Administrative Law

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I. Introduction and Overview

Today, the topic may be voter photo identification cards. Tomorrow, teacher discipline may be on the agenda. With administrative law, many of the front-burner issues that appear in the news are decided according to administrative procedures, and those cases generally are well ahead of litigation entering the court system. This Article surveys cases from the Georgia Supreme Court and the Georgia Court of Appeals from June 1, 2007 through May 31, 2008. There has been a deliberate attempt to omit cases that would likely be included in other traditional topics for articles in this volume. While there may be cases in this Article that appear in others, the reader will find that the analysis contained in this Article is generally confined to the administrative law aspects of the subject matter.

This Article begins with cases illustrating standing issues and moves to the defenses and immunities asserted by agencies in various cases. The standards of review used in determining agency actions follow, and then come cases on the choice of a direct or discretionary appeal. At the end, developments from the 2008 regular session of the Georgia General Assembly regarding state agencies are reviewed.

II. Standing Issues

Several cases hit the appellate courts during this survey period regarding standing to initiate proceedings against governmental entities.

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The first case was *Newton County Home Builders Ass'n v. Newton County*.[1] The Newton County Home Builders Association and the Home Builders Association of Georgia brought an action in superior court to have an ordinance containing an impact fee program declared illegal. They sought an order to have all the fees that had been collected since the inception of the ordinance and those collected after the filing of the action to be held until the matter was decided. After discovery, the county moved for summary judgment regarding the requested relief and cited a lack of standing as the basis. Factually, neither association had paid impact fees; rather, the claims were based upon fees paid by the membership of each of the plaintiffs. The superior court granted summary judgment to the county, and the associations appealed.[2]

The Georgia Court of Appeals had little problem affirming the superior court.[3] As explained by the court, the associations had to rely upon claims that actually belonged to the membership because the impact fees had been charged to those builders and developers.[4] Citing a case from the United States Supreme Court for the proposition that an appropriate request for relief by an association could only be in the form of prospective relief, the court said that a claim for damages was not allowable.[5] The court held that seeking the collection of past impact fees equates to a claim for damages, which can only be maintained by the persons who actually paid the fees.[6] Accordingly, the plaintiffs had no standing to maintain the action.[7]

A recurring line of cases contesting the requirement of state-issued identification cards for voters was the next standing case. In *Perdue v. Lake*,[8] there was one plaintiff left in the case by the time it reached the Georgia Supreme Court. On the date the case was originally filed, the plaintiff had just moved from Florida and could have shown any one of a number of types of identification to vote, not just a state identification card with a picture. It was the plaintiff's contention, however, that standing was conferred upon her on a later voting date because she voted in person by filing an affidavit (meaning her ballot was contestable).[9]

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1. 286 Ga. App. 89, 648 S.E.2d 420 (2007).
2. *Id.* at 89-90, 648 S.E.2d at 421.
3. *Id.* at 92, 648 S.E.2d at 422.
4. *Id.* at 90, 648 S.E.2d at 421.
5. *Id.* (citing Warth v. Seldin, 422 U.S. 490, 515 (1975)).
6. *Id.* at 91, 648 S.E.2d at 421.
7. *Id.*, 648 S.E.2d at 422.
8. 282 Ga. 348, 647 S.E.2d 6 (2007).
9. *Id.* at 348-49, 647 S.E.2d at 7-8.

In a very short opinion, the court vacated the judgment of the superior court, which found standing for the plaintiff, and the case was remanded with instructions to dismiss it.[10] The court noted that standing must be intact on the date the action is filed.[11] (Of course, the plaintiff did not help her case by possessing a government identification card with her photograph as issued by MARTA.)[12]

The next standing case was somewhat of a garden variety decision, but it is still a good example of the enforcement link between local and state agencies regarding standing that may exist in litigation. In *Smith v. DeKalb County*,[13] an Open Records Act[14] request was made for a CD-ROM originally compiled by the local elections superintendent. The county personnel replied to the requester that the CD-ROM would be produced but also stated that the secretary of state, as the state official in charge of elections, and the attorney general would also be notified. The secretary of state sought to block the release by filing for a temporary restraining order and permanent injunction. The requesting party questioned the standing of the secretary of state to bring the action, especially because the requested record was not in the custody of that state official.[15] Both the trial court and the court of appeals disagreed, based upon extensive statutory citations regarding the duties of the secretary of state.[16]

The last case on standing was a coastal neighbor dispute that originally involved the Department of Natural Resources (the Department).[17] The Vasarhelyi family applied to build a dock over state property to a coastal waterway. The application process involved obtaining a permit and license first from the Department and then the actual dock permit from the Army Corps of Engineers. When the Corps subsequently approved the dock application, the Hitches became alarmed and filed an action in superior court against the Vasarhelyis and the Department. From the Hitches' perspective, that dock would take away their scenic view.[18]

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10. *Id.* at 350, 647 S.E.2d at 8.
11. *Id.* at 349, 647 S.E.2d at 8.
12. *Id.* at 350, 647 S.E.2d at 8.
13. 288 Ga. App. 574, 654 S.E.2d 469 (2007).
14. O.C.G.A. §§ 50-18-70 to -77 (2006).
15. *Smith*, 288 Ga. App. at 574-76, 654 S.E.2d at 470-71.
16. *Id.* at 576, 654 S.E.2d at 471. Other issues were presented not relevant to standing. *Id.* at 576-78, 654 S.E.2d at 471-72.
17. *See* Hitch v. Vasarhelyi, 291 Ga. App. 634, 662 S.E.2d 378 (2008).
18. *Id.* at 634-35, 662 S.E.2d at 379-80.

The Department successfully moved to dismiss based on a lack of standing, and the court of appeals upheld the dismissal.[19] Citing *Hollberg v. Spalding County*,[20] the appellate court stated that "a property owner must demonstrate both that he or she has a substantial interest in the governmental decision and that the property owner has sustained special damages."[21] Because the Department had only given the Vasarhelyis a license to build a dock, which had not been constructed, standing had not been conferred.[22]

III. AGENCY DEFENSES AND IMMUNITIES

This section is generally the busiest in terms of number of cases contained in the survey article, and the current survey period was no exception. The first case, *Georgia Pines Community Service Board v. Summerlin*,[23] involved the Georgia Tort Claims Act (GTCA)[24] and how state defendants must be served. Summerlin was the mother of a child who died at a facility under the control of the Georgia Pines Community Service Board. She brought a wrongful death action under the GTCA but lost in superior court on a motion for summary judgment filed by the board. The superior court found that the personnel manager at the facility was the one served with notice, and not the director of the facility or some other equivalent figure for the board. Therefore, the service was deemed to violate the GTCA provisions found in the Official Code of Georgia Annotated (O.C.G.A.) § 50-21-35.[25]

Summerlin brought the case to the Georgia Court of Appeals, which reversed and held that the Civil Practice Act,[26] under O.C.G.A. § 9-11-4(e)(5),[27] would be applicable and, thus, service was adequate.[28] The board brought the case to the Georgia Supreme Court, questioning whether the GTCA should receive a more liberal interpretation of what

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19. *Id.* at 636, 662 S.E.2d at 380-81.
20. 281 Ga. App. 768, 637 S.E.2d 163 (2006).
21. *Hitch*, 291 Ga. App. at 636, 662 S.E.2d at 380 (citing *Hollberg*, 281 Ga. App. at 773, 637 S.E.2d at 169).
22. *Id.* at 636-37, 662 S.E.2d at 381.
23. 282 Ga. 339, 647 S.E.2d 566 (2007).
24. O.C.G.A. §§ 50-21-20 to -37 (2006 & Supp. 2008).
25. *Summerlin*, 282 Ga. at 339, 647 S.E.2d at 567; O.C.G.A. § 50-21-35 (2006). The cited provision states one must "cause process to be served upon the chief executive officer of the state government entity involved at his or her usual office address." O.C.G.A. § 50-21-35.
26. O.C.G.A. §§ 9-11-1 to -133 (2006 & Supp. 2008).
27. O.C.G.A. § 9-11-4(e)(5) (2006).
28. *Summerlin*, 282 Ga. at 339, 647 S.E.2d at 567.

should constitute service outside of O.C.G.A. § 50-21-35.[29] The supreme court reasoned that an interpretation relying upon the Civil Practice Act service provisions was not an unwarranted liberal construction of provisions waiving sovereign immunity.[30] Instead, because the GTCA does not contain its own procedural instructions for civil actions, the statute should necessarily be supplemented by using the Civil Practice Act.[31] Thus, the court of appeals judgment was affirmed.[32]

In what almost appears to be an afterthought, the supreme court added that the board could be viewed as waiving any defense regarding the waiver of process by not responding to interrogatories from Summerlin which specifically asked if the board believed that there were any deficiencies regarding service.[33] It is quite possible that the court added the additional ground because of a strong special concurrence by Justice Melton.[34] Justice Melton saw the matter as requiring strict construction under the GTCA, especially the service provisions of O.C.G.A. § 50-21-35.[35]

This Author is certain that the next case was a procedural nightmare. *Hall v. Nelson*[36] involved a primary school principal that the Atlanta Independent School System (AISS) sought to fire. An independent tribunal conducted a hearing and agreed with AISS's decision not to renew Nelson's contract, as did the Atlanta Board of Education. However, a subsequent appeal to the State Board of Education brought a reversal of the decision, which was affirmed by the Fulton County Superior Court.[37]

Nelson was supposed to be reinstated but was instead made a primary school teacher at a lesser rate of pay. He returned to superior court for a writ of mandamus against the school superintendent to command her to act in accordance with the prior rulings. That petition was granted, and the school superintendent appealed.[38]

Multiple defenses were offered by the school superintendent, and chief among them was that mandamus should not have been available because Nelson had an adequate remedy at law, which had not been exhausted. It was argued that Nelson should have used the administra-

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29. *Id.* at 339-40, 647 S.E.2d at 567-68.
30. *Id.* at 341, 647 S.E.2d at 569.
31. *Id.*
32. *Id.* at 344, 647 S.E.2d at 570.
33. *Id.* at 341-42, 647 S.E.2d at 569.
34. *See id.* at 344-47, 647 S.E.2d at 570-72 (Melton, J., concurring).
35. *Id.* at 345, 647 S.E.2d at 571.
36. 282 Ga. 441, 651 S.E.2d 72 (2007).
37. *Id*. at 441, 651 S.E.2d at 73.
38. *Id*.

tive hearing procedures prior to the action seeking a mandamus.[39] The supreme court noted that because of past decisions from the board, the supposedly adequate remedy was, in actuality, a futile act.[40] Accordingly, Nelson did not have to carry out the charade of going before the board, knowing beforehand what its decision would be because of prior actions.[41] The supreme court also said that contempt was not an available remedy, and this part of the decision was based upon the majority's reading of the superior court order.[42] The writ of mandamus was affirmed, and the supreme court directed the superior court to add additional language to its order making it clear that the reinstatement of Nelson had to be in a particular type of position and without loss of pay.[43] Justice Melton, dissenting from the majority opinion, reasoned that the remedy of contempt was available in the case because of language from the lower court addressing reinstatement.[44] Instead of granting the extraordinary remedy of mandamus, a contempt citation would have done nicely.[45]

Mandamus was also the subject of *Oconee County Board of Tax Assessors v. Thomas*.[46] Thomas and her husband owned property subject to a conservation use covenant. When they divorced, Thomas received the property as sole owner and was notified that a penalty assessment would ensue if the covenant was not continued. When she did not seek to continue the covenant, the penalty was assessed by the Oconee County Board of Tax Assessors (BOA).[47] Thomas followed the appeal provision found at O.C.G.A. § 48-5-311(e)(1)-(2)(A),[48] but the BOA denied her request.[49]

Thereafter, Thomas sought a writ of mandamus from superior court to make the BOA submit the appeal from the penalty assessment to the Oconee County Board of Equalization (BOE). The court ruled in her favor, but the BOA appealed.[50]

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39. *Id*. at 442-43, 651 S.E.2d at 74-75.
40. *Id*. at 443, 651 S.E.2d at 75.
41. *Id.*
42. *Id*. at 443-44, 651 S.E.2d at 75.
43. *Id*. at 446, 651 S.E.2d at 76-77.
44. *Id*., 651 S.E.2d at 77 (Melton, J., dissenting).
45. *Id*.
46. 282 Ga. 422, 651 S.E.2d 45 (2007).
47. *Id*. at 422, 651 S.E.2d at 46.
48. O.C.G.A. § 48-5-311(e)(1)-(2)(A) (1999 & Supp. 2008).
49. *Thomas*, 282 Ga. at 422, 651 S.E.2d at 46.
50. *Id*.

Central to the position maintained by the BOA was the meaning of "assessment" in O.C.G.A. § 48-5-311[51] and whether the term was broad enough to encompass the penalty.[52] The supreme court held that the term was broad enough to cover the penalty, in spite of the BOA's assertion that a determination of value was the central limiting thread for matters to be considered on appeal.[53] The court apparently thought it ironic that the BOA argued Thomas should have exhausted administrative remedies.[54] Since the BOA refused an appeal for Thomas and failed to instruct her on the appeals process, the later filing of the petition for mandamus was correct.[55] The court noted that Thomas was seeking the mandamus to force the BOA to allow the administrative appeal, not to determine the validity of the assessment of the penalty.[56]

In a special concurring opinion from Justice Melton, it was maintained that there were two facets to the subject matter of the appeal.[57] The BOA had found that a breach of the conservation use easement had occurred and also proceeded to assess a penalty for that breach.[58] Justice Melton reasoned that because qualifying uses of property subject to a conservation use covenant may be appealed to the BOE, the finding made by the BOA declaring a breach of a covenant should also be appealable.[59]

The defense of a dismissal motion based on an untimely appeal was successfully used by the secretary of state in *Slater v. State ex. rel. Cox, Secretary of State*.[60] In Georgia, the secretary of state also serves as the commissioner of securities and had issued a cease and desist order against Slater.[61] Slater filed an appeal in superior court after the passage of twenty days, which would be longer than the period allowed under the Georgia Securities Act,[62] but before the passage of thirty days, the appeal time period under the Georgia Administrative Procedures Act (GAPA).[63] The superior court dismissed the action, and

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51. O.C.G.A. § 48-5-311 (1999 & Supp. 2008).
52. *Thomas*, 282 Ga. at 422-23, 651 S.E.2d at 46.
53. *Id*. at 423, 651 S.E.2d at 46.
54. *Id.* at 425, 651 S.E.2d at 47 (noting that Thomas filed the writ of mandamus in order to get the BOA to follow the available administrative remedies).
55. *Id*. at 424-25, 651 S.E.2d at 47.
56. *Id*. at 424, 651 S.E.2d at 47.
57. *Id*. at 425-27, 651 S.E.2d at 48-49 (Melton, J., concurring specially).
58. *Id*. at 425, 651 S.E.2d at 48.
59. *Id*. at 426-27, 651 S.E.2d at 48-49.
60. 287 Ga. App. 738, 653 S.E.2d 58 (2007).
61. *Id*. at 738, 653 S.E.2d at 58.
62. O.C.G.A. §§ 10-5-1 to -24 (2000 & Supp. 2008); *see* O.C.G.A. § 10-5-17 (2006).
63. O.C.G.A. § 50-13-19(b) (2006).

Slater appealed.[64] Using the rule of statutory construction that provisions specific in nature will govern over general ones, the dismissal was affirmed by the court of appeals.[65]

Normally, exhaustion of administrative remedies is a defense used by governmental entities when litigants too quickly resort to court filings. In *City of Atlanta v. Hotels.com, LP*,[66] the roles were reversed. The City of Atlanta (the City) wanted to collect hotel and occupancy taxes from seventeen travel companies that operated on the internet. Instead of making tax estimates and delivering tax assessments to the companies, the City brought an action in superior court. In response, the companies moved to dismiss, arguing that the City had not exhausted its "administrative remedies" by following the normal tax assessment, collection, and appeal procedures. The motion to dismiss was successful, and the City appealed.[67]

The court of appeals upheld the dismissal, refuting the City's arguments.[68] First, the court acknowledged that a type of exhaustion doctrine does lie against governmental entities in situations where following procedures set out by statutory provisions is mandatory.[69] Second, the normal assessment and notice provisions were required and could not be bypassed by filing the instant action.[70] Finally, the estimation and assessment procedures were not futile, as the City could either have examined the companies first or could have acted against the companies after questions were raised following estimated assessments.[71]

A rare exception to the ante litem notice provisions of the GTCA was the crux of an appeal in *Cummings v. Georgia Department of Juvenile Justice*.[72] Cummings was hurt in a car wreck with a state van driven by a state employee. Within the proper time, Cummings sent an ante litem notice to the risk management division of the Georgia Department of Administrative Services (DOAS), and he sent a copy to the Georgia Department of Transportation (DOT). The van driver, however, worked for the Georgia Department of Juvenile Justice (DJJ). A state adjuster subsequently offered a settlement amount to Cummings. Months later, the adjuster let Cummings' attorney know that the wrong agency had

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64. *Slater*, 287 Ga. App. at 738, 653 S.E.2d at 58.
65. *Id*., 653 S.E.2d at 59.
66. 288 Ga. App. 391, 654 S.E.2d 166 (2007).
67. *Id*. at 391-92, 654 S.E.2d at 168-69.
68. *Id.* at 399, 654 S.E.2d at 173.
69. *Id*. at 393, 654 S.E.2d at 169.
70. *Id*. at 396, 654 S.E.2d at 171-72.
71. *Id*. at 398, 654 S.E.2d at 173.
72. 282 Ga. 822, 653 S.E.2d 729 (2007).

been notified and no settlement would be effected. Well after the statutory time limit, Cummings sent another ante litem notice to the correct agency, the DJJ.[73]

Cummings filed a complaint in superior court against the State, the DOT, the DJJ, and the driver. The court granted a motion to dismiss for each party except the DJJ. The DJJ appealed, and the court of appeals dismissed Cummings' case, citing a failure to follow the GTCA provisions.[74] With no defendants left in the case, Cummings appealed to the supreme court.[75]

Surprisingly, the supreme court reversed and reinstituted the action against the DJJ.[76] Although the court cited many cases in which the invocation of the ante litem notice provision prevented plaintiffs from proceeding, the court made the following statement regarding statutory underpinnings that may have been somewhat obscured in past decisions: "Thus, presumably in acknowledgment of a claimant's potentially imperfect knowledge, the plain language of the statute requires the identification of the agency asserted to be responsible, rather than identification of the agency actually responsible."[77] The court further observed that Cummings had made an effort regarding the identification of the agency, and the court departed from the assessment made by the court of appeals that was equivalent to placing an absolute burden on Cummings to determine the correct agency.[78]

This Author believes the supreme court engaged in a little bit of equity by its ruling. It was apparent that the adjuster from the DOAS who made the offer to Cummings knew very early that the wrong agency had been named and yet engaged in initial settlement discussions as if the claim was valid and would be recognized.[79] Dissenting from the majority opinion, Justice Melton asserted that Cummings had not exhibited even a reasonable degree of diligence to ascertain the correct state agency.[80]

Everyone knows that "state government time" and clock time are not necessarily the same. A group seeking new voter registration rules discovered this in *Charles H. Wesley Education Foundation, Inc. v. State*

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73. *Id*. at 822-23, 653 S.E.2d at 730-31.

74. *Id*. at 823, 653 S.E.2d at 731; Ga. Dep't of Juvenile Justice v. Cummings, 281 Ga. App. 897, 903, 637 S.E.2d 441, 446 (2006).

75. *See Cummings*, 282 Ga. at 822, 653 S.E.2d at 730.

76. *Id.* at 827, 653 S.E.2d at 734.

77. *Id*. at 825, 653 S.E.2d at 732 (emphasis omitted) (citing O.C.G.A. § 50-21-26(a)(5)(A) (2006)).

78. *Id*. at 826, 653 S.E.2d at 733.

79. *See id.* at 822, 653 S.E.2d at 731.

80. *Id*. at 828-29, 653 S.E.2d at 735 (Melton, J., dissenting).

Election Board.[81] Using O.C.G.A. § 50-13-9,[82] the Charles H. Wesley Education Foundation (the Foundation) submitted a petition to the State Election Board (the Board) in hopes of having the Board embark on a new set of rules for voter registration.[83] When the petition was neither denied nor acted upon after two months, the Foundation filed for a declaratory judgment and a writ of mandamus. The trial court dismissed the matter, and it landed in the supreme court.[84]

Upholding the dismissal, the supreme court ruled that the cited provision was merely directory in nature, meaning that the Board (or any other administrative agencies falling under the GAPA) did not have to take action within the thirty-day consideration period.[85] Because the expiration of the thirty-day period did not bring other consequences under the statute, such as a requirement of rule-making or other result, the Board was not mandated to either deny the petition or begin the rule-making process during the allotted time.[86] Justice Sears, apparently sensing the magnitude of the ruling, filed a dissenting opinion.[87]

The last case in this section, *Chisolm v. Tippens*,[88] is noteworthy only for its affirmation of the continuing sovereign immunity of school districts and their officers and employees. Chisolm was a disgruntled parent who felt that his daughter was treated unfairly by school officials in Cobb County. He filed a multitude of complaints in state court, all of which were dismissed and all of which were authored pro se.[89]

This Author has considerable sympathy for judges who must hear pro se actions and even more sympathy for appellate judges attempting to decide appeals for such actions. Wading through the many allegations before affirming the dismissal, the court of appeals noted the continued applicability of the proviso contained in the GTCA for school districts and recognized the official immunity of the school district employees.[90]

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81. 282 Ga. 707, 654 S.E.2d 127 (2007).
82. O.C.G.A. § 50-13-9 (2006).
83. O.C.G.A. § 50-13-9 states that an agency must deny a petition or begin rule-making within thirty days of the filing. *Id.*
84. *Charles H. Wesley Educ. Found.*, 282 Ga. at 708, 654 S.E.2d at 128.
85. *Id*. at 709-10, 654 S.E.2d at 129.
86. *Id*.
87. *Id*. at 712-20, 654 S.E.2d at 131-37 (Sears, J., dissenting).
88. 289 Ga. App. 757, 658 S.E.2d 147 (2008).
89. *Id*. at 757-58, 658 S.E.2d at 150.
90. *Id*. at 759-60, 658 S.E.2d at 151-52.

IV. STANDARDS OF REVIEW FOR AGENCY DECISIONS

In *City of College Park v. Wyatt*,[91] the Georgia Supreme Court determined that a jury trial is unnecessary in a quo warranto proceeding when the only issue is a question of law.[92] April Wyatt filed a petition for quo warranto and declaratory judgment against the City of College Park, the mayor, and the councilmen (the City), claiming that she was improperly removed from the College Park Business and Industrial Development Authority (CPBIDA) because she did not live in Ward 2, the ward that she was appointed to serve. The trial court found that because nothing in the CPBIDA Bylaws required a member to live within the ward they served, the City did not have cause to remove Wyatt. The trial court also directed the CPBIDA to enact regulations providing for the removal of its members.[93]

On appeal, the City argued the judgment should be reversed because it was not supported by legally admissible evidence. Specifically, the City pointed to the hearing when the trial court entertained argument of counsel but did not seek or receive testimony, exhibits, or other evidence.[94] The supreme court determined that while a jury trial is proper in a quo warranto proceeding to adjudicate issues of fact, a jury trial is not required when the only issue concerns a question of law.[95] The court noted that the decision was further supported by the fact that at no point during the hearing did the City state it was entitled to present evidence, despite the fact that it was clear the court intended to rule on the merits of the case.[96] Furthermore, the court noted that no harm was caused because the City did not identify any facts that it would have introduced in evidence which would have changed the court's decision.[97]

The supreme court reversed the trial court's requirement that the CPBIDA enact regulations providing for the removal of its members.[98] While a court may compel an agency to perform a public duty it is bound to perform, the court cannot require a discretionary act unless there is a gross abuse of discretion.[99]

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91. 282 Ga. 479, 651 S.E.2d 686 (2007).
92. *Id.* at 480, 651 S.E.2d at 688.
93. *Id.* at 479, 651 S.E.2d at 688.
94. *Id.* at 480, 651 S.E.2d at 688.
95. *Id.*
96. *Id.*, 651 S.E.2d at 689.
97. *Id.*
98. *Id.* at 481, 651 S.E.2d at 688.
99. *Id.*

In *Hicks v. Khoury*,[100] the supreme court again addressed an abuse of discretion issue, this time as it related to a county commission's broad discretion to exercise control over public property. The plaintiffs, acting as representatives of the unincorporated association Concerned Citizens for Good Government, filed a petition for mandamus, injunctive relief, and attorney fees against current members of the Peach County Board of Commissioners. The petition alleged that allocation of the Special Local Option Sales Tax (SPLOST) funds set forth in an intergovernmental agreement executed in 2006 was inconsistent with the purpose approved by the voters. The trial court denied relief, and the plaintiffs appealed.[101]

On appeal, the plaintiffs asserted that the defendants failed to faithfully perform their official duties as county commissioners by entering into an intergovernmental agreement that only allocated funds for water and sewer facilities in incorporated areas of the county and allocated no funds for the unincorporated areas.[102] The court acknowledged that the law grants municipal governments broad discretion to exercise control over public property and provides that absent clear abuse, this discretion is not to be interfered with by the courts.[103] A county commission is required to use the SPLOST proceeds exclusively for those purposes specified in the resolution imposing the tax.[104]

The Peach County Commission was required to use the SPLOST proceeds for the purpose of constructing water, sewer, and waste water lines and facilities for the benefit of the citizens of both incorporated and unincorporated Peach County.[105] The supreme court held that the allocation of funds in the intergovernmental agreement was consistent with this stated purpose.[106] Because the plaintiff failed to show a gross abuse of discretion by the Peach County Commission, the supreme court affirmed the trial court's denial of mandamus relief.[107]

In *DeKalb County v. Cooper Homes*,[108] the supreme court again dealt with a request for a writ of mandamus.[109] Cooper Homes' application for interior side yard setback variances to allow for the construction of

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100. 283 Ga. 407, 658 S.E.2d 616 (2008).
101. *Id.* at 407, 658 S.E.2d at 617.
102. *Id.* at 408, 658 S.E.2d at 618.
103. *Id.* at 408-09, 658 S.E.2d at 618 (quoting Dickey v. Storey, 262 Ga. 452, 454, 423 S.E.2d 650, 652 (1992)).
104. *Id.* at 409, 658 S.E.2d at 618.
105. *Id.*
106. *Id.*
107. *Id.* at 410, 658 S.E.2d at 619.
108. 283 Ga. 111, 657 S.E.2d 206 (2008).
109. *Id.* at 112, 657 S.E.2d at 207-08.

five residences on ten legal nonconforming lots was denied by the DeKalb County Board of Zoning Appeals (ZBA), and the related application for building permits was denied by the DeKalb County Planning and Development Department (Department). Cooper Homes sought judicial review of the ZBA decision by filing a petition for writ of certiorari to the superior court, requesting a writ of mandamus for issuance of the building permits and a declaratory judgment as to the construction and application of section 27-938 of the county's zoning ordinance.[110]

The trial court granted mandamus, finding that Cooper Homes had the right to appeal the Department's denial of the building permit application to the ZBA but was not required to appeal prior to seeking mandamus in superior court because "[s]uch an appeal would have been futile as it would have ultimately resulted in a decision on the same issue by the same body [which had denied the application for variance to the interior side yard setback requirement], the ZBA."[111] The supreme court granted DeKalb County's discretionary appeal because of concern over the trial court's determination that it was unnecessary for Cooper Homes to exhaust its administrative remedies before applying for a writ of mandamus.[112]

A writ of mandamus is not generally available when there is an adequate remedy at law available at the time mandamus relief is sought.[113] However, it is not necessary to pursue the available legal remedy prior to seeking mandamus when to do so would be a "futile act."[114] Such an act occurs when the administrative remedy available at the time mandamus relief is sought is "'to seek a review that ultimately would result in a decision on the same issue by the same body.'"[115]

The trial court incorrectly applied the futile act exception, determining that the ZBA's review of the denial of the building permits' application would result in a decision on the same issue as that involved in the ZBA's denial of the application for variances from the interior side yard setback requirements.[116] The supreme court, however, determined the building permits' denial and the variance denial were two separate

110. *Id.* at 111-12, 657 S.E.2d at 207-08.
111. *Id.* at 112, 657 S.E.2d at 208 (alterations in original).
112. *Id.*
113. *Id.* at 113, 657 S.E.2d at 208.
114. *Id.*
115. *Id.* (quoting WMM Props. v. Cobb County, 255 Ga. 436, 439, 339 S.E.2d 252, 256 (1986)).
116. *Id.*, 657 S.E.2d at 209.

issues.[117] Therefore, the court reversed the grant of mandamus and remanded the case to the trial court for reconsideration of the ZBA's denial of the variance request.[118]

DeKalb County was also a party in the next case, *DeKalb County v. Buckler*,[119] which examined the standards for granting or denying summary judgment. Robert H. Buckler and H. Anthony McCullar (Buckler) purchased three adjacent lots of land located on Clifton Road in the Druid Hills Historic District in Atlanta. After purchasing the property, Buckler applied for a certificate of appropriateness for two alternate plans for subdividing the property into five lots. The DeKalb County Historic Preservation Commission (HPC) denied the application, finding that both plans would have a substantial adverse effect on the aesthetic, historic, or cultural significance and value of the historic district. At the time of the hearing there were four active members of the HPC, all of whom were present. Three members voted against the application, and one member abstained.[120]

The DeKalb County Board of Commissioners (BOC) upheld the decision, and Buckler petitioned the superior court, asserting that the HPC decision was void because the HPC did not have seven active members at the time of the hearing as required under the county ordinance. The superior court agreed and granted Buckler's motion for partial summary judgment.[121] The Georgia Court of Appeals granted the discretionary appeal filed by DeKalb County and the DeKalb County Board of Commissioners.[122]

"Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law."[123] An appellate court reviews a grant or denial of summary judgment de novo and construes evidence in the light most favorable to the nonmovant.[124] Applying this standard, the court of appeals reversed the trial court's decision, holding that the superior court erred as a matter of law in concluding that the HPC's decision was invalid because there were not seven active members at the time of the hearing.[125] Section 1-3-1(c) of the O.C.G.A.[126] provides, "A substan-

117. *Id.* at 115, 657 S.E.2d at 210.
118. *Id.* at 116, 657 S.E.2d at 210.
119. 288 Ga. App. 346, 654 S.E.2d 193 (2007).
120. *Id.* at 347, 654 S.E.2d at 194.
121. *Id.* at 347-48, 654 S.E.2d at 194.
122. *Id.* at 348, 654 S.E.2d at 194.
123. *Id.* at 347, 654 S.E.2d at 194 (citing O.C.G.A. § 9-11-56(c) (2006)).
124. *Id.*
125. *Id.* at 349, 654 S.E.2d at 196.
126. O.C.G.A. § 1-3-1(c) (2000 & Supp. 2008).

tial compliance with any statutory requirement, especially on the part of public officers, shall be deemed and held sufficient, and no proceeding shall be declared void for want of such compliance, unless expressly so provided by law."[127] Neither the Georgia Historic Preservation Act[128] nor the DeKalb County Historic Preservation Ordinance[129] provides that failure to have seven active members on the HPC invalidates an HPC decision; rather, DeKalb's ordinance provides that members serve until their successors are appointed and qualified.[130] In addition, nothing in the record provides that missing members cannot continue to serve.[131] Furthermore, no harm was caused by the fact that the HPC was not comprised of seven active members at the time of the decision since a quorum was present.[132]

Agency deference was at issue in *Georgia Department of Revenue v. Owens Corning*.[133] Owens Corning filed a claim with the Georgia Department of Revenue (the Department) seeking a refund for sales taxes it paid on machinery repair parts purchased from July 1, 1997 to December 31, 1999, based on an exemption in the 1997 version of O.C.G.A. § 48-8-3(34)(A).[134] When the Department failed to rule on the claim, Owens Corning brought an action in trial court seeking a refund. The trial court granted the Department's motion for summary judgment, finding that there was no exemption in the code section. The court of appeals reversed, determining that the statute created an exemption from taxation for machinery repair parts.[135] The supreme court granted certiorari.[136]

The standard of review for tax statutes provides that for an exemption to be valid, it must be expressed in clear and unambiguous terms.[137] Furthermore, the interpretation of a statute by an administrative agency that has the duty of enforcing or administering the statute is to be given great weight and deference.[138]

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127. *Id.*
128. O.C.G.A. §§ 44-10-20 to -31 (2002).
129. DEKALB COUNTY, GA., CODE § 13.5-3 (2008).
130. *Buckler*, 288 Ga. App. at 348, 654 S.E.2d at 195 (citing DEKALB COUNTY, GA., CODE § 13.5-3).
131. *Id.* at 349, 654 S.E.2d at 195.
132. *Id.*
133. 283 Ga. 489, 660 S.E.2d 719 (2008).
134. O.C.G.A. § 48-8-3(34)(A) (2005 & Supp. 2008).
135. *Owens Corning*, 283 Ga. at 489, 660 S.E.2d at 720.
136. *Id.*
137. *Id.* (quoting Collins v. City of Dalton, 261 Ga. 584, 585–86, 408 S.E.2d 106, 108 (1991)).
138. *Id.* at 490, 660 S.E.2d at 720.

The supreme court first examined the language of the original statute implemented in 1951, which provided that machinery repair parts were explicitly subject to sales tax.[139] In 1994 the Georgia General Assembly amended the statute to provide an exception for machinery, but there was no reference to machinery repair parts and thus no exemption.[140] Similarly, when the general assembly amended the statute in 1997, no explicit exemption for machinery repair parts was created.[141] While some ambiguity may exist on whether repair parts are exempt under the 1997 amendment, in cases of ambiguity the statute must be interpreted in favor of the tax, not the exemption.[142] The court noted that because the general assembly had provided for the taxation of machinery repair parts since 1951, the general assembly likely would have explicitly provided for any change in taxation status.[143] Furthermore, in 2000 the general assembly amended the statute and explicitly provided an exemption for machinery repair parts.[144] The court reasoned that the language of the 2000 amendment clearly demonstrated an intent to clear up any ambiguity over machinery repair parts and to eliminate the sales tax for the first time.[145]

The court of appeals further examined the standard of review for agency decisions in *Georgia Peace Officers Standards & Training Council v. Anderson*.[146] This discretionary appeal filed by the Georgia Peace Officer Standards and Training Council (the POST Council) resulted from the superior court's reversal of an administrative law judge's (ALJ) decision upholding the POST Council's decision to revoke Isaac Anderson's certification.[147] Section 50-13-19(h) of the O.C.-G.A.[148] provides that a superior court reviewing the decisions of an administrative agency "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."[149] When reviewing an agency decision, the court's duty is to determine whether the record supports the final decision of the administrative agency, not whether the record supports the superior court's decision.[150]

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139. *Id.*, 660 S.E.2d at 720-21.
140. *Id.*, 660 S.E.2d at 721.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 491, 660 S.E.2d at 721.
146. 290 Ga. App. 91, 658 S.E.2d 840 (2008).
147. *Id.* at 91, 658 S.E.2d at 841.
148. O.C.G.A. § 50-13-19(h) (2006).
149. *Id.*
150. *Anderson*, 290 Ga. App. at 91, 658 S.E.2d at 841.

Isaac Anderson, who at the time was the sheriff of Baker County, was charged with conspiracy to obstruct justice resulting from a cover up of an assault on a woman in Baker County. The jury acquitted Anderson of conspiracy. The POST Council completed its own investigation and determined that Anderson had violated its standards and regulations and revoked his certification. Anderson appealed the POST Council's decision before the ALJ. The ALJ granted the POST Council's motion for summary determination and upheld the revocation of Anderson's certification based on his refusal to cooperate with the investigation of the assault.[151] Anderson appealed the decision to the superior court, which reversed the ALJ and held that the State could not terminate Anderson for his failure to cooperate after invoking his constitutional right against self-incrimination.[152]

The court of appeals held that Anderson's assertion of his right against self-incrimination did not shield him from an administrative inquiry into the effect of that assertion on his job performance.[153] Because there was sufficient evidence in the record to support the ALJ's findings, the court of appeals reversed the superior court's reinstatement of Anderson's certification.[154]

V. DIRECT OR APPLICATION TO APPEAL

This year the Georgia Court of Appeals once again examined the issue of whether there is a legal right to appeal or whether a party must file for a discretionary appeal. In *Zitrin v. Georgia Composite State Board of Medical Examiners*,[155] a group of citizens (Zitrin) filed an action against the Georgia Composite State Board of Medical Examiners and its executive director (the Board) after the Board refused to open a disciplinary investigation of doctors who participated in executions by lethal injection. The trial court dismissed the complaint for failure to state a claim upon which relief could be granted. Zitrin then filed a direct appeal, and the Board moved to dismiss, arguing that because the underlying subject matter involved the decision of a state administrative agency, Zitrin was required to file an application for appeal.[156]

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151. Summary determination is similar to summary judgment but is used before administrative agencies.

152. *Anderson*, 290 Ga. App. at 93, 658 S.E.2d at 842.

153. *Id.* at 94, 658 S.E.2d at 843.

154. *Id.*

155. 288 Ga. App. 295, 653 S.E.2d 758 (2007).

156. *Id.* at 295, 653 S.E.2d at 760.

The court of appeals disagreed.[157] The court determined that the following two claims asserted by Zitrin were separate and independent: (1) a claim for declaratory relief that physician participation in executions is prohibited by Georgia law, and (2) a claim under the Georgia Administrative Procedure Act (GAPA).[158] Because the claim under Georgia's Declaratory Judgment Act[159] is directly appealable under O.C.G.A. § 5-6-34(d),[160] the GAPA claim may also be included in the direct appeal.[161] The court denied the Board's motion to dismiss for failure to file an application for a discretionary appeal.[162] However, the court held that Zitrin lacked standing to pursue the declaratory relief sought or to bring a claim under the GAPA and affirmed the trial court's order dismissing the action on those grounds.[163]

VI. LEGISLATIVE DEVELOPMENTS

At the 2008 regular session of the Georgia General Assembly, there were no earth-shaking changes to departments and agencies. There were, however, some minor adjustments and alterations and a few new assignments. Consider the following:

(1) The Georgia Seed Development Commission changed provisions for its internal activities and created an advisory board.[164]

(2) We now have an Agricultural Commodity Commission for Blueberries.[165]

(3) The functional relationships among the State Soil and Water Conservation Commission, the Environmental Protection Division, the Georgia Land Conservation Council, and the Georgia Environmental Facilities Authority were addressed and coordinated.[166]

(4) The Department of Technical and Adult Education became the Technical College System of Georgia.[167]

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157. *Id.*
158. *Id.* at 297-98, 653 S.E.2d at 761-62; O.C.G.A. ch. 50-13 (2006 & Supp. 2008).
159. O.C.G.A. ch. 9-4 (2007).
160. O.C.G.A. § 5-6-34(d) (1995 & Supp. 2008).
161. *Zitrin*, 288 Ga. App. at 298, 653 S.E.2d at 762.
162. *Id.* at 300, 653 S.E.2d at 763.
163. *Id.*
164. Ga. S. Bill 515 §§ 1 to 4, Reg. Sess. (2008) (codified as amended at O.C.G.A. §§ 2-4-3, -7, -8 (2000)).
165. Ga. H.R. Bill 649 § 1, Reg. Sess. (2008) (codified as amended at O.C.G.A. §§ 2-8-13 to -14 (2000)).
166. Ga. S. Bill 342 §§ 1-1 to 2-4, Reg. Sess. (2008).
167. Ga. S. Bill 435 §§ 1-12, Reg. Sess. (2008).

(5) There is now a Georgia Charter Schools Commission.[168]

(6) The Georgia Firefighter Standards and Training Council received internal alterations.[169]

(7) The Legislative Budget Office has been replaced by the Senate Budget Office and the House Budget Office. Likewise, the Budgetary Responsibility and Oversight Committee ended.[170]

(8) The Health Strategies Council received revised duties and internal procedures.[171]

(9) We have a brand new agency called the Georgia Transportation Infrastructure Bank, created as a part of the existing State Road and Tollway Authority.[172]

(10) The Georgia State Indemnification Fund is now located administratively as a part of the Department of Administrative Services.[173]

(11) A Governor's Office for Children and Families was created, replacing the Children and Youth Coordinating Council and the Children's Trust Fund Commission.[174]

(12) The general law no longer contains references to the State Law Library or to the State Librarian.[175]

(13) The four areas of the Georgia Building Authority were consolidated, including Markets, Hospitals, Penal, and the Agency for Removal of Hazardous Materials.[176]

(14) There is now a Georgia Arts Alliance.[177]

(15) The War of 1812 Bicentennial Commission was established.[178]

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168. Ga. H.R. Bill 881 §§ 1 to 3, Reg. Sess. (2008) (to be codified at O.C.G.A. §§ 20-2-2080 to -2092, -165.1, and as amended at O.C.G.A. §§ 20-2-166, -2068.1 (2005)).

169. Ga. S. Bill 414 §§ 1 to 5, Reg. Sess. (2008) (codified as amended at O.C.G.A. §§ 25-4-2, -6 to -8 (2003)).

170. Ga. H.R. Bill 529 §§ 1-14, 2-1, Reg. Sess. (2007) (to be codified at O.C.G.A. § 28-5-6 and repealing O.C.G.A. § 28-5-5 (2007)).

171. Ga. H.R. Bill 210 § 1-1, Reg. Sess. (2007) (codified as amended at O.C.G.A. § 31-6-20 (2006)).

172. Ga. H.R. Bill 1019 §§ 1 to 4, Reg. Sess. (2008) (to be codified at O.C.G.A. §§ 32-10-120 to -133 (Supp. 2008)).

173. Ga. S. Bill 254 § 1, Reg. Sess. (2008) (codified as amended at O.C.G.A. § 45-9-82 (2002)).

174. Ga. H.R. Bill 1054 §§ 9 to 15, Reg. Sess. (2008).

175. Ga. S. Bill 482 §§ 1 to 10, Reg. Sess. (2008) (repealing O.C.G.A. §§ 50-11-1 to -10 (2006) and codified as amended in scattered titles of the O.C.G.A.).

176. Ga. S. Bill 130 §§ 1 to 8, Reg. Sess. (2008) (repealing scattered articles of the O.C.G.A. and codified as amended in scattered titles of the O.C.G.A.).

177. Ga. H.R. Bill 291 §§ 1 to 2, Reg. Sess. (2008) (to be codified at O.C.G.A. §§ 50-12-30 to -35 (Supp. 2008)).

178. Ga. H.R. Bill 464 §§ 1 to 3, Reg. Sess. (2008) (to be codified at O.C.G.A. §§ 50-12-140 to -147 (Supp. 2008)).

(16) The General Assembly improved its manner of questioning the promulgation of administrative rules under the Georgia Administrative Procedures Act.[179]

179. Ga. S. Bill 352 §§ 1 to 3, Reg. Sess. (2008) (codified as amended at O.C.G.A. § 50-13-4 (2006)).