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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 overflowing, 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."¹

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

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1. An account from R. PERRY SENTELL, JR., LOCAL GOVERNMENT LAW: LITE 41 (1997).

2. For a general "profile" of Georgia local government law, those who practice it and the practice itself, see R. PERRY SENTELL, JR., A PROFILE: THE PEOPLE AND THE PRACTICE OF GEORGIA LOCAL GOVERNMENT LAW (1996), a volume jointly published by the Georgia Municipal Association and the Association County Commissioners of Georgia, Atlanta.

3. See generally R. Perry Sentell, Jr., *The Law of Municipal Annexation in Georgia: Evolution of a Concept?*, 2 GA. L. REV. 35 (1967); R. Perry Sentell, Jr., *Municipal Annexation in Georgia: Nay-Sayers Beware*, 5 GA. L. REV. 499 (1971).

latter method includes three systems,⁴ each of which expressly limits the municipal annexation power to "contiguous" territory.⁵ Whether annexation by local statute is likewise limited was, prior to this survey period, an unresolved issue.⁶

The Georgia Supreme Court finally provided the answer in *City of Fort Oglethorpe v. Boger*,⁷ a challenge to a local statute annexing land "not adjacent or contiguous to an existing municipal boundary."⁸ Reversing the trial judge, the supreme court declared the legislature's annexation power both "plenary," and "limited only by the federal and state constitutions."⁹ Accordingly, the court held the non-contiguous property validly within the municipality.¹⁰

4. O.C.G.A. §§ 36-36-1 to -22 ("100% method"); O.C.G.A. §§ 36-36-30 to -40 ("60% method"); O.C.G.A. §§ 36-36-50 to -61 (1993 & Supp. 1997) ("resolution of intent" method).

5. See discussion in R. Perry Sentell, Jr., *Municipal Annexation in Georgia: The Contiguity Conundrum*, 9 GA. L. REV. 167 (1974).

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).

7. 267 Ga. 485, 480 S.E.2d 186 (1997).

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 (concurring 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,¹¹ the action featured in *Hornsby v. Campbell*.¹² The contest turned upon whether the appointment-retention office of city solicitor¹³ constituted an "elective" position which the holder automatically vacated upon qualifying as a candidate for county district attorney.¹⁴ 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.¹⁵

Equally extraordinary, the writ of mandamus constituted the disgruntled employee's remedy of choice in *Byrd v. City of Atlanta*.¹⁶ That employee, whose dismissal had been modified to suspension, sought an order for the award of back pay.¹⁷ On grounds that petitioner could have challenged the board's omission of back pay by writ of certiorari,

11. For perspective upon this historic writ and its concrete context in Georgia local government, see R. PERRY SENTELL, JR., *THE WRIT OF QUO WARRANTO IN GEORGIA LOCAL GOVERNMENT LAW* (1986).

12. 267 Ga. 511, 480 S.E.2d 189 (1997).

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, § II, 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.*

16. 266 Ga. 800, 471 S.E.2d 852 (1996). For the history and applicability of the writ of mandamus in the concrete context of local government, see R. PERRY SENTELL, JR., *MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW* (1989). As its title would indicate, the monograph emphasizes the inordinately inappropriate and excessive appeal to the writ as a means of righting perceived wrongs in the local government context.

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,"¹⁸ the supreme court held mandamus unavailable.¹⁹

To complete the high intrigue cycle, *City of Buchanan v. Pope*²⁰ encompassed an official's plea of municipal estoppel.²¹ 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."²² 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.²³ 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."²⁴ "[T]here can be no [municipal] estoppel," the court explained to the chief, "where the act is ultra vires."²⁵

Yet another police officer's dismissal yielded the contest in *City of Atlanta v. Houston*.²⁶ 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.²⁷ Specifically, the judge ordered

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.*

20. 222 Ga. App. 716, 476 S.E.2d 53 (1996).

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.

26. 221 Ga. App. 61, 471 S.E.2d 12 (1996).

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.²⁸ 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."²⁹

Few aspects of municipal employment attract more litigation than workers' compensation.³⁰ In *Autry v. Mayor of Savannah*,³¹ the court of appeals reviewed an assessment of attorney fees for the municipality's refusal to pay for an injured employee's physical therapy.³² Emphasizing the standard as one of "reasonable grounds,"³³ the court noted evidence that the prescribed therapy was unlikely to effect a cure or give relief.³⁴ Accordingly, "the finding of the board that the City's defense was made without reasonable grounds is without evidence to support it."³⁵

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).

31. 222 Ga. App. 691, 475 S.E.2d 702 (1996).

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*,³⁶ the attack went to ballot preparation.³⁷ In response, the supreme court held that the challenger possessed no statutory right to have his nickname placed on the ballot.³⁸ Such matters, the court asserted, "are best left to the discretion of the General Assembly."³⁹ Additionally, the court refused to void the election for the superintendent's failure to prepare a sample ballot.⁴⁰ That "irregularity," the court held, was insufficient "to change or place in doubt the result of the election."⁴¹

The second contest, *City of East Point v. League of Women Voters*,⁴² 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.⁴³ 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.⁴⁴

§ 34-9-11 (1992)). 223 Ga. App. at 822, 479 S.E.2d at 174. Thus, the court concluded, "the employer 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.

36. 267 Ga. 243, 477 S.E.2d 119 (1996).

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 OCGA [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

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 *Sexton v. City of Jonesboro*⁴⁷ to invalidate a municipal "occupation tax" on practicing law.⁴⁸ 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."⁴⁹ Additionally, the measure imposed punishment not upon delinquency of payment, but upon the delinquent's attempt to conduct business.⁵⁰ 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."⁵¹

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. *Id.*

Dealing with recall rather than election, *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." *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., *Remembering Recall in Local Government Law*, 10 GA. L. REV. 883 (1976); R. Perry Sentell, Jr., *Defamation in Georgia Local Government Law: A Brief History*, 16 GA. L. REV. 627 (1982).

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

47. 267 Ga. 571, 481 S.E.2d 818 (1997).

48. *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. *Id.*

49. *Id.* at 572, 481 S.E.2d at 820.

50. *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." *Id.*

51. *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." *Id.*

Frequently, regulatory litigation pivots on procedural points. In *Soerries v. City of Columbus*,⁵² the court of appeals rejected a challenge to the municipal revocation of an alcoholic beverage license.⁵³ 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."⁵⁴ In contrast, in *City of Albany v. Oxford Solid Waste Landfill, Inc.*,⁵⁵ the supreme court rejected the procedural argument.⁵⁶ There the court approved a mandamus ordering issuance of a land disturbance permit.⁵⁷ 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."⁵⁸

Substantively, municipal regulation continued its focus of recent years upon adult entertainment establishments.⁵⁹ *Secret Desires Lingerie, Inc. v. City of Atlanta*⁶⁰ featured an ordinance purporting to regulate

52. 222 Ga. App. 745, 476 S.E.2d 64 (1996).

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.*

55. 267 Ga. 283, 476 S.E.2d 729 (1996).

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.*

In yet another case of the period, *Cheshire Bridge Enters., Inc. v. State*, 221 Ga. App. 426, 472 S.E.2d 6 (1996), the court of appeals held that general statutes (O.C.G.A. section 3-3-20(a)) prohibiting liquor sales on Sunday are applicable to private clubs, and that any municipal code exceptions to the prohibition would be invalid. *Id.* at 427, 472 S.E.2d at 7.

59. For the previous year's focus upon such establishments, see R. Perry Sentell, Jr., *Local Government Law*, 48 MERCER L. REV. 421, 428 (1996). For the treatment of the substantive municipal regulatory power in an assortment of contexts, see R. Perry Sentell, Jr., *Discretion in Georgia Local Government Law*, 8 GA. L. REV. 614 (1974); R. Perry Sentell, Jr., *Reasoning by Riddle: The Power to Prohibit in Georgia Local Government Law*, 9 GA. L. REV. 115 (1974); R. Perry Sentell, Jr., *Local Government Law and Liquor Licensing: A Sobering Vignette*, 15 GA. L. REV. 1039 (1981); R. Perry Sentell, Jr., "Ascertainable Standards" v. "Unbridled Discretion" in *Local Government Regulation*, GA. COUNTY GOV. MAG. (Dec. 1989).

60. 266 Ga. 760, 470 S.E.2d 879 (1996).

lingerie modeling studios.⁶¹ Assuming the ordinance's impetus to be pernicious secondary effects of such studios, the supreme court sought municipal evidence of those effects.⁶² 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."⁶³ Accordingly, the court declared the measure unconstitutional.⁶⁴

The municipality enjoyed more success in *Goldrush II v. City of Marietta*,⁶⁵ defending its 1995 ordinance prohibiting any one establishment from obtaining both a liquor license and an adult entertainment license.⁶⁶ 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.⁶⁷ Then focusing upon the ordinance itself,⁶⁸ the court reviewed preamble statements,⁶⁹ meeting tran-

61. *Id.* at 760, 470 S.E.2d at 879.

62. *Id.*, 470 S.E.2d at 880. "When a governing body enacts an ordinance regulating adult entertainment establishments because of their purported undesirable secondary effects, it must rely upon specific evidence showing a correlation between such establishments and the undesirable secondary effects the governing body seeks to control." *Id.* at 760-61, 470 S.E.2d at 880.

63. *Id.* at 761, 470 S.E.2d at 880 (emphasis added). The court said that at trial the city introduced testimony of three vice squad officers that there was a correlation between lingerie studios and prostitution, but "[t]here is not a scintilla of evidence demonstrating that the police officers (or their superiors) alerted the city council to the problems they uncovered." *Id.*

64. *Id.* Presiding Justice Fletcher, joined by Justice Hunstein, dissented, on grounds that the trial judge found municipal knowledge of secondary effects at the time of the ordinance's enactment. That finding, Justice Fletcher maintained, was not clearly erroneous and the ordinance did not violate free speech. 266 Ga. at 762, 470 S.E.2d at 880 (Fletcher, J., dissenting).

65. 267 Ga. 683, 482 S.E.2d 347 (1997).

66. *Id.* at 683, 482 S.E.2d at 347. "In effect, the amended adult entertainment ordinance banned alcohol in adult entertainment establishments by requiring an applicant to choose between obtaining a liquor license or obtaining a license to provide adult entertainment." *Id.*, 482 S.E.2d at 350.

67. *Id.* at 685, 482 S.E.2d at 352 (citing GA. CONST. art. III, § VI, para. VII). Rejecting the challenge of overbreadth, the court reasoned that the amendment was not self-executing, and that "while the wording of the constitutional amendment authorizes enactment of local legislation that would be condemned as overbroad, it is the language of the enacted local legislation, not the constitutional amendment, which must be examined for overbreadth." *Id.*

68. 267 Ga. at 687, 482 S.E.2d at 353. The court held that the ordinance must be analyzed under the tests of the First Amendment, not the Twenty-First Amendment nor the 1994 amendment to the Georgia Constitution. *Id.*

scripts,⁷⁰ and executed affidavits.⁷¹ The court deemed this evidence sufficient to confirm the city's "predominate goal of combatting pernicious secondary effects,"⁷² and to establish the ordinance as "content-neutral."⁷³ Proceeding to its familiar "tripartite test" for restrictions upon expression,⁷⁴ the court held the ordinance to "pass constitutional muster" as "a proper exercise of the city's police power."⁷⁵ Finally, the court considered previous license holders' claims to vested property rights. Although challengers held vested rights in licenses annually issued them,⁷⁶ the court delineated, they possessed no "legitimate claim of entitlement to continued reissuance of their annual licenses,"⁷⁷ and thus no "protectable property interest in their renewal."⁷⁸

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*⁷⁹ 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.⁸⁰ 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.⁸¹ 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.⁸² 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."⁸³

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.⁸⁴ Both the

79. 267 Ga. 679, 482 S.E.2d 237 (1997).

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.*

84. For background on the general principle, and its operation in the area of "binding contracts," see R. Perry Sentell, Jr., *Local Government and Contracts That Bind*, 3 GA. L. REV. 546 (1969); R. Perry Sentell, Jr., *Binding Contracts in Local Government Law: Recent Perspectives*, 11 GA. ST. B.J. 148 (1975); R. Perry Sentell, Jr., *Binding Contracts in Georgia Local Government Law: Configurations of Codification*, 24 GA. L. REV. 95 (1989); R. Perry Sentell, Jr., *Binding Contracts in County Government—Never Mind*, GA. COUNTY GOV. MAG. 28 (Mar. 1991).

principle and a qualification upon it received service in *Walston & Associates, Inc. v. City of Atlanta*.⁸⁵ There, plaintiff performed services for the municipality under an oral agreement with two officials possessing no authority to bind the city.⁸⁶ 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.⁸⁷ 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."⁸⁸

G. Liability

Municipal responsibility constituted the concern of many survey-period plaintiffs; their claims assumed numerous approaches to hurdling the bar of sovereign immunity.⁸⁹ The most basic approach,⁹⁰ illustrated in *Koehler v. City of Atlanta*,⁹¹ sought to classify as a "ministerial function" the maintenance of a darkened city auditorium where plaintiff had fallen.⁹² Rejecting the effort,⁹³ the court of appeals scored plain-

85. 224 Ga. App. 482, 480 S.E.2d 917 (1997).

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 Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

90. See R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* 5-57 (4th ed. 1988).

91. 221 Ga. App. 534, 472 S.E.2d 91 (1996).

92. *Id.* at 534-35, 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,⁹⁵ featured in *Rischack v. City of Perry*,⁹⁶ 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).

96. 223 Ga. App. 856, 479 S.E.2d 163 (1996).

97. See R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* 62-177 (4th ed. 1988).

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).

103. 221 Ga. App. 710, 472 S.E.2d 455 (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.¹⁰⁷ *Wilson v. City of Atlanta*¹⁰⁸ invoked that responsibility for a claimant struck by a vehicle pursued by a police officer.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."¹¹⁰ The court emphasized evidence that public risk existed prior to the chase,¹¹¹ and that the officer neither closely pursued the suspect nor continued the chase once he determined the public risk was excessive.¹¹² This unrefuted evidence revealed no basis for liability.¹¹³

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

107. O.C.G.A. § 40-6-6(d) (1997).

108. 223 Ga. App. 144, 476 S.E.2d 892 (1996).

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.*

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.

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.*

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).

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.

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

115. 221 Ga. App. 666, 472 S.E.2d 499 (1996).

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.*

runway's operational date,¹¹⁷ the court declared the nuisance a permanent one.¹¹⁸ As such, it stood capable of full compensation more than four years prior to plaintiff's action,¹¹⁹ an action consequently barred by the statute of limitation.¹²⁰

The nuisance action enjoyed greater success in *Hibbs v. City of Riverdale*,¹²¹ a claim for repeated flooding of plaintiffs' homes caused by a defective drainage system.¹²² There, the supreme court reversed the court of appeals' position that a claim founded in negligence could not succeed in nuisance.¹²³ "[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."¹²⁴ 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."¹²⁵

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.¹²⁶ In *City of Warner Robins v. Holt*,¹²⁷ 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.*

121. 267 Ga. 337, 478 S.E.2d 121 (1996).

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.*

123. *Hibbs v. City of Riverdale*, 219 Ga. App. 457, 458, 465 S.E.2d 486, 489 (1995).

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.¹²⁸ First, the court rejected the city's characterization of litigation expenses as punitive and thus inappropriate.¹²⁹ The court reasoned that punishment is not the purpose of litigation expenses and that municipalities are subject to such awards.¹³⁰ Second, the court found sufficient evidence for the jury's award for diminution of fair market value resulting from a permanent nuisance.¹³¹ Given the latter award, however, the court held the jury precluded from also awarding the homeowner lost rental value for an abatable nuisance.¹³²

*City of Atlanta v. Watson*¹³³ illustrated yet another effort to bypass municipal tort immunity—the “inverse condemnation” exception.¹³⁴ Plaintiffs claimed unequal treatment by the city of their apartments near the municipal airport, as contrasted with similarly located single-

that the landfill was encroaching upon other lots in 1989. *Id.* at 794, 470 S.E.2d at 238.

127. 220 Ga. App. 794, 470 S.E.2d 238 (1996).

128. *Id.* at 795, 470 S.E.2d at 240. Plaintiff had moved out of his house in 1990, sued the municipality, and a jury had awarded plaintiff damages on a number of items. *Id.*

129. *Id.*

130. *Id.* “Though awards of litigation expenses and attorney fees may often have a somewhat punitive effect on the party against whom they are awarded, to punish or penalize is not their purpose.” *Id.*

131. *Id.* at 797, 470 S.E.2d at 241. There was evidence that removal of the house would be necessary to solve the problem, and that the installation of a barrier and ventilation system would render plaintiff's property unmarketable. “Though contradicted by other evidence, this evidence was sufficient to allow the jury to conclude the nuisance is permanent.” *Id.*

132. *Id.* at 796, 470 S.E.2d at 241. “If the nuisance is permanent, the measure of damages is the diminution of fair market value of the property. If the nuisance is abatable, the measure of damages is lost rental value for so long as the nuisance is allowed to continue.” *Id.* Here, “[t]he greater subsumes the lesser, and, in this case, it is the lesser claim for lost rental value which should not have been included in the judgment.” *Id.* at 797, 470 S.E.2d at 241. The court also upheld an award for emotional distress as a result of the nuisance. *Id.*, 470 S.E.2d at 241-42.

Almost a year later, the court of appeals decided a second case arising from the same occurrence. In *Hammond v. City of Warner Robins*, 224 Ga. App. 684, 482 S.E.2d 422 (1997), plaintiff's subdivision lot was directly across the street from that of plaintiff Holt in the case above treated. Apparently, tests were less conclusive as to the presence of methane gas upon plaintiff's property, and she had not been forced to abandon it. *Id.* at 685-86, 482 S.E.2d at 425. Reviewing the evidence, the court reversed the trial judge's grant of the city's motion for summary judgment: “In the case sub judice, there is conflicting evidence regarding the elements of a nuisance, and summary judgement should be denied.” *Id.* at 692, 482 S.E.2d at 429. Judge Beasley dissented.

133. 267 Ga. 185, 475 S.E.2d 896 (1996).

134. For treatment of aspects of this exception, see R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* 134-43 (4th ed. 1988); R. Perry Sentell, Jr., *Local Government Liability Limitations: “Causation” is to Tort as “Police Power” is to Eminent Domain*, URBAN GA. 20 (Jan.-Feb. 1987).

family dwellings.¹³⁵ Unlike the latter, plaintiffs' properties were excluded from municipal purchase under the city's "Noise Compatibility Program."¹³⁶ Reversing the court of appeals,¹³⁷ the supreme court declared municipal treatment of multi-family dwellings not violative of plaintiffs' equal protection.¹³⁸ Given the limited funds available for the program, the city's classifications were reasonable.¹³⁹ 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."¹⁴⁰

A final possibility for immunity avoidance, the "constitutional tort,"¹⁴¹ surfaced in *Watson v. Mayor of Savannah*.¹⁴² There, plaintiff

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.¹⁴³ Emphasizing 42 U.S.C. § 1983 exactions,¹⁴⁴ 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."¹⁴⁵ On that rationale, the court sustained the municipality's summary judgment.¹⁴⁶

Municipal liability's "ante litem" notice requirement¹⁴⁷ found confirmation in *Goen v. City of Atlanta*,¹⁴⁸ an action for damage to plaintiffs' land in expanding the city airport.¹⁴⁹ First, the court refuted plaintiffs' reliance upon a notice provided the city by another property owner for himself and "all other persons similarly situated."¹⁵⁰ 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]."¹⁵¹ Second, the court rejected plaintiffs' argument of municipal waiver for failing to assert the notice issue in the pretrial order:¹⁵² "[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."¹⁵³

Local Government and Constitutional Torts: In the Georgia Courts, 49 MERCER L. REV. 1 (1997).

142. 223 Ga. App. 399, 477 S.E.2d 667 (1996).

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.*

147. O.C.G.A. § 36-33-5 (1991). For treatment of the statute, its history, and its application in cases, see R. PERRY SENTELL, JR., *THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA* 145-74 (4th ed. 1988); R. Perry Sentell, Jr., *Georgia Municipal Tort Liability: Ante Litem Notice*, 4 GA. L. REV. 134 (1969); R. Perry Sentell, Jr., *Ante Litem Notice: Cause for Pause*, URBAN GA. MAG. 24 (Oct. 1978).

148. 224 Ga. App. 484, 481 S.E.2d 244 (1997).

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.*,¹⁵⁴ the property owner claimed the city's rezoning of his land to result in inverse condemnation.¹⁵⁵ Delineating between police power and eminent domain,¹⁵⁶ the court viewed the latter to require "a determination that the new zoning ordinance was unconstitutional as applied."¹⁵⁷ 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."¹⁵⁸ 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."¹⁵⁹ The court thus declared plaintiff's action "procedurally barred."¹⁶⁰

I. Authorities

Although housing authorities do not enjoy governmental immunity,¹⁶¹ 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*¹⁶² featured a tenant's action for injury by a stray bullet from a gun fight arising from a drug transaction in defendant's complex.¹⁶³ Holding defendant's duty of protection to rest upon knowledge of prior similar incidents on the premises,¹⁶⁴ the court of appeals probed plaintiff's evidence.¹⁶⁵

154. 267 Ga. 173, 476 S.E.2d 581 (1996).

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.*

161. See the discussion in R. Perry Sentell, Jr., "Sue and Be Sued" in *Georgia Local Government Law: A Vignette of Vicissitudes*, 41 MERCER L. REV. 13 (1989).

162. 223 Ga. App. 216, 477 S.E.2d 325 (1996).

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 shootings¹⁶⁶ and to incidents investigated by police but unknown to defendant,¹⁶⁷ 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."¹⁶⁸

The claimant enjoyed greater success on the duty issue in *Housing Authority of Atlanta v. Jefferson*,¹⁶⁹ an action for the authority's failure to provide a smoke detector in a house qualified for its rental program.¹⁷⁰ Rejecting defendant's no-duty argument, the court viewed federal regulations to require compliance with a municipal ordinance imposing the responsibility.¹⁷¹ Holding the housing authority a residence "owner" under the ordinance,¹⁷² the court found a violation of the "statutory duty" to inspect for (and provide) the detector.¹⁷³

II. COUNTIES

A. Officers and Employees

Logically, county tax administration assumes high profile among the most controversial of local government functions. That controversy often

(quoting *Days Inn v. Matt*, 265 Ga. 235, 236, 454 S.E.2d 507, 508 (1995)).

165. *Id.*

166. *Id.* at 217, 477 S.E.2d at 327. "[W]e do not find this apparent domestic dispute to be substantially similar to the incident in which plaintiff was injured." *Id.*

167. *Id.* "Of the incidents in the police reports, defendant had knowledge of three, a domestic dispute, a theft by taking, and a trespass. None of the incidents was substantially similar to the incident in which plaintiff was injured." *Id.*

168. *Id.* The court said that although the prior incident need not be identical, it must be sufficient "to have put an ordinarily prudent person on notice that the housing complex tenants were facing increased risk." *Id.* at 218, 477 S.E.2d at 327. The court affirmed the trial judge's grant of summary judgment for defendant. *Id.*

169. 223 Ga. App. 60, 476 S.E.2d 831 (1996).

170. *Id.* at 60, 476 S.E.2d at 832. Plaintiff's three-year-old child was injured in a fire in a house which plaintiff had rented. "Prior to the rental, the house was inspected by [the authority], acting in its capacity as the area Section 8 administrator. [The authority] found the house was suitable for participation in the program, and [the child's] family received Section 8 assistance to rent the dwelling." *Id.*

171. *Id.* The court cited to O.C.G.A. section 8-3-7, subjecting housing authority projects to ordinances of the locality in which the housing project is located, and to a municipal ordinance requiring owners to provide smoke detectors in residential dwellings prior to their rental. *Id.* at 60-61, 476 S.E.2d at 832-33.

172. *Id.* at 61, 476 S.E.2d at 833. "Clearly, in its capacity as the area administrator, [the housing authority] exercised significant control over the [plaintiffs] dwelling." *Id.*

173. *Id.* The court also held that whether the lack of a smoke detector contributed to the child's injuries was a jury question. *Id.* Accordingly, the court sustained the trial judge's refusal to grant the housing authority's motion for summary judgment. *Id.*

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

174. 266 Ga. 646, 469 S.E.2d 666 (1996).

175. *Id.* at 646, 469 S.E.2d at 666. The removal was effected under O.C.G.A. section 48-5-295. *Id.*

176. *Geron v. Calibre Cos.*, 250 Ga. 213, 296 S.E.2d 602 (1982); *Parsons v. Chatham County Bd. of Comm'rs*, 204 Ga. App. 130, 418 S.E.2d 459 (1992).

177. 266 Ga. at 647, 469 S.E.2d at 668. 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.*

180. 223 Ga. App. 301, 477 S.E.2d 433 (1996).

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.*

182. O.C.G.A. § 48-5-302 (1991).

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*,¹⁸⁵ a challenge founded both on due process and breach of contract.¹⁸⁶ 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.¹⁸⁷ 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."¹⁸⁸

In *Mayo v. Fulton County*,¹⁸⁹ a deputy sheriff unsuccessfully challenged his termination as a result of testing positive for cocaine.¹⁹⁰ The court held the county sheriff to possess both inherent¹⁹¹ and authorized¹⁹² powers to implement random drug testing. Moreover, the court decided, the sheriff had afforded sufficient prior notice by two

185. 223 Ga. App. 455, 477 S.E.2d 889 (1996).

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).

189. 220 Ga. App. 825, 470 S.E.2d 258 (1996).

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.¹⁹³

Finally, the court turned a deaf ear in *Jellico v. Effingham County*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.¹⁹⁵ Even so, the court concluded, plaintiff was merely an "at will" employee who could not sue for wrongful discharge.¹⁹⁶

B. Elections

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

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." *Id.* The court affirmed the trial judge in upholding plaintiff's termination. *Id.*

194. 221 Ga. App. 252, 471 S.E.2d 36 (1996).

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. *Id.*

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." *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. *Id.*

197. O.C.G.A. § 21-2-409 (1993). The only reasons rendering assistance permissible are inability to read english and physical disability. *Id.*

198. 267 Ga. 416, 478 S.E.2d 377 (1996).

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. *Id.* at 417, 478 S.E.2d at 379.

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." *Id.*

201. *Id.* Chief Justice Benham dissented without opinion.

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 Appeals*²⁰³ 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 County*²⁰⁹ contested an exchange of property between govern-

202. For background, and an early discussion of Georgia law on the matter, see R. Perry Sentell, Jr., *The Omen of "Openness" in Local Government Law*, 13 GA. L. REV. 97 (1978).

203. 221 Ga. App. 801, 472 S.E.2d 558 (1996).

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)).

209. 267 Ga. 94, 475 S.E.2d 597 (1996).

ments, seeking to set aside the resulting conveyance to the county.²¹⁰ The supreme court reviewed the matter by drawing a clear delineation between "the concepts of exchange and disposal."²¹¹ Only the latter, the court held, was subject to the requirements that the former owner be afforded notice and the right of repurchase.²¹² 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.²¹³

Defendant claimed the county property featured in *West v. Fulton County*²¹⁴ as a result of a tax sale, a sale the county challenged as ineffective to pass title.²¹⁵ 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."²¹⁶ If, as in this case, no such resolution appeared on the minutes, "the purported conveyance did not pass[] title to the land therein described."²¹⁷ Refusing to find an

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.

214. 267 Ga. 456, 479 S.E.2d 722 (1997).

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,²¹⁸ the court declared the conveyance ineffective and the county's title intact.²¹⁹

E. Liability

County liability emerged as local government law's most prolific subject of the survey period.²²⁰ In one fashion or another, claimants attributed the majority of their ills to counties and county officers. In *Kordares v. Gwinnett County*,²²¹ the attribution appeared in a wrongful death action for county negligence in failing to perform a subsurface inspection of a bridge.²²² Assuming the traditional position, the court of appeals simply adopted the trial judge's opinion²²³ that the county was immune from negligence liability,²²⁴ and that plaintiff had cited no statute specifically waiving that immunity for bridges.²²⁵

The missing element of "duty" proved fatal to the negligence claim in *Washington v. Jefferson County*,²²⁶ an action for the death of plaintiff's son caused by a county arrestee out on bail.²²⁷ The court of appeals condemned plaintiff's claim for two reasons: first, the county possessed

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).

220. For treatment of the subject, see 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 Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

221. 220 Ga. App. 848, 470 S.E.2d 479 (1996).

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.

226. 221 Ga. App. 81, 470 S.E.2d 714 (1996).

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;²²⁸ and second, the county could not be held liable for failing to perform its general "public duty" to provide police protection.²²⁹ On the latter issue, the court marked the absence of a necessary "special relationship" between the county and the decedent.²³⁰

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

228. *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." *Id.*

229. *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." *Id.*

230. *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."

Id. (quoting *City of Rome v. Jordan*, 263 Ga. 26, 29, 426 S.E.2d 861, 863 (1993)).

231. 267 Ga. 655, 482 S.E.2d 370 (1997).

232. *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.

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

234. *Id.* at 656, 482 S.E.2d at 372. The court noted that in *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 656, 482 S.E.2d at 372.

provide police protection based on a general duty to protect the public.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*.²³⁶

On occasion, the county may escape liability via basic agency principles. In *Brown v. Jackson*,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."²³⁸ Consequently, the county sheriff, rather than the county itself, "would have been the proper party" for suit under a theory of respondeat superior.²³⁹

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

235. *Id.* The court relied upon its more recent decision in *Department of Transportation v. Brown*, 267 Ga. 6, 471 S.E.2d 849 (1996).

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." *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 [decendent] and the deputy sheriff under the circumstances of this case." *Id.* at 664, 482 S.E.2d at 377.

237. 221 Ga. App. 200, 470 S.E.2d 786 (1996).

238. *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. *Id.*

239. *Id.* The court thus reversed the trial judge's denial of the county's motion for summary judgment. *Id.*

240. 221 Ga. App. 18, 470 S.E.2d 724 (1996).

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.

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. *Id.*

243. *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." *Id.*

court held plaintiff's complaint to exceed charges of simple negligence.²⁴⁴ Accordingly, omission of the affidavit was fatal to the claim.²⁴⁵

Several claimants raised the prospect of immunity waiver by statutory authorization of liability insurance.²⁴⁶ *Rawls v. Bulloch County School District*²⁴⁷ featured the statute requiring school boards to purchase insurance covering students injured in school bus accidents.²⁴⁸ There, a student sought recovery for the school district's alleged failure to protect him from injury by a fellow student.²⁴⁹ Although the campus attack apparently resulted from an altercation on the school bus several days earlier,²⁵⁰ the court of appeals held the incident outside the province of the insurance statute²⁵¹ and affirmed summary judgment for the school district.²⁵²

*Roberts v. Burke County School District*²⁵³ focused upon the district's "comprehensive liability policy" with a coverage exclusion for injury arising from the "use" of a vehicle.²⁵⁴ *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

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

247. 223 Ga. App. 234, 477 S.E.2d 383 (1996).

248. O.C.G.A. § 20-2-1090 (1996).

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.

253. 267 Ga. 665, 482 S.E.2d 282 (1997).

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.

him.²⁵⁵ Reversing the court of appeals,²⁵⁶ 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.²⁵⁷

The court of appeals considered two instances of alleged immunity waiver under the motor vehicle liability insurance statute.²⁵⁸ *Blum-sack v. Bartow County*²⁵⁹ involved a decedent struck by an insured county truck while being test-driven by a mechanic.²⁶⁰ Because the county's insurance policy expressly excluded coverage for anyone repairing the truck, the county was uninsured for the incident.²⁶¹ Accordingly, the court held, the insurance statute had not waived the county's sovereign immunity on behalf of the decedent.²⁶²

*Crider v. Zurich Insurance Co.*²⁶³ presented a prison inmate's claim for injury in a fall from a county backhoe.²⁶⁴ 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.

258. O.C.G.A. § 33-24-51 (1996).

259. 223 Ga. App. 392, 477 S.E.2d 642 (1996).

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.*

261. *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 respondeat 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.

263. 222 Ga. App. 177, 474 S.E.2d 89 (1996).

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,²⁶⁵ the court eschewed a "strict interpretation" of the statute's reference to "motor vehicle."²⁶⁶ Rather, the court reasoned, "[g]eneral liability policies are purchased primarily to provide coverage for incidents other than those covered under automobile liability policies."²⁶⁷ 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."²⁶⁸

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*,²⁶⁹ a wrongful death action for a collapsing bridge.²⁷⁰ 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.²⁷¹

*Butler v. Gwinnett County*²⁷² featured plaintiffs' effort, some two years following condemnation of portions of their property, to claim inverse condemnation of their remaining property.²⁷³ 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.²⁷⁴ 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.

269. 220 Ga. App. 848, 470 S.E.2d 479 (1996).

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).

272. 223 Ga. App. 703, 479 S.E.2d 11 (1996).

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"

275. *Id.* at 705, 479 S.E.2d at 13. This was true whether or not plaintiffs had anticipated these consequential damages at the time of the original condemnation. *Id.*

276. *Id.* The court thus affirmed the trial judge's grant of summary judgment for the county. *Id.*

277. 221 Ga. App. 81, 470 S.E.2d 714 (1996).

278. *Id.* at 82-83, 470 S.E.2d at 716. Plaintiff sued under 42 U.S.C. § 1983 which "imposes liability where persons acting under color of state law have deprived a person of a federal constitutional or statutory right." *Id.* See R. PERRY SENTELL, JR., *GEORGIA LOCAL GOVERNMENT LAW'S ASSIMILATION OF Monell: SECTION 1983 AND THE NEW "PERSONS,"* (1984); R. Perry Sentell, Jr., *Local Government and Constitutional Torts: In the Georgia Courts*, 49 *MERCER L. REV.* 1 (1997).

279. 221 Ga. App. at 83, 470 S.E.2d at 716. The court emphasized that plaintiff's son was not in custody and did not face any special danger of assault by the arrestee as distinguished from the danger to the general public. *Id.*

280. *Id.* at 82, 470 S.E.2d at 716. The court affirmed the trial judge's summary judgment for the county on plaintiff's Section 1983 claim. *Id.* at 83, 470 S.E.2d at 716.

281. 221 Ga. App. 496, 471 S.E.2d 561 (1996).

282. *Id.* at 496-97, 471 S.E.2d at 561-62. County deputies had responded to a request for assistance from municipal police and found the suspect holding a large knife and acting erratically. When the suspect charged one of the deputies, he was shot, given first aid, and transported to a hospital. *Id.*

283. *Id.* at 499, 471 S.E.2d at 564 (citing O.C.G.A. § 42-5-2(a) (1997)). "Although this Code section is included in the chapter of Title 42 that concerns correctional institutions, it nevertheless indicates that it is the intent of the legislature that governmental entities should pay for the medical expenses incurred by inmates who are in their physical custody." *Id.*

284. *Id.* at 497-98, 471 S.E.2d at 563.

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."²⁸⁵ These conclusions led the court to sustain the trial judge's grant of summary judgment for the medical provider.²⁸⁶

Claimants frequently sought recovery from individual county officers and employees themselves, prompting defendants' countering assertions of "official immunity."²⁸⁷ Deriving from the 1991 constitutional amendment,²⁸⁸ official immunity turns upon whether the offending conduct is deemed "ministerial" (liability for negligence)²⁸⁹ or "discretionary" (liability only for willfulness).²⁹⁰ 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*²⁹¹ for failures by a school principal and teacher to check repairs to a drainage grate,²⁹² in *Kelly v. Lewis*²⁹³ for failures by a principal and teacher to properly supervise and secure students;²⁹⁴ 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.

287. "Sovereign" or "governmental" immunity protects the local government's public purse, and "official" immunity protects officials and employees sued in their individual capacities so that responsible people will fill public positions. *See, e.g., Schmidt v. Adams*, 211 Ga. App. 156, 438 S.E.2d 659 (1993). For treatment of the topic, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for their Wrongs*, 13 GA. L. REV. 747 (1979); R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27 (1988); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993).

288. GA. CONST. art. I, § II, para. IX(d). The leading decision on the point remains, however, *Hennessy v. Webb*, 245 Ga. 329, 264 S.E.2d 878 (1980).

289. An act that is "simple, absolute, definite," and "requiring merely the execution of a specific duty." *See, e.g., Joyce v. Van Arsdale*, 196 Ga. App. 95, 395 S.E.2d 275 (1990).

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).

291. 220 Ga. App. 110, 469 S.E.2d 679 (1996).

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.*

293. 221 Ga. App. 506, 471 S.E.2d 583 (1996).

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*²⁹⁵ for improper early dismissals of students by members of a school board, superintendent, and secretary.²⁹⁶

The court employed the same exercise in reviewing charges against county law enforcement personnel. In *Morgan v. Barnes*,²⁹⁷ the court rejected an action against a deputy sheriff who collided with plaintiff while pursuing a suspected stolen car.²⁹⁸ The pursuit decision, the court held, "called for the exercise of personal deliberation and judgment and was therefore discretionary."²⁹⁹ Although arriving at the same classification in *Johnson v. Gonzalez*,³⁰⁰ the court reserved judgment on a further issue.³⁰¹ 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.³⁰² Declaring the officer's response a "discretionary" act,³⁰³ the court nevertheless insisted that a jury consider the issue of the officer's "reckless disregard."³⁰⁴

between negligent acts and negligent failure to act: "[T]he complete failure to perform a discretionary act is the same as the negligent performance of that act for the purposes of determining whether such action was discretionary or ministerial." *Id.* at 509, 471 S.E.2d at 587. The court affirmed the trial judge's decision that official immunity applied. *Id.*

295. 222 Ga. App. 831, 476 S.E.2d 592 (1996).

296. *Id.* at 831-32, 476 S.E.2d at 592-93. Plaintiff's decedent was shot by a third party after being released from school early, and plaintiff charged the school board members and the school superintendent with negligence in adopting early dismissal rules, and the school secretary with negligence in administering those rules. *Id.* at 831, 476 S.E.2d at 592. The court held that the decision to adopt or not adopt such rules was completely discretionary, and that the secretary's actions in following those rules involved discretion. *Id.* at 834, 476 S.E.2d at 595. The court thus affirmed the trial judge's decision that official immunity applied. *Id.* at 837, 476 S.E.2d at 597.

297. 221 Ga. App. 653, 472 S.E.2d 480 (1996).

298. *Id.* at 655, 472 S.E.2d at 481.

299. *Id.* He made the decision "in the early morning hours when traffic was minimal, . . . in response to reports that [the car] had eluded police and under a reasonable perception that it could be stolen." *Id.* There was no evidence of malice or intent, and the court thus affirmed the trial judge's decision that official immunity applied. *Id.* at 654-55, 472 S.E.2d at 481.

300. 223 Ga. App. 646, 478 S.E.2d 410 (1996).

301. *Id.* at 646, 478 S.E.2d at 410.

302. *Id.*, 478 S.E.2d at 411.

303. *Id.* at 647, 478 S.E.2d at 412. "Because the call removed [the officer] from his routine patrol, his acts in response to the call were discretionary." *Id.*

304. *Id.* at 648, 478 S.E.2d at 412.

At some point, as here, the acts of an officer preclude an assessment of the nature of his conduct by a court *as a matter of law*. A jury must decide whether [the officer's] decision to overtake [plaintiff's] vehicle, without activating his emergency lights or siren, was merely negligent or whether it constituted a reckless disregard for the safety of others.

Id. (emphasis added).

*Strickland v. Vaughn*³⁰⁵ arose from plaintiff's being struck by an habitual violator³⁰⁶ whose impounded car the defendant sheriff had released to the violator's friend.³⁰⁷ 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."³⁰⁸ That "position," the court asserted, "is without support in Georgia law."³⁰⁹

Plaintiff's cause likewise foundered in *Booth v. Firemen's Insurance Co.*,³¹⁰ a complaint that a sheriff violated his official bond by referring to plaintiff with racial slurs.³¹¹ 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."³¹²

Finally, the arresting deputy sheriff in *Gardner v. Rogers*³¹³ unsuccessfully claimed qualified immunity to a 42 U.S.C. § 1983 complaint for excessive force.³¹⁴ Reviewing evidence of plaintiff's cooperation with

305. 221 Ga. App. 636, 472 S.E.2d 159 (1996).

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.

310. 223 Ga. App. 243, 477 S.E.2d 376 (1996).

311. *Id.* at 244, 477 S.E.2d at 377. Plaintiff became involved in a traffic altercation with another driver, was interviewed by another officer, 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).

313. 224 Ga. App. 165, 480 S.E.2d 217 (1996).

314. *Id.* at 167, 480 S.E.2d at 220. See 42 U.S.C. § 1983 (1994). Plaintiff also sued the county sheriff for having a policy that condoned violation of plaintiff's civil rights. 224 Ga. App. at 166, 480 S.E.2d at 219.

defendant's investigation,³¹⁵ 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."³¹⁶ Defendant's plea of qualified immunity thus failed the requisite test of "objective reasonableness,"³¹⁷ and the court reversed summary judgment for the deputy.³¹⁸

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*³¹⁹ presented that issue. There, the school district proposed a football stadium at a location where stadiums were prohibited by county zoning regulations.³²⁰ The court of appeals, treating the matter to summary disposition,³²¹ simply affirmed the trial judge's decision that governmental entities possess immunity from local zoning regulations.³²²

The issue in *DeKalb County v. Dobson*³²³ 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.*

319. 222 Ga. App. 264, 474 S.E.2d 70 (1996).

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.

323. 267 Ga. 624, 482 S.E.2d 239 (1997).

adjacent parcels of land.³²⁴ A bare majority of the supreme court, upon its review of the evidence, deemed the trial court's decision "clearly erroneous."³²⁵ That decision, the court determined, rested upon evidence that rezoning would insure greater profits to the landowners and would facilitate the property's development.³²⁶ Neither of those points sufficiently showed "by clear and convincing evidence" that the existing zoning burdened the owners with "a significant detriment."³²⁷

Far more localized in scope, *Bo Fancy Productions, Inc. v. Rabun County Board of Commissioners*³²⁸ compared a specific zoning ordinance and a particular land use.³²⁹ 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).

328. 267 Ga. 341, 478 S.E.2d 373 (1996).

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.*

ment event.³³⁰ Contrarily, the court delineated, land zoned "residential" could not serve as a parking lot for vehicles of those attending the event.³³¹ 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."³³²

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."³³³ 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 1999.³³⁴ 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)).

333. Ga. H.R. Bill 489, Reg. Sess. (1997) (codified at O.C.G.A. §§ 36-70-1 to -5, -20 to -28).

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.³³⁵ Cities will be limited in providing extraterritorial services³³⁶ and in charging higher water-sewer rates in unincorporated areas;³³⁷ counties must eliminate double taxation.³³⁸ Compliance incentives prohibit state financial assistance to local governments without an agreement in place by 1999.³³⁹

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."³⁴⁰ Concurrently, the measure requires, the Department must publish an annual "community indicators report" for local governments making annual expenditures of \$250,000.³⁴¹

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.³⁴² Yet another economically-driven statute confirms the authority of local governments to participate in federal and state programs of job training.³⁴³ The government may also be held liable for local grantees who mispend program funds.³⁴⁴

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.*

340. Ga. H.R. Bill 491, Reg. Sess. (1997) (codified at O.C.G.A. §§ 36-81-1, -3, -8). The charts of accounts must be adopted by December 31, 1998. *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.*

343. Ga. S. Bill 101, Reg. Sess. (1997) (codified at O.C.G.A. § 36-87-2). The programs include job research assistance and workforce development programs. *Id.*

344. *Id.*

retrieval facilities.³⁴⁵ Counties must pay retrieval costs for the records and may specify by contract retrieval times for delivery.³⁴⁶

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.³⁴⁷ Illustrative of the mandatory, local governments are prohibited from authorizing the location of new package liquor retailers within five hundred yards of existing retailers.³⁴⁸

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.³⁴⁹ A municipality desiring to annex land must establish a process for resolving land use classification disputes with an objecting county.³⁵⁰ Additionally, the General Assembly expressly secured its own power to annex or de-annex by local statutes.³⁵¹ That power, the new measure mandates, is unimpaired by alternative methods of municipal annexation or de-annexation.³⁵² 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.³⁵³

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.³⁵⁴ As for state

345. Ga. S. Bill 324, Reg. Sess. (1997) (codified at O.C.G.A. §§ 15-1-10, 15-6-86, 36-9-5).

346. *Id.* Records must be retrieved within a reasonable time. *Id.*

347. Ga. S. Bill 62, Reg. Sess. (1997) (codified at O.C.G.A. § 36-60-3). The statute also revises definitions of nudity and sexual conduct. *Id.*

348. Ga. H.R. Bill 500, Reg. Sess. (1997) (codified at O.C.G.A. § 3-4-49).

349. Ga. H.R. Bill 219, Reg. Sess. (1997) (codified at O.C.G.A. §§ 12-8-25, -59.2).

350. Ga. H.R. Bill 489, Reg. Sess. (1997) (codified at O.C.G.A. § 30-70-24(4)(C)). The process must be established by July 1, 1998. *Id.*

351. Ga. H.R. Bill 217, Reg. Sess. (1997) (codified at O.C.G.A. § 36-36-10).

352. *Id.*

353. Ga. H.R. Bill 490, Reg. Sess. (1997) (codified at O.C.G.A. §§ 48-8-3, -111). The statute does not mandate counties to include municipal projects in the call for the sales tax. *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).³⁵⁵ 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.³⁵⁶ Further, the enactment limits the types of local legislation which must be directly noticed to the affected city or county.³⁵⁷ These include local bills amending city charters or county enabling acts; excepted, however, are local bills requested by the county or city.³⁵⁸

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.

local government codification, including the distinction between municipal and county employment of the practice, see R. PERRY SENTELL, JR., *A PROFILE: THE PEOPLE AND THE PRACTICE OF GEORGIA LOCAL GOVERNMENT LAW* 33-37 (1994).

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.*

