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Local Government Law

by Ken E. Jarrard*

I. MUNICIPALITIES

A. Contracts

During the survey period from June 1, 2010 through May 31, 2011, the Georgia Supreme Court reinforced its willingness to strike a contract believed to unduly prohibit a present or future council from retaining full legislative and budgetary discretion. In City of McDonough v. Campbell,1 it was an employment severance provision that ran afoul of the prohibition on binding future councils.2 The city, by resolution, authorized an employment contract that included twelve months severance upon termination, plus insurance and retirement benefits.3 The supreme court, citing section 36-30-3(a) of the Official Code of Georgia Annotated (O.C.G.A.),4 which prohibits councils from binding

* Founding Partner, Jarrard & Davis, LLP, Cumming, Georgia, a local government boutique serving as general counsel to Forsyth, Cherokee, and Barrow Counties, and the City of Milton, Georgia. Middle Tennessee State University (B.S., 1990); University of Tennessee, Knoxville (M.P.A., 1992; J.D. cum laude, 1995). Member, State Bars of Georgia and Tennessee.
2. Id. at 219, 710 S.E.2d at 540. For additional discussion on the prohibition against binding future councils, a practitioner should consider Buckhorn Ventures, LLC v. Forsyth County, 262 Ga. App. 299, 585 S.E.2d 229 (2003), where the court "strongly encourage[d] parties to enter contracts and to resolve disputes through settlement agreements, consent orders, and the like," while nonetheless declaring that a settlement agreement intended to bind, in perpetuity, a parcel of property to a particular zoning classification and worked to "deprive . . . a succeeding commission in the exercise of its legislative power by the device of entering into a contract," is void ab initio. Id. at 302, 585 S.E.2d at 232-33; see also Brown v. City of East Point, 246 Ga. 144, 144, 268 S.E.2d 912, 913 (1980) ("A contract which restricts governmental or legislative functions of a city council has been traditionally held to be a nullity, ultra vires and void . . . ").
3. Campbell, 289 Ga. at 217, 710 S.E.2d at 538.
themselves or successors "so as to prevent free legislation," held that the employment contract was ultra vires and void "because the severance provision render[ed] the cost of terminating the contract exorbitant." The court noted that

the contract at issue is both governmental and financial. That being so, the reasonableness of the contract is not determined solely by the length of time it continues beyond the term of the officers entering into the contract. Rather, under the circumstances of this case, we must also consider whether the contract places a substantial financial obligation on the part of the city. Because the contract is renewed automatically and the severance package requires the city to pay Campbell his salary and benefits for an entire year after the year in which the contract is terminated, we hold that the contract is ultra vires and void.\(^7\)

The survey period revealed little hesitation by the appellate courts in enforcing city contract obligations and granting mandamus if warranted, as illustrated in City of Hoschton v. Horizon Communities.\(^8\) Hoschton involved an agreement (distilled into a city ordinance) where a developer (Horizon) agreed to build a sewer pump station while reserving the right to seek reimbursement from future tap fees by third parties requiring sewer access. However, when a third party sought to connect, the city, instead of Horizon, demanded and received payment for the sewer access. Litigation ensued, with Horizon pursuing and receiving mandamus by the trial court to compel payment.\(^9\) The city responded that the ordinance did "not create a legal obligation requiring the city to act, and therefore, mandamus relief was improperly granted."\(^10\) Although the ordinance reserved to Horizon merely the "right to recoup a portion of the investment," the Georgia Supreme Court held that this language was sufficient to impose "upon the city the concomitant obligation to reimburse Horizon for its investment from sewer connection and tap fees . . . ."\(^11\) The grant of mandamus was affirmed.\(^12\)

Local governments were likewise warned against imposing overly pedantic or strained interpretations on contracts, particularly by demanding that a party undertake a futile act. In Mayor & Aldermen

5. Id.
6. Campbell, 289 Ga. at 218, 710 S.E.2d at 539.
7. Id. at 219, 710 S.E.2d at 540.
9. Id. at 567-68, 697 S.E.2d at 825.
10. Id. at 568-69, 697 S.E.2d at 826.
11. Id. at 567, 569, 697 S.E.2d at 825-26.
12. Id. at 570, 697 S.E.2d at 826.
of Savannah v. Batson Cook Co., the Georgia Court of Appeals held a general contractor’s failure to comply with certain contract requirements for final payment on a parking deck project did not, under the circumstances, preclude the contractor from petitioning for such payment. It was undisputed that the contractor had not fulfilled all of the prerequisites necessary to make such demand. Nonetheless, the court noted, “at least some of the conditions with which [the contractor] did not comply depended on resolution of the issues of this lawsuit.” The court then stated that “it would have been futile for [the contractor] to comply with these procedural requirements for final payment,” noting that “[t]he law does not require a futile act.”

B. Regulation

In City of Atlanta v. Hotels.com, the issue was whether online travel companies (OTCs) were obligated to remit excise taxes based upon retail versus wholesale lodging rates. The Georgia Supreme Court, reviewing the city's hotel excise tax ordinance in toto and in pari materia with O.C.G.A. §§ 48-13-50 to -63, determined that “the amount that is taxable is the retail amount paid for occupancy by someone who will occupy the room,” as opposed to the lower wholesale rate negotiated between the OTC and city hotels for the right to broker rooms. The court likewise agreed with the lower court’s striking of those portions of OTC contracts with private hotels, which authorized “hotel occupancy

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14. The city and contractor were in a dispute over a change order related to arguably unanticipated soil conditions. Id. at 879, 714 S.E.2d at 244-45.
15. Id. at 883, 714 S.E.2d at 247. The city argued that final payment was appropriately denied because the contractor “failed to comply with contract provisions requiring [it] to request a final inspection, to submit a final accounting, to submit certain affidavits and the consent of its surety to demonstrate that it had paid its subcontractors, and to submit a final application for payment.” Id.
16. Id.
17. Id.
18. Id.
20. Id. at 324, 710 S.E.2d at 768.
taxes [to] be collected and remitted based on the negotiated wholesale rate."

A challenge to occupation taxes was also briefly considered and swiftly rebuffed by the supreme court. The case of *Magby v. City of Riverdale* involved a challenge to a city's duly imposed occupation tax by an in-home day care operator. The supreme court rejected outright the operator's argument that the city's occupation tax ordinance was not authorized by Georgia law or the city's charter. The court also rejected an “as-applied challenge,” concluding that any concern related to a future enforcement action was “based on sheer speculation” and constituted a premature effort at challenging the sufficiency of the evidence.

C. Police Power

County and municipal governments enact ordinances pursuant to their police power, and the legitimacy of those ordinances is routinely challenged in court. A “weed” ordinance was the subject of such a challenge in *Parker v. City of Glennville*. In *Parker*, an owner of

24. *Id.* at 327, 710 S.E.2d at 770. The court explained, "A contract to do an immoral or illegal thing is void. If a contract is severable, however, the part of the contract which is legal will not be invalidated by the part of the contract which is illegal." *Id.* (internal quotation marks omitted); O.C.G.A. § 13-8-1 (2010).


26. *Id.* at 128, 702 S.E.2d at 160.

27. *Id.* at 130, 702 S.E.2d at 161. The court had little difficulty finding this argument meritless, noting that, “O.C.G.A. § 48-13-6(b) provides that ‘each municipal corporation is authorized but not required to provide by local ordinance or resolution ... and to provide for the punishment of violation of such a local ordinance or resolution.’” *Id.*; O.C.G.A. § 48-13-6(b) (2009).

28. *Magby*, 288 Ga. at 129, 702 S.E.2d at 160. The day care operator argued the ordinance violates her due process and equal protection rights because it unreasonably sanctions her for the lawful act of failing to renew an occupation tax permit, it fails to provide her with sufficient notice that the City could sanction her if she fails to renew her permit, and it places her in a class of persons unreasonably sanctioned for not renewing their permits.

29. *Id.* at 130, 702 S.E.2d at 161. The court sardonically observed, If [the day care operator] continues her pattern of operating a business in the city without paying the occupation tax until after she is cited for violating [the ordinance], she will have the opportunity in any future prosecution, in both the City Court and on appeal, to challenge the sufficiency of the evidence used to convict her.


vacant lots received a notice of inspection under an ordinance prohibiting weeds exceeding ten inches in height.\textsuperscript{32} Affirming the trial court's refusal to enjoin enforcement, the Georgia Supreme Court rejected the property owner's contention that the language defining the scope of the ordinance, to wit: "any lot, area, or place located within this city," was unconstitutionally vague.\textsuperscript{33}

The supreme court examined another "weed" ordinance challenge in \textit{Gasses v. City of Riverdale}.\textsuperscript{34} In \textit{Gasses}, owners of property abutting public rights of way were prohibited from allowing weeds to exceed six inches in height.\textsuperscript{35} The property owners claimed that the ordinance "force[d] elderly homeowners to perform the duties of the City's public works employees and . . . treat[ed] owners differently from non-owners who occupy property."\textsuperscript{36} The court declared the ordinance constitutional, holding that it did not exceed the city's police power and did not constitute involuntary servitude by forcing property owners to function as de facto public works employees.\textsuperscript{37}

\textbf{D. Zoning and Land Use}

The "any evidence" standard\textsuperscript{38} received attention in \textit{City of Atlanta v. Starship Enterprises of Atlanta, Inc.},\textsuperscript{39} where an adult business (Starship) sought a permit to operate at a site that had been used for a similar adult-themed business from 1991 to 2007.\textsuperscript{40} In 2007, the prior adult business owner requested that its business license be cancelled. Subsequently, Starship applied for and received a building permit to operate an adult business at the same location. The City of Atlanta revoked the permit based on a determination that the prior use had been

\begin{itemize}
\item 32. \textit{Id.} at 34, 701 S.E.2d at 183. The ordinance provided as follows: "It shall be unlawful for any owner or resident of any lot, area, or place located within this city to permit any weeds, grass, or deleterious, unhealthful growths to obtain a height exceeding ten inches on such property." \textit{Id.} (internal quotation marks omitted).
\item 33. \textit{Id.} at 35, 701 S.E.2d at 184 (internal quotation marks omitted). The court reasoned that such language "clearly inform[s] persons of ordinary intelligence that the ordinance is applicable to all property within the Glennville city limits." \textit{Id.}
\item 34. 288 Ga. 75, 701 S.E.2d 157 (2010).
\item 35. \textit{Id.} at 75-76, 701 S.E.2d at 158.
\item 36. \textit{Id.} at 76, 701 S.E.2d at 159.
\item 37. \textit{Id.} at 78, 701 S.E.2d at 159-60.
\item 38. Pursuant to this standard, "[a]ny evidence is sufficient to support the decision of [a] local governing body." \textit{City of Atlanta v. Starship Enters. of Atl., Inc.}, 308 Ga. App. 700, 701, 708 S.E.2d 538, 539 (2011).
\item 40. \textit{Id.} at 700-01, 708 S.E.2d at 538-39.
\end{itemize}
discontinued. Starship appealed the denial to Atlanta's Board of Zoning Adjustment (BZA), which conducted a hearing and upheld revocation.\textsuperscript{41}

The BZA declared that the intervening operation of a used furniture business, albeit for only a brief period, at the site of a previously operating adult establishment eliminated the site's grandfathered status for a future adult business. The trial court reversed, and the city appealed.\textsuperscript{42} Reaffirming the BZA, the Georgia Court of Appeals declared that the any evidence standard does not allow for a reweighing of evidence and the evidence relied upon by the BZA to conclude the furniture business had opened for a brief period, though entirely circumstantial, satisfied the standard.\textsuperscript{43}

In \textit{Targovnik v. Dunwoody Zoning Board of Appeals},\textsuperscript{44} the court of appeals grappled with the Serbonian Bog\textsuperscript{45} that is Georgia's writ of certiorari process.\textsuperscript{46} In \textit{Targovnik}, a property owner was granted a variance from the city's stream buffer requirements, allowing a preschool to build a playground. A neighbor (Targovnik) appealed the decision by writ of certiorari. Targovnik obtained a certificate of costs from the city's Director of Community Development because the secretary of the Zoning Board of Appeals (ZBA) was not available.\textsuperscript{47} The secretary of

\begin{itemize}
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.} at 700-01, 708 S.E.2d at 538.
\item \textsuperscript{43} \textit{Id.} at 701-02, 708 S.E.2d at 539. It is worth emphasizing that the city had already issued a permit for the adult entertainment business, but subsequently revoked it upon discovery of the intervening furniture operation. \textit{Id.} at 700-01, 708 S.E.2d at 538. That no estoppel issues are discussed in the opinion, in spite of Starship having had a permit in hand, may reasonably be viewed as a testament to the enduring legacy of \textit{Corey Outdoor Advertising, Inc. v. Board of Zoning Adjustment}. 254 Ga. 221, 224, 327 S.E.2d 178, 182 (1985) (citations omitted) (internal quotation marks omitted) ("There is no such doctrine known to the law as a set-off of wrongs. Not even estoppel can legalize or vitalize that which the law declares unlawful and void. If so, the conduct of individuals, whether independently or collusively, could render any and all laws invalid and impotent. The act of the official...who issued the building permit to the appellant was clearly unauthorized, because the ordinance in question prohibited the issuance of a building permit for the site in question.").
\item \textsuperscript{44} 307 Ga. App. 140, 704 S.E.2d 448 (2010).
\item \textsuperscript{45} \textit{See generally} \textit{Landress v. Phoenix Mut. Life Ins. Co.}, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting) (characterizing the obtuse distinction between accidental results and accidental means as a branch of law in a "Serbonian Bog").
\item \textsuperscript{46} \textit{See generally} \textit{O.C.G.A. §§ 5-4-1 to -10} (1995); \textit{Fisher v. City of Atlanta}, 212 Ga. App. 635, 636, 442 S.E.2d 762, 764 (1994) (Cooper & Blackburn, JJ., concurring). Wrestling with a failure of service issue under \textit{O.C.G.A. §§ 5-4-1 to -10} and on motion for reconsideration, the concurring justices in \textit{Fisher} observed that the "whole statutory scheme seems to refer to some archaic proceeding which is a mystery today." \textit{Fisher}, 212 Ga. App. at 636, 442 S.E.2d at 764.
\item \textsuperscript{47} \textit{Targovnik}, 307 Ga. App. at 140-41, 704 S.E.2d at 449.
\end{itemize}
the ZBA executed an affidavit indicating that the director “was authorized in my absence to perform the duties of the [ZBA] secretary.” The court of appeals held that a certificate of costs filed in conjunction with a writ of certiorari was sufficient to satisfy the certificate requirement pursuant to O.C.G.A. § 5-4-5(a) where issued by “the duly appointed secretary for the City of Dunwoody Zoning Board of Appeals, or his proxy.”

E. Annexation

Lest anyone presume that a pro se litigant cannot achieve litigation success in a case involving procedural complexities, we learned otherwise in Worley v. Peachtree City. In Worley, a resident alleged that Peachtree City failed to comply with the Zoning Procedure Law, codified in O.C.G.A. §§ 36-66-1 to -6, with regard to certain rezoning actions. The resident also alleged that, due to improper annexation, Peachtree City had created an “unincorporated island,” which O.C.G.A. § 36-36-4 prohibits. Upon reviewing the citizen’s direct appeal of both the zoning and annexation issues, and in response to the city’s assertion that the zoning appeal failed for lack of a discretionary application, the Georgia Court of Appeals held that “if the underlying subject matter of an appeal involves claims with independent standing, one of which is subject to the discretionary appeal statute and one of which is directly appealable, a party may file a direct appeal and the appellate courts have jurisdiction to address both claims.” As to the alleged improper annexation, the court held that the initial annex-

48. Id. at 141, 704 S.E.2d at 449 (internal quotation marks omitted).
55. Worley, 305 Ga. App. at 119, 699 S.E.2d at 95-96 (internal quotation marks omitted).
56. The trial court granted the city’s motion to dismiss on counts two through six of the complaint and granted summary judgment to the city on the unincorporated island claim. Id. at 119, 699 S.E.2d at 96.
57. Id. at 120, 699 S.E.2d at 96.
58. It was undisputed that the city’s May 3, 2007, annexation of certain property resulted in the creation of an unincorporated island completely surrounded by the city (the so-called Hardy and Kidd Tracts). Id. at 120, 699 S.E.2d at 97. Subsequently, on November 6, 2007, the city attempted to annex the unincorporated island and thereby moot the challenge. Id. at 120-21, 699 S.E.2d at 97.
ation was void because it violated O.C.G.A. § 36-36-4(a)(1) by creating an unincorporated island. The court emphasized that a governmental action that is void is "forever void," or, stated another way, "absolutely void" and "amounts to no law at all." The city's subsequent annexation, which presumed to cure the unincorporated island, could not revive the fatal infirmity, and the issue, therefore, remained "alive." The award of summary judgment to the city was reversed and summary judgment along with an associated injunction was directed in favor of the pro se complainant.

F. Liability and Defenses

That the "king can do no wrong" remains well established in Georgia, though the survey period witnessed litigants attempting (though not necessarily succeeding) to further expand exceptions to sovereign immunity and otherwise reach the deeper pocket that is government. In Naraine v. City of Atlanta, a woman slipped and fell on an icy sidewalk near a public fountain, injuring her ankle. She sued the City of Atlanta claiming that the accumulation of ice originated from a nearby city fountain and that the city had been negligent both in maintaining the fountain and in failing to remove ice from the sidewalks and streets. The city tendered proof that prior to the incident it had received no complaints of ice falling from the fountain but had received an emergency call that ice was forming on the fountain itself, and in response to the call, a city employee turned the fountain off. The Georgia Court of Appeals acknowledged that "municipalities generally have a ministerial duty to keep their streets in repair, and they are liable for injuries resulting from defects after actual notice, or after the defect has existed for a sufficient length of time for notice to be inferred." However, in Naraine, there was no evidence that the city had any prior knowledge of the accumulated ice on the streets.

60. Worley, 305 Ga. App. at 122, 699 S.E.2d at 98.
61. Id. at 123, 699 S.E.2d at 98 (quoting Jones v. Maskill, 112 Ga. 453, 456, 37 S.E.2d 724, 725 (1900)) (internal quotation marks omitted).
62. Id. (quoting Se. Greyhound Lines, Inc. v. City of Atlanta, 177 Ga. 181, 184, 170 S.E.2d 43, 44 (1933)).
63. Id. at 125, 699 S.E.2d at 99 (internal quotation marks omitted).
64. Id. at 125, 699 S.E.2d at 100.
66. Id. at 561-62, 703 S.E.2d at 32.
67. Id. at 563, 703 S.E.2d at 33 (quoting Roquemore v. City of Forsyth, 274 Ga. App. 420, 423, 617 S.E.2d 644, 647 (2005)) (internal quotation marks omitted).
68. Id. at 564, 703 S.E.2d at 33.
Further, the court even noted that the plaintiff failed to demonstrate the "cause in fact" of the ice—to wit, whether the ice formed from water flowing from the fountain or from melting snow located elsewhere. The court of appeals held that a city is not liable in negligence for the performance of a governmental function. Because the fountain at issue was not operated to generate revenue, the court had little difficulty concluding its operation was purely governmental in nature and that, therefore, a negligence theory must fail.

An injured athlete was similarly unsuccessful in holding a municipality and volunteer coach responsible for injuries suffered during a track and field training session. In *Heard v. City of Villa Rica*, the plaintiff claimed the volunteer coach was grossly negligent while training participants in the long jump. Reasoning, in part, that O.C.G.A. § 51-1-41 affords immunity to volunteer sports officials, the court of appeals affirmed summary judgment. Dismissal of the city was also affirmed (with little explanation), but ostensively predicated upon a lack of evidence of a master-servant relationship sufficient to impute liability. Based upon the lack of proof and the court's corollary lack of need to analyze further, there is, unfortunately, no discussion on how sovereign immunity would have affected respondeat superior analysis. This is particularly notable, given that the operation of a public recreational facility is typically a governmental, as opposed to a ministerial, function.

69. *Id.*
70. *Id.* at 562, 703 S.E.2d at 32. In the present case, "the City produced the affidavit of . . . its director of parks, who stated that the fountain is located in the Square; the Square is operated 'for the public good and not as a proprietary function;' and the City 'does not charge a fee for use of [the Square]'". *Id.*
71. See *id.* at 562-63, 703 S.E.2d at 32.
73. *Id.* at 292-93, 701 S.E.2d at 917-18.
74. O.C.G.A. § 51-1-41 (2000) (protecting sports officials who officiate amateur athletic events from liability for injuries occurring within the confines of the athletic facility where the athletic contest is played in the absence of gross negligence).
Contrast the respondeat superior analysis in *Heard* to that of *City of Atlanta v. Harbor Grove Apartments, LLC.*\(^7\) In *Harbor Grove*, the court of appeals agreed with the trial court that the city may be vicariously liable for the actions of its Watershed Management Commissioner (commissioner).\(^7\) The court of appeals concluded that the commissioner acted in his official capacity and for the benefit of his employer, the city, when implementing an “unwritten policy” related to the operation of the city’s water system.\(^8\) Given that the operation of a waterworks is a nongovernmental function, the city’s sovereign immunity was not at issue and standard respondeat superior analysis applied.\(^9\) Moreover, because the commissioner implemented the policy without the requisite guidelines to ensure consistency and fair enforcement, the court agreed that the city may be held vicariously liable.

In *City of Ashburn v. Ivie Mini Warehouses, Inc.*,\(^10\) the court of appeals rejected applying a variation on the discovery rule to trigger the six-month ante litem requirement for claims against municipalities.\(^11\) In *Ivie*, a thirty-three foot high brick wall collapsed onto an adjacent property causing damage. The property owner sought recovery against the city upon discovering that, in May or June of 2007, the city had prevented that very wall from being razed. Other critical dates at issue were December 15, 2007, the date the wall collapsed, and July 25, 2008, the date the plaintiff provided an ante litem notice to the city.\(^12\) The court of appeals affirmed dismissal of the city based upon an untimely ante litem.\(^13\) The court rejected the plaintiff’s contention that the ante litem clock should not have begun ticking until the date that the plaintiff discovered the city’s role in preventing the wall’s removal.\(^14\) Rather, the court held that December 15, 2007, the date the wall fell, was the appropriate trigger date.\(^15\)

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79. *Id.* at 58-59, 706 S.E.2d at 724-25. In *Harbor Grove*, the commissioner of the city’s watershed management department was alleged to have improperly conditioned the sale of a water meter to an apartment building on a requirement that the owner extend the water main across the frontage of property to be serviced, which was beyond the city limits. *Id.* at 57, 706 S.E.2d at 723.
80. *Id.* at 59-60, 706 S.E.2d at 725.
81. *See id.*
82. *Id.* at 60, 706 S.E.2d at 725.
84. *Id.* at 308, 707 S.E.2d at 543.
85. *Id.* at 307, 707 S.E.2d at 542.
86. *Id.* at 308, 707 S.E.2d at 543.
87. *Id.*
88. *Id.*
While *Ivie* involved a city preventing a structure from being razed, the next case involves municipal liability based upon a city destroying a structure. In *Brown Investment Group, LLC v. Mayor & Alderman of Savannah*, the purchaser of a tax deed to real property sought to hold the city liable, pursuant to O.C.G.A. § 48-4-40(1), for the value of a building demolished on that same property within the twelve-month redemption period. The Georgia Supreme Court affirmed judgment in favor of the city because the tax deed purchaser “does not have standing to sue the City for trespass or the value of the destroyed building because it was not the legal owner and had no right to possession of the real property when the building was demolished.”

In *Solid Equities, Inc. v. City of Atlanta*, the Georgia Court of Appeals rejected a commercial landlord's effort to establish an inverse condemnation against a city and recover amounts paid to settle the water bill of a former tenant. Upholding an award of summary judgment, the court of appeals acknowledged that, under O.C.G.A. § 36-60-17, a city may not condition the supply of water service to “single or multifamily residential property based on the indebtedness of a prior owner, occupant or lessee,” but the statute does not prevent the city from denying water service to a commercial property owner until a prior indebtedness is paid.

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89. 289 Ga. 67, 709 S.E.2d 214 (2011).
90. O.C.G.A. § 48-4-40(1) (2010). O.C.G.A. § 48-4-40 authorizes redemption: “(1) [a]t any time within 12 months from the date of the sale; and (2) [a]t any time after the sale until the right to redeem is foreclosed by the giving of the notice provided for in Code Section 48-4-45.” O.C.G.A. §§ 48-4-40(1)-(2).
92. *Id.* at 69, 709 S.E.2d at 216 (quoting *Brown Inv. Grp.*, LLC v. Mayor & Alderman of Savannah, 303 Ga. App. 885, 886, 695 S.E.2d 331, 331 (2010)). In so holding, the court examined the law on interests conveyed via tax deed, specifically noting that, “It is well-settled that the title acquired by the purchaser of a tax deed is ‘not a perfect fee simple title, but rather an inchoate or defeasible title subject to the right of redemption.’” *Id.* (quoting *BX Corp. v. Hickory Hill 1185, LLC*, 285 Ga. 5, 7, 673 S.E.2d 205, 207 (2009)). The court also noted that “[t]he purchaser ‘has consequently no constructive possession of the premises, and no more right to go upon and make use of them than any stranger to the title would have . . . .’” *Id.* at 68, 709 S.E.2d at 216 (quoting *Elrod v. Groves*, 116 Ga. 468, 470, 42 S.E. 731, 731 (1902)) (internal quotation marks omitted). Finally, the court noted that “[a] tax deed does not entitle a purchaser to possession as a matter of law or right until the right of redemption is terminated.” *Id.*
94. *Id.* at 895, 710 S.E.2d at 166.
96. *Solid Equities*, 308 Ga. App. at 897, 710 S.E.2d at 167. The court observed, “If the legislature [had] intended to prohibit a supplier from refusing to supply water service to non residential property based on the indebtedness of a prior owner, occupant or lessee,
In *Joiner v. Glenn*,\(^97\) the issue was the proper remedy when a city denied a name-clearing hearing to a terminated city employee.\(^98\) The Georgia Supreme Court, overturning a denial of the city’s request for judgment on the pleadings, ruled that an adequate state law remedy existed and that the plaintiff’s proper remedy for the city’s failure to hold a name-clearing hearing was a mandamus action.\(^99\)

In *Georgia Interlocal Risk Management Agency v. Godfrey*,\(^100\) the issue was whether a risk management pool, Georgia Interlocal Risk Management Agency (GIRMA), was obligated as a matter of law to provide the city “uninsured motorist coverage that encompasses ‘underinsured’ motorist coverage.”\(^101\) The requirement of such coverage by judicial fiat would, of course, necessarily expand the extent to which the city’s sovereign immunity was waived.\(^102\) The trial court declared the GIRMA policy must provide such coverage.\(^103\) The court of appeals reversed, holding that

\(^{97}\) 288 Ga. 208, 702 S.E.2d 194 (2010).

\(^{98}\) *Id.* at 208, 702 S.E.2d at 195. The terminated employee was the former chief of police who brought claims against the mayor, the city council, and the city manager under O.C.G.A. § 36-33-4 and the due process clause of the Georgia Constitution. *Id.* at 209, 702 S.E.2d at 195; see also Ga. Const. art. I, § 1, para. 1; O.C.G.A. § 36-33-4 (2006).

\(^{99}\) *Joiner*, 288 Ga. at 210, 702 S.E.2d at 196. In a spirited dissent, Justices Hunstein, Carley, and Melton argued that the majority’s application of the adequate state remedy doctrine was wholly misplaced and that the plaintiff had articulated a viable claim under O.C.G.A. § 36-33-4. *Id.* at 212, 702 S.E.2d at 197 (Hunstein, C.J., dissenting). Moreover, the dissent noted that because conducting a name clearing hearing was in the nature of a ministerial act, the failure to make one available to plaintiff was necessarily actionable and would support a claim for damages. *Id.*

\(^{100}\) 305 Ga. App. 130, 699 S.E.2d 377 (2010), cert. granted.

\(^{101}\) *Id.* at 130-31, 699 S.E.2d at 377. The GIRMA policy of insurance “provide[d] uninsured motorist coverage up to the statutorily defined limits found in [O.C.G.A.] § 33-7-11(a)(1)(A), [but did] not provide underinsured coverage and it [did] not allow a covered individual the option of selecting the amount of such coverage.” *Id.* at 131, 699 S.E.2d at 378; see also O.C.G.A. § 33-7-11(a)(1)(A) (Supp. 2011).


The [sovereign immunity] waiver provided by this chapter shall be increased to the extent that: (1) The governing body of the local governmental entity by resolution or ordinance voluntarily adopts a higher waiver; (2) The local government entity becomes a member of an interlocal risk management agency created pursuant to Chapter 85 of this title to the extent that coverage obtained exceeds the amount of the waiver set forth in this Code section. . . .

\(^{103}\) *Godfrey*, 305 Ga. App. at 131, 699 S.E.2d at 378.
municipalities are protected by sovereign immunity... [and] nothing in the... 2002 legislation nor any other provision of the Georgia Code indicates that the legislature intended to waive municipal immunity in order to mandate the inclusion of uninsured/underinsured coverage where it is not included in the coverage afforded by a municipality's participation in an interlocal risk management program.

Stated simply, "because underinsured coverage was not provided as a part of the GIRMA motor vehicle liability coverage afforded to [the city], any attempt to require underinsured coverage under [O.C.G.A.] § 33-7-11 would run afoul of [the city's] sovereign immunity."

The interplay between O.C.G.A. § 36-92-2 and O.C.G.A. § 36-92-3 also received attention during the survey period. In DeLoach v. Elliott, an injured motorist sought recovery against a police officer and city for an automobile collision occurring while the officer was on duty and acting within the scope of his official duties. However, because the plaintiff could not provide evidence that a timely ante litem notice was served upon the city, the city was dismissed. In accord with O.C.G.A. § 36-92-3, the police officer was, likewise, dismissed. On appeal, the plaintiff argued that the O.C.G.A. § 36-92-3(b) requirement that a plaintiff sue the local government, and not the individual officer, was mandatory only if a cause of action against the government could be maintained. The Georgia Supreme Court rejected this theory outright, holding that the plaintiff's interpretation would result in O.C.G.A. § 36-92-2 providing "no immunity at all for the employee."

Rather, the court analogized O.C.G.A. § 36-92-3 to tort immunity for

104. The court noted that O.C.G.A. § 33-24-51 was amended in 2002 to provide, inter alia, that sovereign immunity was deemed waived for the negligent use of a covered motor vehicle according to the maximum waiver amounts in O.C.G.A. § 36-92-2. Id. at 132, 699 S.E.2d at 378; see also O.C.G.A. § 33-24-51 (2005).
105. Godfrey, 305 Ga. App. at 132, 699 S.E.2d at 378. The court of appeals recognized that there are mandatory insurance minimums recognized in O.C.G.A. § 33-24-51 but that, otherwise, the statute endows local governments with discretion as to whether to obtain insurance at all. Id. at 134, 699 S.E.2d at 380; see also O.C.G.A. 33-24-51(a).
111. Id. at 319-20, 710 S.E.2d at 763-64. O.C.G.A. § 36-92-3(a) provides that "[a]ny local government officer or employee who commits a tort involving the use of a covered motor vehicle while in the performance of his or her official duties is not subject to... liability therefor." O.C.G.A. § 36-92-3(a).
113. Id. at 321, 710 S.E.2d at 764.
state employees under the Georgia Tort Claims Act \(^{114}\) and concluded that "the General Assembly intended to provide immunity for municipal employees in the context of torts involving a covered motor vehicle which is comparable to the immunity granted to state employees in the context of all torts." \(^{115}\)

Immunities available to city officials—outside of the automobile context—continue to be powerfully applied by the appellate courts. In *Taylor v. Waldo*, \(^{116}\) the trial court declared police officers immune from allegations that they falsely arrested and imprisoned an individual under investigation for a hit and run. \(^{117}\) Because the decision to arrest is deemed discretionary in nature, evidence of actual malice was required in order to strip the officers of that immunity. \(^{118}\) In *Taylor*, the arrestee did "not even argue[] that the record contain[ed] evidence of actual malice or intent to injure," and the court of appeals likewise found none. \(^{119}\) Consequently, the officers' immunity remained intact, and the claims were dismissed. \(^{120}\)

The outcome was similar in *Marshall v. Browning*. \(^{121}\) A City of Roswell investigator secured a child molestation warrant against a male teacher accused by various ten-year-old female students of inappropriate physical contact. \(^{122}\) When neither the district attorney nor solicitor would prosecute, the teacher sued for malicious prosecution, claiming the investigator lacked probable cause for the warrant and had otherwise pursued the prosecution based upon subjective feelings that the teacher was guilty. \(^{123}\) As in *Taylor*, the court of appeals had little difficulty concluding the investigator was shielded by official immunity. \(^{124}\) The court stated that "[t]here is no evidence that [the investigator] was motivated by a personal animus towards [the teacher]." Nor is she

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117. *Id.* at 109, 709 S.E.2d at 280. The offense establishing cause to arrest was the suspect's apparent failure to remove his license from a wallet quickly enough when directed to do so by an officer, and the suspect otherwise retorting "sir, can't you see that?" *Id.* at 108-09, 709 S.E.2d at 280.
118. *Id.* at 111, 709 S.E.2d at 281. The court stated that "[a] deliberate intention to do wrong such as to constitute the actual malice necessary to overcome official immunity must be the intent to cause the harm suffered by the plaintiffs." *Id.* (quoting *Selvy v. Morrison*, 292 Ga. App. 702, 704, 665 S.E.2d 401, 405 (2008)) (internal quotation marks omitted).
119. *Id.*
120. *Id.* at 112, 709 S.E.2d at 282.
122. *Id.* at 64, 66, 712 S.E.2d at 72-73.
123. *Id.* at 66-67, 69-70, 712 S.E.2d at 73, 75.
124. See *id.* at 70, 712 S.E.2d at 76.
accused of manufacturing evidence or knowingly presenting perjured testimony."125 Moreover, the court concluded that even if the investigator was motivated by personal feelings, the arrest warrant affidavit was "based on her investigation, not her personal feelings."126

G. Elections

The Georgia Supreme Court considered two election challenges by unsuccessful candidates for city office. The first, Scoggins v. Collins,127 produced an entirely ordinary result; that is, the supreme court rejected a general election challenge by two unsuccessful candidates based upon their assertion of fraud and improper recordation of ballots. Affirming the integrity of the election, the court counted the ballots and ultimately concluded the challengers had not established that any of the contested ballots were illegitimate.128

The second case, Spalding County Board of Elections v. McCord,130 produced a more interesting opinion, albeit similar result. In Spalding, an unsuccessful city office candidate challenged the sufficiency of certain absentee ballots because the ballots were not accompanied by one of the six enumerated reasons for voting absentee, which the 2009 version of O.C.G.A. § 21-2-380(a)131 specified.132 The supreme court, in overturning the trial court's invalidation of the election, provided both a historical perspective on absentee voting and a detailed discussion of the controlling rules of statutory construction.133 The court reasoned that a statutory scheme should not be interpreted to produce an absurd result and that courts should consider subsequent statutory enactments on the

125. Id. at 68, 712 S.E.2d at 74.
126. Id. at 70, 712 S.E.2d at 75.
128. Id. at 28, 701 S.E.2d at 136-37. The court observed that the challenger's accusations of fraud and improper vote recordation were based on nothing more than "speculation and innuendo." Id. at 28, 701 S.E.2d at 136.
129. Id. at 28, 701 S.E.2d at 136-37.
132. McCord, 287 Ga. at 835, 700 S.E.2d at 558-59. The state of the law as it existed in 2009 is important. Although the 2009 version of O.C.G.A. § 21-2-380(a) continued to list the six enumerated reasons for voting absentee, the 2009 version of O.C.G.A. § 21-2-380(b) declared that an elector "shall not be required to provide a reason in order to cast an absentee ballot in any primary, election, or run-off primary or election." Id. at 839, 700 S.E.2d at 561; O.C.G.A. § 21-2-380(b) (2009), amended by Ga. H.R. Bill 540, § 17, Reg. Sess., 2010 Ga. Laws 914, 922 (codified at O.C.G.A. § 21-2-380(b) (Supp. 2011)). The tension between the two statutory mandates was at the heart of McCord.
same subject matter to harmonize the statute in question with the clear trajectory of Georgia law.\textsuperscript{134}

\textbf{H. Open Government}

The Georgia Court of Appeals considered a trio of cases involving both the Open Records Act\textsuperscript{135} and the Open Meetings Act.\textsuperscript{136} In \textit{City of Carrollton v. The Information Age, Inc.},\textsuperscript{137} the court of appeals showed little patience for a city's refusal to respond to a records request for non-health insurance related information because the requests were vague and overly broad.\textsuperscript{138} The trial court held, and the court of appeals affirmed, that the disputed requests were as "plain as day" and "self-explanatory."\textsuperscript{139} Moreover, with respect to the requests being overly burdensome, the court of appeals responded that the Open Records Act has a fee recovery mechanism that could alleviate such a concern.\textsuperscript{140} Also demonstrating a preference for records disclosure, in \textit{State Road \\& Tollway Authority v. Electronic Transaction Consultants Corp.},\textsuperscript{141} the court of appeals overturned an injunction that prevented the State Road and Tollway Authority from releasing a successful bidder's alleged trade secret information.\textsuperscript{142} The court was unimpressed with the bidder's argument regarding perceived harm, and was openly skeptical at the suggestion set forth in the bidder's verified complaint, that releasing detailed pricing information would, somehow, "enable a competitor to

\begin{itemize}
\item \textsuperscript{134} \textit{Id.} at 840, 700 S.E.2d at 561-62.
\item \textsuperscript{136} O.C.G.A. §§ 50-14-1 to -6 (2009).
\item \textsuperscript{137} 306 Ga. App. 891, 703 S.E.2d 431 (2010).
\item \textsuperscript{138} \textit{Id.} at 892, 703 S.E.2d at 432. The four purportedly "vague" requests sought:
\begin{enumerate}
\item All non-health related insurance claims filed by the City of Carrollton since October 1, 2008;
\item All non-health related insurance claims filed against the City of Carrollton since October 1, 2008;
\item All non-health related insurance payments to the City of Carrollton as a result of insurance claims since October 1, 2008;
\item All non-health related insurance payments to anyone from the City of Carrollton's insurance since October 2008.
\end{enumerate}
\item \textsuperscript{139} \textit{Id.} at 892, 703 S.E.2d at 433 (internal quotation marks omitted).
\item \textsuperscript{140} \textit{Id.} at 892-93, 703 S.E.2d at 433.
\item \textsuperscript{141} 306 Ga. App. 487, 702 S.E.2d 486 (2010).
\item \textsuperscript{142} \textit{Id.} at 487-88, 702 S.E.2d at 487. The subject trade secret documentation purportedly contained "specific detailed technical and pricing information which [the bidder suggested was] proprietary and confidential." \textit{Id.} at 489, 702 S.E.2d at 488 (internal quotation marks omitted). Curiously, the bidder posited that release of the unredacted price information would "indicate[ ] how [the bidder] designs and provides its systems . . . thereby enabling a competitor to determine how [the bidder] would perform the work and what is being charged for each component . . . ." \textit{Id.} at 490, 702 S.E.2d at 489 (internal quotation marks omitted).
\end{itemize}
deduce how [the bidder] designs its systems . . . 

In the absence of facts demonstrating how such harm could occur, the court reversed.\(^{144}\)

Finally, in *Cardinale v. City of Atlanta*,\(^{145}\) the court of appeals reviewed an alleged Open Meetings Act violation and ruled in favor of the government.\(^{146}\) In *Cardinale*, the court rejected a pro se plaintiff’s argument that the Open Meetings Act mandates that minutes of meetings reflect how each member voted even when official action was taken by a nonroll-call vote.\(^{147}\) The court held that “by its plain terms, the statute only requires that names of persons voting for or against a proposal be recorded ‘[i]n the case of a roll-call vote.’”\(^{148}\) The court stated, “Nothing in [O.C.G.A.] § 50-14-1 demands detailed information on nonroll-call votes, and [the court reasoned] [it] [could not] graft such a requirement onto the provision.”\(^{149}\)

II. COUNTIES

A. Liability and Defenses

As noted in the municipal law discussion, gaps in the armor of sovereign immunity exist, and those gaps continue to be tested by advocates making creative, albeit generally unsuccessful, arguments. *Polk County v. Ellington*\(^{150}\) was one such case. The Georgia Court of Appeals had before it a sympathetic fact pattern: a county emergency responder was summoned to a residence and diagnosed a female senior citizen complaining of chest pain as having acid reflux. The senior experienced cardiac arrest and died within two hours of emergency personnel departure.\(^{151}\) The trial court declared that sovereign immunity, otherwise available to the County and the Emergency Medical

\(^{143}\) Id. at 490, 702 S.E.2d at 489.
\(^{144}\) Id.
\(^{146}\) Id. at 234, 706 S.E.2d at 692-93.
\(^{147}\) Id.
\(^{148}\) Id. at 235, 706 S.E.2d at 693 (alteration in original); see also O.C.G.A. § 50-14-1(e)(2).
\(^{149}\) *Cardinale*, 308 Ga. App. at 236, 706 S.E.2d at 694.
\(^{151}\) Id. at 194-95, 702 S.E.2d at 20.
Services (EMS) staff, was waived and individual, official immunity was inapplicable.

Apparently mindful of the admonition "hard cases make bad law," the court of appeals applied straightforward sovereign and official immunity analysis, concluding that both defenses remained intact and were dispositive. As to sovereign immunity, the court rejected the conclusion that, because the emergency responder travelled in an ambulance and the critical cardiac monitor was located in the ambulance, the death "arose out of" the operation of a county owned or maintained vehicle. The court held "there is no evidence that the ambulance and its use played any part in [the emergency responder's] diagnosis [of] or choice of treatment. . . . Thus, the county ambulance was, at best, tangentially related to [the emergency responder's] failure to use the cardiac monitor. . . ." Official immunity to the emergency responder was awarded because the act of triaging the patient was discretionary, requiring the responder to "examine the facts . . . and exercise personal deliberation and judgment in making his assessment of [the decedent]." The supervisor's official immunity was, similarly, resurrected with the court likening the training of emergency medical personnel to the training of a police department, which has long been considered a discretionary function.

Unlike Ellington, Effingham County v. Rhodes did not involve a legal dispute over conclusions derived from the evidence; rather, it hinged on the utter lack of evidence at all. In Rhodes, a motorist that drove into a three-foot hole in a road brought an action against the county, claiming negligence in failing to maintain, repair, and warn of a known road hazard. The plaintiff asserted that the hole was created by the installation of county utilities, and that county-owned vehicles

152. The trial court determined that sovereign immunity was waived under O.C.G.A. § 33-24-51 because the "death 'arose out of' the operation or use of the ambulance driven to [decedent's] home [] because it 'arose out of' [the EMS responder's] failure to utilize the cardiac monitor located in that vehicle." Id. at 197, 702 S.E.2d at 21 (internal quotation marks omitted).

153. Id. at 194, 197, 702 S.E.2d at 19, 21. The trial court found that both the emergency responder and his supervisor had negligently performed ministerial functions in handling the emergency response and in establishing programs "to ensure appropriate physician control over the rendering of emergency medical services . . . to patients who are not in a hospital." Id. at 195, 702 S.E.2d at 20 (internal quotation marks omitted).

154. See id. at 197-203, 702 S.E.2d at 21-25.

155. Id. at 197, 199, 702 S.E.2d at 21-22.

156. Id. at 198-99, 702 S.E.2d at 22.

157. Id. at 202, 702 S.E.2d at 24.

158. Id. at 202, 702 S.E.2d at 24-25.

were necessarily used when conducting such installations. Thus, the plaintiff argued that sovereign immunity was waived pursuant to O.C.G.A. § 36-92-2, as the claim arose out of the use of a county-owned motor vehicle. Alas, the plaintiff's theory of county involvement was, apparently, just a theory. The court of appeals noted that, “Rhodes ... failed to submit evidence of any kind on the issue [that county utility installation created the hole] and therefore ... failed to establish that the County waived sovereign immunity.”

The plaintiff in McCobb v. Clayton County fared better. McCobb involved a wrongful death action arising out of a high-speed police chase where the fleeing vehicle lost control and the passenger was killed. The county moved for and was granted judgment on the pleadings, with the trial court concluding the injuries did not "originate[] from, [have] their origins in, [grow] out of, or flow[] from [the officer's] use of his patrol vehicle," and therefore the county's sovereign immunity remained intact.

The court of appeals disagreed. In so doing, the court rejected the principle authority relied upon by the county, Peeples v. City of Atlanta, reasoning that Peeples was not binding authority in the present case and that the language in Peeples that appeared to support the county's position was mere dicta. Instead, the court held that

160. Id. at 504-05, 705 S.E.2d at 858.
161. Id. at 505, 705 S.E.2d at 858.
162. Id. at 505-06, 705 S.E.2d at 859.
163. 309 Ga. App. 217, 710 S.E.2d 207 (2011). 164. Id. at 218, 710 S.E.2d at 209. The complaint did not allege the pursuing officer made physical contact with the fleeing vehicle. See id. at 219, 710 S.E.2d at 210. For purposes of this review, it is assumed the fleeing suspect lost control due to speed or other related factors and not due to a Pursuit Intervention Technique (PIT) maneuver or other technique involving one vehicle striking the other. See id.
165. Id. at 219, 710 S.E.2d at 210.
166. Id. at 222, 710 S.E.2d at 212.
167. 189 Ga. App. 888, 377 S.E.2d 889 (1989). In Peeples, the court of appeals addressed a claim by the estate of a third party motorist who was killed when struck by the suspect in a high speed chase. The decedent's estate sued the city with whom the pursuing officer was employed. Id. at 888, 377 S.E.2d at 890. The court determined that O.C.G.A. § 36-33-3 shielded the municipality from liability, thereby resolving the case. Id. at 890, 377 S.E.2d at 892; see O.C.G.A. § 36-33-3 (2006). However, later in the opinion, the court said, “We do not view plaintiffs decedent's death as arising from the use, maintenance or operation of the City's motor vehicle. Plaintiff's decedent's death was due to the negligence or wilful misconduct of a fleeing felon in running a red light and as a consequence thereof striking the decedent's car.” Peeples, 189 Ga. App. at 890, 377 S.E.2d at 892-93.
the current state of Georgia law, as embodied in O.C.G.A. § 40-6-6(d)(1), appeared to contemplate that a pursuing officer may be the proximate cause of any death or injury if the officer acted with reckless disregard for proper law enforcement procedures. O.C.G.A. § 40-6-6(d)(1) opens the door, albeit narrowly, for a plaintiff to argue that injuries sustained during a high-speed pursuit may arise out of the use, maintenance, or ownership of a county vehicle, even without physical contact between vehicles, thereby potentially waiving sovereign immunity. At a minimum, future plaintiffs will contend there should be an entitlement to thorough and sifting discovery as to the degree of care used by the pursuing officer. The holding in McCobb is more of a testament to the significant deference afforded plaintiffs facing dismissal on the pleadings than it is a notable departure from established sovereign immunity jurisprudence.

B. Officers

The official immunity opinions during the survey period are well in line with historical precedent. In Grammens v. Dollar, a high school teacher was protected by official immunity in a claim alleging breach of a ministerial duty by not requiring students to wear eye protection during an experiment. While the school system had an eye protection policy, the policy required the teacher to make a determination as to whether an experiment involved “explosive materials.” The example

170. McCobb, 309 Ga. App. at 220, 710 S.E.2d at 211; see also O.C.G.A. § 40-6-6(d)(2) (“Where such reckless disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard shall not in and of itself establish causation.”).
171. For a different perspective on sovereign immunity and waiver, review Upper Oconee Basin Water Authority v. Jackson County, 305 Ga. App. 409, 699 S.E.2d 605 (2010). The case involved a dispute between the Water Authority and one of its county members regarding threshold technical calculations and assumptions related to an intergovernmental agreement for water supply. The Water Authority filed a motion to dismiss asserting sovereign immunity. Id. at 409, 699 S.E.2d at 606. The court of appeals concluded that the county’s claim was, at its most elementary, a claim for breach of the intergovernmental agreement; and, “sovereign immunity is . . . waived as to any action ex contractu for the breach of any written contract . . . .” Id. at 412, 699 S.E.2d at 608; see also GA. CONST. art. I, § 2, para. 9(c).
173. Id. at 618, 697 S.E.2d at 776. The experiment involved “launching” a two-liter plastic bottle by means of compressed water and air pressure. Id. (internal quotation marks omitted). When the bottle was launched, the pull string launch device was ejected and injured a student’s eye. Id.
174. Id. at 618, 697 S.E.2d at 776-77 (internal quotation marks omitted).
Georgia Supreme Court held that, "[w]here the written policy requires the public official to exercise discretion in the implementation of the written policy, the policy does not require the performance of a ministerial duty."¹⁷⁵

Similarly, in Scott v. Waits,¹⁷⁶ a school resource officer’s entitlement to official immunity was upheld in a claim by an injured motorist that the officer negligently failed to perform the ministerial duty of locking a free-swinging metal gate on school grounds.¹⁷⁷ Although the officer testified that if he observed the gate open it was his duty to close it, the court declared that the obligation was still discretionary because the record did not establish that the resource officer’s “employer informed him of ‘clear, definite[,] and certain’ instructions or procedure that required him to conduct the purportedly ‘relatively simple, specific’ duty to inspect the gate[].”¹⁷⁸

Compare Barnard v. Turner County,¹⁷⁹ where a county road superintendent’s official immunity was stripped because he took no immediate action to post warning signs or remediate nearby drainage ditches when he learned of standing water on a county maintained roadway.¹⁸⁰ Within an hour of receiving notice of the water, a fatal vehicle accident occurred at the same location.¹⁸¹ The court of appeals, in reversing the superintendent’s dismissal, stated the following:

[the superintendent’s] knowledge of the hazardous condition on the Road gave rise to a ministerial duty to take remedial action . . . [The superintendent] had discretion in the manner in which he took remedial action, but the notice he received of the dangerous condition on the Road triggered a ministerial duty to act. Whether he breached such a duty is an issue for a jury to decide.¹⁸²

In Cosby v. Lewis,¹⁸³ a wrongful death action involving two school employees, the court of appeals made clear that an official’s entitlement to official immunity is more than a mere liability defense; it is, rather,
an entitlement not to be sued, and the availability of official immunity as a complete bar to further litigation “must [be] consider[ed] as a threshold issue . . . ” Indeed, the court of appeals ruled that it was error as a matter of law for the trial court to hold that, “entry of the default judgment barred the [school employees] from being able to assert that official immunity protected them . . . “

C. Regulation

In a nod to local government leeway in interpreting and administering their own regulations, the Georgia Supreme Court, in Danbert v. North Georgia Land Ventures, LLC, upheld Towns County’s issuance of a disputed subdivision permit. The appellant, Danbert, purchased two adjoining lots in Towns County that were bordered by an easement known as Chinquapin Ridge Road. The appellee, North Georgia Land Ventures, LLC (NGLV), subsequently purchased forty-six acres further along that easement—the sole access to NGLV’s land. NGLV proceeded to subdivide and develop the property. Danbert filed suit seeking a permanent injunction and writ of mandamus to compel Towns County to enforce its subdivision regulations and halt the subdivision. The critical question was whether the subdivision was authorized at all under county regulations mandating that “[a]ccess to every subdivision shall be provided over a public street or a public access street. Access cannot be provided over private easement.” Danbert argued that the access easement (i.e., Chinquapin Ridge Road) was a private easement and did not fit the definition of “public street” or “public access street” as used in the regulations.

The supreme court disagreed, noting that it would not assume that the term “public street” and “public access street” were synonymous, as such an interpretation would render the latter mere surplusage.

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184. Id. at 671, 708 S.E.2d at 588 (quoting Russell v. Barrett, 296 Ga. App. 114, 116, 673 S.E.2d 623, 626 (2009)) (stating “a trial court ‘must consider as a threshold issue whether the officer is entitled to qualified immunity from personal liability’”).
185. Id. at 672, 708 S.E.2d at 588.
186. 287 Ga. 495, 697 S.E.2d 204 (2010).
187. Id. at 495, 697 S.E.2d at 204-05.
188. Id.
189. Id. at 496, 697 S.E.2d at 205 (internal quotation marks omitted).
190. Id. (internal quotation marks omitted). Danbert’s plats of record contained no detail as to the character of the subject easement other than identifying it as an easement of right of way. Id.
191. The supreme court affirmed the trial court, thereby effectively denying the permanent injunction and writ of mandamus. Id. at 495, 697 S.E.2d at 204-05.
192. Id. at 496-97, 697 S.E.2d at 205-06 (internal quotation marks omitted).
Further, the county’s definition of “street” encompassed both “public or dedicated thoroughfare” which, in the court’s estimation, meant that the term “public” meant something other than a road which had been formally “dedicated.” Finally, citing Walker v. Duncan, the court noted that the “recording of a subdivision plat acts as the grant of an easement to the purchasers of the property, but also raises a presumption of intent to dedicate to the public.”

D. Zoning

In yet another nod to local governments, the Georgia Court of Appeals, in Dawkins & Smith Homes, LLC v. Lowndes County, sided with the county and agreed that the local zoning code did not allow parties to make use of a boat ramp easement on a residential parcel. In 2003 and 2004, a developer, Dawkins & Smith Homes, LLC (DSH), acquired fourteen neighboring, residentially zoned lots (Lots 1-13 and 15). Lot 15 contained a boat ramp providing access from the street to a lake at the rear of the lot. DSH petitioned the county to allow Lot 15 to serve as a common area for Lots 1-13, which the county denied. This decision was not challenged. Beginning in 2005, DSH sold Lots 1-13, including in the vesting deeds a perpetual easement for access to the lake over Lot 15 for the benefit of the then current owner of the purchased lot and any future owners. The county zoning ordinance prohibited use of a property if the use was not expressly allowed under the pertinent zoning classification. Lot 15’s classification allowed use only for a single-family residence and any accessory uses thereto. The zoning ordinance defined “accessory use” as a use “which is incidental and subordinate to the principal use or structure.” After complaints from the community, the county advised the thirteen lot owners that the zoning ordinance prohibited their use of the easements over Lot 15. The lot owners and developer

193. Id. at 497, 697 S.E.2d at 206 (internal quotation marks omitted). Curiously, although the court took great care to offer a possible justification for why the private access easement satisfied the definition of “public access,” it spent no time explaining why the regulation’s unambiguous prohibition on subdivisions being accessed via private easements was not offended by the plan.
197. Id. at 79, 701 S.E.2d at 544.
198. Id. at 79-80, 701 S.E.2d at 545.
199. Id. at 80, 701 S.E.2d at 545 (internal quotation marks omitted).
sought a declaration from the court that the easements were not prohibited by the zoning ordinance.\textsuperscript{200}

In \textit{Dawkins}, the court of appeals acknowledged the requirement that a zoning ordinance be strictly construed in favor of a property owner; however, the court also noted that "zoning ordinances also must be given a reasonable construction."\textsuperscript{201} Applying this balanced method of construction, the court ruled in favor of the county, holding that multiple access easements running into and across a single family residential parcel, merely to provide boat ramp access, was an impermissible "accessory use" in a residential zoning district.\textsuperscript{202}

The law regarding collateral challenges to zoning decisions was likewise scrutinized during the survey period. In \textit{Fortson v. Tucker},\textsuperscript{203} the county issued permits in 2004 allowing a citizen (Massey) to place manufactured homes on his property. A neighbor (Tucker) challenged issuance of the permits based on a minimum property size requirement in the county's zoning ordinance. As a result, in June of 2004, Massey applied for and was granted a variance from the size requirement by the Zoning Board of Appeals (ZBA) after a hearing at which Tucker appeared with counsel. Tucker did not appeal the ZBA's variance decision. In 2007, some three years after the ZBA decision, Tucker filed suit against the county, Massey, and the Director of Code Administration (Fortson) alleging fraud, conspiracy, negligent performance of ministerial duties, and civil rights violations, all related to the previous variance action.\textsuperscript{204}

The court of appeals reaffirmed that the thirty-day limit in O.C.G.A. § 5-3-20\textsuperscript{205} works as a jurisdictional bar to the superior court hearing a zoning decision challenge filed more than thirty days after the underlying decision.\textsuperscript{206} Notwithstanding the challenger's attempt to characterize the a 2007 lawsuit as a "tort claim[]" rather than an appeal of the 2004 variance decision, the court of appeals was unconvinced and reaffirmed that "a party dissatisfied with a zoning decision must appeal

\begin{itemize}
\item \textsuperscript{200} \textit{Id.}
\item \textsuperscript{201} \textit{Id.} (quoting Rock v. Head, 254 Ga. App. 382, 386, 562 S.E.2d 768, 771 (2002)) (internal quotation marks omitted).
\item \textsuperscript{202} \textit{Id.} at 81, 701 S.E.2d at 546. In so holding, the court noted that the "easements to use the boat ramp to access the lake were appurtenant to their own properties and were not dependent on and did not pertain to the primary use of Lot 15 as a single-family residence." \textit{Id.}
\item \textsuperscript{203} 307 Ga. App. 694, 705 S.E.2d 895 (2011).
\item \textsuperscript{204} \textit{Id.} at 695-96, 705 S.E.2d at 895-96.
\item \textsuperscript{205} O.C.G.A. § 5-3-20 (1995).
\item \textsuperscript{206} \textit{Fortson}, 307 Ga. App. at 696, 705 S.E.2d at 896.
\end{itemize}
to the superior court; it cannot circumvent the review process by instituting an untimely collateral attack on the zoning decision.\textsuperscript{207}

E. Taxation

The inherent tension between commissioners and constitutional officers yielded \textit{Channell v. Houston}.\textsuperscript{208} In \textit{Channell}, the Greene County Board of Commissioners enacted a special tax district to fund the sheriff's office. The sheriff objected and filed for declaratory judgment claiming the tax district violated the Georgia Constitution.\textsuperscript{209} The Georgia Supreme Court agreed, holding that the powers of county commissioners are not unlimited and, while the constitution allows special tax districts to be created for the provision of local government services, that allowance does not extend to the office of the sheriff.\textsuperscript{210} The court noted that while sheriffs clearly perform governmental services on a local level, they are nevertheless elected constitutional officers and not employees of the county.\textsuperscript{211} The sheriff's duties are beyond the control of, and may not be interfered with by, the local governing authority; therefore, the power to create a special tax district to fund the sheriff's office was unconstitutional.\textsuperscript{212}

Another survey case questioning the authority of county governments in the realm of taxation was \textit{Fulton County v. T-Mobile, South, LLC}.\textsuperscript{213} \textit{T-Mobile} involved the challenge of a Fulton County ordinance attempting to assess a 9-1-1 charge on prepaid wireless phone calls.\textsuperscript{214} When Fulton County adopted the ordinance, the Georgia Emergency Telephone Number 9-1-1 Service Act of 1977 (the Act),\textsuperscript{215} Fulton County was not authorized to collect 9-1-1 charges on prepaid wireless phone calls.\textsuperscript{216} Since the opinion in \textit{T-Mobile} was issued, the Act has been amended to authorize such collections.\textsuperscript{217} The court of appeals acknowledged that T-Mobile "was not required to remit 9-1-1 charges" for prepaid customers.\textsuperscript{218} Having done so pursuant to the ordinance, the court held that

\begin{itemize}
  \item \textsuperscript{207} \textit{Id.}
  \item \textsuperscript{208} 287 Ga. 682, 699 S.E.2d 308 (2010).
  \item \textsuperscript{209} \textit{Id.} at 682-83, 699 S.E.2d at 309.
  \item \textsuperscript{210} \textit{Id.} at 684, 699 S.E.2d at 310; \textit{see also} GA. CONST. art. IX, § 2, para. 7.
  \item \textsuperscript{211} \textit{Channell}, 287 Ga. at 684, 699 S.E.2d at 310.
  \item \textsuperscript{212} \textit{Id.}
  \item \textsuperscript{213} 305 Ga. App. 466, 699 S.E.2d 802 (2010).
  \item \textsuperscript{214} \textit{Id.} at 466, 699 S.E.2d at 804.
  \item \textsuperscript{216} \textit{T-Mobile}, 305 Ga. App. at 466 n.2, 699 S.E.2d at 804 n.2.
  \item \textsuperscript{217} \textit{See} O.C.G.A. § 46-5-134.2(b)(1) (Supp. 2011).
  \item \textsuperscript{218} \textit{T-Mobile}, 305 Ga. App. at 467, 699 S.E.2d at 804.
\end{itemize}
T-Mobile was entitled to a refund under O.C.G.A. § 48-5-380,219 as the exaction by Fulton County was undertaken without authority and was in the nature of an impermissible tax.220

F. Contracts

The Georgia Court of Appeals yet again demonstrated its willingness to invalidate contracts when they run afoul of established public policy or statute. In Effingham County Board of Commissioners v. Park West Effingham, L.P.,221 the court of appeals explained that O.C.G.A. § 36-71-4(d),222 which “prohibit[s] the collection of impact fees before the issuance of a building permit,”223 could not be modified by contract.224 Prior to beginning development on a project, the county entered into an agreement with the developer that provided for the payment of required impact fees. The provision included immediate delivery of a letter of credit for one half of the impact fees and a schedule of ten annual payments for the remainder based on the anticipated build out.225 When the successor-in-interest to the original developer failed to make the contractually required payments, the county sent a “Notice of Shortfall” for the payments due.226 Building permits had not been issued with respect to the impact fees for which the county was seeking payment under the agreement. The county also attempted to call the original letter of credit.227

The court of appeals ruled that a contractual agreement to pay impact fees prior to the issuance of a building permit was unenforceable and a violation of O.C.G.A. § 36-71-4(d).228 Although the county argued that “[a]bsent a limiting statute or controlling public policy, parties may contract with one another on whatever terms they wish,” the court retorted that “here: a limiting statute is present. [O.C.G.A.] § 36-71-4(d) forbids the pre-payment of impact fees.”229

225. Id. at 682-83, 708 S.E.2d at 621.
226. Id. at 683, 708 S.E.2d at 621-22.
227. Id. at 683, 700 S.E.2d at 622.
228. Id. at 681, 708 S.E.2d at 620.
III. CONCLUSION

During the survey period, appellate courts offered local governments a wide berth in the realm of regulation and land use and otherwise dutifully applied the formidable protections of official and sovereign immunity. However, the courts also exhibited a willingness to strike contracts and issue mandamus against local governments if the circumstances so warranted.