

Mercer Law Review

Volume 64
Number 1 *Annual Survey of Georgia Law*

Article 14

12-2012

Local Government Law

Kirk Fjelstul

James E. Elliott Jr.

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



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

Recommended Citation

Fjelstul, Kirk and Elliott, James E. Jr. (2012) "Local Government Law," *Mercer Law Review*. Vol. 64 : No. 1 , Article 14.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol64/iss1/14

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

Local Government Law

by Kirk Fjelstul*
and James E. Elliott, Jr.**

This was another active year of litigation by, for, against, within, and between local governments. The Article that follows includes appellate decisions with unique, new, or instructive issues.¹

I. EMPLOYMENT CONTRACTS

While local government employees probably hope newly elected officials will not challenge their employment contracts, they are likely aware of the potential. In *City of McDonough v. Campbell*,² the building inspector filed a complaint against the City demanding severance pay when the new mayor and council declared his contract null and void and refused to pay his salary.³ Although the contract was upheld at trial and in the Georgia Court of Appeals, the Georgia Supreme Court reversed and declared the employment contract ultra vires and void.⁴

The contract included an annual renewal provision that was automatic unless terminated before October 30th of each year.⁵ In the case of

* Deputy Director, Georgia Regional Transportation Authority (GRTA). Adjunct Professor, Georgia State University Law School. Drake University Law School (J.D., 1988); Emory University Law School (LL.M., 1989). Member, State Bar of Georgia.

** City Attorney, Warner Robins, Georgia. Adjunct Professor, Mercer University, Walter F. George School of Law. Georgia Institute of Technology (B.S., 1979); Mercer University, Walter F. George School of Law (J.D., 1982). Member, State Bar of Georgia.

Special thanks to Ken Jarrard, a partner in the firm of Jarrard & Davis, LLP in Cumming, Georgia, who provided advice on the impact of changes to the Open Meetings Act. Thanks also to Kenneth P. Brockman, a Georgia State University Law School student, who contributed to the section on "Speech."

1. For an analysis of Georgia local government law during the prior survey period, see Ken E. Jarrard, *Local Government Law, Annual Survey of Georgia Law*, 63 MERCER L. REV. 251 (2011).

2. 289 Ga. 216, 710 S.E.2d 537 (2011).

3. *Id.* at 216-17, 710 S.E.2d at 538.

4. *Id.* at 216-17, 219, 710 S.E.2d at 538, 540.

5. *Id.* at 217, 710 S.E.2d at 538.

termination, the contract called for “[twelve] months salary as severance pay, plus insurance and retirement benefits.”⁶ The supreme court, in declaring the contract void, relied on the Official Code of Georgia Annotated (O.C.G.A.) section 36-30-3,⁷ which prohibits one council from “bind[ing] itself or its successors to prevent free legislation in matters of municipal government.”⁸ The court noted that the prohibition applies equally to the adoption of ordinances and to the approval of government contracts, and that the prohibition is to be interpreted strictly in order to carry out the intent of allowing local governments to legislate freely.⁹ The court concluded that the employment contract was void because the contract automatically renewed unless terminated, and because the severance provision requiring twelve-months pay plus benefits made the cost of termination exorbitant, thereby restricting the ability of successor councils to terminate the agreement.¹⁰

II. INTERGOVERNMENTAL AGREEMENTS

The Georgia Supreme Court was required to address another case where the actions of local governing bodies may bind their successors.¹¹ Intergovernmental agreements are frequently used to memorialize long-term obligations between local governments,¹² but we were reminded in *City of Decatur v. DeKalb County*¹³ that they do have limitations.¹⁴ The DeKalb County cities in *City of Decatur* executed a forty-nine-year intergovernmental agreement with DeKalb County in 1998. The purpose of the agreement was to memorialize the formula for distributing sales tax proceeds among the jurisdictions from the Homestead Option Sales and Use Tax (HOST), which was approved by the voters in 1997. More than a decade of litigation followed, over what began in the year 2000 as a dispute over the distribution formula.¹⁵ The litigation in this case concluded in the summer of 2011 after a third trip to the Georgia Supreme Court.¹⁶

6. *Id.* (internal quotation marks omitted); see also O.C.G.A. § 36-30-3(a) (2012).

7. O.C.G.A. § 36-30-3.

8. *Campbell*, 289 Ga. at 217, 710 S.E.2d at 538; see also O.C.G.A. § 36-30-3.

9. *Campbell*, 289 Ga. at 217, 710 S.E.2d at 538 (quoting *Brown v. City of East Point*, 246 Ga. 144, 146, 268 S.E.2d 912, 915 (1980)).

10. *Id.* at 218-19, 710 S.E.2d at 539-40.

11. *City of Decatur v. DeKalb Cnty.*, 289 Ga. 612, 614, 713 S.E.2d 846, 849 (2011).

12. See *Berry v. City of East Point*, 277 Ga. App. 649, 649, 627 S.E.2d 391, 395 (2006).

13. 289 Ga. 612, 713 S.E.2d 846 (2011).

14. See *id.* at 614-15, 713 S.E.2d at 849.

15. *Id.* at 612-13, 713 S.E.2d at 847-48.

16. *Id.* at 613, 713 S.E.2d at 848.

The court ruled, in the final version, that the intergovernmental agreement was not valid.¹⁷ Local governments may not ordinarily enter into contracts lasting longer than the “government’s term of office.”¹⁸ The Intergovernmental Contracts Clause in the 1983 Georgia Constitution¹⁹ offers an exception that allows intergovernmental agreements to last up to fifty years in length.²⁰ Their purpose, however, must be for the “provision of services, or . . . the joint or separate use of facilities or equipment, [and] must deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide.”²¹ The court in *City of Decatur* declared the intergovernmental agreement between the cities and DeKalb County invalid because its “plain and unambiguous” purpose was to determine how sales tax proceeds were to be divided.²² It was not an agreement to provide services or address the use of facilities.²³

III. PUBLIC MEETINGS

The right of citizens under the Open Meetings Act²⁴ to know how their local elected officials vote was at stake in *Cardinale v. City of Atlanta*.²⁵ Its importance as case law, however, has likely faded as a result of changes to the Open Meetings Act in 2012.²⁶

Cardinale considered a non-roll-call vote at a retreat of the Atlanta City Council, where the council members were polled on their preference

17. *Id.*

18. *Id.* at 614, 713 S.E.2d at 849 (quoting *Greene Cnty. Sch. Dist. v. Greene Cnty.*, 278 Ga. 849, 850, 607 S.E.2d 881, 882 (2005)).

19. GA. CONST. art. IX, § 3, para. 1(a).

20. *Id.*

21. *Id.*; see also *City of Decatur*, 289 Ga. at 614, 713 S.E.2d at 849 (quoting *Greene Cnty. Sch. Dist.*, 278 Ga. at 851, 607 S.E.2d at 882 (internal quotation marks omitted)).

22. *City of Decatur*, 289 Ga. at 614-15, 713 S.E.2d at 849.

23. *Id.* at 615, 713 S.E.2d at 849-50.

24. O.C.G.A. § 50-14-1 to -6 (2009 & Supp. 2012).

25. 290 Ga. 521, 521-22, 722 S.E.2d 732, 734 (2012).

26. O.C.G.A. § 50-14-1 (2009) was amended in 2012. Prior to legislative amendment, O.C.G.A. § 50-14-1(e)(2) provided:

In the case of a roll-call vote the name of each person voting for or against a proposal shall be recorded and in all other cases it shall be presumed that the action taken was approved by each person in attendance unless the minutes reflect the name of the persons voting against the proposal or abstaining.

O.C.G.A. § 50-14-1(e)(2) (2009). The 2012 amendments removed the reference to roll-call votes at O.C.G.A. § 50-14-1(e)(2)(B) (Supp. 2012): “The name of each person voting for or against a proposal shall be recorded. It shall be presumed that the action taken was approved by each person in attendance unless the minutes reflect the name of the persons voting against the proposal or abstaining.” O.C.G.A. § 50-14-1(e)(2) Supp. 2012).

to change certain council rules. Observers of the vote noted that eight council members opposed a change and seven favored a change. The minutes did not record the vote, only noting that the council was not in favor of changes.²⁷

The issue was whether a non-roll-call vote pursuant to O.C.G.A. § 50-14-1(e)(2)²⁸ of the Open Meetings Act, which was in effect at the time, required a listing of which members cast the yes and no votes.²⁹ The arguments revolved around the legislative distinction in the Act between roll-call and non-roll-call votes; roll-call votes required a record of all persons voting for and against the proposal.³⁰ In all other cases, the vote is presumed unanimous unless the "minutes reflect the name of the persons voting against the proposal or abstaining."³¹

In reversing both the trial court and the Georgia Court of Appeals, the Georgia Supreme Court ruled that the City must record the council members voting against the proposal in a non-roll-call vote.³² The court reasoned that declining to record negative votes or abstentions would "potentially deny [the] non-attending members of the public access to information available to those who attended [the] meeting. Such a result conflicts with the Act's goal of greater governmental transparency."³³ The court further reasoned that when no names are recorded, the public should be able to presume that the vote was unanimous.³⁴

Subsequent to *Cardinale*, the General Assembly made substantial changes to the Open Meetings Act, including elimination of the reference to either roll-call or non-roll-call votes.³⁵ The reference to a roll-call vote prior to the 2012 amendments seemed to be at the heart of the dispute that led to the litigation in *Cardinale*.³⁶ Now the Act simply requires that all non-unanimous votes record the name of each person voting for or against a proposal.³⁷ The Act creates a presumption that a vote was unanimous in favor of an item unless the minutes reflect a person has voted against an item or abstained.³⁸

27. *Cardinale*, 290 Ga. at 522, 722 S.E.2d at 734.

28. O.C.G.A. § 50-14-1(e)(2).

29. *Cardinale*, 290 Ga. at 521-22, 722 S.E.2d at 734.

30. *Id.* at 523, 722 S.E.2d at 735; *see also* O.C.G.A. § 50-14-1(e)(2).

31. *Cardinale*, 290 Ga. at 523, 722 S.E.2d at 735; *see also* O.C.G.A. § 50-14-1(e)(2).

32. *Cardinale*, 290 Ga. at 524, 722 S.E.2d at 736.

33. *Id.* at 524-25, 722 S.E.2d at 736.

34. *Id.* at 525, 722 S.E.2d at 736.

35. O.C.G.A. § 50-14-1(e)(2)(B).

36. *Cardinale*, 290 Ga. at 521-22, 722 S.E.2d at 734.

37. *See id.* at 524, 722 S.E.2d at 736; *see also* O.C.G.A. § 50-14-1(e)(2)(B).

38. *See* O.C.G.A. § 50-14-1(e)(2)(B).

IV. SPEECH

If the right to free speech includes the right to question, then the Georgia Supreme Court certainly had the right to question its own free speech analysis in *Grady v. United Government of Athens-Clarke County*.³⁹ In that case, the court upheld the constitutionality of a local noise ordinance challenged by a student who hosted a late-night party at his home.⁴⁰ Apparently, the loud party noise and noise from “mechanical sound-making devices” could be heard more than 170 feet away.⁴¹ Unfortunately, the local noise ordinance for the zoning district prohibited “plainly audible” noises that could be heard from a distance of more than 100 feet.⁴² When the plaintiff was convicted of violating the ordinance, he challenged it as invalid under the free speech clause of the Georgia Constitution.⁴³

More interesting than the result is the court’s review of its free speech test and its invitation for future litigants to test the framework.⁴⁴ The plaintiff in *Grady*, relying on *Statesboro Publishing Co. v. City of Sylvania*,⁴⁵ asserted that the noise ordinance was unconstitutional because it was not the “least restrictive means” of furthering the local government’s interest in regulating noise, which he argued was the proper test for cases seeking free speech protection under the Georgia Constitution.⁴⁶ The court in *Grady* devoted the majority of its opinion to unraveling the history of Georgia’s free speech standard, particularly in relation to *Statesboro*.⁴⁷

According to the court, in 1999 *Statesboro* broke from the historical analysis of Georgia’s free speech clause, which until then mirrored the analysis of First Amendment claims arising under the United States Constitution.⁴⁸ That First Amendment test requires an ordinance be “‘narrowly tailored’ to serve a significant government interest and leave[] open ample alternatives for communication.”⁴⁹ In *Statesboro*, the court

39. 289 Ga. 726, 715 S.E.2d 148 (2011).

40. *Id.* at 726-27, 736, 715 S.E.2d at 149, 155.

41. *Id.* at 727, 715 S.E.2d at 149.

42. *Id.*

43. *Id.*

44. *Id.* at 731, 715 S.E.2d at 151-52.

45. 271 Ga. 92, 516 S.E.2d 296 (1999).

46. *Grady*, 289 Ga. at 728, 715 S.E.2d at 149-50 (citing *Statesboro*, 271 Ga. at 93-95, 516 S.E.2d at 297-98).

47. *Id.* at 726-36, 715 S.E.2d at 148-55.

48. *Id.* at 729, 715 S.E.2d at 150-51 (citing *Statesboro*, 271 Ga. at 92-93, 516 S.E.2d at 297).

49. *Id.* at 728, 715 S.E.2d at 150 (citing *Statesboro*, 271 Ga. at 93, 516 S.E.2d at 297).

advanced the proposition that Georgia's free speech guarantee is broader than its federal counterpart, a proposition previously addressed only in dictum.⁵⁰ The court in *Statesboro* then abandoned the "narrow tailoring" test and adopted a more stringent "least restrictive means" test, which had only been advocated in a minority dissent.⁵¹ The *Statesboro* test requires that the ordinance be the "least restrictive means of furthering the government's significant interests, while still leaving open ample alternatives to communicate."⁵²

In analyzing the new *Statesboro* precedent, the court in *Grady* found the inconsistencies between *Statesboro* and prior precedent troubling because no authority was cited in support of the new test, and no reason for the change was articulated.⁵³ The court in *Grady*, however, stopped short of overruling *Statesboro* because neither party challenged the test.⁵⁴ Instead, the court held that the challenged ordinance could withstand scrutiny under either test.⁵⁵ The court then invited future litigants to challenge the *Statesboro* test: "We therefore leave further consideration of this important issue for a future case."⁵⁶

V. ANTE LITEM NOTICE

What are the *ante litem* notice rules for class action lawsuits? This was the question of first impression addressed by the Georgia Court of Appeals in a group of consolidated cases heard in *City of Atlanta v. Benator*.⁵⁷ Parties intending to file a lawsuit to recover for certain injuries against a local government in Georgia must, as a statutory prerequisite, first serve the local government with an *ante litem* notice.⁵⁸ The purpose of the notice requirement is to allow local governments the opportunity to investigate claims and to determine whether they should be settled in advance of litigation.⁵⁹ The plaintiffs in *Benator*, in multiple lawsuits, asserted class action claims against the City of Atlanta and its contractors on various grounds related to alleged

50. *Id.* at 729, 715 S.E.2d at 150-51; *Statesboro*, 271 Ga. at 93-95, 516 S.E.2d at 297-98.

51. *Grady*, 289 Ga. at 729-30, 715 S.E.2d at 151; *Statesboro*, 271 Ga. at 93-95, 516 S.E.2d at 297-98.

52. *Grady*, 289 Ga. at 728, 715 S.E.2d at 150 (internal quotation marks omitted) (citing *Statesboro*, 271 Ga. at 92, 516 S.E.2d at 296).

53. *Id.* at 730, 715 S.E.2d at 151.

54. *Id.* at 731, 715 S.E.2d at 152.

55. *Id.* at 732, 715 S.E.2d at 152.

56. *Id.* at 731, 715 S.E.2d at 152.

57. 310 Ga. App. 597, 599, 714 S.E.2d 109, 112 (2011).

58. *Id.* at 598, 714 S.E.2d at 111-12; see also O.C.G.A. § 36-33-5 (2012).

59. *Benator*, 310 Ga. App. at 599-600, 714 S.E.2d at 112-13 (quoting *City of Gainesville v. Moss*, 108 Ga. App. 713, 715, 134 S.E.2d 547, 549 (1963)).

overcharges for water and sewer usage.⁶⁰ The court consolidated the cases and then disposed of the issues raised in motions to dismiss filed by the City.⁶¹ The City contended in the first of the consolidated cases that the claims should be dismissed against all but the first named plaintiff because she was the only plaintiff identified in the *ante litem* notice.⁶²

The court agreed with the City, reversing the trial court on this issue, thereby granting the City's motion to dismiss the non-contract damages of the named plaintiffs who failed to meet the notice requirements.⁶³ The ruling meant that each named plaintiff in a class action lawsuit is required to serve a proper *ante litem* notice.⁶⁴ The court recognized that setting the *ante litem* rules in class action cases was an issue of first impression, but it relied on a related precedent to reach its conclusion.⁶⁵ The court in *Goen v. City of Atlanta*,⁶⁶ for example, held that a separate *ante litem* notice is required for each named plaintiff in a non-class action lawsuit.⁶⁷ In other circumstances, where pre-litigation notice is required, proper notice by the named plaintiffs is sufficient for unnamed class members in a class action.⁶⁸

According to the court, requiring that each named plaintiff in a purported class action serve a proper *ante litem* notice supports the public policy intention of *ante litem* statutes.⁶⁹ It allows local governments to more fully investigate claims of each class representative, to better evaluate the likelihood of class certification, and to assess potential exposure.⁷⁰ It would also promote judicial economy in the event class certification is not granted.⁷¹

60. *Id.* at 597, 714 S.E.2d at 111.

61. *Id.* at 597-98, 714 S.E.2d at 111.

62. *Id.* at 599, 714 S.E.2d at 112.

63. *Id.* at 600-01, 714 S.E.2d at 113. While the court granted the City's motion to dismiss regarding claims for money damages on account of injuries to person or property, the court ruled in favor of the plaintiffs on the other counts. The remaining claims did not seek "money damages" but rather sought restitution of overpayment. *Id.*

64. *Id.* at 600, 714 S.E.2d at 113.

65. *Id.* at 599, 714 S.E.2d at 112.

66. 224 Ga. App. 484, 481 S.E.2d 244 (1997).

67. *Id.* at 485, 481 S.E.2d at 246.

68. *Benator*, 310 Ga. App. at 599, 714 S.E.2d at 244.

69. *Id.* at 600, 714 S.E.2d at 113.

70. *Id.*

71. *Id.*

VI. VESTED RIGHTS

While creating new municipalities is popular, it is inevitable that complications occur as the affected land transitions from being regulated by counties to cities.⁷² *Fulton County v. Action Outdoor Advertising, JV, LLC*,⁷³ presented just such an example. Between 2003 and 2006, several billboard companies and others with asserted legal interests (hereinafter collectively referred to as “sign companies”) filed—but were denied—permits throughout unincorporated Fulton County based on provisions of the County’s sign ordinance. The sign companies filed lawsuits contending that the ordinance was unconstitutional.⁷⁴ After the lawsuits were filed and consolidated, and while they were pending, the Georgia Supreme Court ruled in another case, *Fulton County v. Galberaith*,⁷⁵ that Fulton County’s sign ordinance was unconstitutional pursuant to the First Amendment to the United States Constitution.⁷⁶

As a result, the trial court in *Action Outdoor Advertising* granted summary judgment to the sign companies, found they had vested rights to billboards, and ordered they be allowed to erect the billboards.⁷⁷ The County appealed, but at some point during the appeal’s pendency, the cities of Sandy Springs, Milton, and Johns Creek were newly incorporated within Fulton County.⁷⁸ Since the new municipalities all included property where the sign companies’ permits were denied (the City of Alpharetta also annexed unincorporated land where an application had been filed), the County questioned its jurisdiction to issue the permits.⁷⁹ Similarly, the municipalities questioned their obligation to issue permits because the applications had been filed with the County, prior to incorporation or annexation.⁸⁰ In response, the sign companies filed a new action against the cities seeking mandamus.⁸¹ The trial court granted summary judgment to the sign companies on the grounds that their rights to erect billboards vested, in accordance with the laws that

72. See *Fulton Cnty. v. Action Outdoor Adver., JV, LLC*, 289 Ga. 347, 347-48, 711 S.E.2d 682, 684 (2011).

73. 289 Ga. 347, 711 S.E.2d 682 (2011).

74. *Id.* at 347, 711 S.E.2d at 684.

75. 282 Ga. 314, 647 S.E.2d 24 (2007).

76. *Action Outdoor Adver.*, 289 Ga. at 347, 711 S.E.2d at 684; *Galberaith*, 282 Ga. at 319, 647 S.E.2d at 28.

77. *Action Outdoor Adver.*, 289 Ga. at 347-48, 711 S.E.2d at 684.

78. *Id.*

79. *Id.* at 348, 711 S.E.2d at 684.

80. *Id.*

81. *Id.*

existed, as of the date the valid permit applications were filed in Fulton County.⁸²

The Georgia Supreme Court consolidated both versions of *Action Outdoor Advertising* and upheld the trial court decisions.⁸³ The court affirmed the breadth of *Galberaith*, holding that the entire sign ordinance was invalid, thereby leaving no regulations in place at the time the permit applications were filed by the sign companies.⁸⁴ The court reasoned that the ordinance's structure of presuming all signs to be illegal, and then allowing them on a case-by-case basis, violated the First Amendment.⁸⁵ As a result, the entire ordinance was invalid, leaving it void from the date of enactment.⁸⁶ With no valid ordinance in place at the time the applications were filed, the right to erect billboards vested upon filing.⁸⁷

The cities argued that the subsequent incorporations and annexation where the properties were located divested the sign companies of their vested rights.⁸⁸ The court rejected that argument, based on article I, section 1, paragraph 10 of the Georgia Constitution,⁸⁹ which "forbids passage of retroactive laws which injuriously affect the vested rights of citizens."⁹⁰ The court concluded that creation of new cities and annexation of property could not retroactively divest the sign companies of their vested property rights.⁹¹

While *Action Outdoor Advertising* exemplifies the vested rights problems that arise for local governments when an entire ordinance is declared unconstitutional,⁹² *Covenant Christian Ministries, Inc. v. City of Marietta*⁹³ points to the difficulty property owners may have in acquiring vested rights when only a portion of an ordinance is declared

82. *Id.*

83. *Id.*

84. *Id.* at 348-49, 711 S.E.2d at 685.

85. *Id.* at 348, 711 S.E.2d at 685.

86. *Id.*

87. *Id.* at 349, 711 S.E.2d at 685.

88. *Id.* at 350-51, 711 S.E.2d at 686.

89. GA. CONST. art. I, § 1, para. 10.

90. *Action Outdoor Adver.*, 289 Ga. at 351, 711 S.E.2d at 686 (internal quotation marks omitted); see also GA. CONST. art. I, § 1, para. 10.

91. *Action Outdoor Adver.*, 289 Ga. at 351, 711 S.E.2d at 686. The court also determined that that there was no other ordinance prohibiting the erection of signs and other rulings, that the ownership interests were sufficient to grant standing, and that the backdating provisions of O.C.G.A. § 36-60-26 had no application. *Id.* at 349-52, 711 S.E.2d at 685-87; see also O.C.G.A. § 36-60-26 (2012).

92. See *Action Outdoor Adver.*, 289 Ga. at 352, 711 S.E.2d at 687.

93. 654 F.3d 1231 (11th Cir. 2011).

unconstitutional.⁹⁴ In *Covenant Christian Ministries*, the plaintiff was a church and a private school in the City of Marietta looking for land to build a new and larger campus. It contracted in 2004 to purchase eight acres in an R-2 low-density residential zoning district that allowed religious institutions to purchase land, subject to a five-acre minimum lot restriction.⁹⁵

A few weeks after the purchase contract was executed in 2004, the City amended the ordinance as a consequence of an unrelated lawsuit.⁹⁶ The plaintiff alleged that the five-acre minimum for religious institutions violated a federal law known as the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁹⁷ It asserted a violation because the lot requirement did not apply equally to religious and non-religious institutions and places of assembly.⁹⁸ The 2004 amended ordinance prohibited all religious institutions in several residential districts but still allowed other assemblies such as parks, playgrounds, and recreation centers. About a year later, in 2005, the church closed on the property, but unfortunately did nothing to determine whether the ordinance had changed. The church learned about the 2004 amended ordinance in 2006 when it sought a development permit. The City informed the church of the change and directed it to seek a rezoning.⁹⁹

The church filed a lawsuit in federal court when the rezoning application was denied.¹⁰⁰ It challenged the 2004 amended ordinance as well as most of the litigated claims related to asserted violations of RLUIPA and to violations of vested rights.¹⁰¹ The church requested injunctive relief in the form of a directive to issue development permits and damages.¹⁰²

The trial court in *Covenant Christian Ministries* ruled, and the Eleventh Circuit affirmed, that the 2004 amended ordinance prohibiting all religious institutions from the R-2 district violated the equal terms provision of RLUIPA because the ordinance treated religious institutions or assemblies on "less than equal terms with non-religious assemblies

94. *See id.* at 1236-37.

95. *Id.* at 1236.

96. *Id.*

97. *Id.*; *see also* 42 U.S.C. § 2000cc (2006).

98. *Covenant Christian Ministries, Inc.*, 654 F.3d at 1237.

99. *Id.* at 1236-37.

100. *Id.* at 1237.

101. *Id.* It is a little unclear what was asserted at trial because the Eleventh Circuit notes that many of the claims were not briefed and thus were deemed abandoned. *Id.* at 1237 n.1.

102. *Id.* at 1237.

and institutions—namely private parks, playgrounds, and neighborhood recreation centers.”¹⁰³

Although the church won the proverbial battle, it lost the war when the remedy fashioned by the trial court was far different from what was requested. Rather than impose the requested injunction and direct the issuance of development permits, the trial court severed portions of the ordinance so that it was no longer in violation of RLUIPA.¹⁰⁴ The trial court severed the ordinance by striking all of the non-religious places of assembly (parks, playgrounds, and recreation centers) from the list of permitted uses in the R-2 zoning district, thereby eliminating the unequal treatment.¹⁰⁵ In the view of both the trial court and the Eleventh Circuit, this action was consistent with Georgia law for severing ordinances because the stricken uses were not mutually dependant on the remaining ordinance sections, and the severing action did not compromise the legislative intent of the R-2 zoning district (low-density single family).¹⁰⁶

Because the court did not strike the entire zoning ordinance, or otherwise fashion a remedy that allowed religious institutions, the church did not get its development permit.¹⁰⁷ Neither the 2004 amended ordinance, nor the court’s remedy, permitted religious

103. *Id.* at 1237-38. In reaching that conclusion, the court outlined the four-part test for a prima facie showing: “(1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution.” *Id.* at 1245 (internal quotation marks omitted). Once a prima facie showing of a violation is made, the City is subject to strict scrutiny in showing that the regulation “employs a narrowly tailored means of achieving a compelling government interest.” *Id.* (internal quotation marks omitted). The City argued that parks, playgrounds, and recreation centers should not be classified as assemblies because people do not necessarily assemble for a common purpose. *Id.* at 1245-46. The argument was rejected because assembly within the meaning of RLUIPA is simply a place where “groups or individuals dedicated to similar purposes . . . can meet together.” *Id.* at 1246 (internal quotation marks omitted). Parks, playgrounds, and recreation centers offer the opportunity to meet for a common purpose, which is sufficient under RLUIPA. The City argued that even if the ordinance is subject to strict scrutiny, it passes the test because there is a compelling interest in preserving the residential character of the zoning district from traffic, crowds, and disruption. *Id.* at 1246. The argument was rejected because parks, playgrounds, and recreation centers have the same potential for disruption. *Id.*

104. *Id.* at 1238.

105. *Id.*

106. *Id.* at 1240.

107. *Id.*

institutions in the R-2 district.¹⁰⁸ As a result, the church never acquired a vested right to construct a church on the property.¹⁰⁹

The final disappointment was the nominal damage award of one dollar.¹¹⁰ The court refused to allow additional damages because all of the damage claims stemmed from the inability to construct the church.¹¹¹ Although the court ruled in favor of the church on one of the claims, it never acquired the right to construct or operate the church.¹¹²

VII. HIGH-SPEED PURSUIT

Georgia's courts, legislators, and law enforcement agencies have struggled with the topic of law enforcement officers' liability to third parties in high-speed pursuits.¹¹³ Their struggles have principally focused on two issues: (1) the circumstances under which law enforcement officers are immune from lawsuits in high-speed pursuits;¹¹⁴ and (2) the circumstances under which law enforcement officers can be the legal cause of injuries to third parties when immunity has been waived.¹¹⁵ The Georgia Court of Appeals addressed both issues in two separate cases, *McCobb v. Clayton County*¹¹⁶ and *Strength v. Lovett*,¹¹⁷ during the survey period. Although the two issues are easy to point out, the arguments are so interrelated that it is difficult to separate the discussion.

Sovereign immunity is immunity from being subject to a lawsuit;¹¹⁸ the threshold issue, therefore, is whether or not immunity is waived.¹¹⁹ Causation and other liability issues are addressed only when immunity is waived and the lawsuit is allowed to proceed.¹²⁰ Georgia's Constitution grants sovereign immunity to local governments and allows a waiver of immunity only to the extent provided by specific act of the General Assembly.¹²¹ The immunity waiver statute that was the

108. *Id.*

109. *Id.* at 1241-43.

110. *Id.* at 1238.

111. *Id.*

112. *Id.* at 1247.

113. *See, e.g.,* *Peeples v. City of Atlanta*, 189 Ga. App. 888, 377 S.E.2d 889 (1989).

114. *Strength v. Lovett*, 311 Ga. App. 35, 38-39, 714 S.E.2d 723, 726-27 (2011).

115. *McCobb v. Clayton Cnty.*, 309 Ga. App. 217, 222, 710 S.E.2d 207, 212 (2011).

116. 309 Ga. App. 217, 710 S.E.2d 207 (2011).

117. 311 Ga. App. 35, 714 S.E.2d 723 (2011).

118. *McCobb*, 309 Ga. App. at 217-18, 710 S.E.2d at 209.

119. *Id.* at 218, 710 S.E.2d at 209.

120. *Id.*

121. GA. CONST. art. I, § 2, para. 9.

subject of both *McCobb* and *Strength* was O.C.G.A. § 33-24-51,¹²² which generally waives immunity for claims arising from the negligent use of insured motor vehicles.¹²³ The statute authorizes:

a county to secure insurance to cover liability for damages on account of bodily injury, death, and property damage “arising by reason of [the county’s] ownership, maintenance, operation, or use of any motor vehicle” and provides that *the county’s sovereign immunity “for a loss arising out of claims for the negligent use of a covered motor vehicle is waived.”*¹²⁴

If immunity is waived and the lawsuit proceeds, proximate cause is still required for a law enforcement officer’s liability to attach.¹²⁵ In the case of liability to third parties during a high-speed pursuit, a state statute limits proximate cause by raising the liability standard beyond negligence.¹²⁶ O.C.G.A. § 40-6-6(d)(2) provides:

When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, the law enforcement officer’s pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect *unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer’s decision to initiate or continue the pursuit . . .*¹²⁷

The code section was amended in 2002 to address liability in high-speed pursuits in response to a Georgia Supreme Court holding that “the decision of an officer to initiate or continue a pursuit of a fleeing suspect in some cases may be the proximate cause of injuries sustained by a third person.”¹²⁸

122. O.C.G.A. § 33-24-51 (2005).

123. O.C.G.A. § 33-24-51(b); *Strength*, 311 Ga. App. at 38-39, 714 S.E.2d at 726-27; *McCobb*, 309 Ga. App at 222, 710 S.E.2d at 212.

124. *McCobb*, 309 Ga. App at 218, 710 S.E.2d at 209 (alteration in original) (emphasis added); see also O.C.G.A. § 33-24-51.

125. O.C.G.A. § 40-6-6(d)(2) (2011).

126. *Id.*

127. *Id.* (emphasis added).

128. *Strength*, 311 Ga. App. at 40, 714 S.E.2d at 727 (citing *Mixon v. City of Warner Robins*, 264 Ga. 385, 387, 444 S.E.2d 761, 764 (1994), *superseded by statute*, Ga. H.R. Bill 1128, Reg. Sess. (2002)). In *Mixon*, the Georgia Supreme Court looked to Texas law as it crafted a new rule of law:

[W]e find persuasive a recent decision of the Supreme Court of Texas analyzing the same competing public policies involved in this case. In *Travis v. City of Mesquite*, the court relied upon a Texas statute containing language identical with that of [O.C.G.A.] § 40-6-6(d) in providing that the statutory authorization to

The first of the two cases, *McCobb v. Clayton County*,¹²⁹ primarily addressed sovereign immunity.¹³⁰ Sherri McCobb, the mother of the deceased, brought a wrongful death suit against Clayton County alleging that reckless conduct by a county police officer during a high-speed chase resulted in the death of her son, who was a passenger in a fleeing vehicle. The trial court dismissed McCobb's action based on sovereign immunity and did not rule on liability. Although the plaintiff pled that the County carried liability insurance for the asserted claims, thereby waiving immunity in accordance with O.C.G.A. § 33-24-51, the trial court found that immunity was not waived.¹³¹ Citing dicta in *Peeples v. City of Atlanta*,¹³² the lower court reasoned that the plaintiff's claims failed to show that the use of the vehicle for which insurance had been purchased caused the victim's injuries because there was no assertion that the officer "literally used his vehicle to push the [driver's] vehicle off of the road and into the tree."¹³³

On appeal the court rejected the trial court's analysis, holding that the trial court's reliance on *Peeples* was "misplaced."¹³⁴ Contrary to the dicta in *Peeples*, the court ruled that establishing a waiver of sovereign immunity pursuant to O.C.G.A. § 33-24-51 does not require that the

disregard applicable traffic regulations does not "relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons."

Mixon, 264 Ga. at 389, 444 S.E.2d at 765 (citation omitted) (quoting *Travis*, 830 S.W.2d at 98 n.2).

We recognize that police officers must make their decisions about pursuing a fleeing suspect rapidly while under pressure, but we have concluded that there is no special statutory provision excepting police officers from the [general] legal standards for proximate cause. Police officers must balance the risk to the public with their duty to enforce the law to choose an appropriate course of conduct. Public safety should not be thrown to the winds in the heat of the chase *The decision to initiate or continue pursuit may be negligent when the heightened risk of injury to third parties is unreasonable in relation to the interest in apprehending suspects* The intervention of negligent or even reckless behavior by the driver of the car whom the police pursues does not . . . require the conclusion that there is a lack of proximate cause between police negligence and an innocent victim's injuries.

Id. (alteration in original) (quoting *Travis*, 830 S.W.2d at 98-99).

129. 309 Ga. App. 217, 710 S.E.2d 207 (2011).

130. *See id.* at 217-18, 710 S.E.2d at 209-10.

131. *Id.* at 217, 710 S.E.2d at 209.

132. 189 Ga. App. 888, 377 S.E.2d 889 (1989).

133. *McCobb*, 309 Ga. App. at 219, 710 S.E.2d at 210 (alteration in original).

134. *Id.* at 220, 710 S.E.2d at 210.

covered vehicle be used to intentionally and physically contact a suspect's vehicle.¹³⁵

The County argued that there was no waiver of immunity in what, as a practical matter, would have been a "Catch-22" for the plaintiffs by pitting the immunity waiver's *negligence* standard against the *reckless disregard* standard required for liability in high-speed pursuits. The County contended that when the plaintiff asserted an immunity waiver by the purchase of insurance arising from the negligent use of a motor vehicle pursuant to O.C.G.A. § 33-24-51, she was precluded from asserting the higher reckless disregard standard required by O.C.G.A. § 40-6-6(d)(2) to prove causation in a high-speed pursuit case.¹³⁶ The court in *McCobb* rejected the idea that the General Assembly intended to preclude high-speed pursuit claims from a waiver of immunity as "nonsensical on its face," noting the statute "could have simply said so" if that had been the intention.¹³⁷ Instead, the court observed that the statute is located within a section of the Georgia Code that subjects claims against local governments to the procedures and limitations of Chapter 92 of Title 36, which in turn expressly references the immunity waiver at issue.¹³⁸ As a result, the court of appeals reversed the trial court and remanded the case to proceed on the merits.¹³⁹

Shortly after *McCobb*, the court of appeals was again required to address the sovereign immunity and causation issues resulting from a high-speed chase. In *Strength v. Lovett*,¹⁴⁰ Laura Felder's estate filed a wrongful death suit against Strength, the Sheriff of Richmond County, alleging that a deputy's actions in continuing the pursuit of an already identified misdemeanant was in reckless disregard of proper police procedures,¹⁴¹ thus satisfying the proximate cause standard established by the high-speed pursuit statute (O.C.G.A. § 40-6-6(d)(2)).¹⁴² The sheriff moved for summary judgment based on an asserted entitlement to sovereign immunity and an asserted lack of legal

135. *Id.* at 221, 710 S.E.2d at 211.

136. *Id.* at 220-21, 710 S.E.2d at 211.

137. *Id.* at 221, 710 S.E.2d at 211.

138. *Id.*

139. *Id.* at 222, 710 S.E.2d at 212. Although the issue on appeal was immunity, the court briefly addressed liability to the extent the county was arguing in reliance on *Peeples* that a fleeing suspect colliding with a third party became the sole intervening cause as a matter of law. The court of appeals held that such a position is contrary to O.C.G.A. § 40-6-6(d)(2). *Id.* at 220, 710 S.E.2d at 210-11.

140. 311 Ga. App. 35, 714 S.E.2d 723 (2011).

141. *Id.* at 35, 714 S.E.2d at 724.

142. *Id.* at 43, 714 S.E.2d at 729; see O.C.G.A. § 40-6-6(d)(2).

causation from the officer's decision to continue the high-speed pursuit. The motion was denied, and the sheriff appealed.¹⁴³

The court of appeals in *Strength* did not devote much time addressing the immunity issue. It simply upheld the trial court ruling and relied on *McCobb* because the sheriff's immunity arguments were essentially the same as those it rejected in *McCobb* several months earlier.¹⁴⁴

After disposing of the immunity defense, the court turned to the two causation arguments raised by the sheriff.¹⁴⁵ First, the sheriff contended there was no evidence in this case that the officer's "decision to initiate or continue the pursuit" was in "reckless disregard of proper law enforcement procedures," as is required to meet the statutory proximate cause standard in high-speed pursuits under O.C.G.A. § 40-6-6(d)(2).¹⁴⁶

The court reviewed the deputy's actions in the context of the Richmond County Sheriff's pursuit policy to determine if evidence existed from which a jury might find the deputy acted in reckless disregard of the department policy when he decided to continue the pursuit.¹⁴⁷ The Richmond County policy required that the deputy balance the need to "immediately apprehend a fleeing suspect against the risk to the officer and the public of initiating or continuing a pursuit."¹⁴⁸ The policy also provided that "strong consideration should be given to abandoning a pursuit" whenever "the subject can be identified to the point where later apprehension can be accomplished."¹⁴⁹

The court reviewed the record and found evidence upon which a jury could conclude that the deputy acted in reckless disregard of the policy.¹⁵⁰ The court noted that the suspect, Clark, was initially alleged to have committed only traffic violations, that the deputy had no intention of taking him into custody prior to the pursuit, and that the deputy knew Clark's identity and had physical possession of his driver's license.¹⁵¹ As the chase ensued, the deputy observed Clark's reckless behavior including excessive speed, the overtaking of other vehicles, and

143. *Strength*, 311 Ga. App. at 35, 714 S.E.2d at 724.

144. *Id.* at 38-39, 714 S.E.2d at 726-27.

145. *See id.* at 39, 714 S.E.2d at 727.

146. *Id.*; *see also* O.C.G.A. § 40-6-6(d)(2) (emphasis added).

147. *Strength*, 311 Ga. App. at 40-41, 714 S.E.2d at 728.

148. *Id.* at 41, 714 S.E.2d at 728.

149. *Id.* at 42, 714 S.E.2d at 728-29 (internal quotation marks omitted).

150. *Id.* at 41-42, 714 S.E.2d at 728.

151. *Id.* at 41-42, 714 S.E.2d at 728-29.

violation of traffic signals.¹⁵² Finally, the deputy's field supervisor directed that the pursuit end.¹⁵³

The sheriff next contended that the manner of the deputy's driving should be examined, rather than the deputy's decision to continue the pursuit, to determine whether the actions were reckless. The sheriff relied on *Pearson v. City of Atlanta*,¹⁵⁴ where the court concluded that the plaintiff failed to prove proximate cause because there was no evidence that the pursuing officer operated his vehicle in a reckless manner.¹⁵⁵ The court in *Strength* expressly "disapprove[d]" *Pearson*, relying instead on the plain language of O.C.G.A. § 40-6-6(d)(2), which precludes a law enforcement officer's high-speed pursuit as proximate cause unless the law enforcement officer "acted with reckless disregard for proper law enforcement procedures in [the officer's] decision to initiate or continue the pursuit."¹⁵⁶ As a result, the court upheld the trial court's denial of summary judgment on the issue of proximate cause.¹⁵⁷

In the second causation argument, the sheriff contended that there was no proof that the deputy was the cause in fact of the collision because there was no proof that the deputy's decision to continue the pursuit caused the suspect to collide with the third party.¹⁵⁸ The court chose not to address the issue because it had not been reviewed properly by the trial court.¹⁵⁹ Instead, it vacated a portion of the lower court order and directed that cause in fact be examined by the trial court.¹⁶⁰

152. *Id.* at 41-42, 714 S.E.2d at 728.

153. *Id.* at 37, 714 S.E.2d at 725-26. There was some dispute, however, as to whether the deputy heard the directive.

154. 231 Ga. App 96, 499 S.E.2d 89 (1998).

155. *Strength*, 311 Ga. App. at 43, 714 S.E.2d at 729-30 (citing *Pearson*, 231 Ga. App. at 98-99, 499 S.E.2d at 89).

156. *Id.* (internal quotation marks omitted); see also O.C.G.A. § 40-6-6(d)(2).

157. *Strength*, 311 Ga. App. at 43, 714 S.E.2d at 730.

158. *Id.* at 39, 714 S.E.2d at 727.

159. *Id.* at 44, 714 S.E.2d at 730.

160. *Id.* at 45, 714 S.E.2d at 731.
