

Mercer Law Review

Volume 46
Number 1 *Annual Survey of Georgia Law*

Article 12

12-1994

Local Government Law

R. Perry Sentell Jr.

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [State and Local Government Law Commons](#)

Recommended Citation

Sentell, R. Perry Jr. (1994) "Local Government Law," *Mercer Law Review*: Vol. 46: No. 1, Article 12.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol46/iss1/12

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Local Government Law

by R. Perry Sentell, Jr.*

In a year when attention focused upon the propriety of actions taken in high places, local governments naturally came in for their share of scrutiny. For both municipalities and counties, the pace was fervid. Their actions were the actions of interest to courts, legislatures, and people. This survey records the highlights of that preoccupation as it was manifested in law—the law of local government.

I. MUNICIPALITIES

A. Power

The “power” focus of this survey period centered upon the municipal effort to collect franchise fees from electric membership corporations. That effort, in two distinctive contexts, proved notably unsuccessful. Initially, the court of appeals, in *City of Calhoun v. North Georgia Electric Membership Corp.*,¹ tracked an earlier treatment of the nature of a “franchise”.² “[T]his court held that a franchise is a contract creating property rights, that a city could not create such a contractual relationship by its unilateral act; and that in the absence of an agreement between the parties, a city could not collect a franchise fee from the EMC.”³ A municipal ordinance purporting to authorize the fee counted for naught: “At every opportunity the EMC has rejected the proposed franchise and has done nothing inconsistent with that

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

Deep appreciation is expressed to the Carl Vinson Institute of Government of the University of Georgia for summer research support that contributed most significantly to the preparation of this survey.

1. 209 Ga. App. 547, 433 S.E.2d 698 (1993), *cert. granted*.

2. *Id.* at 547, 433 S.E.2d at 699 (citing *City of LaGrange v. Troup County EMC*, 200 Ga. App. 418, 408 S.E.2d 708 (1991)).

3. *Id.*

position."⁴ The municipality was thus "not entitled to a franchise fee,"⁵ the court concluded, and "the trial court did not err in so finding."⁶

The court's analysis in the second case, *Athens-Clarke County v. Walton Electric Membership Corp.*,⁷ went to a markedly distinguishable, and far more unique, issue. It derived from a city-county consolidated government's attempt to impose franchise fees upon an EMC operating only in the previously unincorporated county area.⁸ In evaluating that attempt, the court examined the nature of the governmental consolidation and viewed it to result in "a hybrid" of the former county and municipality.⁹ The unified charter created "a new political entity,"¹⁰ but did not attempt to abolish the former county.¹¹ The entity created, the court asserted, "is not a municipality within the meaning of the Territorial Act which is authorized to charge franchise fees."¹²

B. Officers and Employees

The legal issues unfolding around municipal officers and employees touched upon successive phases of a governmental career. At the threshold, *City of Atlanta v. Jackson*¹³ featured alleged illegality in

4. *Id.* at 548, 433 S.E.2d at 699. The court rejected the municipality's arguments grounded in "contracts implied in fact or law," reasoning that "neither of th[ose] theories is applicable here." *Id.* As the court explained, "the EMC has not accepted services from the City rendered under the purported franchise." *Id.*

5. *Id.* The court emphasized that the EMC had not extended its service into the franchise area but, on the contrary, "the scope of the EMC's service in the city has remained constant or has decreased." *Id.* Indeed, "the City has annexed areas in which the EMC was already providing service." *Id.*

6. *Id.*

7. 211 Ga. App. 232, 439 S.E.2d 504 (1993), *cert. granted.*

8. *Id.* Before consolidation, "[a]s Walton EMC operated only in unincorporated Clarke County, it paid no franchise fees to the City." *Id.* at 232-33, 439 S.E.2d at 505.

9. *Id.* at 234, 439 S.E.2d at 506. The consolidation resulted from the legislative enactment of a charter, under authority of GA. CONST. art. IX, § 3, para. 2(a). The court rejected the consolidated government's position that "as the new governmental entity is both a municipality and a county, it is authorized to collect these fees as is any other municipality." 211 Ga. App. at 234, 439 S.E.2d at 506.

10. *Walton Electric*, 211 Ga. App. at 234, 439 S.E.2d at 506.

11. *Id.* The court emphasized that "no portion of the Athens-Clarke County unified charter was ambiguous as the continued existence of Clarke County as a political entity was the intended result of the unified charter." *Id.*

12. *Id.* at 235, 439 S.E.2d at 507. The court's reference was to the Georgia Territorial Electric Service Act. O.C.G.A. §§ 46-3-1 to -15 (1992). The court viewed any charter provisions to the contrary to be "in conflict with provisions of the general law" and invalid for that reason as well. 211 Ga. App. at 235, 439 S.E.2d at 507. Additionally, the court noted its earlier decision in *City of LaGrange* (discussed above) as authority for no franchise fees "in the absence of an agreement to do so." *Id.* at 235, 439 S.E.2d at 507.

13. 236 Ga. 426, 435 S.E.2d 212 (1993).

obtaining the position itself. Specifically, the Georgia Supreme Court pondered, would the officer's alleged fraud in becoming municipal Aviation Commissioner affect calculation of his pension benefits?¹⁴ Responding in the negative, the court fastened upon what it perceived as the "spirit" of the municipal code, a code explicitly ruling "reason for termination" irrelevant to pension rights.¹⁵ From that declaration, the court reached the following conclusion: "A finding . . . that an act of an individual before becoming employed by the City exposes him to the risk of forfeiting pension benefits, when an act taken while employed by the City does not, would contradict the spirit and terms of the city code."¹⁶ That conclusion found additional support in statutes establishing "a standard for the forfeiture of pension benefits based on an employee's wrongful acts."¹⁷

Concerned with the opposite pole on the employment spectrum, *Martin v. Laporte*¹⁸ confronted the court of appeals with termination and leave of absence.¹⁹ The court considered a municipal employee's appeal from the civil service board's conversion of outright termination to a one-year leave of absence without pay.²⁰ Although the employee testified that she was able to work during the period of the leave, the court found "uncontradicted evidence that shortly before her termination she repeatedly sought a leave of absence through a minister and her lawyer and that the stress of her job was an important factor in her illness."²¹ Consequently, the court sustained the board's actions.²²

14. *Id.* at 426, 435 S.E.2d at 213. The mayor had requested the pension fund board to hear evidence that the officer, a former city councilman, had falsely denied having a business relationship with airport concessionaires. The board rejected that request and determined that the officer's pension should be based upon all his years of public service. *Id.*

15. *Id.* at 427, 435 S.E.2d at 213-14. The court relied upon § 5-28 of the city code stating that "the manner of an employee's termination shall not impair the employee's right to a pension." *Id.*

16. *Id.*

17. *Id.* at 427, 435 S.E.2d at 214. The court relied upon O.C.G.A. §§ 47-1-22 and 47-1-22.1 for the determination "that a public employee's pension benefits may be forfeited only upon conviction of a public employment related crime committed in the capacity of a public employee or upon conviction of a drug related crime." 263 Ga. at 427, 435 S.E.2d at 214. Thus, the court affirmed the trial court's dismissal of the municipality's complaint. *Id.*

18. 211 Ga. App. 459, 439 S.E.2d 704 (1993).

19. *Id.* at 459, 439 S.E.2d at 705.

20. *Id.* The municipality had terminated the employee for reasons of "excessive absenteeism," and "job abandonment." *Id.* After hearing evidence, the civil service board found the employee unable to perform her duties during the period of the imposed leave. *Id.*

21. *Id.* at 461, 439 S.E.2d at 706.

22. *Id.*

Two contests of the survey period revolved around the employee's right to workers' compensation benefits.²³ The court characterized the record in *City of Marietta v. Kirby*²⁴ as revealing that a longtime firefighter sustained a work injury to his cervical spine in 1982, received workers' compensation, returned to normal duties, and had suffered neck and back pain more or less continuously since that time.²⁵ On that record, the court affirmed the compensation board's determination that the employee's medical claims for an episode in 1989²⁶ fit the category of "change in condition" rather than "new accident."²⁷ As such, the court affirmed, the claims related back to the 1982 injury and remained the responsibility of the municipality's then compensation carrier.²⁸

The compensation claim failed in *City of Atlanta v. Spearman*,²⁹ an action for injuries to an employee who fell in the parking lot on her way to work.³⁰ Emphasizing coverage to require that the employer own or maintain the lot, the court carefully reviewed the evidence.³¹ That evidence revealed that the municipality leased 100 spaces in the lot for its employees, allotted those spaces to certain employees, and deducted payment for the space from each employee's monthly check.³² The municipality's allocation of spaces, the court held, did not amount to "operating or controlling" the lot; and the accident, the court concluded, thus did not "arise out of and in the course of" plaintiff's employment.³³

23. For background, see R. Perry Sentell, Jr., *Workers' Compensation in Georgia Municipal Law*, 15 GA. L. REV. 57 (1980).

24. 210 Ga. App. 566, 436 S.E.2d 762 (1993).

25. *Id.* at 566, 436 S.E.2d at 763.

26. *Id.* The claim was for medical payments and temporary total disability for a period of several weeks. *Id.*

27. *Id.* The court refused to find a new accident in the fact that the employee may have aggravated his condition by lifting a dog while fighting a fire; that, the court said, "would have been a normal work duty for [the employee]." *Id.* at 569, 436 S.E.2d at 765.

28. *Id.* at 569, 436 S.E.2d at 765. The municipality had subsequently changed insurance carriers and later shifted to a self-insured status. *Id.*

29. 209 Ga. App. 644, 434 S.E.2d 87 (1993).

30. *Id.* at 644, 434 S.E.2d at 87.

31. *Id.* at 645, 434 S.E.2d at 88. Although injuries in a parking lot constitute an exception to the rule that the employee is not covered for injuries while going and coming from work, the lot must be owned or maintained by the employer. "Where the parking lot is neither owned, controlled, nor maintained by the employer, the lot is not part of the employer's premises and the rationale which allows recovery of workers' compensation benefits does not apply." *Id.*

32. *Id.*, 434 S.E.2d at 87-88.

33. *Id.*, 434 S.E.2d at 88. The court of appeals thus held that the board had erroneously equated allocation of spaces with municipal control, and that the trial judge had erred in finding that the accident arose out of and in the course of plaintiff's employment. *Id.*

C. Recall

Both state and local government officials operate under the historic potentials of the recall proceeding.³⁴ The supreme court plumbed those potentials for municipal officials on two occasions during the period under scrutiny.³⁵ *Collins v. Morris*³⁶ projected as an issue of constitutionality the recall statute's provision for judicial approval.³⁷ Although mandating approval of the recall application's grounds and factual support, there could be no judicial hearing upon the truth or falsity of those grounds.³⁸ That limitation, challengers maintained, operated to deprive elected officials of due process.³⁹ The supreme court responded with the observation that "recall is a concept which is predicated upon the power of the electorate to remove its elected officials."⁴⁰ That concept was served, the court reasoned, by "a statute which provides that the electorate, rather than the judiciary, shall determine the ultimate truth or falsity of the allegations of misconduct"⁴¹ The court thus held the statute adequate in its provision of due process to the public official.⁴²

As for the sufficiency of grounds and supporting facts, *Davis v. Shavers*⁴³ featured a recall application which alleged acts of "malfeas-

34. The Georgia Constitution expressly provides for the procedure, GA. CONST. art. II, § 2, para. 4, and the implementing statutes are found in O.C.G.A. §§ 21-4-1 to -21 (1993).

35. For background, see R. Perry Sentell, Jr., *Remembering Recall in Local Government Law*, 10 GA. L. REV. 883 (1976).

36. 263 Ga. 734, 438 S.E.2d 896 (1994). The case involved the attempted recall of the members of a municipal council. *Id.* at 734-35, 438 S.E.2d at 896-97.

37. *Id.* at 735, 438 S.E.2d at 897.

38. O.C.G.A. § 21-4-6(f) (1993). The court described the statute as providing "that an elected official is entitled to judicial review of the recall application to determine whether a statutorily specified ground for recall has been indeed stated and whether the supporting allegations of fact, if true, would authorize a finding that the statutorily specified ground for recall exists." 263 Ga. at 736, 438 S.E.2d at 897-98.

39. 263 Ga. at 735, 438 S.E.2d at 897. Challengers charged the statute denies "an elected official any meaningful opportunity for a hearing even when the evidence would demonstrate that the alleged factual grounds for recall are completely fabricated." *Id.*

40. *Id.* at 737, 438 S.E.2d at 898. The court conceded that the elected official's "property interest" in his office can be taken only by means of due process, but asserted that "appellants took office subject to the condition that they could be recalled by the electorate." *Id.* at 736, 438 S.E.2d at 897. Due process, the court explained, is "a flexible concept." *Id.* at 737, 438 S.E.2d at 898.

41. *Id.* Justices Benham and Hunstein dissented from this determination. *Id.*

42. *Id.* The court also held that the trial judge's determination that the form of the recall application was insufficient would not bar the filing of a revised application within six months. *Id.* at 738, 438 S.E.2d at 899.

43. 263 Ga. 785, 439 S.E.2d 650 (1994).

ance' and 'misconduct'" on the part of a municipal councilman.⁴⁴ Supporting facts included the councilman's illegal passage of an amendment by resolution rather than by ordinance, his voting to pay another councilman two years salary in advance, and his voting to give the city manager a raise in a closed meeting which should have been open.⁴⁵ Holding the trial judge's finding of insufficiency not "clearly erroneous,"⁴⁶ the court reasoned as follows: Although the recall advocates "maintain in their application that all three factual allegations are violations of . . . the Code of Ethics for Government Service,"⁴⁷ it is only by reference to their brief that one gains notice of why these alleged sets of facts may constitute acts of malfeasance or misconduct in office.⁴⁸

D. Regulation

Local government regulation of conduct must avoid undue encroachment upon constitutionally protected freedoms.⁴⁹ The face-off is particularly acute when it involves the freedoms of expression protected by the First Amendment. The Georgia Supreme Court confronted that

44. *Id.* at 788, 439 S.E.2d at 652. The trial court had found the recall application legally insufficient and enjoined the issuance of recall petition forms. *Id.* at 785, 439 S.E.2d at 650.

45. *Id.* at 786, 439 S.E.2d at 651.

46. *Id.*, 439 S.E.2d at 652. The court emphasized that

it is imperative that the application state with clarity and specificity the facts supporting the grounds for recall such that both the public and the official sought to be recalled are properly notified of the violation alleged to have been committed. This court has held that the standard of determining the "legal sufficiency," [], of a factual allegation, is whether it states "with reasonable particularity a ground for recall."

Id. at 786-87, 439 S.E.2d at 652 (quoting *Hamlett v. Hubbard*, 262 Ga. 279, 416 S.E.2d 732, 733 (1992)).

47. O.C.G.A. § 45-10-1 (1990).

48. 263 Ga. at 787, 439 S.E.2d at 652 (citations omitted). As for amending by resolution rather than by ordinance and voting for advance salary, "there is nothing in the application for recall from which the public may determine that the facts themselves, even if taken as true, amount to acts of misconduct or malfeasance." *Id.* (citing *Brooks v. Branch*, 262 Ga. 658, 424 S.E.2d 277 (1993)). As for the alleged closed meeting, "the public was given notice of neither time nor place of the alleged violations such that verification and an informed decision as to whether to sign the application for recall could be made." *Id.*

49. For background on local government regulation, see R. Perry Sentell, Jr., *Discretion in Georgia Local Government Law*, 8 GA. L. REV. 614 (1974); *Reasoning by Riddle: The Power to Prohibit in Georgia Local Government Law*, 9 GA. L. REV. 115 (1974); "Ascertainable Standards" versus "Unbridled Discretion" in *Local Government Regulation*, GA. COUNTY GOVERNMENT MAGAZINE, Dec. 1989, at 19.

face-off in resolving *Gravelly v. Bacon*,⁵⁰ a challenge to the validity of a municipal ordinance prohibiting the sale of alcohol at erotic dance establishments.⁵¹ The ordinance defined covered establishments as featuring live performances emphasizing "specified sexual activities or specified anatomical areas."⁵² The challenge arose upon the municipality's denial of a liquor license to a nude dancing establishment.⁵³

The court approached the controversy by acknowledging nude dancing to be "protected expression,"⁵⁴ and sketching a three-pronged test for balancing regulation and infringement.⁵⁵ The challenger's attack, the court asserted, engaged the third prong: "the incidental restriction of speech [can be] no greater than is essential to further the government interest."⁵⁶ With test in place, the court interpreted the ordinance "as limited to adult dance entertainment businesses that studies have shown produce undesirable secondary effects."⁵⁷ As narrowly construed, the ordinance did not prohibit the live performance of plays, operas, or ballets, nor private conduct or public entertainment not involving live performances.⁵⁸ Accordingly, the court concluded, "[the] . . . ordinance's incidental restriction on the protected expression of nude dancing at adult dance establishments is no greater than is essential to protect the government's interest in preventing unwanted secondary effects."⁵⁹

50. 263 Ga. 203, 429 S.E.2d 663 (1993).

51. *Id.* at 203, 429 S.E.2d at 664.

52. *Id.* at 204, 429 S.E.2d at 664. The ordinance listed seven "specified sexual activities," and defined "specified anatomical areas." *Id.* at 204-05, 429 S.E.2d at 664-65.

53. *Id.* at 203, 429 S.E.2d at 664. Plaintiff challenged the ordinance as unconstitutional and sought to enjoin its enforcement by the municipality. *Id.*

54. *Id.* at 205, 429 S.E.2d at 665.

55. *Id.* The court adopted the test from its opinion in *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E.2d 250 (1982). The test focuses upon whether the regulation furthers an important government interest, whether that interest is unrelated to suppression of speech, and whether the regulation's incidental restriction of speech is no greater than is essential to further the government interest. 263 Ga. at 205, 429 S.E.2d at 665.

56. 263 Ga. at 205, 429 S.E.2d at 665. The challenger did not dispute compliance with the first two prongs. *Id.*

57. *Id.* at 206, 429 S.E.2d at 666. "The ordinance applies to 'topless or bottomless dancers, go-go dancers, strippers or similar entertainers' whose public performance conveys an erotic message distinguished by an emphasis on sexual activities or anatomical areas." *Id.*

58. *Id.* at 205, 429, S.E.2d at 665.

59. *Id.* at 207, 429 S.E.2d at 666. "Therefore, it does not restrict protected expression in violation of the federal or state free speech clauses." *Id.* The court also held the ordinance not violative of equal protection. *Id.* Justice Sears-Collins dissented on grounds that the ordinance violated protected expression. *Id.* at 208, 429 S.E.2d at 667.

E. Property

In *Bridges v. City of Moultrie*,⁶⁰ the municipality's action for possession of real property, against a lessee of that property, bested two defensive objections.⁶¹ First, the lessee could not dispute his landlord's title, asserted the court of appeals, when the lessee was in possession and recognizing the title he sought to dispute.⁶² Second, the lessee's claim of a railroad's (former owner) abandonment of the railway line was not a proper defense to an action for possession of property upon which the depot had been located.⁶³ "The lease covers the parcel of land, adjacent to the line on which the former depot is situated."⁶⁴ Accordingly, the court affirmed a summary judgment for the municipality, favoring issuance of a writ of possession.⁶⁵

F. Finances

Municipal public works projects carry several statutory strictures. One of those strictures commands that the municipality obtain from the project contractor a bond "in the manner and form" specified by the statute.⁶⁶ Failure to obtain the bond subjects the municipality to liability to unpaid subcontractors on the project.⁶⁷ *Mayor of Savannah v. Norman J. Bass Construction Co.*⁶⁸ featured a subcontractor's action under the statute against the municipality.⁶⁹ In defense, the municipality tendered the subcontractor's failure to comply with yet another statute, one requiring nonresident contractors to register and file a bond with the Revenue Commissioner.⁷⁰ Violation of that statute precludes "an action to recover payment for performance on the contract in the

60. 210 Ga. App. 697, 437 S.E.2d 368 (1993).

61. *Id.* at 698-99, 437 S.E.2d at 369-70. The municipality had acquired the real property by quitclaim deed from a railroad as well as the assignment of a lease from the railroad to the defendant. Thereafter, under the terms of the lease, the municipality terminated the lease effective 30 days later. *Id.* at 698, 437 S.E.2d at 369.

62. *Id.* at 699, 437 S.E.2d at 370. The landlord's action for ejectment rested not upon its legally enforceable title to the land, said the court, but rather upon a presently enforceable lease contract with the tenant which the tenant had breached. *Id.*

63. *Id.*

64. *Id.* This was true no matter what disposition was made of the railroad line itself upon abandonment: "the railroad line is not the subject property." *Id.*

65. *Id.*

66. O.C.G.A. § 36-82-102 (1993).

67. *Id.*

68. 264 Ga. 16, 441 S.E.2d 63 (1994).

69. *Id.* at 16, 441 S.E.2d at 64.

70. O.C.G.A. §§ 48-13-31 to -32 (1982).

courts of this state.⁷¹ Confronted with this statutory standoff, the supreme court rejected the subcontractor's contention that preclusion went only to nonresident contractor actions "to recover payment for performance under the contract."⁷² Rather, the court reasoned, the statute "precludes any action in which the relief sought is the recovery of payment for performance under the contract."⁷³ By virtue of its action under the statutory bond command, the court asserted, plaintiff "seeks to recover payment due it for work it has performed under its subcontract;" that it based municipal liability upon failure to obtain a proper bond "is irrelevant."⁷⁴ Accordingly, the court reversed the trial judge's denial of a municipal motion to dismiss plaintiff's action.⁷⁵

G. Liability

Typically, the most litigated facet of municipal law during the survey period was that of liability.⁷⁶ In one fashion or another, plaintiffs pressed assorted claims against municipalities for the alleged wrongs of their agents. When those claims sounded in negligence, they risked the bar of sovereign immunity unless (under the Georgia Constitution of 1983) that immunity had been waived by liability insurance.⁷⁷ *City of Lawrenceville v. Macko*,⁷⁸ an action for periodic flooding of plaintiffs' property, illustrated the point.⁷⁹ Prior to any other element of the negligence claim, the court of appeals emphasized, plaintiffs must

71. *Id.* § 48-13-37.

72. 264 Ga. at 17, 441 S.E.2d at 65.

73. *Id.*

74. *Id.* at 18, 441 S.E.2d at 65.

75. *Id.* "For these reasons, we reverse the trial court's ruling that § 48-13-37 did not apply to [plaintiffs] action against the City. On remand, the trial court will be free to address [plaintiffs] contention that it was not a nonresident contractor." *Id.*

76. See generally R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA (4th ed. 1988); R. Perry Sentell, Jr., *Georgia Local Government Tort Liability: The "Crisis" Conundrum*, 2 GA. ST. U. L. REV. 19 (1986); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

77. GA. CONST., art. I, § 2, para. 9. Actually, the provision covered the state and its "departments and agencies," but the Georgia Supreme Court applied it to counties in *Toombs County v. O'Neal*, 254 Ga. 390, 330 S.E.2d 95 (1985), and to municipalities in *Hiers v. City of Barwick*, 262 Ga. 129, 414 S.E.2d 647 (1992).

78. 211 Ga. App. 312, 439 S.E.2d 95 (1993).

79. *Id.* at 313, 439 S.E.2d at 98. Plaintiffs alleged municipal negligence in building inspections and issuance of a building permit. *Id.* at 312, 439 S.E.2d at 97.

affirmatively show a waiver of municipal immunity.⁸⁰ Their "failure to produce the insurance policy was fatal to their action for negligence."⁸¹

In 1990, the people ratified an amendment to the Georgia Constitution replacing the waiver provision and declaring the state and "its departments and agencies" immune from liability (despite insurance).⁸² That amendment, the supreme court held in *City of Thomaston v. Bridges*,⁸³ did not apply to municipalities.⁸⁴ Accordingly, in *Bridges*, an action for injuries resulting from plaintiff's collision with a police officer,⁸⁵ the court concluded that "the City has no immunity to the extent its liability is covered by the purchase of liability insurance."⁸⁶

Aside from the immunity issue, municipal liability cases must also meet general negligence requirements. One of those requirements, "proximate cause," claimed controlling status in *Mixon v. City of Warner*

80. *Id.* at 314, 439 S.E.2d at 98. The court noted that sovereign immunity is not an affirmative defense and that waiver must be established by the party seeking to benefit from it. *Id.*

81. *Id.* "[I]t is undisputed that [plaintiffs] failed to present any evidence showing the City's affirmative waiver of its immunity from suit. The policy of insurance was not presented at trial, and a determination of a waiver of immunity cannot be made if an insurance policy has not been furnished." *Id.* (citing *Hancock v. Dobbs*, 967 F.2d 462 (11th Cir. 1992)). The court thus reversed the trial court's judgment for plaintiffs. *Id.* at 317, 439 S.E.2d at 100.

82. GA. CONST. art. I, § 2, para. 9.

83. 264 Ga. 4, 439 S.E.2d 906 (1994). The court said: "The issue presented in this appeal is whether Art. 1, § 2, ¶ 9 of the 1983 Georgia Constitution, as amended effective January 1, 1991 . . . precludes a waiver of sovereign immunity by a municipality through the purchase of liability insurance." 264 Ga. at 4, 439 S.E.2d at 907 (footnote omitted). The court expressly did not address the amendment's applicability to counties. *Id.* at 4 n.1, 439 S.E.2d at 907 n.1.

84. 264 Ga. at 7, 439 S.E.2d at 909.

Accordingly, although in *Hiers* we construed the language in former Art. 1, § 2, ¶ 9 to include municipalities, we cannot allow that construction, which effectuated the intent behind the 1983 provision, to bind this Court to a construction which directly conflicts with the obvious intent of the drafters of the 1991 amendment and contravenes the cardinal rule of construction Accordingly, we cannot agree with the City that we are constrained to hold that "state and its departments and agencies," as interpreted in the 1983 provision in *Hiers*, includes municipalities, as used in the 1991 amendment. Instead, we conclude that municipalities do not come within the ambit of the 1991 amendment. 264 Ga. at 6-7, 439 S.E.2d at 909 (footnote omitted).

Justice Carley, joined by Presiding Justice Hunt and Justice Fletcher, concurred specially, on the ground that the court's decision in *Hiers* itself had been wrong. *Id.* at 7-9, 439 S.E.2d at 909-11.

85. *Id.* at 4, 439 S.E.2d at 907. The accident occurred while the police officer was responding to an emergency call. *Id.*

86. *Id.* This was the finding of the trial court, the finding affirmed by the Georgia Supreme Court's decision. *Id.* at 7, 439 S.E.2d at 909.

Robins,⁸⁷ an action for the death of a motorist struck by a suspect fleeing a police officer.⁸⁸ Scoring the recurring nature of the instance, the court of appeals sought "to articulate for the first time in Georgia a general rule to guide the trial courts in their consideration of these cases."⁸⁹ Explicitly balancing "public policy interests,"⁹⁰ the court elaborated the rule:

We hold that when a police officer is pursuing a fleeing suspect, and the suspect injures a third party as a result of the chase, the officer's pursuit is not the proximate cause nor is it a contributing proximate cause of those injuries unless the plaintiff can show that the conduct of the police officer, either in initiating or continuing the pursuit, was such that it posed a higher threat to public safety than is ordinarily incident to high-speed police pursuits.⁹¹

The court held that the pursuit in *Mixon*, lasting less than one minute and only until the officer could radio the suspect's license number, failed to yield liability.⁹²

A close common law companion of "proximate cause," the element of "duty" dominated *City of Lawrenceville v. Macko*.⁹³ Examining a claim for municipal negligence in inspecting construction of plaintiffs' home and issuing a building permit,⁹⁴ the court viewed the municipal building code to create no duty to any particular resident.⁹⁵ Otherwise, the court concluded, no "special relationship" existed between the parties,⁹⁶ as the municipality made no "specific assurances to the

87. 209 Ga. App. 414, 434 S.E.2d 71 (1993).

88. *Id.* at 414, 434 S.E.2d at 72. The officer gave chase upon seeing the suspect run a stop sign until the officer could observe and read to dispatch the suspect's tag number. The officer then slowed, but the suspect ran another stop sign and collided with decedent. *Id.*, 434 S.E.2d at 71-72.

89. *Id.* at 416, 434 S.E.2d at 73.

90. *Id.* The court eschewed both the rule that as a matter of law the pursuing officer's conduct was not the "proximate cause" of the third party's injury and the approach making the issue a jury question in every case. *Id.* at 417, 434 S.E.2d at 73.

91. *Id.*

92. *Id.*, 434 S.E.2d at 73-74. The court affirmed the trial judge's summary judgment for the municipality and the police officer. *Id.* at 417, 434 S.E.2d at 74.

93. 211 Ga. App. 312, 439 S.E.2d 95 (1993).

94. *Id.* at 312, 439 S.E.2d at 97. Because of that negligence, plaintiffs alleged, they had suffered periodic flooding damages to their home. *Id.* at 313, 439 S.E.2d at 98.

95. *Id.* at 315, 439 S.E.2d at 99. The code "expressly provides that it is to protect the safety, health, and general welfare of its citizens." *Id.*

96. *Id.* at 316, 439 S.E.2d at 99. Relying upon the Georgia Supreme Court's decision in *City of Rome v. Jordan*, 263 Ga. 26, 426 S.E.2d 861 (1993), the court said that "liability attaches to the municipality only where a special relationship exists between the municipality and the injured individual which sets the individual apart from members of

[plaintiffs] or promises *prior* to the inspection and approval of the home.⁹⁷

The survey period unfolded a novel defense to the traditional "nuisance" exception to municipal immunity.⁹⁸ In *City of Thomasville v. Shank*,⁹⁹ the municipality argued its nuisance liability to have suffered termination by the 1990 constitutional amendment eliminating the insurance waiver provision.¹⁰⁰ Rejecting that argument,¹⁰¹ the supreme court expressly reaffirmed "the longstanding principle that a municipality is liable for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property."¹⁰²

The court of appeals considered a nuisance complaint in *Banks v. Mayor of Savannah*,¹⁰³ an action for damages from plaintiff's collision with a police car.¹⁰⁴ Turning a deaf ear, the court explicated the necessity for "a continuous or regularly repetitious act or condition" and municipal notice of "the dangerous condition or repetitive acts causing injury."¹⁰⁵ This collision, the court concluded, "was a one-time occurrence."¹⁰⁶

the general public." 211 Ga. App. at 315, 439 S.E.2d at 99.

97. 211 Ga. App. at 315-16, 439 S.E.2d at 99. "As [plaintiffs] did not establish that a duty of care was owed to them by the city based upon a special relationship, the trial court erred in failing to grant the city's motion for directed verdict." *Id.* at 316, 439 S.E.2d at 99.

98. For treatment of "nuisance" liability in Georgia local government law, see R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* 117-34 (4th ed. 1988); R. Perry Sentell, Jr., *Municipal Liability in Georgia: The "Nuisance" Nuisance*, 12 GA. ST. B.J. 11 (1975); R. Perry Sentell, Jr., *Georgia County Liability: Nuisance or Not?*, 43 MERCER L. REV. 1 (1991).

99. 263 Ga. 624, 437 S.E.2d 306 (1993). Plaintiff sued the municipality for damage to her home which was flooded with raw sewage. *Id.* at 624, 437 S.E.2d at 307.

100. GA. CONST. art. I, § 2, para. 9. Later in the survey period, the court would hold this amendment not to apply to municipalities. See *City of Thomaston v. Bridges*, discussed at text accompanying *supra* note 83.

101. 263 Ga. at 625, 437 S.E.2d at 307-08. "This holding is not in conflict with the 1990 amendment as that amendment deals with the concept of waiver, and in the case of nuisance we are dealing not with a waiver of but an exception to sovereign immunity."

102. *Id.*, 437 S.E.2d at 307. As for plaintiff's claim, the court affirmed the trial judge's refusal to take the issue of nuisance from the jury. *Id.* at 626, 437 S.E.2d at 308.

103. 210 Ga. App. 62, 435 S.E.2d 68 (1993).

104. *Id.* at 62, 435 S.E.2d at 69-70. Plaintiff charged the municipality with inadequate training of its police officers in operating the cars. *Id.*

105. *Id.*, 435 S.E.2d at 70. "The fact that other collisions have occurred with police cars in [the municipality] does not make each collision part of the maintenance of a nuisance." *Id.*

106. *Id.* "Nuisance can be shown only by acts of appellees, that is, evidence of their specific failure or specific negligence in training which resulted in the collisions. Plaintiff

Plaintiffs of the period also sought escape from municipal immunity via "Section 1983,"¹⁰⁷ the federal civil rights statute.¹⁰⁸ An apt illustration of the tactic, *Bell v. City of Albany*¹⁰⁹ featured an action by one arrested while intoxicated and injured while struggling with a police officer at the booking station.¹¹⁰ Searching in vain for the municipal "policy or custom" prerequisite to the proceeding,¹¹¹ the court assessed plaintiff's efforts:

There was no evidence of any official City policy or custom of using excessive force against arrestees, nor was there any evidence that the City endorsed a policy or custom of handling intoxicated arrestees in a manner which resulted in injury. There was no evidence of other incidences of such conduct suggesting any widespread informal policy or practice constituting a custom or usage with the force of law.¹¹²

The court thus affirmed the trial judge's summary judgment for the municipality.¹¹³

has not shown this." *Id.*

The court also rejected a nuisance contention in *City of Lawrenceville v. Macko*, 211 Ga. App. 312, 439 S.E.2d 95 (1993), regarding the periodic flooding of plaintiffs' home. The court held the evidence to show no municipal control over the drainage system and, at most, to reveal only insufficient municipal negligence. 211 Ga. App. at 317, 439 S.E.2d at 100.

107. 42 U.S.C. § 1983 (1988).

108. See generally R. PERRY SENTELL, JR., *GEORGIA LOCAL GOVERNMENT LAW'S ASSIMILATION OF MONELL: SECTION 1983 AND THE NEW "PERSONS"* (1984).

109. 210 Ga. App. 371, 436 S.E.2d 87 (1993).

110. *Id.* at 371, 436 S.E.2d at 89. While the officer was attempting to maneuver plaintiff through a door, plaintiff suddenly began to struggle, and in the ensuing fall, plaintiff struck his head. *Id.* at 371-72, 436 S.E.2d at 89.

111. *Id.* at 372-73, 436 S.E.2d at 90. "Municipalities are persons under the statute held accountable if the deprivation of rights alleged was the result of a municipal policy or custom." *Id.* at 372, 436 S.E.2d at 90.

112. *Id.* at 373, 436 S.E.2d at 90. "Neither was there evidence sufficient to create any factual issue in support of any claim of inadequate training." *Id.* To the plaintiff's action against the officer individually, the court probed the applicable Fourth Amendment standard and concluded as follows: "We find, as a matter of law, that [the officer's] actions were an objectively reasonable use of force under the circumstances, and that he is entitled to the protection of qualified immunity." *Id.* at 376, 436 S.E.2d at 92 (footnotes omitted).

113. *Id.* The court afforded short shrift to yet another § 1983 complaint in *Banks v. Mayor of Savannah*, 210 Ga. App. 62, 435 S.E.2d 68 (1993). In response to an action for injuries suffered by plaintiff in a collision with a police car, the court asserted that § 1983 "is not a means to circumvent sovereign immunity in cases involving negligence; it applies only to acts of a governing body which deprive a citizen of constitutional rights pursuant to an impermissible or corrupt policy which is intentional and deliberate." *Id.* at 63, 435 S.E.2d at 70 (citing *City of Cave Springs v. Mason*, 252 Ga. 3, 5, 310 S.E.2d 892 (1984)).

Several claimants encountered difficulty with the "ante litem notice" requirement, the statutory command of written notice of claim to the municipal governing authority within six months of the event.¹¹⁴ In *Brown v. City of Chamblee*,¹¹⁵ plaintiff alleged a municipal conspiracy in his citation for electrical code violations.¹¹⁶ Affirming dismissal, the court could find no evidence that the notice, a "condition precedent" to the action, had been given.¹¹⁷ Plaintiff fared no better in *City of LaGrange v. USAA Insurance Co.*,¹¹⁸ an insurer's claim to subrogation for damages to its insured's house by a ruptured water main.¹¹⁹ The only written notice given, the court emphasized, went to the municipality's insurance carrier, and "notice to the City's insurer is not substantial compliance with the requirement of notice to the governing authority of the municipality."¹²⁰ The court was equally adamant concerning waiver of notice by a municipal official.¹²¹ "The statutory requirements for ante litem notice to the governing authority of the city generally may not be waived by the city or by an individual, even if that individual is the official directly responsible for the injury or for claims adjustment."¹²²

114. O.C.G.A. § 36-33-5 (1993). For discussion, see R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* 145-74 (4th ed. 1988); R. Perry Sentell, Jr., *Georgia Municipal Tort Liability: Ante Litem Notice*, 4 GA. L. REV. 134 (1969); R. Perry Sentell, Jr., *Ante Litem Notice: Cause for Pause*, URBAN GA. 24 (Oct. 1978).

115. 211 Ga. App. 145, 438 S.E.2d 396 (1993).

116. *Id.* at 145, 438 S.E.2d at 397.

117. *Id.* at 148, 438 S.E.2d at 398. "The record contains no such ante litem notice, and [plaintiff] does not allege the sending of a notice in his complaint or state that he did so in his affidavit." *Id.* The court was incredulous over plaintiff's attempt to use the "hazard notice" issued to him by the city as an ante litem notice: "This contention is completely without merit It is a notice of a 'hazard' directed to [plaintiff], not notice of a 'claim' by [plaintiff]." *Id.*

118. 211 Ga. App. 19, 438 S.E.2d 137 (1993).

119. *Id.* at 19, 438 S.E.2d at 138.

120. *Id.* at 21, 438 S.E.2d at 139. "The insurer is not a 'department' of the City, nor is it the 'agent' of the 'governing authority of the municipality.' The contract between the City and its insurer does not convert the insurer to the agent of the City for the purpose of ante litem notice" *Id.* at 20-21, 438 S.E.2d at 139.

121. *Id.* at 21, 438 S.E.2d at 139. Plaintiff alleged that an official in the municipal personnel department has misled plaintiff in respect to the notice. *Id.* at 20, 438 S.E.2d at 138.

122. *Id.* at 21, 438 S.E.2d at 139. Moreover, the court said, the municipal governing authority could not be estopped as the result of an ultra vires act of its officer in waiving the notice. *Id.* For discussion of the doctrine of estoppel generally in local government law, see R. PERRY SENTELL, JR., *THE DOCTRINE OF ESTOPPEL IN GEORGIA LOCAL GOVERNMENT LAW* (1985).

In yet another case of the period, *Maxwell v. City of Chamblee*, 212 Ga. App. 135, 441 S.E.2d 257 (1994), the court reversed a summary judgment for the municipality for lack

An additional, incidental but nevertheless effective, immunity for local governments is the Recreational Property Act,¹²³ insulating from negligence liability owners of public recreational property provided without charge.¹²⁴ Illustratively, *Spivey v. City of Baxley*¹²⁵ presented a softball game spectator's action for injury from a fall at the city-county recreational park.¹²⁶ Affirming summary judgment for defendants, the court found the evidence to show neither wilfulness¹²⁷ nor a charge for plaintiff's entry onto the premises.¹²⁸ Additionally, the court extended the statute's coverage beyond those actually involved in recreational activities and to spectators at athletic events.¹²⁹

Accompanying claims for municipal liability, disgruntled plaintiffs frequently seek personal accountings from the governmental officers themselves.¹³⁰ The petition in *Brown v. City of Chamblee*¹³¹ for example, alleged an official conspiracy against plaintiff in the operation of his business.¹³² Plaintiff anchored his claim for damages in the historic statutory mandate of personal liability for "members of the

of notice. *Id.* at 136-37, 441 S.E.2d at 259. Because there were material issues of fact present regarding the city's continuing trespass, summary judgment was proper only as to those trespasses occurring more than four years prior to filing the complaint. *Id.* at 136, 441 S.E.2d at 259. As to later trespasses, the proper disposition was dismissal. *Id.* at 136-37, 441 S.E.2d at 259.

123. O.C.G.A. §§ 51-3-20 to -26 (1982).

124. *Id.* § 51-3-23. The statute's purpose is to encourage owners to make their property available for recreational purposes. *Id.* § 51-3-20.

125. 210 Ga. App. 772, 437 S.E.2d 623 (1993).

126. *Id.* at 773, 437 S.E.2d at 625. Plaintiff was a minister's wife who was attending a church softball game at the park. *Id.* at 772, 437 S.E.2d at 624.

127. *Id.* at 773, 437 S.E.2d at 625. Plaintiff had stepped into a hole next to a concrete drainage slab; the court found no evidence that authorities were aware of the danger so as to come within the "wilfulness" exception to the immunity conferred by the statute. *Id.* at 773-74, 437 S.E.2d at 626 (citing O.C.G.A. § 51-3-25).

128. 210 Ga. App. at 774, 437 S.E.2d at 626. No fee was charged for spectator admission, but a fee was charged for individuals and teams participating in the softball program. The court rejected plaintiff's argument that she had paid an entry fee via her church contributions. *Id.*

129. *Id.* at 775, 437 S.E.2d at 626. Although the statute does not expressly mention spectators at athletic events, the court held such coverage "not an unwarranted extension" of its scope. *Id.*

130. For background on official and personal liability, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979); R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27 (1988); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405, 423 (1993).

131. 211 Ga. App. 145, 438 S.E.2d 396 (1993).

132. *Id.* at 145, 438 S.E.2d at 397.

council and other officers of a municipal corporation."¹³³ In treating that claim, the court of appeals sketched plaintiff's charges of a political "vendetta" resulting in his being cited for an electrical code violation.¹³⁴ Affirming summary judgment for defendant officers, the court found no evidence "that the appellees acted contrary to a nondiscretionary, ministerial duty or that they acted with malice."¹³⁵ Without such evidence, the court concluded, the statutory claim could not survive.¹³⁶

H. Zoning

The municipal zoning issues encompassed by *OS Advertising Co. of Georgia v. Rubin*¹³⁷ emerged from two primary attacks by an outdoor sign business against municipal action.¹³⁸ First, plaintiff contested, as arbitrary and capricious, the municipal board of zoning adjustment's denial of a variance for a particular sign.¹³⁹ Under the "any evidence" standard of review, the supreme court noted findings by "the city's experts in zoning and planning," and deemed the trial judge possessed of "adequate evidence" for affirming the board's denial.¹⁴⁰ Plaintiff's second attack went to the constitutionality of the municipality's sign ordinance as it related to other of plaintiff's properties.¹⁴¹ On this issue, the court reversed the trial judge's dismissal for plaintiff's failure to exhaust administrative remedies.¹⁴² Delineating "declaratory

133. *Id.* at 147, 438 S.E.2d at 398 (citing O.C.G.A. § 36-33-4 (1993)).

134. *Id.*, 438 S.E.2d at 397. Plaintiff alleged improper inspections of his business premises, resulting in invalid charges against him, an improper hazard notice, and illegal termination of his electrical service. He charged "a vendetta against him because of his political opposition to the mayor." *Id.*

135. *Id.* at 147-48, 438 S.E.2d at 398. For the necessity of such evidence under the statute, the court relied upon the supreme court's decision in *City of Hawkinsville v. Wilson & Wilson, Inc.*, 231 Ga. 110, 200 S.E.2d 262 (1973). 211 Ga. App. at 147, 438 S.E.2d at 398.

136. 211 Ga. App. at 147, 438 S.E.2d at 398. "Without more, this disagreement between [plaintiff] and city officials does not rise to the level required to show liability under O.C.G.A. § 36-33-4." 211 Ga. App. at 147, 438 S.E.2d at 398.

137. 263 Ga. 761, 438 S.E.2d 907 (1994).

138. *Id.* at 761-62, 438 S.E.2d at 909.

139. *Id.*, 438 S.E.2d at 908. The sign admittedly violated both setback and height requirements of the municipal ordinance, thus the necessity of a variance. *Id.*

140. *Id.* at 762, 438 S.E.2d at 909. Given the municipal power to engage in land use restrictions, "[t]he courts will not disturb the decisions of local agencies unless they act beyond the discretionary powers conferred upon it or acted arbitrarily or capriciously concerning the property owner's constitutional rights." *Id.*

141. *Id.* "OS Advertising alleges that the sign ordinance is unconstitutional, with regard to all the property within its purview." *Id.* at 763, 438 S.E.2d at 909-10.

142. *Id.* at 762, 438 S.E.2d at 909.

judgment claims in zoning cases,¹⁴³ the court held that "there is . . . no exhaustion requirement when . . . the property owner challenges the constitutionality of an ordinance on its face."¹⁴⁴

In another zoning controversy of the period, *Board of Zoning Adjustment of Atlanta v. Murphy*,¹⁴⁵ the court of appeals considered whether a variance applicant could "take advantage of [a] previous non-conforming off-site parking situation"¹⁴⁶ Deciding in the negative, the court held that the owner of a restaurant, wishing to move to another building enjoying a nonconforming lack of sixteen parking spaces, could not employ that nonconformance in seeking a variance.¹⁴⁷ Accordingly, the applicant must provide the required forty-two spaces for the building rather than the twenty-six spaces resulting from a deduction of the previously excepted sixteen spaces.¹⁴⁸

II. COUNTIES

A. Power

The power contest of the survey period featured a standoff between the two dominant forces of county government: the board of commissioners and the sheriff. *Wayne County v. Herrin*¹⁴⁹ constituted the commissioners' challenge to the newly elected sheriff's termination of seventeen

143. *Id.* The exhaustion requirement did apply, the court emphasized, when the property owner's claim "arises from [the ordinance's] effect upon a particular parcel of land because of features unique to that property . . ." *Id.*

144. *Id.* at 763, 438 S.E.2d at 909 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). Additionally, the court rejected the municipal argument that plaintiff's statement in its application for a variance was insufficient to raise the constitutional question. *Id.*, 438 S.E.2d at 910. "Although appellant did not name specific code sections, we hold that the references to the Atlanta Zoning Ordinance were not so vague that the [board of zoning adjustments] could not understand the nature of the challenge." *Id.* at 764, 438 S.E.2d at 910.

145. 211 Ga. App. 120, 438 S.E.2d 134 (1993).

146. *Id.* at 120, 438 S.E.2d at 135.

147. *Id.* at 121, 438 S.E.2d at 136. The building housed a retail store, requiring 27 parking spaces, but lacked 16 of those spaces as a nonconforming use. Plaintiff's restaurant in the building would require 42 spaces, and he sought a variance based on providing only 26 (42 minus 16) spaces, thereby seeking to employ the previous nonconforming use. *Id.* at 120, 438 S.E.2d at 135.

148. *Id.* at 121, 438 S.E.2d at 135. Additionally, the court reversed the board of adjustment's allowance of off-site parking if plaintiff would provide an attendant at those locations. The court reasoned that "the record is devoid of evidence as to just how the parking attendant condition would protect the public interest." *Id.*

149. 210 Ga. App. 747, 437 S.E.2d 793 (1993).

prior employees of the sheriff's office.¹⁵⁰ Plaintiffs relied upon civil service protection of the employees,¹⁵¹ the defendant upon the sheriff's statutory power of appointment.¹⁵² The court of appeals approached the controversy by approving county creation of its personnel system¹⁵³ as well as the system's inclusion of all seventeen affected employees.¹⁵⁴ With system in place, the court construed the sheriff's appointment power as "limited to vacancies created by the removal of employees in the manner provided under the applicable personnel or civil service system or vacancies created when employees resign or retire."¹⁵⁵ Accordingly, the court held the terminations violative of county personnel policies¹⁵⁶ and reversed the trial judge's refusal to mandamus reinstatement.¹⁵⁷

B. Officers and Employees

No concern looms larger to the prospective county officer than eligibility for the office. This was the concern of *McIntyre v. Miller*,¹⁵⁸ litigation over an amendment to the constitution rendering convicted felons ineligible to hold public office for ten years following completion

150. *Id.* at 747, 437 S.E.2d at 795. The sheriff had effected the immediate terminations upon the first day of his tenure and appointed replacements at the same time. The county had continued to pay the "terminated" employees and refused to pay the replacements. *Id.* at 748, 437 S.E.2d at 796.

151. *Id.* at 748-49, 437 S.E.2d at 796-97. The Georgia Constitution, art. IX, § 1, para. 9, empowers the legislature to authorize county civil service systems, and the Georgia Legislature, O.C.G.A. § 36-1-21 (1993), has implemented the delegation.

152. 210 Ga. App. at 751, 437 S.E.2d at 798 (citing O.C.G.A. § 15-16-23 (1990 & Supp. 1994)). The court conceded that "deeply embedded in our case law is the notion that the sheriff alone has the authority and power to appoint and fire deputies." *Id.*

153. *Id.* at 750, 437 S.E.2d at 797. The court rejected the sheriff's contention that the county's creation of the system was invalid because performed by "motion." The court said: "[W]e hold the motion creating the current personnel system was a resolution within the meaning of O.C.G.A. § 36-1-21." 210 Ga. App. at 750, 437 S.E.2d at 797. For a review of this and other facets of the local government legislative process, see R. Perry Sentell, Jr., *The Legislative Process in Georgia Local Government Law*, 5 GA. L. REV. 1 (1970).

154. 210 Ga. App. at 755, 437 S.E.2d at 801. Indeed, the court noted "this case highlights a problem associated with our legislature's decision not to limit what positions within an elected official's office could be brought within a civil service system." *Id.* at 753, 437 S.E.2d at 800.

155. *Id.* at 753, 437 S.E.2d at 799. The court rejected the commissioners' argument that the civil service statute could not be reconciled with the sheriff's appointment power. *Id.*

156. *Id.* at 755, 437 S.E.2d at 801; e.g., the requirement that employees could be dismissed only for cause.

157. *Id.* at 755-56, 437 S.E.2d at 801. Additionally, the court reversed the trial judge's order that the commissioners pay the 17 replacements. *Id.* at 756, 437 S.E.2d at 801.

158. 263 Ga. 578, 436 S.E.2d 2 (1993).

of sentence.¹⁵⁹ That prohibition applied, the supreme court held, even though plaintiff had completed his sentence prior to the date of the amendment.¹⁶⁰ The court declared plaintiff without "vested rights which mandate a deviation from the long-standing rule that eligibility to hold public office is to be determined by the statutory and constitutional requirements in effect on the date of the election."¹⁶¹

Of only slightly less concern than eligibility is the prospect of a successful election contest. *Johnson v. Byrd*¹⁶² presented that prospect to the winner of a runoff election for county probate judge.¹⁶³ Transforming prospect to reality, the supreme court found the election tarnished by a sufficient number of ineffective votes.¹⁶⁴ First, the court declared invalid the votes of eight convicted felons.¹⁶⁵ Second, the court likewise invalidated the votes of forty-three individuals listed as electors but who had failed to sign their registration cards.¹⁶⁶ By virtue of that failure, the court reasoned, the individuals had taken no oath and thus "never became lawfully registered voters who were authorized to cast ballots."¹⁶⁷

The contestants in *Ellis v. Johnson*¹⁶⁸ enjoyed less success in their efforts to effect recounts for county elections.¹⁶⁹ Those efforts rested upon contestants' stated belief that the tabulating machines had erred,¹⁷⁰ but their admissions of no knowledge of an actual malfunction.¹⁷¹ Concluding that the material statute required allegation and

159. GA. CONST. art. II, § 2, para. 3 (1983 & Supp. 1994).

160. 263 Ga. at 579, 436 S.E.2d at 4. Plaintiff had completed serving his sentence in 1987, and the constitution was amended in 1991. *Id.* at 578, 436 S.E.2d at 3.

161. *Id.* at 578, 436 S.E.2d at 4. The court also rejected plaintiff's argument of double jeopardy: "The obvious purpose of the instant constitutional amendment is not to impose an additional penalty upon convicted felons, but merely to designate a reasonable ground of eligibility for holding public office in this state." *Id.*

162. 263 Ga. 173, 429 S.E.2d 923 (1993).

163. *Id.* at 173, 429 S.E.2d at 924.

164. *Id.* at 175, 429 S.E.2d at 925. The contestee won the election by only 41 votes, and the court found a total of 51 invalid votes. *Id.*

165. *Id.* This was true even though the felons had not been notified of their ineligibility to vote nor their names removed from the list of electors. *Id.* at 174, 429 S.E.2d at 924.

166. *Id.*

167. *Id.* Justices Sears-Collins and Benham dissented on this point. 263 Ga. at 176-78, 429 S.E.2d at 926-27.

168. 263 Ga. 514, 435 S.E.2d 923 (1993).

169. *Id.* at 514, 435 S.E.2d at 924. The elections were for sheriff and members of the county board of education. *Id.*, 435 S.E.2d at 923-24.

170. *Id.*, 435 S.E.2d at 924. The beliefs were based upon expressions of disbelief in the election results by many voters. *Id.*

171. *Id.* The contestants admitted "that they did not have any information or knowledge that the tabulating machine had in fact malfunctioned in any way." *Id.*

proof of some cause for the belief of error,¹⁷² the court held contestants deficient in carrying their burden for a recount.¹⁷³

More drastic than the election context, *Gipson v. Bowers*¹⁷⁴ instanced the effort at removal from office.¹⁷⁵ The plaintiff citizen effected that effort through an action to mandamus the removal of a county sheriff. Plaintiff charged specified state officers and entities with failure to perform their official duties by refusing to remove the sheriff from office.¹⁷⁶ Mandamus, however, issues only when the act sought is one required by law.¹⁷⁷ In this case, the court asserted, "[plaintiff] has cited no authority, nor have we found any, that would support his contention that the defendants . . . are required by law to seek [the sheriff's] removal from office."¹⁷⁸

Finally, *In re Smith*¹⁷⁹ projected a county sheriff beyond concerns with right to office and into the realm of criminal contempt.¹⁸⁰ Essentially, the court of appeals held the sheriff in contempt¹⁸¹ of an order which was not filed until after the sheriff had complied with its terms.¹⁸² The court emphasized that sheriffs are "officers of the

172. *Id.* at 515-16, 435 S.E.2d at 925. That statute was O.C.G.A. § 21-2-524(a)(8) (1993). The court rejected contestants' contention that this statute was in conflict with O.C.G.A. § 21-2-524(c) by construing the latter provision "as focusing only on the contestant's burden with respect to the ultimate fact of whether an error in counting actually occurred." 263 Ga. at 516, 435 S.E.2d at 925. The court construed the former (and controlling) statute "to require an underlying factual basis or 'cause' that had led the contestant to state generally his or her belief in the ultimate fact that an actual error in counting occurred." *Id.*

173. 263 Ga. at 516, 435 S.E.2d at 925. Although thus affirming the judgment in favor of contestees, the court did reverse the trial judge's award of attorney fees. *Id.* at 516-17, 435 S.E.2d at 925. It was this point upon which Presiding Justice Hunt and Justice Fletcher dissented. *Id.* at 517, 435 S.E.2d at 926.

174. 263 Ga. 379, 434 S.E.2d 490 (1993).

175. *Id.* at 379, 434 S.E.2d at 490.

176. *Id.*, 434 S.E.2d at 491. Plaintiff named as defendants the Governor, the Attorney General, and the Georgia Peace Officer Standards and Training Council. *Id.*

177. For treatment of mandamus, and its dominant role in local government law, see R. PERRY SENTELL, JR., *MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW* (1989).

178. 263 Ga. at 379, 434 S.E.2d at 491. The court noted that the Council had authority only to discipline and revoke certification of police officers, and that the Governor and Attorney General could act only upon a criminal indictment. *Id.* The court thus affirmed the trial judge's grant of defendants' motion to dismiss. *Id.*

179. 211 Ga. App. 493, 439 S.E.2d 725 (1993).

180. *Id.* at 493, 439 S.E.2d at 726.

181. *Id.* at 498, 439 S.E.2d at 729.

182. *Id.* The contempt concerned a statement taken by the sheriff from an inmate, and kept by the sheriff personally rather than in the inmate's file. The statement was not turned over to the GBI in compliance with an order signed on February 21, 1992, but not

court,¹⁸³ a status broadening their exposure to the judicial contempt power.¹⁸⁴ That power extended, therefore, to an order "which, although not filed, was reduced to writing and delivered into the hands of sworn deputies of the officer of the court for service on the sheriff."¹⁸⁵ As for the conviction itself, the court highlighted evidence that the sheriff was "well aware" of the order's existence¹⁸⁶ and was "wilful" in its violation.¹⁸⁷

C. Contracts

County officers sought on two occasions during the survey period to hold the county to employment contracts. Neither effort succeeded. In *Brennan v. Chatham County Commissioners*,¹⁸⁸ the commissioners had executed an agreement appointing plaintiff county attorney for a term of two years, but later dismissed him short of that term.¹⁸⁹ Rejecting plaintiff's action for moneys under the contract,¹⁹⁰ the court of appeals reflected that under both the county's "Enabling Act"¹⁹¹ and under "the law generally, a county attorney is an appointed public official who

filed until June 19, 1992, the date of the trial judge's hearing on the contempt citation. The statement had been turned over to the authorities in May, 1992. *Id.* at 494, 439 S.E.2d at 727.

183. *Id.* at 495, 439 S.E.2d at 727.

184. *Id.* "The contempt power of the courts is broader in cases of 'misbehavior of any of the officers of the courts in their official transactions' pursuant to subsection (a)(2) of O.C.G.A. § 15-1-4." 211 Ga. App. at 495, 439 S.E.2d at 727.

185. 211 Ga. App. at 496, 439 S.E.2d at 728.

186. *Id.* at 498, 439 S.E.2d at 729. The court referred to testimony "sufficient to support a finding that [the sheriff] knew the order required him to release [the inmate's] statement to the GBI." *Id.* at 497, 439 S.E.2d at 729.

187. *Id.* The court found the sheriff's belief that the statement was private was "insupportable" and his failure to read the actual terms of the order "more than simple oversight." *Id.*

188. 209 Ga. App. 177, 433 S.E.2d 597 (1993).

189. *Id.* at 177, 433 S.E.2d at 598. The contract extended until 1992, and the commissioners dismissed plaintiff in 1991. On a preliminary point, plaintiff alleged violation of the Open Meetings Law. O.C.G.A. §§ 50-14-1 to -6 (1990 & Supp. 1993). The court noted the Open Meetings Law's exception for meetings discussing dismissal of employees, and the inapplicability of a more recent requirement that votes and minutes of such meetings shall be public. *Id.* § 50-14-3(6). That requirement "was not in effect at the times relevant to this litigation." 209 Ga. App. at 178, 433 S.E.2d at 599. For background, see R. Perry Sentell, Jr., *Remembering Recall in Local Government Law*, 10 GA. L. REV. 883 (1976).

190. 209 Ga. App. at 178, 433 S.E.2d at 599. Plaintiff claimed a specific amount "allegedly due pursuant to the agreement with the county." *Id.* at 177, 433 S.E.2d at 598.

191. 1984 Ga. Laws 5050. These were the local statutes applicable to the county.

serves at the pleasure of the governing body."¹⁹² Declaring the contract "void as against public policy,"¹⁹³ the court observed that plaintiff "should have known that it was unenforceable" at the time he drafted it.¹⁹⁴

*Harris County v. Penton*¹⁹⁵ featured a contract via which the commissioners employed plaintiff as county manager "for a period not to exceed 24 months."¹⁹⁶ Upon termination without cause some six months later, plaintiff sought damages for breach of the contract.¹⁹⁷ Rebuffing that action, the court of appeals read the document as follows: "The term of employment under this contract could not be more than 24 months, but it could be less."¹⁹⁸ The contract, therefore, "was indefinite and terminable at will."¹⁹⁹ Accordingly, plaintiff's "employment as county manager was terminable at will . . . and his firing 'without

192. 209 Ga. App. at 178, 433 S.E.2d at 599 (citing *Madden v. Bellew*, 260 Ga. 530, 397 S.E.2d 687 (1990)). The court rejected plaintiff's reliance upon the authorization contained in O.C.G.A. § 36-60-13 (1993) to contract for necessary services and the like. 209 Ga. App. at 178, 433 S.E.2d at 599. The court reasoned that statute to apply to multiyear leases or lease purchase contracts, and to be inapplicable to the provision of legal services. *Id.*

193. 209 Ga. App. at 178, 433 S.E.2d at 599. The court rejected plaintiff's argument that the county should be estopped from claiming the contract to be void: "A governmental body cannot be estopped from denying the validity of a void agreement." *Id.* at 179, 433 S.E.2d at 599. For treatment of estoppel in the law of local government, see R. PERRY SENTELL, JR., *THE DOCTRINE OF ESTOPPEL IN GEORGIA LOCAL GOVERNMENT LAW* (1985).

194. 209 Ga. App. at 179, 433 S.E.2d at 599. The court thus affirmed the trial court's grant of summary judgment for the municipality. *Id.*

195. 211 Ga. App. 498, 439 S.E.2d 729 (1993).

196. *Id.* at 499, 439 S.E.2d at 730.

197. *Id.* at 498, 439 S.E.2d at 730. The effective date of the contract was July 3, 1990, and a successor board of commissioners refused to reappoint plaintiff on January 3, 1991. *Id.*

198. *Id.* at 500, 439 S.E.2d at 731.

199. *Id.* The court found it unnecessary to reach the question whether one county commission could legally have bound its successor by a contract of employment for a definite period. For treatment of this problem in local government law, see R. Perry Sentell, Jr., *Local Government and Contracts That Bind*, 3 GA. L. REV. 546 (1969); R. Perry Sentell, Jr., *Binding Contracts in Georgia Local Government Law: Recent Perspectives*, 11 GA. ST. B. J. 148 (1975); R. Perry Sentell, Jr., *Binding Contracts in Georgia Local Government Law: Configurations of Codification*, 24 GA. L. REV. 95 (1989); R. Perry Sentell, Jr., *Binding Contracts in County Government—Never Mind*, GA. COUNTY GOV. 28 (Mar. 1991).

cause' by the county, through its board of commissioners, is not actionable."²⁰⁰

D. Regulation

In the regulatory sphere, the litigation spotlight fell upon efforts of an alcoholic beverage licensee to overturn a county ordinance.²⁰¹ The ordinance challenged in *S.J.T., Inc. v. Richmond County*²⁰² prohibited covered entertainment, attire, and conduct in establishments licensed to sell or serve alcoholic beverages on the premises, but excepting mainstream establishments deriving less than twenty percent of their gross annual income from alcoholic beverages.²⁰³ Noting the ordinance's stated intent to suppress negative secondary effects of nude dancing, the supreme court reviewed the subjects prohibited and acknowledged coverage by the First Amendment.²⁰⁴ Of that amendment's mandated requirements,²⁰⁵ the court identified the one in controversy: "whether the ordinance is narrowly drawn to further the county's interest in preventing the . . . negative effects associated with adult entertainment establishments offering nude dancing and alcohol."²⁰⁶ As for overbreadth, the court held the ordinance sufficiently narrow in describing both attire and conduct prohibited and in avoiding impact on private behavior.²⁰⁷ In respect to vagueness, the court conceded that the ordinance did not answer every conceivable question, but held it sufficiently specific "to permit [challengers] to conduct themselves so as to avoid that which is forbidden."²⁰⁸ On the rationale of the twenty percent gross income exception, the court agreed there was "nothing magical about the . . . cut-off" but perceived a rational relation

200. 211 Ga. App. at 500, 439 S.E.2d at 731. Chief Judge Pope wrote the court's majority opinion. Presiding Judges Beasley and Birdsong dissented. *Id.* They construed the contract to be one for a definite term of 24 months and agreed with the trial court's decision for the county manager. *Id.* at 500-01, 439 S.E.2d at 731-32.

201. For treatment of other facets of local government liquor licensing, see R. Perry Sentell, Jr., *Local Government Law and Liquor Licensing: A Sobering Vignette*, 15 GA. L. REV. 1039 (1981).

202. 263 Ga. 267, 430 S.E.2d 726 (1983).

203. *Id.* at 270, 430 S.E.2d at 729.

204. *Id.* at 268, 430 S.E.2d at 728.

205. *Id.* The court lifted those requirements from *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E.2d 250 (1982). They went to whether the regulation furthers an important government interest, whether it is unrelated to the suppression of speech, and whether incidental suppression is no greater than essential. 263 Ga. at 268, 430 S.E.2d at 728.

206. 263 Ga. at 268, 430 S.E.2d at 728.

207. *Id.* at 269, 430 S.E.2d at 728. "The conduct forbidden by the ordinance is specifically sexual and does not implicate ordinary public behavior." *Id.*

208. *Id.* at 270, 430 S.E.2d at 729 (footnote omitted).

between purpose and income level.²⁰⁹ Accordingly, the court affirmed the trial judge's decision of constitutionality.²¹⁰

E. Finances

By virtue of *J & A Pipeline Co. v. DeKalb County*,²¹¹ the survey period was an eventful one for county finances. The case turned upon the statutory requirement that in contracting for public works, the county take from the general contractor "a payment bond with good and sufficient surety . . . for the use and protection of all subcontractors . . ." ²¹² Should the bond not be taken "in the manner and form required," another statute declared the county liable to the subcontractors.²¹³ In *J & A Pipeline Co.*, the court of appeals held that the statutory liability could arise "if [the county] fails to inquire adequately into the solvency and sufficiency of the surety where the circumstances surrounding the transaction make such failure to engage in further inquiry unreasonable."²¹⁴ Those circumstances existed, the court further held, when a surety affidavit contained inadequate asset descriptions.²¹⁵

Granting certiorari,²¹⁶ the supreme court reasoned that

[t]he surety's affidavit is taken "in the form" required by [statute] when it purports, on its face, to be a statement under oath that the surety "is the fee simple owner of real estate equal in value to the amount of the

209. *Id.* "While using a cut-off of 21% or of 19% may have been just as effective, some particular figure must be chosen if alcohol-derived income is to be used as a measure; otherwise the ordinance would be too vague to enforce." *Id.*

210. *Id.* at 272, 430 S.E.2d at 730. Justice Sears-Collins, joined by Presiding Justice Hunt, dissented, arguing the ordinance to be unconstitutional. *Id.*, 430 S.E.2d at 730-31.

211. 208 Ga. App. 123, 430 S.E.2d 13 (1993), *cert. granted.*

212. *Id.* at 124, 430 S.E.2d at 16 (citing O.C.G.A. § 13-10-1(b)(2)(A) (1982 & Supp. 1994)).

213. *Id.* (citing O.C.G.A. § 36-82-102 (1993)). Here the contractor failed to pay the subcontractor for labor and materials provided on the project and the subcontractor sought recovery from the county. *Id.* at 123-24, 430 S.E.2d at 15.

214. *Id.* at 125, 430 S.E.2d at 16.

215. *Id.* at 126, 430 S.E.2d at 17. "In this case, facts and circumstances rendering the county's failure to make further inquiry unreasonable could be proved within the framework of the complaint." *Id.*

Before this decision was reversed by the supreme court, the court of appeals rendered similar decisions against the county in two other cases: *Atlanta Mechanical, Inc. v. DeKalb County*, 209 Ga. App. 307, 434 S.E.2d 494 (1993); *Mayer Electric Supply Co. v. DeKalb County*, 210 Ga. App. 24, 435 S.E.2d 220 (1993).

216. *DeKalb County v. J & A Pipeline Co.*, 263 Ga. 645, 437 S.E.2d 327 (1993).

[bond] over and above any and all liens, encumbrances, and exemption rights allowed by law.²¹⁷

Asset descriptions, the court held, were not required.²¹⁸ Accordingly, if the county takes a payment bond or surety affidavit "which does, on its face, comport with the statutory requirements, the subcontractors' and materialmen's direct action remedy will be defeated notwithstanding the subsequent inefficacy of the bond or the subsequent discovery of the falsity of the affidavit."²¹⁹

A remaining case, *NCNB National Bank of Florida v. Charlton County*,²²⁰ litigated a county's obligation under an agreement to levy an annual tax upon the failure of a company, for whose benefit bonds were issued, to pay amounts required by note and loan.²²¹ Specifically, the court held that the bank's acceleration of the company's debt under the note and loan did not create a county obligation under the agreement.²²² Accordingly, acceleration resulted in no new county obligation to levy the annual tax past the twenty-year period in the agreement.²²³

F. Roads

An important consideration involving county roads goes to the source from which their improvement must be funded. This consideration became especially crucial in *DeKalb County School District v. DeKalb*

217. 263 Ga. at 649, 437 S.E.2d at 331-32.

218. *Id.*, 437 S.E.2d at 332. "There is no express statutory requirement that the affidavit provide any legal descriptions of the real estate which the surety has otherwise sworn is owned in fee simple or that the real estate be located in Georgia." *Id.*

219. *Id.* at 649-50, 437 S.E.2d at 332. The court thus reversed the court of appeals. *Id.* at 652, 437 S.E.2d at 333. The court noted that a later statute, not applicable to this case, provides that the payment bond "shall be approved as to form and as to the solvency of the surety by the officer of the . . . county . . . who negotiates the contract . . ." *Id.* at 650, 437 S.E.2d at 332 (emphasis added) (citing O.C.G.A. § 13-10-1(f) (1982 & Supp. 1994)). The court said that whether this statute "is construable as a statutory authorization of a cause of action against a county within the mandate of O.C.G.A. § 36-1-4 must await the case wherein that issue is properly presented and raised." 263 Ga. at 650-51, 430 S.E.2d at 332.

220. 263 Ga. 818, 440 S.E.2d 13 (1994).

221. *Id.* at 818-19, 440 S.E.2d at 14. The agreement had been executed in 1981 in conjunction with the issuance of the bonds. *Id.* at 818, 440 S.E.2d at 14.

222. *Id.* at 820, 440 S.E.2d at 15. The bank contended "that, because the entire debt has been accelerated, a tax levy obligation arose prior to the 20-year expiration date which requires the County to continue to levy the tax until such time as all of the principal and interest due on the bonds is paid in full." *Id.* at 819, 440 S.E.2d at 15.

223. *Id.* at 820, 440 S.E.2d at 15. The court held that "the County's obligation arises anew on an annual basis only after [the company] fails to make the required payments and, until [the company] fails to pay, the County has no obligation which would extend the duration of the Agreement beyond its twenty year term." *Id.*

County,²²⁴ litigation over responsibility for improvements of a road leading to a new county school.²²⁵ The supreme court approached the issue by examining "the synergistic relationship that exists between the [School] District and the County for providing services to citizens of the County."²²⁶ That examination revealed "two different spheres" of operation,²²⁷ with the district "functioning principally to enhance the education of the youth of the County"²²⁸ Road improvements would "stray too far" from that function,²²⁹ the court concluded, and "may not be paid for with school tax funds."²³⁰ Consequently, "the County should be required to pay for the road improvements."²³¹

G. Courts

According to the criminally indicted defendant in *Henry v. State*,²³² he suffered a violation of equal protection by virtue of the county in which indicted.²³³ Because that county had only two terms of court per year,²³⁴ defendant charged, "he may have to wait longer for his trial than others in circuits with more terms of court per year."²³⁵ When combined with the "speedy trial" procedure, defendant contended, the two-term allotment operated with unconstitutional results.²³⁶ Responding, the supreme court opted for a "rational basis" rather than "fundamental right" standard of review.²³⁷ Under that standard,²³⁸

224. 263 Ga. 879, 440 S.E.2d 185 (1994).

225. *Id.* at 879, 440 S.E.2d at 185. The school district purchased the site for building the school on a county public road, and the widening of the road at an intersection became necessary. The improvements did not involve the portion of the road adjoining the school property. *Id.*

226. *Id.* at 880, 440 S.E.2d at 186. The court viewed the Georgia Constitution, art. VIII, § 6, para. 1(b), to limit the purposes for which school tax funds may be expended, but held the county to possess broad power to tax and spend, art. IX, § 4, para. 1. 263 Ga. at 880, 440 S.E.2d at 186.

227. 263 Ga. at 881, 440 S.E.2d at 186.

228. *Id.*

229. *Id.*, 440 S.E.2d at 187.

230. *Id.* at 882, 440 S.E.2d at 187.

231. *Id.*, 440 S.E.2d at 188. The court reversed the trial judge's decision in the case. *Id.*

232. 263 Ga. 417, 434 S.E.2d 469 (1993).

233. *Id.* at 417, 434 S.E.2d at 470.

234. *Id.* (citing O.C.G.A. § 15-6-3(15.1) (1990 & Supp. 1994)).

235. *Id.*

236. *Id.* at 417-18, 434 S.E.2d at 470 (citing O.C.G.A. § 17-7-171 (1990)). Defendant had filed a demand for speedy trial pursuant to the code section. *Id.* at 417, 434 S.E.2d at 470.

237. *Id.* at 418, 434 S.E.2d at 471. The court held that a showing of delay alone is not sufficient to trigger strict scrutiny review. *Id.*

the court conceded the possibility that the term classifications “are not drawn with mathematical nicety, and may in practice result in some inequality”²³⁹ Still, “perfection in drawing classifications is not required,”²⁴⁰ and “[t]he legislature has set the minimum number of terms of court for each county according to the constitutional minimum of two per year.”²⁴¹ Thus, the court concluded, “the legislation is rationally related to the government’s interest in moving judicial caseloads and rationing jury pools.”²⁴²

H. Liability

Claims for liability, levied against counties and agents of counties, accounted for massive litigation during the period. Those directed against counties themselves expended much effort in attempting to circumvent sovereign immunity.²⁴³ The effort succeeded in *Daniels v. Decatur County*,²⁴⁴ an action for plaintiff’s injury while a county prison inmate.²⁴⁵ Allowing the county’s liability insurance to effect immunity waiver, the court relied upon the constitutional provision empowering the legislature to waive the immunity of local governments by law.²⁴⁶ The legislature had implemented that authority, the court held, by permitting local governments to waive immunity for motor vehicles by obtaining liability insurance.²⁴⁷

238. *Id.* The only question was whether the classification bears a rational relationship to a legitimate government interest. *Id.* at 419, 434 S.E.2d at 471.

239. *Id.* at 419, 434 S.E.2d at 471.

240. *Id.*

241. *Id.* “If the legislature determines that certain counties need more terms of court and can handle the additional demands, then it may extend such a benefit to the people in that county.” *Id.*

242. *Id.* “Accordingly, appellant has not produced sufficient proof to demonstrate that O.C.G.A. §§ 17-7-171 and 15-6-3 deny him equal protection of the laws.” 263 Ga. at 419, 434 S.E.2d at 471.

243. For background, see R. Perry Sentell, Jr., *Georgia Local Government Tort Liability: The “Crisis” Conundrum*, 2 GA. ST. U. L. REV. 19 (1986); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of ‘92*, 9 GA. ST. U. L. REV. 405 (1993).

244. 212 Ga. App. 378, 441 S.E.2d 790 (1994), *cert. granted*.

245. *Id.* at 378, 441 S.E.2d at 790. Plaintiff alleged injury while working on a county truck which was knocked off its jack when struck by a front-end loader negligently driven by a deputy warden. *Id.*, 441 S.E.2d at 790-91.

246. *Id.* at 380, 441 S.E.2d at 790-91 (relying on GA. CONST. art. IX, § 2, para. 9). The court noted that this provision remained despite the 1990 amendment to the Article I provision. *Id.*

247. *Id.* at 379, 441 S.E.2d at 791 (relying on O.C.G.A. § 33-24-51 (1990)).

"Inverse condemnation" was the alternative of choice in *Forsyth County v. Greer*,²⁴⁸ an action for county delays in issuing permits and certificates for development of plaintiffs' subdivision.²⁴⁹ The court of appeals afforded the tactic a highly summary disposition: Even "assuming without deciding that the delays in issuing the permits, etc. . . . amounted to a temporary regulatory taking, there is no allegation in the record that such acts were done for a public purpose."²⁵⁰

*Smail v. Douglas County*²⁵¹ illustrated the "nuisance" attempt to hurdle immunity.²⁵² Plaintiff alleged county notice of some three or four incidents in which rocks were thrown from a county bridge, prior to the one resulting in his wife's death.²⁵³ Rejecting plaintiff's charge of a continuing county nuisance, the court denied the existence of the proper "nuisance" elements.²⁵⁴ Those included conduct exceeding mere negligence, conduct of some duration, and failure to remedy a known defect.²⁵⁵ As a matter of law, the court held, plaintiff could "prove no set of facts which would meet the elements of nuisance"²⁵⁶

248. 211 Ga. App. 444, 439 S.E.2d 679 (1993). For background on the "inverse condemnation" exception to local government immunity, see R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* (4th ed. 1988).

249. 211 Ga. App. at 444-45, 439 S.E.2d at 680. Plaintiffs alleged a temporary regulatory taking of their property. *Id.* at 445, 439 S.E.2d at 680.

250. *Id.* at 446, 439 S.E.2d at 681 (citing *Kelleher v. State of Georgia*, 187 Ga. App. 64, 65, 369 S.E.2d 413 (1988)). The court observed that most of the objectionable acts alleged were done without approval of the commissioners, did not occur as a part of a land use plan, and were done with bad faith. *Id.* "Therefore, there is no cause of action for inverse condemnation." *Id.* The court reversed the trial judge's refusal to grant the county's motion to dismiss. *Id.* at 447, 439 S.E.2d at 682.

251. 210 Ga. App. 830, 437 S.E.2d 824 (1993).

252. For background on the "nuisance" exception to local government immunity, see R. Perry Sentell, Jr., *Municipal Liability in Georgia: The "Nuisance" Nuisance*, 12 GA. ST. B. J. 11 (1975); R. Perry Sentell, Jr., *Georgia County Liability: Nuisance or Not?*, 43 MERCER L. REV. 1 (1991).

253. 210 Ga. App. at 830, 437 S.E.2d at 825. Third parties dropped a large rock from the bridge onto plaintiffs vehicle traveling on the highway below. The rock crashed through the windshield and killed plaintiff's wife. *Id.*

254. *Id.* at 831, 437 S.E.2d at 825.

255. *Id.* at 830-31, 437 S.E.2d at 825.

256. *Id.* at 831, 437 S.E.2d at 825. The court thus affirmed summary judgment for the county. *Id.* The court also rejected plaintiff's argument that county law enforcement had a duty to protect its citizens by noting the absence of a "special relationship" as required by the supreme court in *City of Rome v. Jordan*, 263 Ga. 26, 28-29, 426 S.E.2d 861 (1993). See also *Feise v. Cherokee County*, 209 Ga. App. 733, 434 S.E.2d 551 (1993), where the court rejected an action against the county for failure to protect a citizen against a neighbor. Again, the court relied upon *City of Rome*. 209 Ga. App. at 734, 434 S.E.2d at 551.

In equally unsuccessful fashion, *Brayman v. Deloach*²⁵⁷ exemplified the "Section 1983" approach to county liability.²⁵⁸ Plaintiff asserted county responsibility for a lesbian relation which developed between plaintiff's minor daughter and an employee of the county recreation department.²⁵⁹ Affirming summary judgment for the county, the court found no evidence of an "intentionally corrupt or impermissible policy" as required by the federal statute.²⁶⁰ Indeed, the court emphasized, plaintiff complained solely of acts by county employees, a vicarious responsibility not covered by Section 1983.²⁶¹

The court also forcefully foreclosed plaintiff's effort in *Department of Transportation v. Price*²⁶² to extract immunity waiver from the statute applying to county roads in the state highway system.²⁶³ That statute simply provided for the Department of Transportation to be "vouched in" to defend an action against the county.²⁶⁴ The statute "simply makes DOT responsible for the county's liability when the county is liable 'under existing laws.'"²⁶⁵ When the county is not liable, the court declared, "there is nothing which DOT must defend or for which it must be responsible"²⁶⁶

The court operated in similar fashion on the waiver argument in *Burton v. DeKalb County*,²⁶⁷ an action for plaintiff's fall in a county-owned building.²⁶⁸ As an employee working in the building rented by her employer, plaintiff claimed third-party beneficiary status to sue on the county's rental agreement to maintain and repair.²⁶⁹ The court

257. 211 Ga. App. 489, 439 S.E.2d 709 (1993).

258. 42 U.S.C. § 1983 (1988). For background on Georgia local government responsibility under § 1983, see R. PERRY SENTELL, JR., *GEORGIA LOCAL GOVERNMENT LAW'S ASSIMILATION OF MONELL: SECTION 1983 AND THE NEW "PERSONS"* (1984).

259. 211 Ga. App. at 490, 439 S.E.2d at 710. Plaintiff alleged that the relationship followed his daughter's participation in county recreation programs. *Id.*

260. *Id.* at 492, 439 S.E.2d at 711 (citations omitted).

261. *Id.* "Inasmuch as governmental entities cannot be held vicariously liable for the actions of their employees, the trial court did not err in granting summary judgment in favor of the county on [plaintiff's] § 1983 claim." *Id.*

262. 208 Ga. App. 320, 430 S.E.2d 602 (1993).

263. *Id.* at 321, 430 S.E.2d at 602 (citing O.C.G.A. § 32-2-6(a) (1991)).

264. *Id.*

265. *Id.* "The statute says nothing about waiving a county's sovereign immunity and nothing in the statute creates a waiver of a county's immunity." *Id.* (quoting *Christian v. Monroe County*, 203 Ga. App. 342, 344, 417 S.E.2d 37 (1992)).

266. *Id.*, 430 S.E.2d at 603. The court thus reversed the trial judge's conclusion of waiver. *Id.* at 323, 430 S.E.2d at 604.

267. 209 Ga. App. 638, 434 S.E.2d 82 (1993).

268. *Id.* at 638, 434 S.E.2d at 83.

269. *Id.* at 638-39, 434 S.E.2d at 83. In this fashion, plaintiff sought to avail herself of the constitution's express waiver of sovereign immunity in actions based on written

rejected that claim, for two reasons.²⁷⁰ First, plaintiff's action sounded in tort not contract;²⁷¹ and second, plaintiff's employment status "without more, does not evince the requisite intent to make plaintiff a beneficiary to the [rental] contract."²⁷²

Even upon immunity waiver, *Adams v. Coweta County*²⁷³ instanced a newly discovered procedural prerequisite to suing the county.²⁷⁴ The action arose from a truck striking a guardrail on a county bridge, allegedly resulting from the county's negligence in designing, installing, maintaining, and repairing the bridge.²⁷⁵ Delineating carefully, the court held the charge of negligent design to require an expert affidavit.²⁷⁶ Road and bridge design, the court reasoned, require "engineering services," or "the performance of professional services" encompassed by the affidavit statute.²⁷⁷ In contrast, the same conclusion was not forthcoming for installation, repair, and maintenance of the bridge.²⁷⁸

As noted, a number of claims sought liability on the part of county officers or employees.²⁷⁹ An example was *Schmidt v. Adams*,²⁸⁰ a wrongful death action against a physician's assistant at the county jail for negligent diagnosis and treatment of plaintiff's wife.²⁸¹ Emphasizing that "official immunity"²⁸² of governmental employees turns upon

contracts, GA. CONST. art. I, § 2, para. 9. 209 Ga. App. at 638, 434 S.E.2d at 83.

270. 209 Ga. App. at 639, 434 S.E.2d at 83-84.

271. *Id.*, 434 S.E.2d at 83. "We agree with the trial court that plaintiff's action against the county for the negligent failure to maintain the building sounded in tort, not contract, and that, therefore, there was no waiver of sovereign immunity in this case." *Id.*

272. *Id.*, 434 S.E.2d at 84. The court thus affirmed summary judgment for the county. *Id.*

273. 208 Ga. App. 334, 430 S.E.2d 599 (1993).

274. *Id.* at 334-35, 430 S.E.2d at 600. The court held that insurance waiver had occurred under the 1983 constitutional provision, art. I, § 2, para. 9, and that the 1990 amendment did not apply. 208 Ga. App. at 335, 430 S.E.2d at 600.

275. 208 Ga. App. at 334, 430 S.E.2d at 600.

276. *Id.* at 336, 430 S.E.2d at 601.

277. *Id.* The court noted previous decisions under O.C.G.A. § 9-11-9.1 (1993), and affirmed the trial court's dismissal of the claim for negligent design. 208 Ga. App. at 336, 430 S.E.2d at 601.

278. 208 Ga. App. at 336, 430 S.E.2d at 601. Those functions "would not necessarily require the exercise of professional skill and judgment," and the pleadings did not show that an affidavit was required. *Id.*

279. For background on local government officer and employee liability, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979); R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27 (1988).

280. 211 Ga. App. 156, 438 S.E.2d 659 (1993).

281. *Id.* at 156, 438 S.E.2d at 659.

282. *Id.* The court relied upon the supreme court's landmark decision in *Hennessy v. Webb*, 245 Ga. 329, 264 S.E.2d 878 (1980). 211 Ga. App. at 156, 438 S.E.2d at 659.

“discretionary functions,” the court examined the nature of defendant’s duties.²⁸³ Medical diagnosis and treatment clearly called for decisions based upon experience and judgment.²⁸⁴ “The acts complained of are thus ‘discretionary’ and fall within the scope of [defendant’s] official immunity.”²⁸⁵

Adding an extra dimension, *Parker v. Wynn*²⁸⁶ featured an action against a school teacher for negligent supervision of a classroom.²⁸⁷ Although the act was undisputedly “discretionary” and performed in his “official capacity,”²⁸⁸ and although the school district possessed no liability insurance, the teacher was insured under a policy issued to his professional association.²⁸⁹ Reasoning that official immunity could not be waived by the individual,²⁹⁰ the court held the teacher immune to plaintiff’s claim.²⁹¹

The court followed its *Parker* decision in *Guthrie v. Irons*,²⁹² an action against a high school principal and teacher for the death of a student beaten in a school hallway between classes.²⁹³ Again the court held that exclusively private insurance could not waive the defendants’

283. 211 Ga. App. at 156, 438 S.E.2d at 659-60. “[O]fficial immunity is intended to protect public officials in the honest exercise of their judgment, however erroneous or misguided that judgment may be.” *Id.* at 156, 438 S.E.2d at 660.

284. *Id.* at 157, 438 S.E.2d at 660.

285. *Id.* The court reversed the trial judge and ordered a summary judgment for defendant. *Id.* at 158, 438 S.E.2d at 661.

The court reached a similar decision in *Gilbert v. Richardson*, 611 Ga. App. 795, 440 S.E.2d 684 (1994), *cert. granted*, an action against a county deputy sheriff who collided with plaintiff while responding to an emergency call. Holding the effect of the 1990 Georgia Constitutional amendment, art. I, § 2, para. 9, to render county participation in an interlocal risk management plan not to constitute waiver by insurance, the court concluded that the deputy’s decision to rush to an emergency amounted to a “discretionary act.” 611 Ga. App. at 798, 440 S.E.2d at 687.

286. 211 Ga. App. 78, 438 S.E.2d 147 (1993).

287. *Id.* at 78, 438 S.E.2d at 148. During the teacher’s brief absence from the classroom, another student hit the plaintiff in the eye with a pecan. *Id.*

288. *Id.* at 79, 438 S.E.2d at 148. Thus, the teacher enjoyed official immunity. *Id.* at 80, 438 S.E.2d at 148.

289. *Id.* at 79, 438 S.E.2d at 148. The case was controlled by the 1983 provision of the Georgia Constitution, art. I, § 2, para. 9, effecting waiver of immunity to the extent of insurance. 211 Ga. App. at 79, 438 S.E.2d at 148.

290. 211 Ga. App. at 79, 438 S.E.2d at 148. The court said that “immunity is vested in the sovereign, and assertion or waiver of that defense is the original prerogative of the sovereign, and not the individual.” *Id.*

291. *Id.*, 438 S.E.2d at 149. The court thus affirmed summary judgment in favor of defendant. *Id.* at 80, 438 S.E.2d at 149.

292. 211 Ga. App. 502, 439 S.E.2d 732 (1993).

293. *Id.* at 502, 439 S.E.2d at 733. Decedent had been beaten and kicked by a fellow student in a school hallway while classes were changing. *Id.*

official immunity.²⁹⁴ Then turning to the nature of defendants' acts, the court characterized their duties as monitoring, supervising, and controlling "the movement of large numbers of students during a change in classes."²⁹⁵ Those duties "necessarily required the exercise of some discretion in deciding where their attention should be directed at any particular moment, and what action might be required."²⁹⁶ Both defendants, the court concluded, "were exercising what amounts to a policing function analogous to the discretionary activities of police officers,"²⁹⁷ and "were shielded by official immunity."²⁹⁸

Finally, *Long v. Jones*²⁹⁹ presented a pre-trial detainee's action against a county sheriff for restraint, via isolation and chains, after plaintiff had escaped three times during a period of five weeks.³⁰⁰ In delineating the appropriate constitutional protections, the court disallowed plaintiff's Eighth Amendment claim: that amendment applies only to a convicted inmate.³⁰¹ As to due process, however, the court reversed summary judgment for the sheriff.³⁰² "A question of fact is presented as to whether the restraints were punishment, rather than a reasonable response to legitimate security concerns."³⁰³

294. *Id.* at 504, 439 S.E.2d at 734. "Because official immunity is a form of governmental immunity arising from the state's sovereign immunity, it may be waived under the applicable constitutional provision [art. I, § 2, para. 9 of 1983] only where the state provides insurance on behalf of its employees." *Id.*

295. *Id.* at 506, 439 S.E.2d at 736. The court said that "[t]he determination as to whether an action is discretionary or ministerial depends on the character of the specific actions complained of, not the general nature of the job, and is made on a case by case basis." *Id.* at 504, 439 S.E.2d at 735.

296. *Id.* at 506, 439 S.E.2d at 736.

297. *Id.*

298. *Id.* at 507, 439 S.E.2d at 736. "In exercising their professional judgment, the defendants should not be deterred or intimidated by the constant threat of personal liability, as long as they act within the scope of their authority, and without wilfulness, malice or corruption." *Id.* The court thus affirmed summary judgment for defendants. *Id.*, 439 S.E.2d at 736-37. Judge Andrews wrote the court's majority opinion. Chief Judge Pope, with whom Presiding Judge McMurray and Judges Cooper and Blackburn concurred, dissented. They viewed defendants' negligent acts to have occurred in the performance of ministerial duties and thus not entitled to official immunity. *Id.*, 439 S.E.2d at 737.

299. 208 Ga. App. 798, 432 S.E.2d 593 (1993).

300. *Id.* at 798, 432 S.E.2d at 594.

301. *Id.* at 799, 432 S.E.2d at 595.

Since [plaintiff] was a pre-trial detainee, not a convicted inmate, his claims involve the due process clause rather than the Eighth Amendment. While due process prohibits punishment of a pre-trial detainee, a convicted inmate may be punished, but not in a cruel and unusual manner in violation of the Eighth Amendment. *Id.* at 799, 432 S.E.2d at 595 (citing *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979)).

302. *Id.* at 802, 432 S.E.2d at 597.

303. *Id.*

I. Zoning

The court of appeals employed *Pruitt v. Fulton County*³⁰⁴ to make a point of zoning procedure. Dismissing the appeal of property owners who challenged county denial of a rezoning request, the court observed that no application had been filed from the superior court's grant of summary judgment for the county.³⁰⁵ The court relied upon a 1989 direction from the supreme court that "all zoning cases appealed either to the Court of Appeals or the Supreme Court of Georgia must hereafter come by application . . ."³⁰⁶

The other zoning decision of the period, *Dyches v. McCorkle*,³⁰⁷ went to whether members of an area planning commission were liable for damages for the disapproval of plaintiff's preliminary plan for a subdivision.³⁰⁸ That disapproval rested upon the finding that the drainage plan for the subdivision did not comply with county regulations.³⁰⁹ Observing the controlling statute to require bad faith and wilful and wanton misconduct, the court asserted that the defendants could not be held personally liable for the negligent performance of their duties.³¹⁰ Despite plaintiff's charges that defendants bowed to political interests, the court viewed the evidence as insufficient to support a finding of bad faith.³¹¹

J. Authorities

Both appellate courts examined the issue of sovereign immunity for county hospital authorities. They reached diametrically opposing conclusions. In *Carter v. Fulton-DeKalb County Hospital Authority*,³¹²

304. 210 Ga. App. 873, 437 S.E.2d 861 (1993).

305. *Id.* at 874, 437 S.E.2d at 861-62. "No application having been filed, we are without jurisdiction to consider this case." *Id.*

306. *Id.* at 873-74, 437 S.E.2d at 861 (quoting *Trend Dev. Corp. v. Douglas County*, 259 Ga. 425, 383 S.E.2d 123 (1989)).

307. 212 Ga. App. 209, 441 S.E.2d 518 (1994).

308. *Id.* at 209, 441 S.E.2d at 519.

309. *Id.* at 210, 441 S.E.2d at 520.

310. *Id.* at 215-16, 441 S.E.2d at 523-24 (citing O.C.G.A. § 51-1-20(a) (1982 & Supp. 1994)). The court noted that the statute did not distinguish between ministerial and discretionary functions. *Id.* at 215, 441 S.E.2d at 523.

311. *Id.* at 216, 441 S.E.2d at 524. The court was not persuaded by plaintiff's charge of different treatment for different applicants, and emphasized that there was conflicting expert evidence on whether applicant met applicable requirements. "The record is devoid of conduct that would lift the [planning commission] members' shield of immunity." *Id.* at 217, 441 S.E.2d at 524.

312. 209 Ga. App. 384, 433 S.E.2d 433 (1993). Plaintiffs alleged defendant's negligent treatment and transport of their decedent. *Id.* at 384, 433 S.E.2d at 434.

the court of appeals reiterated its previously announced conclusion of immunity.³¹³ The court observed that the supreme court had declined to review that earlier decision.³¹⁴

Later in the period, in *Thomas v. Hospital Authority of Clarke County*,³¹⁵ the supreme court reviewed with a vengeance.³¹⁶ The court initiated that review by locating the following language of the constitution: "Sovereign immunity extends to the state and all of its departments and agencies."³¹⁷ That language, the court announced, simply did not apply to hospital authorities: "[H]ospital authorities, because they are neither the state nor a department or agency of the state, are not entitled to the defense of sovereign immunity."³¹⁸ Although an "instrumentality of government," and performing "essentially governmental functions," the authority "is not only not the state or a part of the state, it is also not the county or a part of the county."³¹⁹ The court thus reversed the trial judge's grant of summary judgment for the authority.³²⁰

The supreme court's exercise in *Thomas* may, but does not necessarily, impact upon yet another earlier decision by the court of appeals. In *Hospital Authority of Clarke County v. Martin*,³²¹ it was clear that the authority's insurance had waived its immunity; but did that insurance

313. *Id.* at 387, 433 S.E.2d at 436. See *Hospital Auth. of Fulton County v. Litterilla*, 199 Ga. App. 345, 404 S.E.2d 796 (1991), *rev'd on other grounds*, 262 Ga. 34, 413 S.E.2d 718 (1992). There the court effected a retroactive application of the supreme court's decision in *Self v. City of Atlanta*, 259 Ga. 78, 377 S.E.2d 674 (1989), that the language "sue and be sued" in an entity's charter or enabling statute does not waive sovereign immunity. 259 Ga. at 80, 377 S.E.2d at 676. For extensive treatment of *Self*, see R. Perry Sentell, Jr., "Sue and Be Sued" in *Georgia Local Government Law: A Vignette of Vicissitudes*, 41 MERCER L. REV. 13 (1989).

314. See 209 Ga. App. at 397, 433 S.E.2d at 436. *Litterilla v. Hospital Auth. of Fulton County*, 262 Ga. 34, 413 S.E.2d 718 (1992). There the court held that a liability trust fund constituted insurance which waived the authority's immunity. *Id.* at 36, 413 S.E.2d at 720.

315. 264 Ga. 40, 440 S.E.2d 195 (1994).

316. *Id.* at 40, 440 S.E.2d at 195. Plaintiff's action was for a fall on the authority's premises. *Id.*

317. *Id.* (citing GA. CONST. art. I, § 2, para. 9).

318. *Id.* at 41, 440 S.E.2d at 196. "Further, it is irrelevant that the hospital authority is an instrumentality created by a department or agency of the state, i.e., the county." *Id.* at 42, 440 S.E.2d at 196.

319. *Id.* at 42, 440 S.E.2d at 196. As for "policy considerations," the court emphasized that the hospital authority is in "direct competition" with private enterprise, and that its ability to provide itself with insurance rendered inapplicable the concern for protecting the public purse. *Id.* at 43, 440 S.E.2d at 197.

320. *Id.* at 44, 440 S.E.2d at 198. Justice Hunstein concurred only in the judgment, and Justice Fletcher dissented. *Id.*

321. 210 Ga. App. 893, 438 S.E.2d 103 (1993), *cert. granted.*

also entail liability for punitive damages?³²² In response, the court first declared "Georgia public policy" is opposed to an award of punitive damages against a hospital authority.³²³ Because that policy did not rest exclusively upon a concern for the public purse, the court reasoned, it did not bow to the presence of insurance.³²⁴ "If the Hospital Authority has insurance which would cover an award of punitive damages, . . . [i]t simply means the Authority has purchased insurance it does not need."³²⁵

III. LEGISLATION

Space limitations render impossible a discussion of 1994 legislation affecting local governments. A few measures (all general statutes) might simply be mentioned.

Municipal boundaries may change by virtue of an enactment empowering municipalities to de-annex property simply upon the application of its owner.³²⁶ The terms of members on boards of

322. *Id.* at 893, 438 S.E.2d at 104. It was clear that the case was controlled by the 1983 provision of the constitution and that the authority had procured insurance. *Id.*

323. *Id.* at 894, 438 S.E.2d at 105. The court noted prior indications by the supreme court that hospital authorities fell within the policy disallowing punitive damages against governmental entities. *Id.* at 893-94, 438 S.E.2d at 104-05. Accordingly, "we conclude that . . . it is against Georgia public policy to allow an award of punitive damages against a hospital authority created as a governmental entity under the Hospital Authorities Act." *Id.* at 894, 438 S.E.2d at 105.

324. *Id.* at 894, 438 S.E.2d at 105. The court said that "an award of punitive damages in this context makes no sense because it will not deter the wrongdoing public official regardless of whether the award is paid out of government coffers or from insurance purchased by the government." *Id.* at 895, 438 S.E.2d at 105.

325. *Id.* at 895, 438 S.E.2d at 105. Judge Andrews wrote the majority opinion for six judges. Chief Judge Pope, with whom Presiding Judge Beasley and Judge Cooper joined, dissented on grounds that "[w]hen . . . taxpayers are not forced to pay for the consequences of official misconduct, public policy considerations should not bar a plaintiff from being able to recover an award of punitive damages." *Id.* at 897, 438 S.E.2d at 107.

In *Matthews v. DeKalb County Hospital Auth.*, 211 Ga. App. 858, 440 S.E.2d 743 (1994), the court held that one who waited for four hours in the emergency room, left without seeing a doctor, and died two days later, had severed any causal relation between her death and the defendant's act of classifying her in a non-life-threatening condition. *Id.* at 858, 440 S.E.2d at 745.

Finally, in *Amalgamated Transit Union Local 1324 v. Roberts*, 263 Ga. 405, 434 S.E.2d 450 (1993), the supreme court refused to apply the collateral source rule in an employee's action against a county transit authority for wrongful termination. *Id.* at 408, 434 S.E.2d at 452. As distinguished from tort cases, the court held, "the collateral source rule is not applicable in *contract* cases because collateral source evidence *can* be admitted if it is relevant to demonstrate the extent of the plaintiff's *actual loss* that was caused by the breach." *Id.* at 408, 434 S.E.2d at 452.

326. O.C.G.A. § 36-36-22 (Supp. 1994).

Downtown Development Authorities were reduced from six to four years.³²⁷ Legislation created a "Council of Municipal Court Judges," with an executive committee composed of two representatives from each judicial administrative district, with the purpose of improving the municipal court system.³²⁸

Of considerable importance to counties, a measure repealed such civil duties of county grand juries as inspections of public records, funds, and property, with the requirement, however, that the county jail must be inspected at least once annually and certain county offices once every three years.³²⁹

Another enactment requires county governing authorities to make appointments to the Department of Family and Children Services, and declares state and local elected officials ineligible for service as board members.³³⁰

When a county intends to abandon a county road, it must now publish its intent for a period of two weeks and hold a public hearing on the matter.³³¹

Two measures focused upon political influence in local government. One enactment limits to \$1,000 contributions for the purpose of influencing the outcome of a city or county referendum.³³² Other legislation supplemented the definition of "Lobbyist" by including persons who, for compensation, seek to influence the passage or defeat of ordinances or resolutions, and by requiring their registration and financial disclosure.³³³

A requirement of signal importance is that mandating renegotiation by local governments of local option sales tax distributions following each United States Census.³³⁴ Specified factors for consideration include population served during business hours and special events; the "inherent value" of unincorporated areas; service delivery responsibilities; debt obligations; intergovernmental contracts; and joint services plans.³³⁵ Failure to reach a renegotiated agreement will result in mediation or non-binding arbitration.³³⁶

327. *Id.* § 36-42-4 (1993 & Supp. 1994).

328. *Id.* § 36-32-40 (Supp. 1994).

329. Ga. H.R. Bill 1190, Reg. Sess. (1994).

330. O.C.G.A. § 49-3-2 (1994).

331. *Id.* § 32-7-2 (1991 & Supp. 1994).

332. Ga. H.R. Bill 1199, Reg. Sess. (1994).

333. O.C.G.A. § 21-5-70 (1993 & Supp. 1994).

334. *Id.* § 48-8-89 (1982 & Supp. 1994).

335. *Id.*

336. *Id.*

Another requirement goes to voting procedures. All cities maintaining their own voter registration lists must transfer those lists to the county board of registrars.³³⁷ In turn, the county board must provide cities with a voter registration list at least fourteen days prior to a municipal election.³³⁸

A new prohibition bars local governments from refusing to supply water to residential property, to which water has been furnished through a separate water meter, because of previous water service debts of a prior owner.³³⁹ Local governments may not impose a lien against real property to secure unpaid charges for water unless the property owner is the one who incurred the charges.³⁴⁰ Local governments are to maintain records of identifying information on the user of water service and seek to recover unpaid charges from the person who incurred the charges.³⁴¹

Local government power enhancements include a clarification of the right to accept and spend Community Development Block Grant funds, and validates previous expenditures of the funds.³⁴² Local governments are empowered to use outstanding tax liens and existing special assessment tax liens as a credit to offset payments made to an owner of vacant or abandoned property.³⁴³

Local governments gained new powers in combatting soil erosion.³⁴⁴ If certified, they may issue stop work orders and require corrective action when permit holders commit violations; they may impose penalties in municipal courts; they may enact ordinances exceeding minimum legal requirements; and they may require permit applicants to post bonds.³⁴⁵

IV. CONCLUSION

If an impetus for improvement is attention, the cause of Georgia local government law stands to benefit immeasurably from the developments chronicled here. For again this year, the account reflects, the law of local government was the law of public preoccupation.

337. Ga. H.R. Bill 1429, Reg. Sess. (1994).

338. *Id.*

339. O.C.G.A. § 36-60-17 (Supp. 1994).

340. *Id.*

341. *Id.*

342. *Id.* § 36-87-2 (1993 & Supp. 1994).

343. *Id.* § 36-61-9.

344. *Id.* §§ 12-7-6 to -8, -15 (1992 & Supp. 1994).

345. *Id.*

