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Local Government Law

by R. Perry Sentell, Jr.*

The world of local government is a place of remarkable occurrences:

At the meeting of the governing authority, the chambers were overflow-
ing, passions were palpable, and the media descended in droves. The vote was taken on the re-zoning petition. The council's vote was evenly split. The newly elected Mayor would have to break the tie. He announced to all that he did not know how he should vote. He then proceeded to toss a coin into the air, explaining that if it was "heads," he would vote "yes," and if it was "tails," he would vote "no." As if in slow motion, the coin descended—and the Mayor voted "yes."!

The law applicable to local governments, both decisional and statutory, is no less remarkable.2

I. MUNICIPALITIES

A. Annexation

The Georgia General Assembly provides two basic methods of municipal annexation: (a) by enacting individual local statutes; and (b) by authorizing municipalities themselves to effect the procedure.3 The

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

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


latter method includes three systems, each of which expressly limits the municipal annexation power to "contiguous" territory. Whether annexation by local statute is likewise limited was, prior to this survey period, an unresolved issue.

The Georgia Supreme Court finally provided the answer in City of Fort Oglethorpe v. Boger, a challenge to a local statute annexing land "not adjacent or contiguous to an existing municipal boundary." Reversing the trial judge, the supreme court declared the legislature's annexation power both "plenary," and "limited only by the federal and state constitutions." Accordingly, the court held the non-contiguous property validly within the municipality.

6. "Whether or not, therefore, the General Assembly considers itself limited by the requirement of contiguity when it adopts local annexation statutes, it has expressly imposed the requirement in all three of its general delegations of the annexation power to municipalities." R. Perry Sentell, Jr., Municipal Annexation in Georgia: The Contiguity Conundrum, 9 GA. L. REV. 167, 178 (1974).
8. Id. at 485, 480 S.E.2d at 186. Plaintiffs' primary objections were to a later annexation by the municipality of lands contiguous to lands annexed by local statute some eleven years earlier. The earlier annexed lands were admittedly non-contiguous to the municipality. "Thus, even though this dispute focuses on the property annexed by the City, the question for decision is whether the General Assembly's annexation was valid." Id., 480 S.E.2d at 187.
9. Id. at 486, 480 S.E.2d at 187. "Although contiguity is a requirement for annexation by a municipality, there is no such requirement for annexation by the General Assembly." Id.
10. Id. An indication that the General Assembly had considered contiguity a limitation upon its annexation power was its statement in the "60% method" statute as follows: "This article is not intended to affect or restrict the present authority of the General Assembly to legislate regarding the annexation of any area contiguous to any municipal corporation in this state." O.C.G.A. § 36-36-50 (1991) (emphasis added). The court's majority opinion rejected that argument as follows:

The plain meaning of that code section is that the General Assembly is not precluded from annexing contiguous property simply because it granted to municipalities the authority to do that. That code section cannot be construed to limit the power of the legislature to annex property which is not contiguous to a municipality.

267 Ga. at 486, 480 S.E.2d at 187. In a dissenting opinion (concurred in by Justice Hunstein), Justice Carley maintained that the above code section "should be construed as a general law limiting the General Assembly to annexation of contiguous areas into municipalities by local laws." Id. at 488, 480 S.E.2d at 188 (Carley, J., dissenting).
B. Officers and Employees

Litigation of the survey period focused upon municipal officers and employees from a number of intriguing perspectives. Few perspectives are more intriguing than the historic writ of quo warranto, the action featured in *Hornsby v. Campbell*. The contest turned upon whether the appointment-retention office of city solicitor constituted an "elective" position which the holder automatically vacated upon qualifying as a candidate for county district attorney. Although retention elections subject the incumbent only to a yes-or-no popular vote, the supreme court declared the solicitor a "municipal elected official" subject to the vacation prescription.

Equally extraordinary, the writ of mandamus constituted the disgruntled employee's remedy of choice in *Byrd v. City of Atlanta*. That employee, whose dismissal had been modified to suspension, sought an order for the award of back pay. On grounds that petitioner could have challenged the board's omission of back pay by writ of certiorari,

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13. *Id.* at 512, 480 S.E.2d at 190. The mayor selected the solicitor from a slate of candidates recommended by a panel of superior court judges. The solicitor then served an initial term followed by a yes-no city wide retention vote in a special election which did not involve a challenge by another candidate. *Id.*
14. *Id.* The municipal mayor sought quo warranto to vacate the solicitor's office upon the incumbent's qualifying as a candidate for the office of county district attorney. The mayor maintained that the qualification triggered the provision of the Georgia Constitution (art. II, § 1, para. V) requiring that the office of any "municipal elected official" be declared vacant upon that official qualifying "for another city, county or municipal elective office." The solicitor argued that her retention election position was not a "municipal elected official" within the meaning of the constitutional provision. *Id.*
15. *Id.* at 514, 480 S.E.2d at 191-92. The court reasoned that because the solicitor "could not serve without impunity and was subject to a vote in an open election," she was a "municipal elected official" who vacated the office when qualifying for another. *Id.* Accordingly, the court sustained the trial judge's issuance of the writ of quo warranto. *Id.*
17. 266 Ga. at 801, 471 S.E.2d at 853. The municipal police department had fired the employee, the civil service board had modified the dismissal to a thirty-day suspension, and the employee had failed to appeal the board's failure to award back pay. *Id.*
"an adequate legal remedy," the supreme court held mandamus unavailable. To complete the high intrigue cycle, City of Buchanan v. Pope encompassed an official's plea of municipal estoppel. There the court of appeals was able to reconcile the municipal “refusal to reappoint” its long-time police chief with the municipal police manual's protection against “dismissal.” The former power derived from the municipal charter so that even in the event of conflict it would prevail over the provisions of the manual. To the former chief's argument that the city had previously failed to abide by its charter, the court declared any such failures “ultra vires.” “[T]here can be no [municipal] estoppel,” the court explained to the chief, “where the act is ultra vires.”

Yet another police officer's dismissal yielded the contest in City of Atlanta v. Houston. The case climaxed the trial judge's efforts to clarify the municipal civil service board's actions in overturning the dismissal and ordering a suspension. Specifically, the judge ordered

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18. Id. at 800, 471 S.E.2d at 853.
19. Id. at 801, 471 S.E.2d at 853. The court thus affirmed dismissal of petitioner's request: “The writ of mandamus is an extraordinary remedy that is available only when the petitioner has a clear legal right to the relief sought and there is no other adequate legal remedy.” Id.
21. Id. at 716, 476 S.E.2d at 53. For perspective upon, and extensive analysis of, the doctrine of estoppel, see R. Perry Sentell, Jr., The Law of Estoppel in Georgia Local Government Law (1984).
22. 222 Ga. App. at 721, 476 S.E.2d at 58. In summary, if the “discipline” provisions of the City ... police department manual are interpreted as a disciplinary scheme rather than as a merit system or a grant of permanent tenure, then they do not conflict with the City's charter setting a maximum term of office for the City's police chief.

Id. The court effected this harmonizing construction under the interpretative precept of in pari materia. Id. at 717, 476 S.E.2d at 55. For extensive treatment of that precept, confined peculiarly to Georgia law, see R. Perry Sentell, Jr., Statutory Construction in Georgia: The Doctrine of in Pari Materia (1996).
23. 222 Ga. App. at 721, 476 S.E.2d at 58. “The interpretation advocated by [the Chief], however, directly conflicts with [section] 16 of the charter, and the charter must prevail over that interpretation.” Id.
24. Id. at 720, 476 S.E.2d at 57. “Any earlier failure or refusal of the City to obey the terms of its charter was ultra vires.” Id.
25. Id. “While a municipal corporation may be estopped where the act relied on, though irregular, was within its charter powers, there can be no estoppel where the act is ultra vires.” Id. The court reversed the trial judge's refusal to grant the municipality's motion for summary judgment in its entirety. Id. at 722, 476 S.E.2d at 58.
27. Id. at 61, 471 S.E.2d at 12. The police officer's dismissal had occurred in 1991, the civil service board had overturned the dismissal and ordered suspension in 1992, the municipality appealed to the superior court, and, in 1993, the court began its efforts to
members of the 1992 board to reconvene in 1995 and explain their decisions. Reversing that order, the court expressly concurred with the city's position that "the superior court erred as a matter of law by ordering the reconstitution of the former Board thereby impermissibly bestowing upon ordinary citizens authority that could only be granted to them by the charter, code of ordinances, and mayoral appointment."

Few aspects of municipal employment attract more litigation than workers' compensation. In *Autry v. Mayor of Savannah*, the court of appeals reviewed an assessment of attorney fees for the municipality's refusal to pay for an injured employee's physical therapy. Emphasizing the standard as one of "reasonable grounds," the court noted evidence that the prescribed therapy was unlikely to effect a cure or give relief. Accordingly, "the finding of the board that the City's defense was made without reasonable grounds is without evidence to support it."

have the board clarify aspects of its decision. The board members' terms expired in 1994, with a new mayor and board taking office. *Id.* at 61-62, 471 S.E.2d at 12-13.

28. *Id.* at 62-63, 471 S.E.2d at 13. The court concluded that the new board had no authority over the case and sought to confer all authority upon the former members. *Id.*

29. *Id.* at 63, 471 S.E.2d at 13. "Thus, we find that the court abused its discretion in ordering the former Board members to reconvene to clarify their initial decision." *Id.* at 64, 471 S.E.2d at 14.

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


32. *Id.* at 691, 475 S.E.2d at 702. The Administrative Law Judge had awarded benefits and attorney fees, the Board of Workers' Compensation had affirmed, the trial court had reversed the assessment of attorney fees, and the claimant had appealed the reversal. *Id.*

33. *Id.* at 692, 475 S.E.2d at 703. "While the question of whether there are reasonable grounds for resisting an award of compensation is an issue of fact to be determined by the board, attorney fees may not be awarded where the matter is closely contested on reasonable grounds." *Id.*

34. *Id.* at 693, 475 S.E.2d at 703.

Given the evidence that [claimant's] subjective manifestations of pain failed to correspond with objective medical findings, [claimant's] failure to improve after an earlier cycle of physical therapy, and [the doctor's] contemporaneous notes indicating that the May-June treatments were likewise ineffective, it cannot be said that the prescribed therapy was likely to effect a cure or give relief.

*Id.*

35. *Id.*, 475 S.E.2d at 704. An additional contest of the period involved workers' compensation but not a municipal employee. Rather, *City of Dalton v. Gene Rogers Construction Co.*, 223 Ga. App. 819, 479 S.E.2d 171 (1996), featured a municipal effort to obtain indemnification from the employer whose employee was electrocuted from contact with a municipal power line. *Id.* at 819-20, 479 S.E.2d at 171-73. Rejecting that effort, the court held that the High Voltage Safety Act (O.C.G.A. § 46-3-33 (1992)) did not create an exception to the exclusive remedy provision of the Workers' Compensation Act (O.C.G.A.
C. Elections

The process of filling the office of municipal council gave rise to two contests during the period under scrutiny. In Maye v. Pundt, the attack went to ballot preparation. In response, the supreme court held that the challenger possessed no statutory right to have his nickname placed on the ballot. Such matters, the court asserted, are best left to the discretion of the General Assembly. Additionally, the court refused to void the election for the superintendent's failure to prepare a sample ballot. That "irregularity," the court held, was insufficient "to change or place in doubt the result of the election."

The second contest, City of East Point v. League of Women Voters, featured disagreement over filling a council vacancy. Under the municipal charter, the term of the office was four years and, if the vacancy occurred during the last two years, it was to be filled by appointment. The court held that later general statutes had changed the office term to five years, with the result that more than two years remained in the term at the time of the vacancy's occurrence.

§ § 34-9-11 (1992)). 223 Ga. App. at 822, 479 S.E.2d at 174. Thus, the court concluded, "the employee may not sue the employer in tort, and the employer may not be impleaded as a joint tortfeasor in an employee's action against a third party." Id. at 819-20, 479 S.E.2d at 171, 173. Presiding Judge Pope and Presiding Judge McMurray dissented.

37. Id. at 243, 477 S.E.2d at 120.
38. Id. at 246, 477 S.E.2d at 121. The court reasoned that "failure to place [challenger's] nickname on the ballot cannot be considered an act of misconduct within the meaning of O.C.G.A. [section] 21-3-422(1)." Id.
39. Id. Even assuming otherwise, the court observed, challenger had failed to show that the omission had placed the election result in doubt. Id.
40. Id., 477 S.E.2d at 122. See O.C.G.A. § 21-3-194(b) (1993).
41. 267 Ga. at 246, 477 S.E.2d at 122. The statute authorizing election challenges (O.C.G.A. § 21-3-422(1) (1993)) requires that challenger show "misconduct, fraud, or irregularity by any primary or election official or officials sufficient to change or place in doubt the result."
42. 267 Ga. 112, 475 S.E.2d 598 (1996).
43. Id. at 113, 475 S.E.2d at 598. Here the council member had been elected in 1992 and then resigned in 1995, with only one year remaining in the term. The council filled the vacancy by appointment as authorized by the charter for vacancies occurring with less than two years remaining in the term. Plaintiffs in the case sought to mandamus a special election for filling the vacancy. Id.
44. Id. at 114, 475 S.E.2d at 600. The court relied upon O.C.G.A. section 21-3-60(a)(4) (1993) which expressly provided that "municipal officers elected in 1992 shall have their terms expire December 31, 1997." The court reasoned that "as the latest expression of the General Assembly on the length of the term of office of a municipal officer elected in 1992, the statute takes precedence over the city charter's provision for a four-year term of office for a municipal officer elected in 1992." 267 Ga. at 114, 475 S.E.2d at 600.
Accordingly, the charter required a special election for the unexpired term.\(^45\)

\section*{D. Regulation}

The municipality must ever be mindful of the illusive line between regulation and taxation, and of the general prohibition against employing the latter to accomplish the former.\(^46\) That prohibition operated in \textit{Sexton v. City of Jonesboro} to invalidate a municipal “occupation tax” on practicing law.\(^47\) As structured, the measure required registration and fee payment at the beginning of each year, thus operating as a “precondition on the practice of law.”\(^48\) Additionally, the measure imposed punishment not upon delinquency of payment, but upon the delinquent’s attempt to conduct business.\(^49\) Both those features convinced the supreme court that the “tax ordinance” operated “effectively as a precondition or license for engaging in the practice of law, rendering it a regulatory fee.”\(^50\)

\begin{thebibliography}{50}
\bibitem{45} 267 Ga. at 114, 475 S.E.2d at 600. The court thus affirmed the trial judge’s issuance of a mandamus ordering that a special municipal election be conducted to fill the council vacancy. \textit{Id.}

Dealing with recall rather than election, \textit{Davis v. Shavers}, 225 Ga. App. 497, 484 S.E.2d 243 (1997), focused upon a libel action against members of a political group which filed unsuccessful recall applications against a municipal official. Holding allegations contained in recall applications only conditionally (rather than absolutely) privileged, the court reasoned that the recall statute “affords an elected official no opportunity to contest false and malicious accusations in a judicial forum prior to a recall election, and we will not take away the official’s only right to seek recourse against false and malicious accusations subsequent to a recall effort.” \textit{Id.} at 500, 484 S.E.2d at 247. For treatments of both recall and defamation in the setting of local government, see R. Perry Sentell, Jr., \textit{Remembering Recall in Local Government Law}, 10 GA. L. REV. 883 (1976); R. Perry Sentell, Jr., \textit{Defamation in Georgia Local Government Law: A Brief History}, 16 GA. L. REV. 627 (1982).

\bibitem{46} Both the line and the prohibition are among the facets treated in R. Perry Sentell, Jr., \textit{Discretion in Georgia Local Government Law}, 8 GA. L. REV. 651 (1974).

\bibitem{47} 267 Ga. 571, 481 S.E.2d 818 (1997).

\bibitem{48} \textit{Id.} at 571, 481 S.E.2d at 819. The ordinance purported to levy the tax and to require professionals to pay either a flat fee or a fee determined by gross receipts, with payment option to be exercised on January 1 of each year. Punishment was by fine or imprisonment for transacting business without a tax certificate and while delinquent. The challengers were attorneys engaged in the practice of law within the municipality. \textit{Id.}

\bibitem{49} \textit{Id.} at 572, 481 S.E.2d at 820.

\bibitem{50} \textit{Id.} at 573, 481 S.E.2d at 821. “This supports the conclusion that the ordinance’s aim and effect is to regulate the practice of [law] rather than to simply gain revenue.” \textit{Id.}

\bibitem{51} \textit{Id.} at 572-73, 481 S.E.2d at 820. “Examination of the ordinance compels the conclusion that regardless of its stated purpose, it operates pragmatically as more than a measure to generate revenue.” \textit{Id.}
\end{thebibliography}
Frequently, regulatory litigation pivots on procedural points. In *Soerries v. City of Columbus*, the court of appeals rejected a challenge to the municipal revocation of an alcoholic beverage license. Reviewing the challenger's attacks upon both ordinance and proceedings, the court emphasized that plaintiff's "exclusive mechanism [for challenging] the Council's revocation of his liquor license was by filing a petition for certiorari." In contrast, in *City of Albany v. Oxford Solid Waste Landfill, Inc.*, the supreme court rejected the procedural argument. There the court approved a mandamus ordering issuance of a land disturbance permit. Refuting the municipal contention that an adequate legal remedy existed, the court deemed it "obvious that [requiring plaintiff] to pursue an administrative appeal before the City's Planning Commission would be a futile act." Substantively, municipal regulation continued its focus of recent years upon adult entertainment establishments. *Secret Desires Lingerie, Inc. v. City of Atlanta* featured an ordinance purporting to regulate

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53. Id. at 745, 476 S.E.2d at 64. The council had provided notice and hearing and predicated revocation on evidence of multiple calls for law enforcement personnel at the challenger's club. Id.
54. Id. at 746, 476 S.E.2d at 66. The court reasoned that the revocation constituted the exercise of judicial power and that O.C.G.A. section 5-4-1 "provides that such judicial decisions are reviewable in superior courts by way of certiorari." Id.
56. Id. at 283, 476 S.E.2d at 729.
57. Id. at 284, 476 S.E.2d at 730-31. Plaintiff sought the permit for operation of a landfill, and the court held that the municipality's own zoning ordinance "recognizes that land may be used for landfill purposes, so long as the proper procedures are followed and the requisite approvals are obtained." Id.
58. Id., 476 S.E.2d at 730. The court relied upon evidence that the city engineer had rejected application for the permit because he was so instructed by the city manager at the direction of the city commission. Id. "Accordingly, there was no error in the issuance of the writ, despite an available avenue of administrative appeal." Id.
60. 266 Ga. 760, 470 S.E.2d 879 (1996).
lingerie modeling studios. Assuming the ordinance's impetus to be pernicious secondary effects of such studios, the supreme court sought municipal evidence of those effects. That search, the court announced, was in vain: "The City is unable to point to any evidence ... that it considered specific studies of the pernicious secondary effects of lingerie modeling studios before enacting the ordinance." Accordingly, the court declared the measure unconstitutional.

The municipality enjoyed more success in *Goldrush II v. City of Marietta*, defending its 1995 ordinance prohibiting any one establishment from obtaining both a liquor license and an adult entertainment license. Establishments previously possessing both licenses presented the court with broad constitutional challenges. In an extensive opinion, the Chief Justice first declared free from federal infirmity Georgia's 1994 amendment to its constitution expressly delegating expansive regulatory authority over alcohol and nudity. Then focusing upon the ordinance itself, the court reviewed preamble statements, meeting tran-
scripts," and executed affidavits. The court deemed this evidence sufficient to confirm the city's "predominate goal of combatting pernicious secondary effects," and to establish the ordinance as "content-neutral." Proceeding to its familiar "tripartite test" for restrictions upon expression, the court held the ordinance to "pass constitutional muster" as "a proper exercise of the city's police power." Finally, the court considered previous license holders' claims to vested property rights. Although challengers held vested rights in licenses annually issued them, the court delineated, they possessed no "legitimate claim of entitlement to continued reissuance of their annual licenses," and thus no "protectable property interest in their renewal."

69. Id. at 690, 482 S.E.2d at 355. The preamble stated that the ordinance was based on the experiences of other local governments, police reports of criminal activity around the establishments, and a finding of accelerated community blight around such establishments. Id.

70. Id. at 691, 482 S.E.2d at 356. Transcripts of the meeting at which the ordinance was enacted evidenced that the council considered studies from other communities showing a correlation between the increase in crime and the presence of adult entertainment, and citizen concern over property values. Id.

71. Id. Affidavits executed by each member of the council, following the filing of the lawsuit, averred reliance upon studies from other cities and that the studies were relevant to problems faced by their municipality. Id.

72. Id. at 692, 482 S.E.2d at 356.

73. Id.

74. Id. The court draws this test from Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 297 S.E.2d 250 (1982): "(1) Does the ordinance further an important governmental interest? (2) Is that interest unrelated to the suppression of speech? and (3) Is the legislation an incidental restriction of speech no greater than essential to further the important governmental interest?" 267 Ga. at 692, 482 S.E.2d at 356. Here the court held the municipality to have a substantial interest in preserving the quality of urban life, that the city's goals were important interests unrelated to suppressing speech, and the ordinance was sufficiently "narrowly tailored" because it exempted "mainstream performance houses, museums, or theaters." Id. at 693, 482 S.E.2d at 357.

75. 267 Ga. at 693, 482 S.E.2d at 357.

76. Id. at 695, 482 S.E.2d at 359. "Since [the] city code sets forth the criteria which, if met, results in the issuance of a license, and specifies that a liquor license issued by the city can be suspended or revoked only upon a showing of cause, the city code created a protectable property interest in the license." Id.

77. Id. at 697, 482 S.E.2d at 360. "The City Code makes it clear that the ... licensees before us do not have a vested right in the law never changing, and are not exempt from the exercise of the city's police power by its elected officials to further an important governmental interest." Id.

78. Id. The court, with only Justice Sears dissenting, affirmed the trial judge's grant of summary judgment to the municipality and denial of injunctive relief to plaintiffs. Id.
E. Property

Historically, municipalities obtain much property through the process of dedication. On occasion, the elements of that process, and their ramifications, become crucial both to city and citizen. *Teague v. City of Canton* presented such an occasion, with control of a sewer system hanging in the balance. *Teague* featured a subdivision developer’s effort to restrain the municipality from tapping into the subdivision’s sewer system. Conceding his express offer to dedicate the subdivision’s streets and sewers to the municipality, plaintiff proved the city’s express acceptance of the streets but its express refusal of the sewer system. In review, the supreme court emphasized that the municipality had previously permitted lot owners to tap on to the sewer line, had processed sewage from the system, and had charged subdivision residents a sewer fee. The court reasoned that the municipality, “by its exercise of dominion and control over the sewer lines, impliedly accepted the offer of dedication before it rejected [plaintiff’s] offer of dedication.”

F. Contracts

It is familiar “law” that one who deals with a municipality is presumed to know of any legal limitations upon the city’s power to contract. Ordinarily, that presumption leaves the disappointed party in whatever position his “invalid” contract has cast him. Both the

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80. Id. at 679, 482 S.E.2d at 237. Plaintiff had developed the subdivision and still owned a lot there. He sought to prevent the city from constructing a sewer line across his lot and permitting the developer of an adjoining subdivision to tap into the sewer line. *Id.*
81. Id. at 681, 482 S.E.2d at 238. Following plaintiff’s express offers of dedication, the municipality accepted a quit-claim deed for the streets but informed the plaintiff that the sewer system did not meet its standards. *Id.*
82. Id. at 682, 482 S.E.2d at 239. The court reviewed the elements of dedication to include an offer, either express or implied, and an acceptance, either express or implied. *Id.*
83. Id. at 681-82, 482 S.E.2d at 238 (emphasis added). The court in this fashion avoided the plaintiff’s argument that the municipality could not impliedly accept the offer of dedication after it had expressly declined the offer. *Id.*
principle and a qualification upon it received service in Walston &
Associates, Inc. v. City of Atlanta. There, plaintiff performed services
for the municipality under an oral agreement with two officials
possessing no authority to bind the city. Without question, the court
of appeals declared, the agreement was invalid (not simply irregular),
the municipality was free to disavow it, and plaintiff was precluded from
breach-of-contract recovery. Nevertheless, the court hedged, with the
record evidencing municipal acceptance of his services, plaintiff could
pursue “a quantum meruit action for the reasonable value to the City,
if any, of the services provided.”

G. Liability

Municipal responsibility constituted the concern of many survey-period
plaintiffs; their claims assumed numerous approaches to hurdling the
bar of sovereign immunity. The most basic approach, illustrated
in Koehler v. City of Atlanta, sought to classify as a “ministerial
function” the maintenance of a darkened city auditorium where plaintiff
had fallen. Rejecting the effort, the court of appeals scored plain-

86. Id. at 482, 480 S.E.2d at 918. The services were of a consultative nature, and it
was clear from the city charter that the two officials possessed no municipal contracting
authority. Id.
87. Id. at 483, 480 S.E.2d at 918. “Since this case does not involve an irregular or
unauthorized method of exercising a granted power, but rather action taken by City
officials who had no authority to do so, the unauthorized nature of the contract precludes
[plaintiffs] from asserting estoppel against the City.” Id. For treatment of the doctrine of
estoppel in the specific context of local government law, see R. Perry Sentell, Jr., THE
DOCTRINE OF ESTOPPEL IN GEORGIA LOCAL GOVERNMENT LAW (1985).
88. 224 Ga. App. at 484, 480 S.E.2d at 919. The court thus affirmed the trial judge’s
grant of summary judgment for the city in breach of contract, but reversed the summary
judgment for the city on the quantum meruit claim. Id.
89. For orientation, perspective, and general chronology on municipal liability
(immunity), see R. Perry Sentell, Jr., THE LAW OF MUNICIPAL TORT LIABILITY IN
GEORGIA (4th ed. 1988); R. Perry Sentell, Jr., Georgia Local Government Tort Liability:
The “Crisis” Conundrum, 2 Ga. St. U. L. Rev. 19 (1985); R. Perry Sentell, Jr., Local
90. See R. Perry Sentell, Jr., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 5-
92. Id. at 534-95, 472 S.E.2d at 91-92. Plaintiff alleged that he had attempted to sit
in the missing seat and alleged both negligence and gross negligence on the part of the
municipality. Id.
93. “Because the sovereign immunity of municipal corporations is waived when they
negligently perform ministerial duties, this case turns on whether operating the Cyclorama
constitutes a governmental function or ministerial duty.” Id. at 535, 472 S.E.2d at 91.
tiff's failure to show "that the Cyclorama was operated primarily as a source of revenue, rather than as a place of public recreation."94

A statutory exception to municipal immunity,96 featured in Rischack v. City of Perry,98 encompasses the negligent maintenance of streets and sidewalks.97 There, plaintiff complained of a fall resulting from a shallow depression in a grassy strip between street and sidewalk.98 Although the municipality owned the strip, the court deemed plaintiff's evidence of negligence to be insufficient.99 No evidence indicated the city's actual knowledge of the defect,100 the court reasoned, and plaintiff failed to show "that the city's knowledge . . . should be inferred."101

Municipal liability for street defects does not extend to the construction or maintenance of the state highway system.102 In Duncan v. City of Macon,103 plaintiff alleged her son's injury at a city intersection, admittedly a part of the state system, due to negligent design and construction.104 Rejecting plaintiff's evidence of a municipal maintenance agreement,105 the court held that agreement exclusive of "any activities related to construction, design, or modifications of a crosswalk and traffic signal for safety purposes."106

94. Id., 472 S.E.2d at 92. "The controlling point is not whether the Cyclorama actually turns a profit, but its function." Id., 472 S.E.2d at 91. The court thus affirmed the trial judge's summary judgment for the municipality. Id.

95. O.C.G.A. § 32-4-93(a) (1996).


98. 223 Ga. App. at 856, 479 S.E.2d at 165. Plaintiff fell while walking from the sidewalk, across the grassy strip, to her car parked on the street. Id., 479 S.E.2d at 164-65. The court described the depression as "a gradual depression that appears to be shallower than six inches [with] grass growing in the depression [giving] it a similar appearance to the surrounding ground covered by short grass." Id., 479 S.E.2d at 165.

99. Id. at 859, 479 S.E.2d at 166.

100. Id. Plaintiff had "presented no evidence that city workers were on the site at any time between December 1992 and [plaintiff's] August 1993 fall." Id.

101. Id., 479 S.E.2d at 166-67. "The evidence in this case is simply too speculative to create a jury issue concerning the age of the depression." Id., 479 S.E.2d at 166. Presiding Judge McMurray dissented.

102. O.C.G.A. § 32-4-93(b) (1996).


104. Id. at 711, 472 S.E.2d at 456.

105. Id. Plaintiff "appears to argue that because the City agreed to maintain the intersection, it was responsible for correcting design and construction deficiencies." Id.

106. Id., 472 S.E.2d at 457. "Because the gravamen of [plaintiff's] claim is based on negligent design and construction of the crosswalk and traffic signal, and [plaintiff] has not shown that the City was under any duty to perform these tasks, the trial court did not err in granting the City's motion on this claim." Id.
Other statutorily anchored responsibility arises from duties imposed upon drivers of emergency vehicles.\textsuperscript{107} Wilson v. City of Atlanta\textsuperscript{108} invoked that responsibility for a claimant struck by a vehicle pursued by a police officer.\textsuperscript{109} Reviewing both statutory and case law, the court extracted the standard of whether the pursuing officer "drove [in] reckless disregard for the safety of the driving public."\textsuperscript{110} The court emphasized evidence that public risk existed prior to the chase,\textsuperscript{111} and that the officer neither closely pursued the suspect nor continued the chase once he determined the public risk was excessive.\textsuperscript{112} This unrefuted evidence revealed no basis for liability.\textsuperscript{113}

A familiar effort at escaping tort immunity focuses upon the municipality's alleged creation and maintenance of a nuisance.\textsuperscript{114} Even nuisance actions, however, must honor applicable statutes of limitation. This lesson devolved from Southfund Partners v. City of Atlanta,\textsuperscript{115} a complaint of airport runway noise and its effect upon plaintiff's property.\textsuperscript{116} Viewing the property damage as complete upon the

\begin{itemize}
\item \textsuperscript{107} O.C.G.A. § 40-6-6(d) (1997).
\item \textsuperscript{108} 223 Ga. App. 144, 476 S.E.2d 892 (1996).
\item \textsuperscript{109} Id. at 144, 476 S.E.2d at 892. Plaintiff was a passenger in the vehicle struck by the vehicle being pursued by the officer. Id.
\item \textsuperscript{110} Id. at 147, 476 S.E.2d at 895. The court closely examined the supreme court's decision in Mixon v. City of Warner Robins, 264 Ga. 385, 444 S.E.2d 761 (1994), as well as the subsequent modification of O.C.G.A. section 40-6-6(d) which occurred after the date of the collision in issue. 223 Ga. App. at 145-46, 476 S.E.2d at 893-96. The court then inquired whether the officer violated "the principle of OCGA section 40-6-6(d), recognized in Mixon, by driving in reckless disregard for the safety of the driving public." Id. at 147, 476 S.E.2d at 895.
\item \textsuperscript{111} 223 Ga. App. at 147, 476 S.E.2d at 895. "[O]nly minutes before the pursuit began, the occupants of the vehicle were involved in violent criminal activity." Id.
\item \textsuperscript{112} Id. The officer was not "right up on the suspect's bumper," as in Mixon, and he resumed a normal speed "when he determined that the risk to the driving public became too great." Id. (citations omitted).
\item \textsuperscript{113} Id. at 148, 476 S.E.2d at 895-96. Plaintiff "presented no evidence refuting [the officer's] testimony," and "summary judgment in [defendant's] favor was appropriately granted." Id. at 147-48, 476 S.E.2d at 895-96.
\item \textsuperscript{115} 221 Ga. App. 666, 472 S.E.2d 499 (1996).
\item \textsuperscript{116} Id. at 666, 472 S.E.2d at 499. Because of the property's proximity to the airport, he could not obtain its rezoning and his contract for the sale of the property became null and void. Id.
\end{itemize}
runway's operational date, the court declared the nuisance a permanent one. As such, it stood capable of full compensation more than four years prior to plaintiff's action, an action consequently barred by the statute of limitation.

The nuisance action enjoyed greater success in Hibbs v. City of Riverdale, a claim for repeated flooding of plaintiffs' homes caused by a defective drainage system. There, the supreme court reversed the court of appeals' position that a claim founded in negligence could not succeed in nuisance: "[W]here a municipality negligently constructs or undertakes to maintain a sewer or drainage system which causes the repeated flooding of property, a continuing, abatable nuisance is established, for which the municipality is liable." The lower court must now determine whether the city controlled or accepted the drainage system "so as to establish a duty... to adequately maintain it."

The nuisance theory also loomed large in a case arising from a homeowner's complaint of methane gas contamination by the city's former landfill. In City of Warner Robins v. Holt, the court of

117. Id. The runway had become operational in December 1984, and plaintiff filed his complaint in 1994. Id.
118. Id. at 667, 472 S.E.2d at 501. The court thus rejected plaintiff's characterization of the nuisance as a continuing one with every continuance a fresh nuisance for which a fresh action will lie. Id.
119. Id. at 669, 472 S.E.2d at 502. Therefore, since the damage complained of became apparent at the time the runways in question began operating, and since [plaintiff] does not show any increase in the nuisance occurring within the four-year period prior to the bringing of its complaint, the nuisance claim is... barred by the applicable four-year statute of limitation. Id. The court reached basically the same conclusion regarding plaintiff's claim in inverse condemnation. Id. at 668, 472 S.E.2d at 501.
120. Id. at 669, 472 S.E.2d at 502. The court thus sustained the trial judge's grant of summary judgment for the city. Id.
122. Id. at 337, 478 S.E.2d at 121-22. Plaintiffs alleged that the city negligently approved a developer's plans and construction of an inadequate storm drainage system and was responsible for the maintenance of the nuisance resulting from it. Id.
124. Hibbs, 267 Ga. at 338, 478 S.E.2d at 122 (emphasis added). The supreme court said that although a sole act of approval cannot create nuisance liability, the negligent maintenance of a system causing repeated flooding can. Id.
125. Id. The supreme court thus reversed summary judgment for the municipality and remanded for the court of appeals' determination on acceptance creating duty. Id.
126. City of Warner Robins v. Holt, 220 Ga. App. 794, 470 S.E.2d 238 (1996). The municipality had closed the landfill in 1977; a residential subdivision was developed adjacent to the site several years later, the Georgia Environmental Protection Division detected methane gas on one of the subdivision lots in 1987, and an engineering firm found
appeals reviewed several aspects of a jury's nuisance award. First, the court rejected the city's characterization of litigation expenses as punitive and thus inappropriate. The court reasoned that punishment is not the purpose of litigation expenses and that municipalities are subject to such awards. Second, the court found sufficient evidence for the jury's award for diminution of fair market value resulting from a permanent nuisance. Given the latter award, however, the court held the jury precluded from also awarding the homeowner lost rental value for an abatable nuisance.

City of Atlanta v. Watson illustrated yet another effort to bypass municipal tort immunity—the "inverse condemnation" exception. Plaintiffs claimed unequal treatment by the city of their apartments near the municipal airport, as contrasted with similarly located single-
family dwellings. Unlike the latter, plaintiffs' properties were excluded from municipal purchase under the city's "Noise Compatibility Program." Reversing the court of appeals, the supreme court declared municipal treatment of multi-family dwellings not violative of plaintiffs' equal protection. Given the limited funds available for the program, the city's classifications were reasonable. They bore "a rational relationship to the legitimate governmental purpose of reducing land use incompatible with airport noise in a sound and responsible fiscal manner, while simultaneously avoiding the virtual elimination of [a neighboring municipality's] residential basis and the resulting negative impact on its business community and infrastructure."

A final possibility for immunity avoidance, the "constitutional tort," surfaced in *Watson v. Mayor of Savannah.* There, plaintiff

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135. 267 Ga. at 185, 475 S.E.2d at 896. Plaintiffs claimed inverse condemnation of their properties based on a violation of equal protection under the Georgia constitution. *Id.*

136. *Id.* at 185-86, 475 S.E.2d at 898. The city's efforts took place under a federal program for airports receiving federal funding, seeking to reduce existing land uses incompatible with airport noise. *Id.* See 49 U.S.C § 47504(b)(1)(B) (1997).

137. *Watson v. City of Atlanta,* 219 Ga. App. 704, 466 S.E.2d 229 (1995). The supreme court viewed the court of appeals to have erred in inquiring only into the city's claim that multi-family residences were more compatible with airport noise than single family residences. Rather, the lower court should have examined "the other justifications supported by the record in defense of the City's classification between single and multi-family residences." 267 Ga. at 188, 475 S.E.2d at 900.

138. 267 Ga. at 187, 475 S.E.2d at 899. The classification not being "suspect," the court held the "rational basis test" appropriate in determining whether the classification "bears a reasonable relationship to a legitimate purpose of government." *Id.*

139. *Id.* at 190, 475 S.E.2d at 901. The city had funds sufficient only to purchase single-family residences, and its decision left open the possibility that other residences might be purchased during a later phase of the program. *Id.*

140. *Id.*

Had the City effectively relocated over 81,000 people from College Park to other communities at once, rather than in stages, there would have been no opportunity for the redevelopment of land formerly occupied by single-family residences with the establishment of businesses that are compatible with airport noise—a stated goal of both the federal noise abatement program and the City's Program. *Id.* at 189, 475 S.E.2d at 900-01. Thus, the court concluded, "the classification drawn by the City between the two types of residences does not violate the constitutional guarantee of equal protection, and we reverse the contrary ruling by the Court of Appeals." *Id.* at 190, 475 S.E.2d at 901.

141. The "constitutional tort" emerges from the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1994), providing a civil action for governmental violations of constitutional protections. For treatment of this statute by both federal and state courts in respect to Georgia local governments, see R. Perry Sentell, Jr., *Georgia Local Government Law's Assimilation of Monell: Section 1983 and the New "Persons"* (1984). For an exclusive focus upon the statute in the Georgia appellate courts, see R. Perry Sentell, Jr.,
pursued the federal remedy for injuries received in an altercation with an off-duty police officer. Emphasizing 42 U.S.C. § 1983 exceptions, the court of appeals provided the claim summary disposition. "[T]here is simply no evidence in the record sufficient to show that [the officer's] off-duty altercation with [plaintiff] was the result of an impermissible or corrupt policy which was intentional and deliberate." On that rationale, the court sustained the municipality's summary judgment.

Municipal liability's "ante litem" notice requirement found confirmation in Goen v. City of Atlanta, an action for damage to plaintiffs' land in expanding the city airport. First, the court refuted plaintiffs' reliance upon a notice provided the city by another property owner for himself and "all other persons similarly situated." That notice did not advise the city "of the claims of these appellants or of the time, place, and extent of injury as required by [the statute]." Second, the court rejected plaintiffs' argument of municipal waiver for failing to assert the notice issue in the pretrial order: "[A]nte litem notice is a condition precedent to filing suit against a city . . . and the failure to give such notice cannot be waived as appellants assert."


143. Id. at 399, 477 S.E.2d at 667. The altercation occurred in a nightclub where plaintiff was a patron and when the police officer was moonlighting as a security guard in a neighboring club. Id.
144. Id. at 402, 477 S.E.2d at 669. I.e., the "respondeat superior" limitation, and, in the context of insufficient training, the reflection of "deliberate indifference to the rights of the inhabitants." Id., 477 S.E.2d at 670.
145. Id. at 402, 477 S.E.2d at 670.
146. Id.
149. Id. at 485, 481 S.E.2d at 244. Plaintiffs alleged that the municipality had trespassed on, and caused damage to, their property while expanding the city airport. Id.
150. Id., 481 S.E.2d at 245. The notice was provided by yet another property owner in the same area. The plaintiffs urged it to constitute substantial compliance with the notice requirement. Id.
151. Id.
152. Id. "Even though the City raised the defense that ante litem notice was not given, no motion to dismiss was filed and the issue was not identified in the pretrial order." Id.
153. Id. at 486, 481 S.E.2d at 246. The court thus affirmed the trial judge's grant of the city's motions for judgment on the pleadings. Id.
H. Zoning

The supreme court's municipal zoning decision of the era was a procedural one. In Mayor of Savannah v. Savannah Cigarette & Amusement Services, Inc., the property owner claimed the city's rezoning of his land to result in inverse condemnation. Delineating between police power and eminent domain, the court viewed the latter to require "a determination that the new zoning ordinance was unconstitutional as applied." Accordingly, "unless it would be futile to do so, a litigant must first petition the local authorities for relief by rezoning before asking a court to find that a zoning ordinance is unconstitutional as applied to the litigant's property." Because plaintiff had failed to show futility, its "collateral attack on the rezoning ... is untimely and ... seeks to circumvent the requirement to exhaust available administrative remedies." The court thus declared plaintiff's action "procedurally barred."

I. Authorities

Although housing authorities do not enjoy governmental immunity, actions against them must meet the basic requirements of tort law. The "duty" requirement proved pivotal in two contests of the period. Scott v. Housing Authority of Glennville featured a tenant's action for injury by a stray bullet from a gun fight arising from a drug transaction in defendant's complex. Holding defendant's duty of protection to rest upon knowledge of prior similar incidents on the premises, the court of appeals probed plaintiff's evidence.

155. Id. at 173, 476 S.E.2d at 581. Plaintiff alleged uncompensated loss of rental income and in the market value of its property as a result of the zoning change. Id.
156. For emphasis upon that distinction, and its ramifications, see R. Perry Sentell, Jr., Local Government Liability Limitations: "Causation" is to Tort as "Police Power* is to Eminent Domain, URBAN GA. MAG. 20 (Jan.-Feb., 1987).
157. 267 Ga. at 174, 476 S.E.2d at 582.
158. Id., 476 S.E.2d at 582-83.
159. Id., 476 S.E.2d at 583.
160. Id. With Justice Carley dissenting without opinion, the court reversed the trial judge's denial of the city's motion to dismiss. Id.
163. Id. at 216, 477 S.E.2d at 325. Plaintiff alleged that she was hit while attempting to secure the safety of her children after the gun fight erupted. Id.
164. Id., 477 S.E.2d at 326. "Without foreseeability that a criminal act will occur, no duty on the part of the proprietor to exercise ordinary care to prevent that act arises." Id.
Rejecting references to domestic shootings and to incidents investigated by police but unknown to defendant, the court concluded that "the incidents of which defendant may have had knowledge were not substantially similar to the gun battle which caused plaintiff's injury." 166

The claimant enjoyed greater success on the duty issue in Housing Authority of Atlanta v. Jefferson, an action for the authority's failure to provide a smoke detector in a house qualified for its rental program. Rejecting defendant's no-duty argument, the court viewed federal regulations to require compliance with a municipal ordinance imposing the responsibility. Holding the housing authority a residence "owner" under the ordinance, the court found a violation of the "statutory duty" to inspect for (and provide) the detector.

II. COUNTIES

A. Officers and Employees

Logically, county tax administration assumes high profile among the most controversial of local government functions. That controversy often
explodes into personnel upheavals which then result in litigation. The supreme court considered such litigation in *Swafford v. Dade County Board of Commissioners*, 174 a challenge by the chair of the board of tax assessors to his removal for cause.175 Preliminarily, the court overruled two prior decisions176 and held appeals from such removals to require compliance with discretionary appeal procedures.177 Substantively, the court rejected the challenger's due process argument: it was immaterial that the body (commissioners) which brought the chair's fitness for office into question was also the body to decide the question.178 Whether or not the commissioners had prejudged the case, they were the legislatively designated body to hear the procedure.179

The court of appeals reviewed a challenge by tax assessors in *Cashin v. Harman*180 to a removal prompted by the assessors' failure to timely file a tax digest.181 Examining the deadline statute,182 the court held it immaterial whether the duty created was mandatory or directory.183 In either event, the assessors' failure to meet the deadline was sufficient to confer removal-for-cause discretion upon the county commissioners.184

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175. Id. at 646, 469 S.E.2d at 666. The removal was effected under O.C.G.A. section 48-5-295. Id.
177. 266 Ga. at 647, 469 S.E.2d at 666. The court reasoned that although county commissioners also function as a legislative body, their removal determination is equivalent to an administrative function, and an appeal requires compliance with discretionary appeal procedures under O.C.G.A. section 5-6-35(a)(1). Id.
178. Id. This was challenger's rationale for a due process attack upon O.C.G.A. section 48-5-295. Id.
179. Id. The court relied upon *Hill v. Johnson*, 214 Ga. 417, 105 S.E.2d 309 (1958). Additionally, the court reviewed the evidence presented and rejected challenger's contention that it was insufficient to warrant his removal. Id.
181. Id. at 302, 477 S.E.2d at 433. The commissioners effected the removal for cause under O.C.G.A. section 48-5-295. Id.
183. 223 Ga. App. at 302-03, 477 S.E.2d at 434. "The duty under [O.C.G.A. section 48-5-302] is such a duty "imposed upon them by law" whether it is a mandatory or merely a directory duty." Id. (quoting Kirton v. Biggers, 135 Ga. App. 416, 418, 218 S.E.2d 113, 116 (1975)).
184. Id. at 303, 477 S.E.2d at 434. "The superior court correctly held that the tax assessors' failure to complete the digest by the statutory deadline did not mandate their removal, but that this breach of duty gave the commission discretion to remove them." Id.
A terminated employee of the tax commissioner's office fared no better in Jones v. Chatham County, a challenge founded both on due process and breach of contract. As to the former, the court held that failure to provide challenger a pre-termination hearing was remedied by an opportunity for a post-termination hearing some five months later. On the breach-of-contract issue, the court rejected challenger's reliance upon provisions of the personnel manual: "[U]nder Georgia law, personnel manuals stating that employees can be terminated only for cause and setting forth termination procedures are not contracts of employment."

In Mayo v. Fulton County, a deputy sheriff unsuccessfully challenged his termination as a result of testing positive for cocaine. The court held the county sheriff to possess both inherent and authorized powers to implement random drug testing. Moreover, the court decided, the sheriff had afforded sufficient prior notice by two

186. Id. at 455, 477 S.E.2d at 889. Plaintiff was charged with unacceptable personal conduct, resigned, but then brought this action alleging that she had been invalidly terminated. Id.
187. Id. at 458, 477 S.E.2d at 892. The court reasoned that the state may cure a procedural due process violation by providing a later procedural remedy; "nor did the five-month delay render the remedy offered by the state constitutionally inadequate." Id.
188. Id. at 459, 477 S.E.2d at 893. Assuming due process requirements are met, the court said, "failure to follow the termination procedures contained in [the personnel manual] is not actionable." Id.

Another removal controversy of the period, Lee v. Gore, 221 Ga. App. 632, 472 S.E.2d 164 (1996), involved only the appropriate periods of limitation. There, a removed county tax appraiser brought claims in libel, slander, conspiracy to libel and slander, and interference with employment, against individuals publishing a petition to dismiss plaintiff. Id. at 632, 472 S.E.2d at 164. The court of appeals held that the first three claims were barred by a one-year period of limitation, but that the claim of interference with employment alleged violation of a property right governed by a four-year limitation period. Id. at 635, 472 S.E.2d at 167-68. For treatment of the popularity of defamation in the local government context, see R. Perry Sentell, Jr., Defamation in Georgia Local Government Law: A Brief History, 16 GA. L. REV. 627 (1982).
190. Id. at 825, 470 S.E.2d at 258.
191. Id., 470 S.E.2d at 259. The court termed the sheriff a constitutional officer with inherent authority to implement public safety policies, including testing of personnel who carry weapons "because drug use by them undermines public confidence in the integrity of the Sheriff's Office and poses a danger to fellow employees, inmates and the public at large." Id.
192. Id. The court held county personnel regulations to authorize the sheriff to implement drug screening as a means of enforcing a provision forbidding employees from being on duty while under the influence of intoxicating drugs. Id.
memos to all county employees that a positive test would mandate dismissal.\textsuperscript{193}

Finally, the court turned a deaf ear in \textit{Jellico v. Effingham County}\textsuperscript{194} to a building inspector's charge of "constructive wrongful termination." The court reviewed plaintiff's allegations that building certificates were being improperly issued beyond his control, and that he resigned for fear of potential liability.\textsuperscript{195} Even so, the court concluded, plaintiff was merely an "at will" employee who could not sue for wrongful discharge.\textsuperscript{196}

\section*{B. Elections}

Electors who receive assistance in voting are required to take an oath describing the reason for assistance.\textsuperscript{197} Violation of that requirement, the supreme court held in \textit{McCranie v. Mullis},\textsuperscript{198} can invalidate the election.\textsuperscript{199} Finding the irregularity to affect a sufficient number of ballots to cast doubt upon the result,\textsuperscript{200} the court voided a primary election for county commissioner and ordered that a new election be held.\textsuperscript{201}

\begin{footnotes}
\textsuperscript{193} Id. at 826, 470 S.E.2d at 260. Plaintiff had admitted during his hearing that he had received the memos; thus, "we conclude that he had adequate notice of the random drug test policy." \textit{Id}. The court affirmed the trial judge in upholding plaintiff's termination. \textit{Id}.\textsuperscript{194} 221 Ga. App. 252, 471 S.E.2d 36 (1996).\textsuperscript{195} Id. at 252, 471 S.E.2d at 36. Plaintiff alleged that his supervisor was issuing the permits and that neither the supervisor nor the county commissioners would rectify the situation. \textit{Id}.\textsuperscript{196} Id. at 253-54, 471 S.E.2d at 38. The court reasoned as follows: "[I]t is undisputed that the legislature has not created a specific public policy exception to OCGA [section] 34-7-1 that would allow plaintiff to recover on his claim of constructive wrongful termination." \textit{Id}. The court rejected plaintiff's plea that it declare a public policy exception to the rule, and affirmed the trial judge's grant of defendant's motion to dismiss. \textit{Id}.\textsuperscript{197} O.C.G.A. § 21-2-409 (1993). The only reasons rendering assistance permissible are inability to read English and physical disability. \textit{Id}.\textsuperscript{198} 267 Ga. 416, 478 S.E.2d 377 (1996).\textsuperscript{199} Id. at 416, 478 S.E.2d at 377. Other irregularities included significant disparities among precincts in the number of assisted voters, the fact that many who signed their voter certificates then marked the oath for assistance with an "X," the fact that one individual alone assisted some 142 voters who cast absentee ballots, and the fact that this individual was married to the secretary of the candidate. \textit{Id}. at 417, 478 S.E.2d at 379.\textsuperscript{200} Id. at 417, 478 S.E.2d at 379. "We agree with the trial court that these irregularities, which affect well over 163 ballots [the agreed upon number sufficient to cast doubt on the election], are sufficient to cast doubt on the result of the election." \textit{Id}.\textsuperscript{201} \textit{Id}. Chief Justice Benham dissented without opinion.
\end{footnotes}
C. Openness

Open meetings and open records provide basic assurances of fairness in the conduct of local government; they lend democratic flavor to the tending of the public’s business.202 Beck v. Crisp County Zoning Board of Appeals203 focused upon the meeting of a county zoning board which granted a conditional use permit for an airstrip. In issue were the board’s actions in holding a “public hearing” on the petition for the permit, announcing that the hearing was “adjourned,” closing the doors of the meeting room, and voting on the permit.204 Under the Open Meetings Act,205 the court of appeals declared, those actions were illegal.206 “The audience had the right to be present for the remainder of the meeting which included the vote and decision on the conditional use permit involved. There was no need or basis to ‘adjourn’ the public hearing. The entire meeting was required to be public.”207 Accordingly, the court invalidated the zoning board’s issuance of the permit.208

D. Property

A local government may use its property in many ways; those uses may well fall subject to different statutory requirements. Swims v. Fulton County209 contested an exchange of property between govern-

204. Id. at 801, 472 S.E.2d at 558. Upon the chair’s announcing that the public hearing was adjourned, the audience left the room before the doors were closed and the vote taken. Id. at 803, 472 S.E.2d at 559.
205. O.C.G.A. §§ 50-14-1 to -6 (1994).
206. 221 Ga. App. at 803, 472 S.E.2d at 560. The court noted O.C.G.A. § 50-14-1(c) (1994): “The public at all times shall be afforded access to meetings declared open to the public pursuant to subsection (b) of this Code section.” In this case, said the court, not only did the Zoning Board chairman unnecessarily announce that the public hearing was adjourned, he was pointedly vague as to the timing of the events which were to follow the “public” hearing. He specifically failed to advise the audience it was entitled to remain for the balance of the agenda, and the doors were closed when the audience left the room. 221 Ga. App. at 803, 472 S.E.2d at 560.
207. 221 Ga. App. at 803, 472 S.E.2d at 560.
208. Id. at 804, 472 S.E.2d at 560. The court relied upon O.C.G.A. section 50-14-1(b): “Any . . . official action of an agency adopted . . . at a meeting which is not open to the public as required by this chapter shall not be binding.” Id. (quoting O.C.G.A. § 50-14-1(b) (1994)).
ments, seeking to set aside the resulting conveyance to the county. The supreme court reviewed the matter by drawing a clear delineation between “the concepts of exchange and disposal.” Only the latter, the court held, was subject to the requirements that the former owner be afforded notice and the right of repurchase. As for the transaction in issue, involving land condemned by the Department of Transportation and then exchanged for land owned by the county, the previous owner possessed no interest in the procedure.

Defendant claimed the county property featured in West v. Fulton County as a result of a tax sale, a sale the county challenged as ineffective to pass title. In looking to the statute governing county sales, the court focused upon the requirement that the sale proceed by “order entered on [the county] minutes.” If, as in this case, no such resolution appeared on the minutes, “the purported conveyance did not pass[] title to the land therein described.” Refusing to find an

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210. Id. at 95, 475 S.E.2d at 598. The Department of Transportation had condemned land for improving a road and then quit-claimed a part of the land to the defendant county for other property then owned by the county. Plaintiff, former owner of the condemned property, claimed the rights of notice and repurchase and thus challenged the validity of the conveyance to the county. Id.

211. Id. at 96, 475 S.E.2d at 598.

212. Id. at 95-96, 475 S.E.2d at 598. Disposals were governed by O.C.G.A. section 32-7-4, the court asserted, and exchanges by O.C.G.A. section 32-3-3(b). Id. Those statutes, the court held, must be viewed in pari materia. Id. For treatment of this inordinately popular approach to statutory interpretation in Georgia, see R. Perry Sentell, Jr., Statutory Interpretation in Georgia: The Doctrine of In Pari Materia (1996).

213. 267 Ga. at 95, 475 S.E.2d at 598. The right to exchange the property “[was completely] unencumbered by any procedural requirements associated with the disposal of property.” Id. The court thus affirmed the trial judge’s grant of the county’s motion for judgment on the pleadings. Id. at 96, 475 S.E.2d at 598.


215. Id. at 456-57, 479 S.E.2d at 722-23. The county had purchased the property with recorded deed, and the county tax commissioner mistakenly purported to sell the property to the defendant for unpaid taxes. Here the county brought the action to determine ownership. Id.

216. Id. at 457, 479 S.E.2d at 722 (citing O.C.G.A. § 36-9-2 (1993)).

217. Id. at 457, 479 S.E.2d at 723 (quoting Head v. Lee, 203 Ga. 191, 201, 45 S.E.2d 666, 673 (1947)). The court analogized to the line of cases invalidating county contracts that are not entered on the minutes as required by a comparable statute, O.C.G.A. section 36-10-1. Id. at 457, 479 S.E.2d at 723. For treatment of the latter statute, and the cases applying it in Georgia county law, see R. Perry Sentell, Jr., County Contracts in Georgia: “Written and Entered,” 32 Mercer L. Rev. 283 (1980).
exception for tax sales, the court declared the conveyance ineffective and the county’s title intact.

E. Liability

County liability emerged as local government law’s most prolific subject of the survey period. In one fashion or another, claimants attributed the majority of their ills to counties and county officers. In Kordares v. Gwinnett County, the attribution appeared in a wrongful death action for county negligence in failing to perform a subsurface inspection of a bridge. Assuming the traditional position, the court of appeals simply adopted the trial judge’s opinion that the county was immune from negligence liability, and that plaintiff had cited no statute specifically waiving that immunity for bridges.

The missing element of “duty” proved fatal to the negligence claim in Washington v. Jefferson County, an action for the death of plaintiff’s son caused by a county arrestee out on bail. The court of appeals condemned plaintiff’s claim for two reasons: first, the county possessed

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218. 267 Ga. at 457, 479 S.E.2d at 723. “Thus, the fact that the purported sale of county-owned property in this case was by tax sale does not operate to negate or otherwise nullify the provisions of O.C.G.A. [section] 36-9-2.” Id.

219. Id. at 458, 479 S.E.2d at 723. Justice Carley dissented on grounds that the general sales statutes “have no application where, as here, the county property was the subject of a tax levy.” Id. (Carley, J., dissenting).


222. Id. at 848, 470 S.E.2d at 479-80. Plaintiffs alleged that the bridge had been constructed with inadequate footings, that the county had failed to perform a subsurface inspection, and that the bridge had partially collapsed killing the decedent. Id.

223. Id., 470 S.E.2d at 479. The court expressly adopted the trial judge’s opinion, set out verbatim, as its own. Id.

224. Id., 470 S.E.2d at 480. Under the 1991 constitutional amendment (GA. CONST. art. I, § II, para. IX), the court asserted, the county was immune unless a statute specifically waived that immunity. Id.

225. Id. at 850, 470 S.E.2d at 481. The court rejected plaintiff’s claim that O.C.G.A. section 32-4-41 constituted a waiver for county bridges; rather, “the Court finds no language in [section] 32-4-41 indicating that a county is liable for defective bridges, and any waiver of sovereign immunity must be explicit.” Id. (citations omitted). The court thus affirmed the trial court’s grant of summary judgment for the county. Id. at 851, 470 S.E.2d at 482.


227. Id. at 81, 470 S.E.2d at 714. Four months after his arrest, while out on bail on charges of assault and terroristic threats, the arrestee fought with plaintiff’s son and shot him. Id., 470 S.E.2d at 715. “The gravamen of plaintiff’s complaint is that [the arrestee] should not have been released from jail because he was too dangerous.” Id.
no control over the bail process;\textsuperscript{228} and second, the county could not be held liable for failing to perform its general "public duty" to provide police protection.\textsuperscript{229} On the latter issue, the court marked the absence of a necessary "special relationship" between the county and the decedent.\textsuperscript{230}

The "public duty" doctrine later experienced extreme turbulence in \textit{Hamilton v. Cannon},\textsuperscript{231} an action for a county deputy sheriff's interruption of a private rescue attempt at a municipal swimming pool.\textsuperscript{232} There, the supreme court responded to a question from the Eleventh Circuit: "Does the 'public duty doctrine' established in \textit{City of Rome} apply outside the police protection context and in the circumstances of this case?"\textsuperscript{233} Conveying a most summary but negative answer, a bare majority of the supreme court restricted its \textit{City of Rome} decision to "the situation in that case."\textsuperscript{234} So restricted, and absent a special relationship, the local government "may not be held liable for its failure to

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\textsuperscript{228} \textit{Id.} at 82, 470 S.E.2d at 715. "A superior court judge, not a sheriff or county, controls the bail procedure for aggravated assault, the offense for which [the arrestee] obtained bond." \textit{Id.}

\textsuperscript{229} \textit{Id.} Plaintiff "had to show that the County . . . had a special relationship with him, apart from that owed to the general public and that this special relationship created a special duty owed to him which the County . . . then breached causing his injury." \textit{Id.}

\textsuperscript{230} \textit{Id.}

A special relationship has three requirements: "(1) an explicit assurance by the [government entity] through promises or actions, that it would act on behalf of the injured party; (2) knowledge on the part of the [government entity] that inaction could lead to harm; and, (3) justifiable and detrimental reliance by the injured party on the [government entity's] affirmative undertaking." \textit{Id.} (quoting \textit{City of Rome v. Jordan}, 263 Ga. 26, 426 S.E.2d 861, 863 (1993)).

\textsuperscript{231} 267 Ga. 655, 482 S.E.2d 370 (1997).

\textsuperscript{232} \textit{Id.} at 655, 482 S.E.2d at 371. Plaintiff alleged that the deputy arrived at the pool in response to an emergency call and interrupted a pool patron in administering CPR to plaintiff's decedent who had collapsed. CPR was later resumed when the city police chief arrived, but decedent was pronounced dead at the hospital. Plaintiff sued in the federal court, asserting both federal and state claims, and named as defendants the county, its sheriff and deputy, the city and its pool manager and lifeguard. The district court granted summary judgment to defendants, based on the public duty doctrine (864 F. Supp. 1332 (1994)); and the Eleventh Circuit certified a question to the Georgia Supreme Court (80 F.3d 1525 (1996)). 267 Ga. at 655, 482 S.E.2d at 370.

\textsuperscript{233} 267 Ga. at 655, 482 S.E.2d at 372 (citing \textit{City of Rome v. Jordan}, 263 Ga. 26, 426 S.E.2d 861 (1993)).

\textsuperscript{234} \textit{Id.} at 656, 482 S.E.2d at 372. The court noted that in \textit{City of Rome v. Jordan}, it had held that a municipality was not liable "to plaintiff, an assault victim, for the failure to respond to an emergency call made by members of the victim's family who had telephoned police when they learned a man they feared posed a threat of harm to the plaintiff's safety was at the plaintiff's home." 267 Ga. at 658, 482 S.E.2d at 372.
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provide police protection based on a general duty to protect the public.\textsuperscript{235} Otherwise, the court proffered, the “public duty” doctrine does not apply “outside the police protection context” and did not preclude plaintiff’s claim for the deputy sheriff’s conduct in Hamilton.\textsuperscript{236}

On occasion, the county may escape liability via basic agency principles. In \textit{Brown v. Jackson},\textsuperscript{237} for example, the court of appeals held that two defendant deputy sheriffs were employees of the sheriff and not the county “at all times relevant to this [wrongful death] case.”\textsuperscript{238} Consequently, the county sheriff, rather than the county itself, “would have been the proper party” for suit under a theory of respondeat superior.\textsuperscript{239}

\textit{Whitley v. Gwinnett County}\textsuperscript{240} involved yet another preliminary issue: the requisite affidavit for a professional malpractice claim.\textsuperscript{241} Specifically, a wrongful death claimant targeted the county’s failure to formally request a traffic control signal for the fatal intersection.\textsuperscript{242} On grounds that the process for obtaining traffic control signals required county engineers to exercise “professional skill and judgment,”\textsuperscript{243} the

\begin{itemize}
  \item \textsuperscript{235} \textit{Id.} The court relied upon its more recent decision in \textit{Department of Transportation v. Brown}, 267 Ga. 6, 471 S.E.2d 849 (1996).
  \item \textsuperscript{236} 267 Ga. at 656, 482 S.E.2d at 372. In a dissenting opinion for three justices, Presiding Justice Fletcher disagreed with the majority’s decision that the public duty doctrine was limited to police protection: “I would hold that the public duty doctrine applies to police and other public employees who provide police services. These services include preserving public order; promoting public health, safety, and morals; and preventing, detecting and punishing crime.” \textit{Id.} at 658, 482 S.E.2d at 374 (Fletcher, J., dissenting). The dissent concluded that “the public duty doctrine applies to claims against the county, but that a special relationship was established between [decedent] and the deputy sheriff under the circumstances of this case.” \textit{Id.} at 664, 482 S.E.2d at 377.
  \item \textsuperscript{237} 221 Ga. App. 200, 470 S.E.2d 786 (1996).
  \item \textsuperscript{238} \textit{Id.} at 201, 470 S.E.2d at 787. Plaintiffs had sued the county and both deputies; the trial judge had granted summary judgment for the deputies on grounds of official immunity, but had refused the county’s motion for summary judgment. \textit{Id.}
  \item \textsuperscript{239} \textit{Id.} The court thus reversed the trial judge’s denial of the county’s motion for summary judgment. \textit{Id.}
  \item \textsuperscript{240} 221 Ga. App. 18, 470 S.E.2d 724 (1996).
  \item \textsuperscript{241} O.C.G.A. section 9-11-9.1 (1993) provides that the affidavit of an expert specifying acts of professional negligence must accompany a malpractice plaintiff’s complaint.
  \item \textsuperscript{242} 221 Ga. App. at 18, 470 S.E.2d at 724. Plaintiff’s decedent had been killed when he proceeded into a county intersection and was struck by a county police officer on routine patrol. Plaintiff argued that her negligent maintenance claim did not amount to a claim of professional malpractice. \textit{Id.}
  \item \textsuperscript{243} \textit{Id.} at 19, 470 S.E.2d at 727 (citations omitted). “The application process required the County DOT’s engineers to prepare a traffic control study justifying the necessity of the traffic control device. These engineers were also required to submit a proposal for the signal’s design to accompany the application.” \textit{Id.}
court held plaintiff's complaint to exceed charges of simple negligence. Accordingly, omission of the affidavit was fatal to the claim.

Several claimants raised the prospect of immunity waiver by statutory authorization of liability insurance. Rawls v. Bulloch County School District featured the statute requiring school boards to purchase insurance covering students injured in school bus accidents. There, a student sought recovery for the school district's alleged failure to protect him from injury by a fellow student. Although the campus attack apparently resulted from an altercation on the school bus several days earlier, the court of appeals held the incident outside the province of the insurance statute and affirmed summary judgment for the school district.

Roberts v. Burke County School District focused upon the district's "comprehensive liability policy" with a coverage exclusion for injury arising from the "use" of a vehicle. Roberts encompassed an action for the death of plaintiffs' child who was struck and killed after walking four-tenths of a mile from the point where the school bus discharged.

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244. Id. "Furthermore, the fact that an expert witness would be required to prove the claim against the County DOT is further proof that [plaintiff's] allegations are not of simple negligence." Id.

245. Id. The court affirmed the trial judge's grant of the county's motion for summary judgment. Id.

246. Id. For perspective, see R. Perry Sentell, Jr., Tort Liability Insurance in Georgia Local Government Law, 24 MERCER L. REV. 651 (1973).


249. 223 Ga. App. at 235, 477 S.E.2d at 384. Plaintiff was attacked by a fellow student with a hammer after arriving at school and while walking toward the school building. Id.

250. Id. At that time, the students had argued and scuffled on the bus, and the attacker had threatened plaintiff. Id.

251. Id., 477 S.E.2d at 385. "No bus was involved in a collision or accident in this case, and OCGA [section] 20-2-1090 says nothing about a waiver of sovereign immunity or the extent of any such waiver." Id.

252. Id. at 235-36, 477 S.E.2d at 385. The court noted that under the 1991 amendment to the Georgia Constitution (art. I, § II, para. IX), county and school district immunity can be waived only by a statute explicitly so providing. Id. at 235, 477 S.E.2d at 385.


254. Id. at 666, 482 S.E.2d at 284. Apparently, there was no argument over the district's authority to obtain this policy, and hence waive its immunity, under the motor vehicle liability insurance statute (O.C.G.A. section 33-24-51 (1996)) empowering local governments to obtain liability insurance for, ironically, the use of its motor vehicles. In fact, the court noted, the district also possessed such a policy, but it was not before the court in this case. Id. at 668-69, 482 S.E.2d at 286.
Reversing the court of appeals, the supreme court held that the child's death "could not be said to have arisen from the 'use' of the school bus within the contemplation of" the policy exclusion.

The court of appeals considered two instances of alleged immunity waiver under the motor vehicle liability insurance statute. Blum-sack v. Bartow County involved a decedent struck by an insured county truck while being test-driven by a mechanic. Because the county's insurance policy expressly excluded coverage for anyone repairing the truck, the county was uninsured for the incident. Accordingly, the court held, the insurance statute had not waived the county's sovereign immunity on behalf of the decedent.

Crider v. Zurich Insurance Co. presented a prison inmate's claim for injury in a fall from a county backhoe. Holding that the motor vehicle insurance statute permitted the county to obtain a general

255. Id. at 666, 482 S.E.2d at 284. The school district permitted the drop-off practice at the request of some parents who wanted their children to arrive home earlier; it required the children to walk along a heavily-traveled road. Id. at 665, 482 S.E.2d at 284.

256. 220 Ga. App. 510, 469 S.E.2d 529 (1996). The supreme court said that the court of appeals "found that the boy's use of the school bus had not ended at the time he was struck even if the school bus was miles away because the boy had not reached a 'place of safety.'" 267 Ga. at 668, 482 S.E.2d at 286.

257. 267 Ga. at 668, 482 S.E.2d at 286. Accordingly, the policy applied and thus waived the district’s immunity. Id. at 667, 482 S.E.2d at 285. Justice Fletcher dissented without opinion.


260. Id. at 392, 477 S.E.2d at 642. The driver was an employee of a transmission shop at which the truck had been repaired. Id.

251. Id. at 394, 477 S.E.2d at 644. "Therefore, the driver of the vehicle would not be an insured under the terms and conditions of [the county's] policy of insurance, and [the county] would not have insurance coverage for this incident." Id.

262. Id. "Thus, since OCGA [section] 33-24-51(b) waives sovereign immunity only to the extent that [the county] has insurance, sovereign immunity has not been waived by [the county] for any claim due to negligence of the driver of the truck under the theories of vicarious liability, imputed liability from ownership, or respondent superior." Id. The court further rejected plaintiff’s argument that the county’s prior modification of the truck, combined with the negligence of the mechanic, operated to waive immunity. Id.

The court reached a similar conclusion in Saylor v. Troup County, 225 Ga. App. 489, 484 S.E.2d 298 (1997), involving a county prison inmate injured while sharpening a swingblade on a vise attached to the bumper of an insured county van. Id. at 489, 484 S.E.2d at 299. Holding no waiver of county immunity to operate, the court observed that "the van itself was only remotely related to the accident," and that plaintiff’s "injury did not 'originate in' or 'flow from' the use of the van as a motor vehicle." Id. at 490, 484 S.E.2d at 299.


264. Id. at 177, 474 S.E.2d at 89. Plaintiff was assigned to a tree trimming detail in the county and fell from the county backhoe operated by a county employee. Id.
liability policy, the court eschewed a "strict interpretation" of the statute's reference to "motor vehicle." Rather, the court reasoned, "general liability policies are purchased primarily to provide coverage for incidents other than those covered under automobile liability policies." Accordingly, the statute permitted the insurance waiver for the backhoe, even though it was not a vehicle "designed for and used primarily on public streets."

Other efforts at avoiding immunity sounded in nuisance, inverse condemnation, and constitutional tort. The nuisance venture drew short shrift from the court of appeals in Kordares v. Gwinnett County, a wrongful death action for a collapsing bridge. A county is liable in nuisance only in the context of inverse condemnation, the court reasoned, not for claims in personal injury or wrongful death.

Butler v. Gwinnett County featured plaintiffs' effort, some two years following condemnation of portions of their property, to claim inverse condemnation of their remaining property. Although conceding that a condemnation award does not preclude recovery for later negligent or improper construction on the condemned property, the court deemed plaintiffs' claims insufficient. Rather, the "claimed damages flow naturally and proximately from the County's decision to

265. Id. at 179, 474 S.E.2d at 92. "The county's waiver of sovereign immunity by the purchase of general liability insurance coverage for the type of incident here involved is clearly authorized under OCGA [section] 33-24-51(a)." Id.

266. Id., 474 S.E.2d at 91-92. "Where, as here, the subject vehicle would not fit the definition of motor vehicle under the automobile liability statutes, as it was not designed for and used primarily on public streets, coverage may be available under the general liability policy . . . ." Id.

267. Id., 474 S.E.2d at 92. Indeed, the court noted, the general liability policy in issue "specifically provides coverage applicable to the present case, for the use of mobile equipment." Id.

268. Id., 474 S.E.2d at 91. The court thus reversed the trial judge's grant of summary judgment for the county. Id. at 180, 474 S.E.2d at 92.


270. Id. at 848, 470 S.E.2d at 479-80.

271. Id., 470 S.E.2d at 479. The court affirmed the trial judge's grant of summary judgment for the county. Id. at 852, 470 S.E.2d at 482. For perspective on both municipal and county nuisances, and the historic distinction between them, see R. Perry Sentell, Jr., Municipal Liability in Georgia: The "Nuisance" Nuisance, 12 GA. ST. B.J. 11 (1975); R. Perry Sentell, Jr., Georgia County Liability: Nuisance or Not?, 43 MERCER L. REV. 1 (1991).


273. Id. at 703, 479 S.E.2d at 12.

274. Id. at 704, 479 S.E.2d at 13. Plaintiffs "point to no authority equating such design complaints with the type of negligent construction authorizing an additional award of damages after a condemnation proceeding." Id.
condemn this property and devote it to building and operating a highway access lane.\[275\] Those damages were recoverable in the original eminent domain proceedings, the court held, and did not constitute inverse condemnation.\[276\]

The constitutional tort claim surfaced in Washington v. Jefferson County,\[277\] a 42 U.S.C. § 1983 action for the death of plaintiff's son killed by a county arrestee out on bail.\[278\] Absent a special relationship, the court concluded, the county had no duty "to protect [plaintiff's son] any more than any other member of the general public."\[279\] Absent the duty, plaintiff "failed to show a nexus between [her son's] injury and any state action."\[280\]

The liability litigated in Cherokee County v. North Cobb Surgical Associates\[281\] concerned charges for medical services rendered by plaintiffs to a suspect shot by a deputy sheriff.\[282\] Viewing county responsibility for those charges to turn upon whether the suspect was an "inmate" in the county's "physical custody," the court reviewed the evidence.\[283\] Finding sufficient "custody," the court emphasized that one deputy shot the suspect, another placed him in restraints, and a county vehicle transported him to the hospital.\[284\] As for "inmate"
status, the court reasoned that but for his injury, the suspect would have been placed in county detention. That circumstance constituted the suspect an inmate, "even though he was not actually detained in the detention facility." These conclusions led the court to sustain the trial judge's grant of summary judgment for the medical provider.

Claimants frequently sought recovery from individual county officers and employees themselves, prompting defendants' countering assertions of "official immunity." Deriving from the 1991 constitutional amendment, official immunity turns upon whether the offending conduct is deemed "ministerial" (liability for negligence) or "discretionary" (liability only for willfulness). During the survey period, the court of appeals designated as "discretionary" (hence immunity) several alleged offenses on the part of county school personnel. This was the result in Hemak v. Houston County School District for failures by a school principal and teacher to check repairs to a drainage grate; in Kelly v. Lewis for failures by a principal and teacher to properly supervise and secure students; and in Perkins v. Morgan

285. Id. at 499-500, 471 S.E.2d at 564.
286. Id. at 500, 471 S.E.2d at 564.
290. An act calling for the exercise of "personal deliberation and judgment" and manifested in actions "not specifically directed." Id. at 96, 395 S.E.2d at 276 (citations omitted).
292. Id. at 110-11, 469 S.E.2d at 679-80. Plaintiff fell into the defective grate while attending a school concert; the grate had previously been repaired but later failed again; and plaintiff charged defendants with negligently failing to inspect. Id. The court concluded that the "follow-up or review of repairs made by a maintenance department, involving as it does the evaluation of the quality of those repairs, is the essence of a discretionary function." Id. at 113, 469 S.E.2d at 682. The court thus deemed official immunity to apply. Id.
294. Id. at 506, 471 S.E.2d at 583-85. Plaintiff's decedent was shot by a gang on the way to school and plaintiff charged defendants with failing to provide adequate supervision and security for arriving students. Id. The court rejected plaintiff's effort to distinguish
County School District for improper early dismissals of students by members of a school board, superintendent, and secretary.
The court employed the same exercise in reviewing charges against county law enforcement personnel. In Morgan v. Barnes, the court rejected an action against a deputy sheriff who collided with plaintiff while pursuing a suspected stolen car. The pursuit decision, the court held, "called for the exercise of personal deliberation and judgment and was therefore discretionary." Although arriving at the same classification in Johnson v. Gonzalez, the court reserved judgment on a further issue. There, an officer responded to an "urgent" call, passed plaintiff's car on the left, and struck the car as plaintiff attempted to make a left turn. Declaring the officer's response a "discretionary" act, the court nevertheless insisted that a jury consider the issue of the officer's "reckless disregard."
Strickland v. Vaughn arose from plaintiff's being struck by an habitual violator whose impounded car the defendant sheriff had released to the violator's friend. Emphasizing that the car undeniably belonged to the violator, the court could not conceive that the sheriff "had a duty to retain indefinitely the property of another without statutory authority to do so." That "position," the court asserted, "is without support in Georgia law."

Plaintiff's cause likewise foundered in Booth v. Firemen's Insurance Co., a complaint that a sheriff violated his official bond by referring to plaintiff with racial slurs. The court observed that the sheriff's conversation was with another officer, that the sheriff had no official business with plaintiff, and exercised no authority toward him. Consequently, the slurs were not "the type of 'official act' performed under color of office that would permit recovery on [the sheriff's] bond."

Finally, the arresting deputy sheriff in Gardner v. Rogers unsuccessfully claimed qualified immunity to a 42 U.S.C. § 1983 complaint for excessive force. Reviewing evidence of plaintiff's cooperation with

306. Id. at 636, 472 S.E.2d at 160. Plaintiff sought to hold the sheriff responsible for the violator's reclaiming his car upon being released from jail and, some twenty-seven days later, colliding with plaintiff's car resulting in the death of plaintiff's small child. Id.
307. Id. The sheriff had released the car to a city police officer who agreed to hold it for the violator while in jail and who then permitted the released violator to reclaim the car. Id.
308. Id. at 639, 472 S.E.2d at 162. The court noted that O.C.G.A. section 40-6-391.2 was not in effect at the time of these events. Id.
309. Id. The court thus affirmed the trial judge's grant of summary judgment in favor of the sheriff. Id., 472 S.E.2d at 163.
311. Id. at 244, 477 S.E.2d at 377. Plaintiff became involved in a traffic altercation with another driver, that officer then conversed with the offending deputy who—during the conversation—referred to the plaintiff in racially offensive language. Id.
312. Id. at 246, 477 S.E.2d at 379. Affirming the trial judge's grant of summary judgment for defendant, the court asserted that "a suit on a deputy's bond is an action in contract for the tortious acts of the deputy in the performance of his official duties . . . and recovery is available only for those acts of the deputy that are performed by virtue of or under color of his office." Id., 477 S.E.2d at 378. For treatment of the official bond liability of Georgia local government officers, see R. Perry Sentell, Jr., Georgia Local Government Officers: Rights for their Wrongs, 13 GA. L. REV. 747 (1979).
The court viewed it “apparent to any reasonable officer in [defendant’s] position that force was not authorized and that [defendant’s] use of force against plaintiff was excessive and illegal.” Defendant’s plea of qualified immunity thus failed the requisite test of “objective reasonableness,” and the court reversed summary judgment for the deputy.

F. Zoning

The genesis issue of local government zoning involves its basic applicability to the proposed land use. Macon-Bibb County Planning & Zoning Commission v. Bibb County School District presented that issue. There, the school district proposed a football stadium at a location where stadiums were prohibited by county zoning regulations. The court of appeals, treating the matter to summary disposition, simply affirmed the trial judge’s decision that governmental entities possess immunity from local zoning regulations.

The issue in DeKalb County v. Dobson proved far more troublesome. There, the county sought reversal of the trial judge’s decision that an existing zoning classification was unconstitutional as applied to two

315. 224 Ga. App. at 168, 480 S.E.2d at 220. Evidence indicated that plaintiff responded to all defendant’s questions, and inquired as to whether she was under arrest before attempting to close the door to defendant. Id.

316. Id.

317. Id. at 167, 480 S.E.2d at 220. “While it is true that police officers performing discretionary functions are generally entitled to qualified immunity shielding them from personal liability under 42 U.S.C. § 1983, such immunity exists only ‘insofar as [the officer’s] conduct does not violate “clearly established” statutory or constitutional rights of which a reasonable person would have known.’” Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 801 (1982))

318. Id. at 169, 480 S.E.2d at 221. The court affirmed summary judgment for the sheriff, finding no evidence of “a direct order from him” or that the arrest was effected “in accordance with an intentional custom or policy instituted by [him].” Id.


320. Id. at 264, 474 S.E.2d at 70-71. The zoning commission had denied the school district’s application for a conditional use permit for construction of the stadium on grounds that the plans did not provide the minimum number of off-street parking spaces required by zoning regulations. The school district then sought injunctive relief, claiming exemption from the zoning regulations. Id.

321. Id. at 264-65, 474 S.E.2d at 71-72. The court noted the available “tests” for determining zoning immunities, as well as the supreme court’s past rejections of those tests. Id. For treatment of the issue, see R. Perry Sentell, Jr., Local Government Exposure to Local Government Zoning, 25 Ga. St. B.J. 180 (1989).

322. 222 Ga. App. at 266, 474 S.E.2d at 72. The court thus affirmed the trial judge’s grant of the school district’s requests for relief.

adjacent parcels of land. A bare majority of the supreme court, upon its review of the evidence, deemed the trial court's decision "clearly erroneous." That decision, the court determined, rested upon evidence that rezoning would insure greater profits to the landowners and would facilitate the property's development. Neither of those points sufficiently showed "by clear and convincing evidence" that the existing zoning burdened the owners with "a significant detriment.

Far more localized in scope, Bo Fancy Productions, Inc. v. Rabun County Board of Commissioners compared a specific zoning ordinance and a particular land use. Initially, the court held that an "agricultural" zone permitted a proposed three-day commercial entertain-

324. Id. at 624-25, 482 S.E.2d at 240-41. The landowners sought to have their land rezoned from a more restrictive to a less restrictive "residential" classification, and the county rejected their efforts. The landowners then appealed to the superior court, contending that the more restrictive classification was unconstitutional as applied to their properties. Id. For background on the litigation-prone posture of local government zoning during the past thirty years (it has constituted the second most litigated issue in Georgia local government law), and a brief description of the contending issues, see R. Perry Sentell, Jr., Georgia Local Government Law: A Reflection on Thirty Surveys, 46 MERCER L. REV. 1, 16-19 (1994).

325. 267 Ga. at 626, 482 S.E.2d at 241. The court agreed that zoning ordinances are "presumptively valid," that the standard of review is the "clearly erroneous" test, and that the presumption of constitutionality can be overcome only by the landowner's showing "by clear and convincing evidence that the zoning classification is a significant detriment to him, and is insubstantially related to the public health, safety, morality, and welfare." Id.

326. Id., 482 S.E.2d at 242. The court asserted that a landowner cannot satisfy his burden by showing that the land could be put to a more profitable use if rezoned; rather, "in cases such as this one, the only relevant evidence regarding the value of the subject property is its value as it currently is zoned." Id.

327. Id. at 627, 482 S.E.2d at 242. Reversing the trial judge, the court said "there was no evidence before the trial court that would justify its ruling that the R-85 zoning classification was unconstitutional as applied." Id. In a dissenting opinion for himself and two other justices, Justice Carley contended that the majority's approach was internally inconsistent:

Rather than properly affirming the judgment on the basis that the trial court's findings are not clearly erroneous, the majority, while purporting to apply the correct standard of review and not to deviate from or expand on precedent, does indeed deviate from this court's precedent by incorrectly reweighing the facts for itself in order to support its conclusion that the Landowners failed to present clear and convincing evidence of invalidity.

Id. at 630, 482 S.E.2d at 244 (Carley, J., dissenting).


329. Id. at 341-42, 478 S.E.2d at 373-74. The county sought to enjoin the holding of a commercial entertainment event, alleging that the event would violate the county zoning ordinance covering the land where the event was to be held. The event itself was to be held on land zoned "agricultural," and parking for the event was to be located on adjoining land zoned "residential." Id.
Contrarily, the court delineated, land zoned "residential" could not serve as a parking lot for vehicles of those attending the event. The court derived its conclusions from the fact that the "zoning ordinance specifically provides that those uses authorized for property zoned 'residential' shall not be employed for 'commercial purposes,' but does not specifically prohibit those uses authorized for property zoned 'agricultural' from being so employed.  

III. LEGISLATION

Space limitations confine treatment of legislation to mere mention of a few major measures enacted by the 1997 General Assembly.

No enactment carries greater long-term implications for local governments than the statute providing for a "Service Delivery Strategy." Intended to address service duplications and land use conflicts between local governments, the extensive enactment requires county-municipal agreement upon a service delivery plan by 1999. The plan will designate the government to provide specified services, mesh local government land use plans, and minimize county-city

330. Id. at 343, 478 S.E.2d at 375. "It follows that the trial court erred in concluding that the rally could not be held on 'agricultural' property simply because it was a 'commercial' endeavor." Id.

331. Id. at 344, 478 S.E.2d at 375. "It follows that operating on 'residential' property a parking lot for the vehicles of those attending the commercial rally on the adjoining 'agricultural' property would violate the ordinance and the trial court was correct in so holding." Id.

332. Id. at 342, 478 S.E.2d at 374. Said the court: "Had the intent been to prohibit the employment for 'commercial purposes' of the uses authorized for property zoned 'agricultural,' as well as for property zoned 'residential,' the ordinance presumably would have so provided." Id.

An additional issue in the case, not specifically local-government in nature, went to the constitutionality of Georgia's Mass Gatherings Act (O.C.G.A. §§ 31-27-1 to -12 (1996)). Because the Act required that a permit be obtained from the State Department of Human Resources, but did not specify when, or even if, the Department must act upon the application, the supreme court held the statute constitutionally impermissible. Id. at 345, 478 S.E.2d at 376. "A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." Id. (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 226 (1990)).


334. Id. All local governments within a county must participate in developing the plan; it must then be approved by each city with a population of more than nine thousand, by each city serving as a county seat, and by at least fifty percent of the remaining municipalities with at least five hundred persons. The plan must be completed by July 1, 1999. Id.
disputes resulting from municipal annexations. Cities will be limited in providing extraterritorial services and in charging higher water-sewer rates in unincorporated areas; counties must eliminate double taxation. Compliance incentives prohibit state financial assistance to local governments without an agreement in place by 1999.

Likewise aspiring to uniformity, a newly enacted statute requires the Department of Community Affairs to prepare, and local governments to use, “uniform charts of accounts.” Concurrently, the measure requires, the Department must publish an annual “community indicators report” for local governments making annual expenditures of $250,000.

A major measure aimed at economic revitalization empowers municipalities and counties to create “enterprise zones” in which the government may offer property tax exemptions and abatements to qualified businesses, as well as reductions of occupational taxes and regulatory fees. Yet another economically-driven statute confirms the authority of local governments to participate in federal and state programs of job training. The government may also be held liable for local grantees who misspend program funds.

Among general government authorizations, counties may now store court records anywhere within the state, and other county documents within one hundred miles of the courthouse, in data storage and

335. Id. The county must file the finished plan with the Georgia Department of Community Affairs, and it must be reviewed and revised over time. Id.
336. Id. Provision of such services must be agreed upon and consistent with the county’s zoning ordinances. Id.
337. Id. Counties are provided standing for challenging the reasonableness of municipal unincorporated water rates. Id.
338. Id. Counties must finance their services to unincorporated residents primarily from revenues derived from unincorporated residents and property. Id.
339. Id. Both the local government and the proposed program must be included in the plan in order to receive state financial assistance on or after July 1, 1999. Id.
341. Id. The report will treat the local government’s services and administration. Id.
342. Ga. H.R. Bill 663, Reg. Sess. (1997) (codified at O.C.G.A. §§ 36-88-1, to -10). The statute provides a table of ad valorem tax exceptions, and specifies that the exemptions may not exceed ten percent of the value of the local government’s tax digest. The life span of an enterprise zone is capped at ten years. Id.
344. Id.
retrieval facilities. Counties must pay retrieval costs for the records and may specify by contract retrieval times for delivery.

Of newly enacted regulatory measures, some are permissive and some are mandatory. Illustrative of the former, local governments are authorized to restrict the location of “explicit media outlets” to commercial or industrial areas, and no such outlet or adult movie theater can be located within one thousand feet of schools, places of worship, or residential areas. Illustrative of the mandatory, local governments are prohibited from authorizing the location of new package liquor retailers within five hundred yards of existing retailers.

In an assortment of measures, the legislature imposed various limitations or restrictions upon local governments. As for municipalities, they may not locate solid waste disposal facilities within one-half mile of the city-county boundary without approval from the county. A municipality desiring to annex land must establish a process for resolving land use classification disputes with an objecting county. Additionally, the General Assembly expressly secured its own power to annex or de-annex by local statutes. That power, the new measure mandates, is unimpaired by alternative methods of municipal annexation or de-annexation. As for counties, they are required to consult with their municipalities on municipal projects for inclusion on ballots for special local option sales tax referenda.

Several newly enacted statutes dealt with matters peculiar to legislative interests of local governments. Seeking to encourage county codification, one measure provides that fees collected to support county law libraries may be used to pay the costs of establishing or maintaining a program for the codification of county ordinances. As for state

346. Id. Records must be retrieved within a reasonable time. Id.
352. Id.
354. Ga. H.R. Bill 54, Reg. Sess. (1997) (codified at O.C.G.A. §§ 36-15-1, -7, -9, 36-32-10.2). These fees are collected on cases filed in courts of record. The county governing authority, with the consent of the chairperson of the board of law library trustees, makes the request for application of the fees to the program of codification. Id. For treatment of
enactments, population statutes attracted additional restrictions. Population statutes may not be used to set salaries of local government officers and employees nor to affect the property, affairs, or operation of a local governing authority (including municipal annexation, de-annexation, incorporation, or dissolution). Local statutes likewise received additional attention. A new enactment specifies the types of local statutes the effective dates of which are delayed until January 1 of the year following enactment. Further, the enactment limits the types of local legislation which must be directly noticed to the affected city or county. These include local bills amending city charters or county enabling acts; excepted, however, are local bills requested by the county or city.

IV. CONCLUSION

If "remarkable" sets the standard, then local government law assuredly claims status as the standard bearer. Its challenge for the future will focus upon obtaining safe passage, free from the snares of analytical trolls, across the heralded "bridge to the twenty-first century." Whether propelled by the toss of the coin or otherwise, that should prove remarkable too.

355. Ga. H.R. Bill 98, Reg. Sess. (1997) (codified at O.C.G.A. § 28-1-15). The statute expressly excepts statewide minimum salary bills even though based on population. The statute further provides that existing population statutes can be amended only to maintain their applicability to the governments for which they were originally intended, as the populations of those localities may change. Id.

356. Ga. H.R. Bill 188, Reg. Sess. (1997) (codified at O.C.G.A. §§ 1-3-4.1, 28-1-14). Included are bills requiring the local government to create new personnel positions; requiring increases in salaries, benefits, or compensation; and requiring capital expenditures. Id.

357. Id. The statute also expands the time for providing the required notice. Id.

358. Id.