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Administrative Law

by Martin M. Wilson*, Jennifer A. Blackburn**, and Courtney E. Ferrell***

I. INTRODUCTION

This Article surveys cases from the Georgia Supreme Court and the Georgia Court of Appeals from June 1, 2011 through May 31, 2012, during which principles of administrative law were either illuminated or formed an important piece of the decision making.1 For a change, the Authors observed a significant increase in the number of reported cases during the survey period, but that increase does not necessarily indicate a trend. No attempt has been made to survey cases that properly would fall under categories of more specific articles in this issue, although some degree of overlap is inevitable because of shared subject matter.

This Article begins with a discussion of cases on exhaustion of administrative remedies. Statutory construction is the next topic, followed by cases discussing discretionary appeals, and then standards of review of an agency decision. The last topic for the survey of appellate cases is sovereign immunity, and the Article concludes with a brief review of enactments from the 2012 regular session of the Georgia General Assembly.

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1. For analysis of Georgia administrative law during the prior survey period, see Martin M. Wilson & Jennifer A. Blackburn, Administrative Law, Annual Survey of Georgia Law, 63 MERCER L. REV. 47 (2011).
II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Georgia Court of Appeals reaffirmed the well established rule that judicial review of a final agency decision is available only where all administrative remedies have been exhausted. In *Alexander v. Department of Revenue,* the trial court found that "Alexander did not exhaust his administrative remedies because he failed to ask the Commissioner [of Revenue] to review the initial decision before it became final." Alexander argued he could not have sought review of the initial decision by the commissioner because section 50-13-41 of the Official Code of Georgia Annotated (O.C.G.A.) does not expressly provide for such review.

While the statute itself does not specifically discuss "an aggrieved party applying to an agency for review of the decision of an administrative law judge," it clearly allows for an agency to undertake such a review. The court determined that if an agency is authorized to take on such reviews, aggrieved parties would most certainly have the ability to request such reviews themselves. Furthermore, O.C.G.A. § 50-13-41 provides that "decision[s] of an administrative law judge shall be treated as an initial decision" and O.C.G.A. § 50-13-17 allows for applications to an agency for review of an initial decision in contested cases. Because Mr. Alexander failed to exhaust the administrative remedies available to him, the court affirmed the trial court's dismissal of his petition for judicial review.

III. STATUTORY CONSTRUCTION

At times, the central issue in an administrative law case relates to the agency's construction of the governing statute that it is charged with administering. In *Palmyra Park Hospital v. Phoebe Sumter Medical Center,* the Georgia Court of Appeals consolidated several cases

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4. *Id.* at 544, 728 S.E.2d at 321.
7. *Id.*
8. *Id.*
appealing two superior court decisions in which the court granted a hospital certificate of need (CON) issued by the Georgia Department of Community Health (DCH). In granting Palmyra Park Hospital’s (Palmyra) CON application to provide basic perinatal services, DCH relied on a 2008 amendment to the CON statute providing that, for perinatal services, where there is only one facility in the applicant’s county and fewer than three facilities in the contiguous counties, need does not have to be established. This provision is commonly referred to as the “Areawide Need Exception.”

On appeal, DCH asserted that “the trial courts erred in failing to defer to DCH’s interpretation of the statute and in concluding that DCH exceeded its statutory authority by improperly expanding the scope of the Areawide Need Exception . . . .” The superior court determined that DCH’s argument about the apparent legislative intent to create a “choice” of basic perinatal providers in enacting the Areawide Need Exception was erroneous. Further, the superior court found DCH “exceeded its statutory authority by determining that the presence of a choice of providers was a factor that affected other considerations in [the statute].”

While the court of appeals acknowledged the superior court’s observation that “the ‘plain language’ of the statute merely removes from consideration the existence of ‘need,’” the court determined DCH did not improperly extend the exception to other considerations and instead simply considered the effects of the Areawide Need Exception in its analysis. Well established Georgia law requires the trial court to defer to such statutory interpretations by an agency. Accordingly, the court of appeals reversed the trial court’s order reversing DCH’s grant of Palmyra’s CON application.

The point in time in which a “planned interchange” becomes an actual “interchange” is speculated in Eagle West, LLC v. Georgia Department

14. Id. at 487, 714 S.E.2d at 72.
15. Id. at 488, 714 S.E.2d at 72; see also O.C.G.A. § 31-6-42(b.2) (2012).
16. Palmyra Park Hosp., 310 Ga. App. at 489, 714 S.E.2d at 73; see also O.C.G.A. § 31-6-42(b.2).
17. Palmyra Park Hosp., 310 Ga. App. at 490, 714 S.E.2d at 74. In response to DCH’s argument, the court of appeals noted, “[t]he cardinal rule in statutory construction is to ascertain the legislature’s intent and effectuate the purpose of the statute.” Id. at 495, 714 S.E.2d at 77.
18. Id. at 498, 714 S.E.2d at 79.
19. Id.
20. Id. at 496, 714 S.E.2d at 78.
21. Id. at 496, 714 S.E.2d at 77-78; see also O.C.G.A. § 31-6-42(b.2).
Eagle West, an applicant for an outdoor advertising sign, cleverly asserted that the statutory provision prohibiting signs from being erected within 500 feet of an interchange does not include interchanges that are under construction but not yet completed. The Georgia Department of Transportation (DOT) denied Eagle West's application for permits to erect and maintain outdoor advertising signs adjacent to Interstate 95 under the Outdoor Advertising Control Act, which prohibits signs from being erected or maintained "adjacent to an interstate highway within 500 feet of an interchange . . . ." The administrative law judge (ALJ) reversed the DOT's decision, finding that the plain language of the statute restricted the location of signs within 500 feet of an interchange, but did not apply to a proposed or future interchange. The ALJ rejected the DOT's assertion that they were authorized to deny the permit application because the interchange was planned and all preconstruction work had been completed on the project.

The DOT deputy commissioner reversed the ALJ's decision, finding that the interchange was not only planned but nearly completed because construction is the final phase of a lengthy approval process. Affirming the DOT's final agency decision, the superior court held: "[O]nce the location of an interchange is publicly announced, [the DOT] is authorized to deny requests for permits to build signs at or adjacent to the site of the interchange which would violate the limitations imposed by O.C.G.A. § 32-6-75(a)(18)."

On discretionary appeal, Eagle West argued that the statutory language "within 500 feet of an interchange" is plain and unambiguous and clearly does not include planned or future interchanges. The rules of statutory construction require the cited clause be reviewed in the "context of the statutory provision in which it is found," as well as in "related statutory provisions[, to determine the] legislative scheme as

24. Id. at 883, 720 S.E.2d at 319.
25. Id. at 882, 720 S.E.2d at 319.
27. O.C.G.A. § 32-6-75(a)(18).
30. Id.
31. Id.
32. Id. at 884, 720 S.E.2d at 320.
33. Id. at 885, 720 S.E.2d at 321; see also O.C.G.A. § 32-6-75(a)(18).
a whole." Noting the statute fails to include modifiers such as "operational," "paved," or "fully constructed" to support Eagle West's argument, the court of appeals held that the General Assembly did not intend to limit the word "interchange" by leaving its meaning so plain and unambiguous that it only applied to constructed interchanges. Because the DOT deputy commissioner's denial of the permit application was consistent with the Outdoor Advertising Control Act, the decision was affirmed.

In *Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield of Georgia, Inc.*, the issue was whether the "Any Willing Provider" (AWP) statute applied to the PPO network owned by Blue Cross and Blue Shield or the HMO network owned by BC Healthcare. Under the rules of statutory construction, the Commissioner of Insurance decided the AWP statute applied to both the PPO and HMO networks.

Based on the plain and unambiguous language of the AWP statute together with relevant statutes, the court of appeals determined there was support for the Commissioner's decision as to the PPO network, but not for the HMO network. While the Commissioner applied the same rules to both the PPO and HMO networks, the HMO network is a separate, for-profit network. A plain reading of the Insurance Code provides that AWP provisions are not applicable to for-profit corporations, such as the BC Healthcare HMO network. Because of the clear intent of the statute, the court held the Insurance Commissioner's decision was erroneous.

This section concludes with a case in which the Georgia Supreme Court appears divided on the proper application of the rules of statutory construction, with the majority relying heavily on legislative intent and the dissent citing the plain language of the statute. In *Cardinale v. City of Atlanta*, the appellant alleged that the Atlanta City Council violated the Open Meetings Act (the Act) by omitting certain informa-

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35. *Id.* at 888, 720 S.E.2d at 322-23.
36. *Id.* at 889, 720 S.E.2d at 323.
38. *Id.* at 523, 726 S.E.2d at 716.
39. *Id.* at 524, 726 S.E.2d at 717.
40. *Id.* at 529, 531, 726 S.E.2d at 720-21.
41. *Id.* at 531, 726 S.E.2d at 721.
42. *Id.* at 531-32, 726 S.E.2d at 721.
43. *Id.* at 533, 726 S.E.2d at 722.
tion from the meeting minutes. Specifically, the meeting minutes failed to list the names of those council members who voted in the minority to amend certain council rules. The trial court dismissed the action and the court of appeals affirmed, holding the language of the Act does not require such information be included in the minutes.

Both courts interpreted the statute’s plain language to provide that the results of a non-unanimous, non-roll call vote must be presumed unanimous unless the agency chooses to record the names of those voting against the proposal or abstaining. The supreme court disagreed, holding that the statute’s silence on the issue requires further review of the legislative intent and purpose of the law. The court stated the Act “was enacted in the public interest to protect the public—both individuals and the public generally—from ‘closed door’ politics and the potential abuse of individuals and the misuse of power such policies entail.” The Act enables both public access to meetings and openness of records through the publication of meeting minutes where members of the public are unable to attend such meetings. To allow the agency discretion to not record the names of members voting against a proposal or abstaining would prevent public access to information to those who did not attend the meeting. This, the court stated, would be contrary to the clear legislative intent of the Open Meetings Act. As such, the supreme court held that the statute requires meeting minutes for non-roll call votes to record the names of those voting against the proposal or abstaining.

Writing for the dissent, Justice Melton argued that under the rules of statutory construction, the plain language of the statute prevails and “makes clear that the minutes of an agency meeting need not include the names of persons voting against a proposal or abstaining [in a non-roll call vote].” The statute provides that in a roll call vote the minutes “must include the name of each person voting for or against [the] proposal;” however, such a requirement is not included for non-roll call votes.

46. Cardinale, 290 Ga. at 521, 722 S.E.2d at 734.
47. Id.
48. Id.
49. Id. at 521-22, 722 S.E.2d at 734.
50. Id. at 523-24, 722 S.E.2d at 735.
51. Id. at 524, 722 S.E.2d at 735-36 (quoting Earth Res., LLC v. Morgan Cnty., 281 Ga. 396, 399, 638 S.E.2d 325, 328 (2005)).
52. Id. at 524, 722 S.E.2d at 736.
53. Id. at 524-25, 722 S.E.2d at 736.
54. Id. at 525, 722 S.E.2d at 736.
55. Id. at 525, 722 S.E.2d at 736-37.
56. Id. at 527, 722 S.E.2d at 737-38 (Melton, J., dissenting).
votes. Because there is nothing confusing or ambiguous about the statute, Justice Melton asserted the plain language applies and does not require the minutes to include the names of members who vote against or abstain in a non-roll call vote.

IV. DISCRETIONARY APPEAL PROCEDURES

In a rare collision of criminal and administrative law, the Georgia Supreme Court decided for the first time whether O.C.G.A. § 5-6-39, which provides authority to courts to grant extensions of the deadline for certain types of filings, authorizes courts to extend the original thirty-day filing deadline for discretionary appeal applications. In Gable v. State, the trial court granted the appellant's motion for an out-of-time discretionary appeal because “[a]ppellant's counsel was ineffective in failing to file a timely application.” The decision was appealed to the Georgia Court of Appeals, where the court held that “the trial court did not have the authority to grant an out-of-time discretionary application” and dismissed the application because it was not filed within the required number of days of the original trial court order.

Established precedent provides that “compliance with the statutory deadline for filing a [discretionary] appeal is [required]” to give the appellate court jurisdiction. However, the supreme court overturned this precedent, holding that an appellate court has the authority to grant an extension for discretionary appeal applications under O.C.G.A. § 5-6-39. In reviewing the text of the statute, Justice Nahmias determined that a discretionary appeal fits within the statute's description and was similar to the four types of filings for which extensions of time are specifically permitted. As Judge McFadden's treatise on appellate practice points out, there was no discretionary appeal procedure in place when the statute was enacted, and while such appeals were not added to the list of items for which extensions are expressly allowed, they were

57. *Id.* at 527-28, 722 S.E.2d at 738.
58. *Id.* at 528, 722 S.E.2d at 738.
60. *Id.*
63. *Id.* at 82, 720 S.E.2d at 171.
64. *Id.*
65. *Id.*
66. *Id.* at 85, 720 S.E.2d at 173.
67. *Id.* at 84, 720 S.E.2d at 173; *see also* O.C.G.A. § 5-6-39(a)(1)-(4).
not added to the list for which extensions are expressly forbidden, either.\textsuperscript{68}

Unfortunately for the appellant, the court’s reversal was not enough to save his discretionary appeal application.\textsuperscript{69} Under the court’s holding, the trial court does not have authority to grant an extension of the discretionary appeal period. Only the appellate court may grant such an extension.\textsuperscript{70} Moreover, the application was not filed within the thirty-day period required in which the trial court may grant a discretionary appeal.\textsuperscript{71}

Whether the appeal qualified as “discretionary” was the issue raised by appellants in \textit{Hamryka v. City of Dawsonville}.\textsuperscript{72} The case arose from a challenge to a rezoning decision by the City of Dawsonville (the City).\textsuperscript{73} The superior court granted the City summary judgment on three of the nine counts, and the appellants filed a direct appeal.\textsuperscript{74} The supreme court initially dismissed the appeals “for failure to comply with the discretionary appeal procedures of [O.C.G.A.] § 5-6-35.”\textsuperscript{75} On the appellants’ motion for reconsideration, the court took another look at the issue.\textsuperscript{76}

As the court noted, O.C.G.A. § 5-6-35 requires “[a]ppeals from decisions of the superior courts reviewing decisions of . . . state and local administrative agencies” to be brought by application for discretionary appeal.\textsuperscript{77} Appellants argued that the discretionary appeals procedure is inapplicable because they sought review of an administrative zoning decision, not an appeal to the superior court under the City’s zoning ordinance.\textsuperscript{78} The supreme court clarified that the statute “is not limited to ‘appeals’ to the superior court but instead applies to appeals \textit{from} the superior court’s ‘review[]’ of an administrative agency decision, [however that] judicial review is sought.”\textsuperscript{79} While the appellants also argued “that they were not ‘parties’ to the administrative proceeding[s]”

\textsuperscript{68} \textit{Gable}, 290 Ga. at 83-84, 720 S.E.2d at 172; see also \textsc{Christopher J. McFadden et al.}, \textsc{Georgia Appellate Practice with Forms} § 19:3, at 550 n.6 (2011-2012 ed.).
\textsuperscript{69} \textit{Gable}, 290 Ga. at 85, 720 S.E.2d at 173.
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} 291 Ga. 124, 124, 728 S.E.2d 197, 198 (2012).
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} Hamryka, 291 Ga. at 124, 728 S.E.2d at 198 (1995).
\textsuperscript{76} \textit{Id.} at 125, 728 S.E.2d at 198 (alteration in original); see also O.C.G.A. § 5-6-35(a)(1).
\textsuperscript{77} \textit{Id.} at 125, 728 S.E.2d at 199 (alteration in original); see also O.C.G.A. § 5-6-35(a)(1).
and therefore not subject to the statute, this issue was easily dismissed by the court because "administrative proceedings may not formally name many of those who are legally entitled to raise issues with the administrative agency and then have standing to seek review of the administrative decision in superior court."\(^8\)

Because the appeal resulted from a challenge to an administrative proceeding that was heard and ruled on by the superior court, the court determined the appeal qualified as discretionary under the statute.\(^9\) Since the appellants failed to comply with the discretionary appeal procedures, the appeal was dismissed.\(^2\)

V. STANDARD OF REVIEW FOR AGENCY DECISIONS

In *Teal v. Thurmond*,\(^3\) the Georgia Court of Appeals held that hearsay evidence will not satisfy the "any competent evidence" standard.\(^4\) Sonja Teal was employed by Host International, Inc. to work at a restaurant in the Atlanta airport.\(^5\) She was terminated when Host alleged that she "failed to account for more than $50 that she collected during a bartending shift . . . [in] violation of Host's cash-handling policy."\(^6\) Teal applied for unemployment benefits, but was disqualified after the Board of Review of the Department of Labor determined that she did not qualify for benefits, a decision later upheld by the superior court.\(^7\) The only evidence offered to prove Teal's alleged violation of the employer's policy was the testimony of a "human resources generalist, who apparently had no personal knowledge of any of the facts surrounding the [cash-handling] incident."\(^8\)

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80. *Hamryka*, 291 Ga. at 125-26, 728 S.E.2d at 199.
81. Id. at 126-27, 728 S.E.2d at 199-200.
82. Id. at 127, 728 S.E.2d at 200.
84. Id. at 313, 713 S.E.2d at 437.
85. Id.
86. Id.
87. Id. at 312-13, 713 S.E.2d at 436.
88. Id. at 314, 713 S.E.2d at 437. It is worth noting that the court did not look kindly on the fact "that Host made no appearance and filed no brief" at the trial court level despite an order directing the employer to do so. Id. at 313 n.2, 713 S.E.2d at 437 n.2. The court also reiterated that the employer's choice of witness for the benefits hearing was a poor one:

When asked by the hearing officer why the assistant store manager, "who actually had knowledge of . . . how the . . . overage occurred," was not available to testify, Host's witness responded that she did not ask him to be at the hearing. The witness later said that she wanted the store manager, who had personal knowledge of the relevant events, to be present for the hearing, but he apparently was not available.
A Georgia court reviewing a decision of the Board regarding unemployment benefits will affirm the Board's decision if it is supported by any competent evidence. However, the court held that hearsay evidence "is without probative value to establish any fact," explaining that "[t]estimony that someone else reported a discrepancy may be competent to prove that the other person made the report, but when offered for the truth of the matter asserted . . . it is the very definition of hearsay." The court held that because no other piece of evidence in the administrative record sustained a finding that Teal had violated the employer's policy, including testimony by Teal who denied the alleged violation, the decision of the Board could not be sustained.

The "any evidence" standard was evaluated in *Brown Mechanical Contractors, Inc. v. Maughon*, when the court of appeals determined that its role was not to supplant the fact-finding procedures of the ALJ when making a determination on disability benefits, adding that the appropriate standard was "any evidence" as opposed to conducting a de novo review. In that case, the Board rejected the employee's benefits claim based on the following evidence: the employee only conducted 110 searches over 144 work days, failed to follow up with twenty-two potential employers, failed to search for employment weeks at a time, and lost employment on two separate occasions due to his need for surgery, which he failed to schedule. The superior court overturned the Board's decision and the court of appeals reversed.

The Georgia Court of Appeals stated that "neither the superior court nor this [court] has any authority to substitute itself as a fact-finding body in lieu of the Board," and that its role was "not to return to the [fact]-findings of the ALJ and examine whether that decision was supported by a preponderance of the evidence, but [was] instead to review the Board's award for the sole purpose of determining whether its findings are supported by any record evidence." As such, the court determined that the superior court's reversal of the Board's decision was

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*Id. at 314 n.4, 713 S.E.2d at 438 n.4.*

*98 Id. at 313, 713 S.E.2d at 437.*

*99 Id. (quoting Finch v. Caldwell, 155 Ga. App. 813, 815, 273 S.E.2d 216, 218 (1980)).*

*100 Id. at 314, 713 S.E.2d at 437-38 (citing Citadel Corp. v. All-South Subcontractors, 217 Ga. App. 736, 738, 458 S.E.2d 711, 712 (1995)).*

*101 Id. at 315, 713 S.E.2d at 438.*

*102 Id. at 106, 728 S.E.2d 757 (2012).*

*103 Id. at 107, 728 S.E.2d at 760.*

*104 Id. at 107, 728 S.E.2d at 758-59.*

*105 Id. at 107, 728 S.E.2d at 758.*

*106 Id. at 107, 728 S.E.2d at 758.*

*107 Id. at 108, 728 S.E.2d at 759-60 (quoting Master Craft Flooring v. Dunham, 308 Ga. App. 430, 434, 708 S.E.2d 36, 40 (2011)).*
erroneous because evidence in the record supported the inferences and factual findings made by the Board in its determination that Maughon failed to conduct a diligent job search.98

In yet another case dealing with the “any evidence” standard of review in the context of a claim for unemployment benefits, the Georgia Court of Appeals again showed deference to the fact-finding determinations of the agency board. In McCauley v. Thurmond,99 Toni McCauley was employed as a supp ort coordinator for Professional Case Management Services of America. Her responsibilities included meeting with individuals receiving Medicaid benefits on a monthly basis, conducting needs assessments, and creating individual service plans. In November 2009, McCauley learned that she had tested positive for influenza, which required that she be quarantined for five days. She notified her supervisor that she was ill, that she would be traveling for the Thanksgiving holiday, and that she would return to work later that month. However, McCauley failed to respond to her manager’s request for a meeting, failed to provide medical documentation, and did not respond to the manager’s inquiry into why McCauley would be traveling if she was to be quarantined due to her illness.100

After being discharged from her position, McCauley applied for unemployment benefits, but was denied. The Georgia Department of Labor determined that McCauley was not eligible by way of a claims examiner’s decision, which was affirmed by an administrative hearing officer and the Board of Review.101 The superior court affirmed the Department’s findings, and the court stated that it would affirm if there was “any evidence to support that ruling.”102 The court found evidence in the record to support the Department’s decision to disqualify McCauley’s benefits, because she was “fired for not following rules, orders, or the instructions of [her] employer,” based on her failure to uphold her job duties or to communicate with her superiors.103

In the final case in this section, the “any evidence” standard was blended, due to equity concerns, with the abuse of discretion standard. In Coastal Marshlands Protection Committee v. Altamaha Riverkeeper, Inc.,104 the court examined the permit appeal process for a moveable

98. Id. at 110, 728 S.E.2d at 760.
100. Id. at 636-37, 716 S.E.2d at 734-35.
101. Id. at 636, 716 S.E.2d at 734.
102. Id. (quoting MCG Health, Inc. v. Whitfield, 302 Ga. App. 408, 408, 690 S.E.2d 659, 659 (2010)).
103. Id. at 639, 716 S.E.2d at 736 (alteration in original).
floating dock over a marshland. In that case, the Coastal Marshlands Protection Committee issued a permit allowing for the construction of a community dock over marshlands on the South Newport River. Altamaha Riverkeeper, Inc. (Riverkeeper) later sought review by an ALJ. The ALJ conducted hearings and issued a 17-page de novo decision affirming the Committee’s approval of the permit. Riverkeeper appealed to the superior court, which concluded that though “the factual determinations made by the [ALJ] are supported by some evidence in the record,”

the ALJ’s refusal to consider whether the Committee’s decision to issue a permit was supported by sufficient evidence... allow[ed] no grounds for challenging a permit other than a violation of the authorizing statute... [creating] an irrebuttable presumption that all permits have been issued pursuant to a proper exercise of discretion and a valid process.

The superior court continued, “[a] permit may be wrongfully issued even though once issued it does not violate its authorizing statute or related regulations.”

The Georgia Court of Appeals began by conducting a de novo review, examining the Coastal Marshlands Protection Act of 1970, which provides: “Applicants seeking a permit must ‘demonstrate to the [Committee] that the proposed alteration is not contrary to the public interest and that no feasible alternative sites exist.’” On appeal, any aggrieved party then has the burden of proof “to show that the permit was wrongfully issued.”

The court held that the ALJ was required to “make an independent determination of whether the permit would violate the provisions of the applicable statute or regulations.” In this case, the ALJ’s order showed careful consideration and analysis of all available evidence to reach the required independent determination “that there was ‘no credible evidence that the proposed dock’ would be contrary to the public

105. Id. at 510-11, 726 S.E.2d at 541.
106. Id. at 511, 726 S.E.2d at 541.
107. Id.
108. Id.
109. Id.
111. Coastal Marshlands, 315 Ga. App. at 511-12, 726 S.E.2d at 524 (alteration in original); see also O.C.G.A. § 12-5-286(b).
113. Id. at 514, 726 S.E.2d at 543 (emphasis added).
interest or that a feasible alternative site existed." Therefore, whereas the superior court's analysis focused on reviewing the ALJ's finding and whether "they were supported by some evidence . . . in the hearing before the Committee," the court of appeals held that "what evidence was presented to the Committee is irrelevant . . . [rather,] [t]he proper issue for the Superior Court was whether there was enough evidence at the hearing before the ALJ." Because there was some evidence before the ALJ, its decision should have been affirmed.

The court continued that the analysis for the superior court remains "whether the permit was wrongfully issued by the ALJ . . . and not whether the permit was wrongfully issued by the Committee." This involvement by the superior court is "an appellate proceeding and not a de novo trial," and the standard is "partly 'any evidence,' and partly 'abuse of discretion.'" By way of explanation, "[t]he ALJ's findings of fact must have been based on some evidence," but will be "overturned[,] even when supported by strong evidence," when the findings of fact were based on an erroneous view of the law. The court explained this "part of an appellate decision is always, really, de novo." This abuse of discretion standard is used when the superior court "reviews the ALJ's finding that the project is in the public interest." In this case, the court held that "[t]he Superior Court erred by focusing on whether the Committee's decision was right or wrong" when it should have focused on "whether the ALJ's decision was right or wrong." The factual findings by the ALJ will stand if they are based on any evidence, but the requirement "that the proposed project was in the public interest, injects equity into the necessary decisions." The court held that where the ALJ or Committee added continuing obligations on the part of the permit-holder, such as gathering additional data or monitoring post-construction changes to the marsh environment, such information did not prove that the original decision-maker lacked sufficient data to support its decision at the time the permit was

114. Id.
115. Id. (emphasis added).
116. But see id. at 515, 726 S.E.2d at 544.
117. Id. at 514, 726 S.E.2d at 543.
118. Id. at 514, 726 S.E.2d at 544.
119. Id.
120. Id.
121. Id. at 514-15, 726 S.E.2d at 544 (emphasis in original).
122. Id.
123. Id. at 515, 726 S.E.2d at 544 (emphasis added).
124. Id.
issued. As such, the court reversed the superior court's decision and remanded to affirm the decision of the ALJ and Board of Natural Resources.

VI. SOVEREIGN IMMUNITY

Several of the cases in this year's Article addressed sovereign immunity and, in particular, the distinction between ministerial and discretionary acts. In Hendricks v. Dupree, the Georgia Court of Appeals reversed the trial court's ruling and granted summary judgment in favor of a county roads superintendent in a case involving the maintenance of the grass found on a county roadside. In May 2007, Dustin Dupree was injured after his all-terrain vehicle overturned after striking a concrete culvert located on the shoulder of a county road. The height of the grass on the road's shoulder hid the culvert. Though the county roads department was responsible for maintaining the shoulder, the grass had not been trimmed since the end of the previous year's mowing season, and the county was not scheduled to begin mowing again for a month.

The county road superintendent testified that the county commission did not provide detailed orders with regard to grass-cutting, that "[t]he roads department had no manual directing the work," no policy specifying the manner in which the grass was to be trimmed, no requirements as to its height, and provided no training to its employees relating to grass-cutting. Dupree relied on the holding in Mathis v. Nelson, in which the court provided that once a decision is made "to engage in the work of keeping the road in repair, 'the actual progress of such work by a local government is of a ministerial character, and . . . the duties of a road supervisor in carrying out the physical details of the work are likewise ministerial in nature." However, the court in this case held that because no established policy existed to address "the timing, manner[,] or method of execution of the cutting of the grass,"

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125. Id.
126. Id.
128. Id. at 96, 714 S.E.2d at 740.
129. Id. at 97, 714 S.E.2d at 740.
130. Id. at 98, 714 S.E.2d at 741.
Hendricks's actions were discretionary, and he was immune from Dupree's injury claims.  
That same court held that the discretionary exception would not cover DOT operational inspections of roadways in Georgia Department of Transportation v. Smith.  
In that case, Ernest and Irene Smith were killed after a large oak tree fell on their vehicle.  
The Smith family alleged that "the tree in question was hazardous; that it was growing on the DOT's right of way; and that the DOT's employees were negligent in failing to discover and remove [the tree]."  
The DOT offered the argument that its tree inspection policy fell within the "discretionary function" exception.  
The court, however, rejected the DOT's argument, holding that the discretionary function required the exercise of "policy judgment in choosing among alternate courses of action based upon a consideration of social, political, or economic factors."  
The factors are to cover only "basic governmental policy decisions," whereas "the day-to-day operational decision of whether and where to send out DOT personnel to inspect for road hazards . . . was not a basic governmental policy decision" and thus did not qualify as a "discretionary function exception to the GTCA's waiver of sovereign immunity."  
Thus, the trial court did not err in failing to grant the DOT's motions to dismiss the Smiths' claims.  
In Spruill v. Georgia Department of Human Services, the Georgia Court of Appeals held that the Department's investigation into allegations of malnourished twins was similarly not a discretionary function.  
The court reiterated that the discretionary function exception applies only to policy decisions and that the caseworker's "decisions regarding the investigation of the reported neglect and malnourishment of the minor children, including his decision not to visually inspect the condition of their bodies," did not satisfy that standard.

133.  Id. at 99, 714 S.E.2d at 742.  
135.  Id. at 412, 724 S.E.2d at 431.  
136.  Id.  
137.  Id. at 414, 724 S.E.2d at 432.  
138.  Id. at 414, 724 S.E.2d at 433 (quoting Ga. Dep't of Transp. v. Miller, 300 Ga. App. 857, 859, 686 S.E.2d 455, 458 (2009)).  
139.  Id. at 414-15, 724 S.E.2d at 433 (quoting Miller, 300 Ga. App. at 859, 686 S.E.2d at 459).  
140.  Id. at 415, 724 S.E.2d at 433.  
142.  Id. at 655.  
143.  Id. at 656.
In Georgia Department of Corrections v. James, the court held that a prison inmate injured on a work detail failed to establish a waiver of sovereign immunity for medical personnel employed at a county prison because no evidence suggested that the DOC assumed the right to control "the time, manner[,] and method of operating either the [county's] work detail or the medical unit," and that the county functioned as an independent contractor for which the state had not waived sovereign immunity. Because the GTCA does not apply to counties or independent contractors, the court held that James failed to show that any tort was committed for which sovereign immunity was waived.

In Kyle v. Georgia Lottery Corp., the Georgia Supreme Court held that the Georgia Lottery Corporation was a state instrumentality capable of asserting the defense of sovereign immunity. George Kyle sued for trademark infringement when he claimed that the Georgia Lottery continued to use the mark for his game "MONEYBAG$" for a longer period than Kyle had given permission. Kyle's game consisted of a marked velvet pouch containing numbered tiles to assist in randomly selecting numbers for lotto games. From 1995 to 2005, Kyle had sold less than fifty such games. In 2006, appellant obtained exclusive distribution rights to the game and sued the Georgia Lottery for trademark infringement, seeking to recover all gross profits the Georgia Lottery had gained from the sale of its MONEYBAG$ lottery tickets for a three-year period, totaling around $5 million.

The court began its analysis of the issue of sovereign immunity by concluding first that, "[b]ecause sovereign immunity applies to state instrumentalities, GLC is entitled to assert sovereign immunity as a defense in this case." In support of this determination, the court cited two earlier decisions, Miller v. Georgia Ports Authority, and Youngblood v. Gwinnett Rodal Newton Community Service Board.

145. Id. at 190, 718 S.E.2d at 57.
146. Id. at 196, 718 S.E.2d at 60-61.
147. Id. at 196-97, 718 S.E.2d at 61.
149. Id. at 88, 718 S.E.2d at 802.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
156. 273 Ga. 715, 545 S.E.2d 875 (2001); see also Kyle, 290 Ga. at 88, 718 S.E.2d at 802.
In *Miller*, the court held that the Georgia Ports authority, as the state administrative unit responsible for maintaining the state docks, is a state agency entitled to sovereign immunity. Using this framework, the court in *Kyle* observed that Georgia Lottery was established by state law for the purpose of generating educational funds and was "indelibly intertwined with the State in a manner that qualifies it for the protection of sovereign immunity as a State instrumentality." In its opinion, the court also invalidated its prior analysis in *Thomas v. Hospital Authority of Clarke County* as that decision predated both *Miller* and relied on authority given prior to the 1991 amendment and the GTCA. In other noteworthy cases, the supreme court upheld the constitutionality of the GTCA under the 1991 amendment to the Constitution of the State of Georgia in *Wilcox v. Penn*, a case that challenged the constitutionality of the legislature's failure to extend the waiver to counties or their officers or employees. Also, in *Strength v. Lovett*, the court of appeals reaffirmed its reasoning in *McCobb v. Clayton County*, in which it held that "a claim that an officer acted with reckless disregard for proper law enforcement procedures in pursuing a fleeing suspect comes within the ambit of claims for negligent use of a city- or county-owned motor vehicle.

**VII. RECENT LEGISLATION**

Legislative activity affecting administrative agencies was on the rise at the 2012 regular session of the Georgia General Assembly. This may be due to a slight improvement in the state's financial condition, coupled with a greater familiarity by the current administration regarding executive branch operations. Among the more noteworthy enactments were the following:

162. Id. at 752, 716 S.E.2d at 145.
165. Id. at 221, 710 S.E.2d at 211; *Strength*, 311 Ga. App. at 38-39, 714 S.E.2d at 726-27.
1. The Commissioner of Agriculture may require a surety bond to be posted for a monetary penalty imposed upon a person because of a consent order or a final administrative decision.\textsuperscript{166}

2. In administrative proceedings, the Commissioner of Agriculture is mandated to render a final decision not more than thirty days from the date of an application for final agency review.\textsuperscript{167}

3. The certifying agency for seed, plant, and variety certification and labeling will be immune from liability just as state officers and employees.\textsuperscript{168}

4. The director of the Environmental Protection Division must now develop and implement procedures for the processing of applications for the issuance or renewal of permits or variances.\textsuperscript{169}

5. Aviation assets from the Georgia Aviation Authority, and the transfer of personnel, are authorized for the Department of Natural Resources, the State Forestry Commission, and the Department of Transportation.\textsuperscript{170}

6. The State Commission on Family Violence now has a provision for each member to serve until a successor is appointed.\textsuperscript{171}

7. The State Board of Education is mandated to promulgate rules to maximize the number of students taking at least one online course.\textsuperscript{172}

8. A school health nurse is provided for every 750 students at the elementary school level and for every 1,500 students at middle and high schools.\textsuperscript{173} There is established within the Department of Education a school health nurse program coordinator.\textsuperscript{174}


\textsuperscript{174} Id. § 3 (codified at O.C.G.A. § 20-2-771.2 (2012)) (amending O.C.G.A. § 20-2-771.2 (2012)).


12. The Herty Advanced Materials Development Center is redesignated as the Georgia Southern University Herty Advanced Materials Development Center and its governance is transferred to the Board of Regents of the University System of Georgia.\footnote{Ga. S. Bill 396 § 1, Reg. Sess. (codified as O.C.G.A. §§ 12-6-130, -131 (2012) and repealing O.C.G.A. §§ 12-6-132 to -139 (2012)).}


14. In a shuffling of duties, the inspection and regulation of such items as elevators, escalators, boilers, amusement rides, scaffolding, and staging have been transferred from the Department of Labor to the Safety Fire Commissioner.\footnote{Ga. S. Bill 407 §§ 1, 2, Reg. Sess. (repealing O.C.G.A. §§ 31-6-20 and 31-22-3 (2012)).}


18. The State Board of Workers’ Compensation has been empowered to waive financial penalties assessed against an employer for the inability to pay benefits if such is due to conditions beyond the control of the employer.\textsuperscript{184}

19. The Georgia Work Ready program has been dissolved and the Georgia Workforce Investment Board provisions have been extensively revised to include within the Board’s power the ability to promulgate rules and regulations.\textsuperscript{186}

20. The Georgia Bureau of Investigation is now required to gather information regarding sex offenders and report the same to the Sexual Offender Registration Review Board.\textsuperscript{186}

21. Zoning proposal review procedures have been repealed.\textsuperscript{187}

22. The regulation of motor carriers and limousine carriers has been transferred from the Public Service Commission to the Department of Public Safety.\textsuperscript{188}

23. Music therapists must now become licensed and comply with a regulatory framework.\textsuperscript{189}

24. There is no longer a State Personnel Administration, as its functions have been transferred to the Department of Administrative Services.\textsuperscript{190} The repeal also necessitated an additional enactment to assure that references throughout the Code were changed correctly.\textsuperscript{191}

25. The Board of Trustees of the Peace Officers’ Annuity and Benefit Fund has been granted the power to employ a hearing officer for its administrative cases.\textsuperscript{192}


\textsuperscript{187} Ga. H.R. Bill 1089 § 1, Reg. Sess. (repealing O.C.G.A. tit. 36 ch. 67 (2012)).


26. The Department of Revenue now has statutes prescribing how it must handle letter rulings. The Commissioner may promulgate rules and regulations regarding the same.\(^{193}\)

27. The Georgia Vocational Rehabilitation Services Board and the Georgia Vocational Rehabilitation Agency are created.\(^{194}\)

28. The old Comptroller General duties are shifted from the Commissioner of Insurance to the State Accounting Office.\(^{195}\)

29. In a one-paragraph enactment, all state agencies are mandated to prepare an annual report detailing federal government mandates that require agency rules and regulations as opposed to the enactment of laws by the General Assembly.\(^{196}\)

30. Among other provisions, there is now a statutorily created Georgia Tax Tribunal assigned as a division of the Office of State Administrative Hearings.\(^{197}\)

31. The open meetings and open records provisions have been comprehensively updated and revised.\(^{198}\)

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81 (2010)).


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