commission for Roswell recommended to the city government that the permit be approved, but ultimately, the approval obtained from the city did not include the new football stadium.¹¹⁶

Instead of initiating a proceeding confined strictly to an appeal of the issuance of the permit without the stadium contained therein, Fellowship filed in superior court for a writ of mandamus to compel the mayor and the city council to issue the permit as originally filed. The trial court issued the writ, and the city appealed through the discretionary appeal process.¹¹⁷

The supreme court, in setting the ground rules for the review, noted that a city ordinance gives the mayor and the city council discretion in deciding how to act on a permit application.¹¹⁸ When discretion is present, a writ of mandamus is only proper if the discretion is grossly abused.¹¹⁹ If any evidence supports the mayor and council's decision, the exercise of discretion is proper.¹²⁰

The mayor and council, under the applicable statutes, did have discretion to consider several different factors that might influence a decision on a permit application.¹²¹ One factor was whether the planned buildings and stadium would result in an increase in traffic without a plan for resolving such a problem.¹²² The supreme court noted that there were two other high school stadiums within a mile of Fellowship's location and that Fellowship's traffic study showed that the stadium would exacerbate heavy traffic conditions.¹²³ This evidence

113. *Id.* at 891, 645 S.E.2d at 16.

114. *Id.* at 891-92, 645 S.E.2d at 16-17.

115. 281 Ga. 767, 642 S.E.2d 824 (2007).

116. *Id.* at 767, 642 S.E.2d at 825.

117. *Id.*

118. *Id.* at 768, 642 S.E.2d at 825.

119. *Id.* (quoting *Jackson County v. Earth Res., Inc.*, 280 Ga. 389, 390, 627 S.E.2d 569, 571 (2006)).

120. *Id.* (citing *Jackson County*, 280 Ga. at 391, 627 S.E.2d at 571).

121. *See id.* at 769, 642 S.E.2d at 826 (citing O.C.G.A. § 36-67-3(4) (2006)).

122. *Id.* (citing O.C.G.A. § 36-67-3(4)).

123. *Id.*

was enough to support the exercise of discretion in decision-making by the mayor and the council, and the superior court's judgment was reversed.¹²⁴

V. EFFECTS OF AGENCY ACTIONS

The decision in *Department of Transportation v. Peach Hill Properties, Inc.*¹²⁵ illustrates what happens when a party does not follow instructions. In a prior appearance of this matter, the supreme court held in favor of Peach Hill Properties ("Peach Hill").¹²⁶ In that prior appearance, Peach Hill had applied for an exemption to develop a landfill near a regional airport. The Department of Transportation (the "Department") would not submit the matter to the Federal Aviation Administration ("FAA"), so Peach Hill sought relief in superior court. The superior court ordered the Department to submit the matter.¹²⁷ The supreme court held the order to be an abuse of discretion.¹²⁸ However, Peach Hill obtained relief by a directed remand which stated that the superior court could develop guidelines that would allow Peach Hill to seek the previously requested exemption from the FAA.¹²⁹

When the superior court received the directions from the supreme court in the prior case, it entered an order to direct the actions of the Department, which then adopted a new rule to cover circumstances such as those in this case.¹³⁰ However, the second prong of the directions given by the supreme court in the prior case stated that the superior court could mandate that Peach Hill be given administrative consideration of its request for an exemption from the ordinary land use contemplated for the area surrounding airports.¹³¹

Peach Hill did not proceed under the original land use request for an exemption but amended the previously filed action to request a declaratory judgment and a writ of mandamus seeking to throw out parts of the new rule. The trial court agreed with Peach Hill and ordered the Department to adopt a new rule. The Department appealed to the supreme court for the second round of appellate review.¹³²

124. *Id.* at 769, 642 S.E.2d at 826.

125. 280 Ga. 624, 631 S.E.2d 660 (2006).

126. *Ga. Dep't of Transp. v. Peach Hill Props., Inc.*, 278 Ga. 198, 201, 599 S.E.2d 167, 170 (2004).

127. *Id.* at 198-200, 599 S.E.2d at 168-69.

128. *Id.* at 201, 599 S.E.2d at 169.

129. *Id.*

130. *Peach Hill Props.*, 280 Ga. at 625, 631 S.E.2d at 661.

131. *Id.* at 624, 631 S.E.2d at 661.

132. *Id.* at 625, 631 S.E.2d at 661.

The Department argued that declaratory judgment should not be rendered on the new rule because Peach Hill had no application for the proposed landfill on file. Thus, the Department argued that there was no need for an exemption from the ordinary land use permitted within the vicinity of the regional airport.¹³³ Even in the administrative arena, where one may easily seek a declaratory judgment regarding whether a rule is valid, an actual controversy between parties must exist, or a proposal is simply one for an advisory opinion.¹³⁴ Because Peach Hill did not rely upon a land use application when seeking an exemption under the new rule, a declaratory judgment was not needed, and the trial court's decision was reversed.¹³⁵

Vidalia onions were the underlying reason for the filing of a mandamus action in the next case, *Bland Farms, LLC v. Georgia Department of Agriculture*.¹³⁶ Vidalia onions are protected under state law, but some growers took that protection further by labeling their onions as "Certified Sweet" or some similar additional designation by trademark.¹³⁷ Bland Farms brought a mandamus action against the Department of Agriculture (the "Department") to compel the agency head to force the rival onion producers to stop using additional labels. The trial court refused to issue the writ, and Bland Farms appealed.¹³⁸

The supreme court reviewed the statutory enactment but concluded that no duties exist under the law that control or dictate to the Department how it must specifically carry out the law.¹³⁹ According to the court, the general authority conferred is to protect the Vidalia trademark and is not to dictate any uniform way of implementation among the different onion producers.¹⁴⁰ The court noted that the manner of implementing the regulatory framework and enforcing its provisions involves the exercise of discretion.¹⁴¹ Because Bland Farms did not question whether such discretion had been exercised but only questioned the manner in which it had been exercised, the court held that the grant of a mandamus was not proper.¹⁴²

133. *See id.* at 626, 631 S.E.2d at 662.

134. *Id.*

135. *Id.* at 626-27, 631 S.E.2d at 662.

136. 281 Ga. 192, 637 S.E.2d 37 (2006).

137. *Id.* at 192, 637 S.E.2d at 38-39. The statutory protection is found at O.C.G.A. sections 2-14-130 to -137 (2000 & Supp. 2006).

138. *Bland Farms*, 281 Ga. at 192, 637 S.E.2d at 39.

139. *Id.* at 193, 637 S.E.2d at 39.

140. *Id.*

141. *Id.* at 194, 637 S.E.2d at 39.

142. *Id.* at 194-95, 637 S.E.2d at 40.

VI. DIRECT OR APPLICATION TO APPEAL

Whether there is a legal right to appeal or whether a party must file for a discretionary appeal in the Georgia appellate courts continues to be a source of consternation to litigants. Determining if there is an underlying subject matter that requires an application for appeal is not always clear from an analysis of a case at the trial court level. This issue was illustrated in a case involving state school superintendent Kathy Cox, whose appeal was dismissed in *Cox v. Academy of Lithonia, Inc.*¹⁴³

The Georgia State Board of Education and the Georgia Department of Education (of which Ms. Cox is the head) rejected the Academy of Lithonia's (the "Academy") application for a multi-year extension of its charter. Instead of a two-year or three-year extension, only a one-year extension was granted. In response, the Academy filed an original action in superior court for a declaratory judgment that the renewal term should be a minimum of two years. The trial court ruled in favor of the Academy. The trial court reasoned that the governing local board of education gave the Academy a two-year extension before it sent the matter to the state board of education.¹⁴⁴

Cox filed a direct appeal, and the Academy filed a motion to dismiss for failure to file an application for discretionary appeal.¹⁴⁵ The court of appeals agreed with the Academy and entered an order of dismissal, holding that the subject matter of the case involved an administrative decision, which was rendered by the state board of education.¹⁴⁶ While the court of appeals discussed distinguishing factors in two prior cases containing similar fact patterns, which were successfully maintained in the appellate courts,¹⁴⁷ it appears to this author that the real mistake took place in the trial court. Although it is not apparent from *Academy of Lithonia*, a defense of failure to exhaust administrative remedies would likely have been successful in superior court to obtain the dismissal of the declaratory judgment action or, depending upon the timeframe, to convert the matter to an administrative appeal.¹⁴⁸

143. 280 Ga. App. 626, 628, 634 S.E.2d 778, 780 (2006).

144. *Id.* at 626, 634 S.E.2d at 779.

145. *Id.*

146. *Id.*

147. The cases discussed were *Department of Transportation v. Peach Hill Properties*, 278 Ga. 198, 599 S.E.2d 167 (2004) (which is contained in section V of this Article) and *Best Tobacco v. Department of Revenue*, 269 Ga. App. 484, 604 S.E.2d 578 (2004).

148. The court in *Academy of Lithonia* mentioned this in passing. 280 Ga. App. at 628, 634 S.E.2d at 780.

Can an available writ of certiorari to the superior court be considered a mandatory appeal for purposes of exhaustion of administrative remedies? The tip of that iceberg was revealed in *Jordan v. City of Atlanta*.¹⁴⁹ Jordan and a coworker, both city employees, were victims of a reduction-in-force ordinance and were terminated. They appealed to the Service Board, which denied relief. They then filed an original action in superior court, but the court granted the City's motion to dismiss on the basis that the plaintiffs failed to exhaust all of their administrative remedies for the adverse determination.¹⁵⁰

The court of appeals affirmed the dismissal, but for a different reason than that contained in the conclusions of the trial court.¹⁵¹ To support its argument that Jordan failed to exhaust all of her administrative remedies, the City contended that the Atlanta, Georgia, Code of Ordinances section 114-554¹⁵² gives separated employees, such as Jordan, two administrative remedies: (1) the right to appeal to the Service Board and (2) the right to take the matter to superior court after a final decision by the board.¹⁵³ The court of appeals disagreed and observed that the only administrative remedy that section 114-554 grants to separated employees is the right to appeal to the Service Board.¹⁵⁴ The court of appeals further observed that while section 114-554 does make reference to the right to seek judicial review of the board's final decision, that right is only available to parties that have already "*exhausted all administrative remedies available before the board.*"¹⁵⁵ As such, the only actual right given to Jordan by section 114-554 was the right to appeal to the Service Board, and the court held that her appeal constituted the exhaustion of all administrative remedies.¹⁵⁶

The court of appeals went further and reviewed whether the motion to dismiss should have been granted because Jordan did not pursue a writ of certiorari to the superior court.¹⁵⁷ Because the writ of certiorari was the proper legal remedy for the superior court to correct any error committed by the Service Board and because neither Jordan nor her

149. 283 Ga. App. 285, 641 S.E.2d 275 (2007).

150. *Id.* at 285, 641 S.E.2d at 276.

151. *Id.*

152. ATLANTA, GA., CODE OF ORDINANCES § 114-554 (Municode through 2007 legislation).

153. *Jordan*, 283 Ga. App. at 285, 641 S.E.2d at 276.

154. *Id.* at 285-86, 641 S.E.2d at 276.

155. *Id.* (emphasis added by court) (quoting ATLANTA, GA., CODE OF ORDINANCES § 114-554).

156. *Id.* at 286, 641 S.E.2d at 276.

157. *Id.*, 641 S.E.2d at 277.

coworker filed a writ of certiorari within the applicable time limit, the Service Board's order became final and deprived the superior court of subject matter jurisdiction.¹⁵⁸ On that basis, the court of appeals affirmed the trial court's grant of the motion to dismiss.¹⁵⁹

VII. RECENT LEGISLATION

The 2007 regular session of the Georgia General Assembly contained no major changes for executive branch agencies or for administrative law principles. Only nine enactments contained agency changes, and they were as follows:

1. Extensions were given to several agricultural commodity commissions;¹⁶⁰

2. The Jekyll Island State Park Authority was extended for forty more years, and the Jekyll Island State Park Authority Oversight Committee was created;¹⁶¹

3. The Georgia Public Defender Standards Council left the judicial branch and is now a part of the executive branch of state government;¹⁶²

4. A Charter Advisory Committee on charter schools is now a part of the Georgia Department of Education;¹⁶³

5. The Georgia Criminal Justice Improvement Council was repealed;¹⁶⁴

6. There is a new Georgia Commission on Hearing Impaired and Deaf Persons;¹⁶⁵

7. A Georgia Trauma Care Network Commission joined the list of agencies;¹⁶⁶

8. Georgia now has a Newborn Umbilical Cord Blood Bank and a Georgia Commission for Saving the Cure;¹⁶⁷ and

158. *Id.* at 286-87, 641 S.E.2d at 277.

159. *Id.* at 287, 641 S.E.2d at 277.

160. Ga. S. Bill 165, § 1, Reg. Sess. (2007) (amending O.C.G.A. § 2-8-13 (2000)).

161. Ga. H.R. Bill 214, §§ 3-5, Reg. Sess. (2007) (amending O.C.G.A. §§ 12-3-232, -233, -234 (2006)).

162. Ga. S. Bill 139, §§ 1-4, Reg. Sess. (2007) (amending O.C.G.A. §§ 17-12-1, -10.1, -26, -30 (2004)).

163. Ga. S. Bill 39, § 5, Reg. Sess. (2007) (enacting new O.C.G.A. § 20-2-2063.1 (Supp. 2007)).

164. Ga. H.R. Bill 220, § 1, Reg. Sess. (2007) (repealing O.C.G.A. §§ 28-8-1 to -3 (2003)).

165. Ga. H.R. Bill 655, § 1, Reg. Sess. (2007) (amending O.C.G.A. § 30-1-5 (2003)).

166. Ga. S. Bill 60, § 1, Reg. Sess. (2007) (enacting new O.C.G.A. §§ 31-11-100 to -103 (Supp. 2007)).

167. Ga. S. Bill 148, § 2, Reg. Sess. (2007) (enacting new O.C.G.A. §§ 31-46-1 to -5 (Supp. 2007)).

9. The State Licensing Board for Residential and General Contractors has a reshuffled board, and in part, new appointment procedures.¹⁶⁸

168. Ga. H.R. Bill 224, §§ 1-2, Reg. Sess. (2007) (amending O.C.G.A. §§ 43-41-3, -4 (2005)).