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Local Government Law

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Had there been an American olympics expedition during this survey period, the gold would in all probability have gone to those who litigate and legislate in Georgia local government law. Again this year, the magnitude of the activity was awesome. Only the more noteworthy developments can be treated; even those must be covered in highly summary fashion. The cases are loosely organized by topic, and the statutes are all general ones. Welcome, therefore, to a legal land of plenty.

I. Court Decisions

A. *Municipalities*

Elections. The election process is obviously basic to government, including local government.[1] Two surveyed instances which illustrate that process in controversy are *City of Atlanta v. League of Women Voters*[2] and *Lucken v. Falligant*.[3] In the former case, the city council president tendered his resignation in August but the council delayed its acceptance until October in an alleged effort to fill the vacancy without holding an election.[4] Upon challenge, the Georgia Supreme Court held that under general statutory law the office was vacant when the president ceased to

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1. *See, e.g.*, Sentell, *Federalizing Through the Franchise: The Supreme Court and Local Government*, 6 Ga. L. Rev. 34 (1971), *reprinted in* R.P. Sentell, Studies in Georgia Local Government Law 77 (3d ed. 1977).

2. 244 Ga. 796, 262 S.E.2d 77 (1979).

3. 243 Ga. 816, 256 S.E.2d 788 (1979).

4. The delay, if effective, would have triggered the municipal charter provision permitting the council to fill vacancies occurring within two years of the next general election.

perform his duties and not when the council accepted the resignation.[5] Indeed, said the court, this was true even should the municipality establish that the president received compensation through October.[6] Accordingly, the court affirmed the issuance of a mandamus requiring the council to call a special election.[7]

The complaining voters in *Lucken* were less successful.[8] They too sought a mandamus, one requiring municipal election officials to administer the oath of office to successful write-in candiates for membership on the governing authority. Even stipulating that the write-in candidates received a majority of the votes cast, the court held general statutory law to require service of notice of the proceedings upon the State Election Board.[9] Because the plaintiffs had admittedly served no such notice, the court affirmed dismissal of their complaint.

Officers and Employees. From the typically active arena for litigation surrounding local government officials, two of the more interesting episodes were depicted in decisions by the court of appeals dealing with municipal mayors. In *Jackson v. State*,[10] a criminal drug conviction, the court invalidated the search warrant which the mayor had issued to the police chief.[11] Reviewing evidence that the mayor was personally involved in the investigation and that he had urged the chief to "catch" the defendant, the court declared the warrant to violate the fourth amendment. Indeed, the court emphasized:

> In view of the fact that the mayor, as chief executive officer of the city government, exercises supervisory control over the police department, it is doubtful whether he could ever serve as a neutral and detached magistrate with regard to the issuance of search warrants, particularly to city police officers.[12]

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5. The court relied upon GA. CODE ANN. § 89-501(7) (1980).

6. The court emphasized that "vacancy" did not depend upon abandonment but upon cessation of performance of duties.

7. In a continuation of the controversy, League of Women Voters v. City of Atlanta, 245 Ga. 301, 264 S.E.2d 859 (1980), the supreme court held that under the municipal charter and code the president *pro tempore* lacked authority to make committee appointments on December 3, 1979, for the year 1980, when the special election to fill the office of president had been called for February 5, 1980. The court said that the president *pro tempore* lacked authority to make such appointments at a time when a call for election of a new council president is or should have been made.

8. 243 Ga. 816, 256 S.E.2d 788 (1979).

9. The court relied upon GA. CODE ANN. § 34A-110 and § 34-203(a)(d) (1980).

10. 150 Ga. App. 67, 256 S.E.2d 670 (1979).

11. The court noted the municipal charter to confer upon the mayor the power to issue warrants as possessed by a justice of the peace.

12. 150 Ga. App. at 67-68, 256 S.E.2d at 670. For discussion of the mayor's "self supervision" problems in other contexts, *see* Sentell, *Some Legal Aspects of Local Government Purchasing in Georgia*, 16 MERCER L. REV. 371 (1965), *reprinted in* R.P. SENTELL, STUDIES

In the second case, *Savannah News-Press v. Whetsell*,[13] the court utilized the opportunity to review the law of libel when a newspaper falsely reported that a mayor had been charged with cattle rustling. Holding the newspaper entitled to the "actual malice" protection of *New York Times Co. v. Sullivan*,[14] the court deemed it undeniable "that news that a mayor has wilfully violated state law, albeit in the conduct of his private affairs, bears a close connection to his fitness for public office."[15] Canvassing evidence on the conduct and knowledge of the newspaper reporter, the court concluded that evidence to fall short of establishing clear and convincing proof of actual malice on the part of the newspaper.[16]

More common to the arena were two instances involving workers' compensation benefits. In *City Council of Augusta v. Nevils*,[17] the court considered the claim of a municipal fireman for injuries suffered while playing on the department softball team. Although the municipality encouraged this activity and deemed it to improve physical fitness, the court noted the absence of a financial contribution to the team and that the games were played off the premises and during non-work time. Upon this balance, the court held the injury not sufficiently work-connected for the purpose of benefits.[18]

The municipal police officers in *Argonaut Insurance Co. v. Head*[19] were more successful. There the court approved awards for injuries which the officers received following their chase of a speeder into the county.[20] The court held the chase to be authorized under the doctrine of "hot pursuit"[21] and the claimants to be acting in their capacity as municipal law enforcement officers. Rejecting the municipality's contention that the officers were in joint service with the county, the court held that although they were duly appointed county deputy sheriffs, the officers received no compensation from the county and thus the county was under no

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IN GEORGIA LOCAL GOVERNMENT LAW 599 (3d ed. 1977).

13. 149 Ga. App. 233, 254 S.E.2d 151 (1979).

14. 376 U.S. 254 (1964).

15. 149 Ga. App. at 235, 254 S.E.2d at 152. Thus, the court concluded, the mayor was a "public official" and the publication concerned his "official" conduct within the rule of *New York Times*.

16. Under *New York Times*, actual malice consists of publishing a statement with knowledge that it was false or with reckless disregard of whether it was false. 376 U.S. at 279-80.

17. 149 Ga. App. 688, 255 S.E.2d 140 (1979).

18. In so holding, the court reversed the trial judge's award.

19. 149 Ga. App. 528, 254 S.E.2d 747 (1979).

20. The speeder had killed one of the officers and injured the other.

21. The court held this doctrine to constitute an exception to GA. CODE ANN. § 92A-509 (1978). For discussion, *see* Sentell, *Extraterritorial Power in Georgia Municipal Law*, 12 GA. L. REV. 1 (1977).

workers' compensation liability to them.[22]

The period also produced its share of retirement, suspension, and dismissal controversies. *City Council of Augusta v. Kennen*[23] established that under the municipality's retirement provisions, disability coverage depended upon whether the employee was contributing to the retirement fund at the date of disability.[24] As to the dismissals, procedural matters were crucial. In *Wooten v. City of Atlanta*,[25] the court held that police bureau employees, having appealed their dismissals to the personnel board, must seek a writ of certiorari to the superior court and could not obtain a declaratory judgment on the issue of constitutionality. Somewhat similarly, the supreme court in *Hamrick v. City of Calhoun*[26] decided that dismissed police officers, having litigated the sufficiency of their dismissal notices,[27] could not reopen their cases by actions for reinstatement, back pay, and damages.[28] Finally, in *Jackson v. Wilson*,[29] the court of appeals affirmed the trial judge's reversal of the demotion and suspension of a police officer who refused to execute a form prior to taking a polygraph examination.[30] Observing that the officer was willing to take the test, the court held the form inappropriate to the circumstances[31] and his refusal to execute it not violative of the bureau's rules and regulations.[32]

Openness. One leg in the tripod of the modern movement for "openness" in government is that of "open records."[33] Georgia's judicial treat-

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22. The court emphasized the point that the "joint service" statute, GA. CODE ANN. § 114-419 (1973), expressly imposes proration of liability "in proportion to [each employer's] wage liability."

23. 150 Ga. App. 844, 258 S.E.2d 651 (1979).

24. Accordingly, an employee who had retired several years prior to her disability was held not entitled to disability benefits.

25. 149 Ga. App. 568, 254 S.E.2d 889 (1979).

26. 243 Ga. 716, 256 S.E.2d 599 (1970).

27. The court said their objections had been overruled and not appealed.

28. The officers sought to make the insufficiency of their notices the basis of their actions.

29. 152 Ga. App. 250, 262 S.E.2d 547 (1979).

30. The officer was the object of investigation involving an alleged departmental cheating scandal.

31. The form designated submission to the examination as voluntary, yet the officer was undergoing the test pursuant to a direct order.

32. The rule in question prohibits an officer from disobeying a lawful order of a superior upon penalty of insubordination.

Similarly, in Bettis v. City of Atlanta, 152 Ga. App. 699, 263 S.E.2d 680 (1979), the court of appeals strictly construed rules and regulations of the municipal police department in order to hold that a dismissal was excessive action when the evidence did not support a finding of "wilfulness" on the part of the employee.

33. The others are "disclosure" and "open meetings." For discussion, *see* Sentell, *The Omen of "Openness" in Local Government Law*, 13 GA. L. REV. 97 (1978).

ment of its "Open Records Act"[34] is sketchy, and the supreme court's opinion in *Brown v. Minter*[35] added little to the mosaic. *Brown* presented a citizen's action under the statute to mandamus the municipal police department to permit the inspection of records of completed investigations. The court summarily sustained the trial judge's findings that the material records were identifiable public records, that the plaintiff possessed a clear legal right to inspect them, but that the department had successfully demonstrated that certain information in the records was entitled to nondisclosure.[36] The court expressly approved the trial judge's "balancing test,"[37] and restated the rule that, given a proper request for material records, the burden is upon the municipality to justify nondisclosure.[38]

Later in the period, the court professed to rely upon the rationale of *Brown* for treatment of *Doe v. Sears,*[39] a citizen's action to inspect municipal housing authority print-outs which contained names, addresses, sources of income, and rents owed by housing tenants.[40] The court harbored no doubts that the housing authority fell within the ambit of the "Open Records Act"; indeed, the court deemed the authority's "entire character"[41] public. A closer question, however, was whether release of such information would violate the tenants' rights of privacy. Answering that question, the court reasoned that a tenant in default impliedly consents to reasonable disclosures to the general public which is properly concerned with whether rentals are paid when due.[42] Accordingly, the court ordered the housing authority to disclose "the names, addresses, sources and amounts of income and the periods and amounts of the rental delinquencies of all tenants"[43] whose accounts were in arrears on the date of the plaintiff's petition.

Contracts. Breaking judicial silence on the matter in recent years,

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34. GA. CODE ANN. §§ 40-2701 to 2703 (1975).

35. 243 Ga. 397, 254 S.E.2d 326 (1979).

36. *E.g.*, information regarding on-going investigations and the names of informants.

37. The court applied the test set forth in Northside Realty Assoc. v. Community Relations Comm., 240 Ga. 432, 241 S.E.2d 189 (1978), in which the benefits to the government from non-disclosure are balanced against the harm to the public.

38. Thus, the court rejected the municipality's contention that the plaintiff had the burden of showing a legal duty to perform.

39. 245 Ga. 83, 263 S.E.2d 119 (1980).

40. The purpose was one of investigative newspaper reporting which sought to determine whether there were patterns of favoritism.

41. 245 Ga. at 85, 263 S.E.2d at 122.

42. The court said the tenants impliedly waived their rights of privacy when they allowed their rental accounts to become deficient.

43. 245 Ga. at 88, 263 S.E.2d at 123. For still another open records decision of the period, although not involving local government, *see* Athens Observer, Inc. v. Anderson, 245 Ga. 63, 263 S.E.2d 128 (1980).

Brown v. City of East Point[44] confronted the court of appeals with the historic statutory command that "[o]ne council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government."[45] Rejecting an effort by municipal employees to require the municipality to implement incremental pay raises which the council had enacted the previous year,[46] a majority of the court reviewed the statute's impact upon municipal government. Conceding "departures" from strict application, as well as an "unsettled" state of the law, the court nevertheless viewed the statute's "plain meaning" to control this case.[47] Agreeing that the tests for distinguishing "governmental" and "proprietary" functions are "somewhat illusive," the court reasoned that "[t]here is no more fundamental function of a municipal government than formulating its annual budget and collecting the necessary revenues to fund such budget."[48] Consequently, the court designated the municipal compensation ordinance in issue as falling squarely within the prohibition of the statute and thus unenforceable.[49]

Legislation. Of the Georgia Constitution's proscriptions which impact upon legislation dealing peculiarly with local government, none has played a more crucial role than the following famous mandate: "Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law."[50] Of the dual directions encompassed by the mandate, the restriction upon special laws has probably received more judicial and popular attention.[51] Indeed, the challenger in *Akin v.*

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44. 152 Ga. App. 801, 264 S.E.2d 267 (1979).

45. GA. CODE ANN. § 69-202 (1976). For discussion of this statute, *see* Sentell, *Local Government and Contracts that Bind*, 3 GA. L. REV. 546 (1969); Sentell, *Binding Contracts in Georgia Local Government Law: Recent Perspectives*, 11 GA. ST. B.J. 148 (1975). Both are reprinted in R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 541, 579 (3d ed. 1977).

46. The successor council had decided not to fund the increases.

47. 152 Ga. App. at 801-02, 264 S.E.2d at 268.

48. *Id.*

49. The dissenting opinion for three judges argued that the ordinance was binding until properly repealed.

50. GA. CONST. art. I, § 2, ¶ 7, GA. CODE ANN. § 2-207 (1976). For history of the evolution of this provision, *see* Sentell, *The Validity of Statutes Pertaining to Georgia County Commissioners: An Exercise in Constitutional Interpretation*, 15 MERCER L. REV. 258 (1963), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 199 (3d ed. 1977).

51. *See e.g.*, Sentell, *When is a Special Law Unlawfully Special?*, 27 MERCER L. REV. 1167 (1976), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 177 (3d ed. 1977). *See also* Sentell, *Unlawful Special Laws: A Postscript on the Proscription*, 30 MERCER L. REV. 319 (1978). For a case dealing with the mandate's restriction upon general statutes, *see* Strickland v. Richmond County, 243 Ga. 462, 254 S.E.2d 844 (1979), treated in the section on "county legislation" *infra*.

Hardison[52] employed that restriction to attack the validity of general statutes which expressly empower local governments to enact ordinances which adopt by reference the "Uniform Rules of the Road."[53] By authorizing such ordinances, the challenger appeared to maintain, the general statutes created the situation proscribed by the constitution.[54] Denominating the challenger's position to be "without merit," the supreme court nevertheless staked out two prohibitions: first, the legislature can not delegate authority to a municipality "to punish in a municipal court a State offense as such;"[55] and second, a municipality can not, without express legislative authorization, adopt an ordinance on the same subject as a general statute. In this case, however, there was express legislative authorization for the ordinance, and the ordinance constituted the offense a municipal one.[56] Thus fortified, neither the general statutes nor the ordinance violated the constitution's "special laws" restriction.

Powers. Municipal power was the point of pivot in a wide assortment of contests during the survey period.[57]

Generally, *Clear-Vu Cable, Inc. v. Town of Trion*[58] concerned the municipal franchise power; specifically, the litigation focused upon the municipality's grant of an exclusive franchise to a cable television service. The service sought to remove from the franchise agreement the municipality's power of approval of rate increases and, upon the municipality's request for financial data justifying a proposed increase, the service reduced from twelve to nine the number of channels supplied.[59] Upon the municipality's protest, the service pointed to still another provision in the franchise specifying that the service would supply a minimum of four channels. In resolution of the disagreement, the supreme court construed the franchise provision to establish only the minimum number of required channels and not as setting the service's obligation at that number.[60] Emphasizing the municipality's insistence that it stood ready to

52. 245 Ga. 57, 262 S.E.2d 814 (1980).

53. GA. CODE ANN. §§ 68A-1503, -1505 (1980).

54. The challenger had suffered revocation of his driver's license by virtue of convictions under three such municipal ordinances.

55. 245 Ga. at 58, 262 S.E.2d at 816.

56. "Code Ann. §§ 68A-1503 and 68A-1505 are laws of general application, and these laws constitute 'express legislative authority' which confer the power upon local authorities to adopt any or all provisions of the Uniform Rules of the Road and make them local ordinance violations." 245 Ga. at 58-59, 262 S.E.2d at 816.

57. For treatment of this area of municipal law, *see* Sentell, *Discretion in Georgia Local Government Law*, 8 GA. L. REV. 614 (1974); Sentell, *Reasoning by Riddle: The Power to Prohibit in Georgia Local Government Law*, 9 GA. L. REV. 115 (1974), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 651, 693 (3d ed. 1977).

58. 244 Ga. 790, 262 S.E.2d 73 (1979).

59. This occurred some eight years after the grant of the franchise.

60. The court relied upon rules of construction that operate against the party drafting

consider a rate increase upon submission of the requested data, the court upheld the trial judge in enjoining the cable service from continuing the reduction of channels.

Another charged facet of municipal power encompasses criminal prosecutions for municipal offenses and their relation to state offenses—the impact of "double jeopardy." The Georgia Supreme Court further evolved that facet in *State v. Burroughs*,[61] a defendant's challenge to a conviction of "simple battery" in the state court following his conviction of "disorderly conduct" in the municipal court.[62] Double jeopardy, the supreme court revealed, is of two varieties: statutory and constitutional. Georgia's double jeopardy statute,[63] the court announced, does not apply to successive municipal and state prosecutions.[64] Accordingly, "[w]here successive municipal and state prosecutions are involved, a criminal defendant's rights are controlled solely by the State and Federal Constitutions."[65] The constitution protects a defendant from being twice placed in jeopardy for the same offense,[66] the court continued, and "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[67] Then examining the municipal ordinance and state statute in issue, the court found the former to turn upon interference with another's lawful occupation and the latter upon physical harm or offensive contact. Thus, the defendant's two convictions did not involve the same offense as prohibited by constitutional double jeopardy.[68]

A different constitutional challenge—that of void for vagueness—was launched against the municipal disorderly conduct ordinance in *City of*

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the agreement (the service). These rules require the agreement serve the public interest and the rules impose a duty of good faith and fair dealings.

61. 244 Ga. 288, 260 S.E.2d 5 (1979), *rev'g* 149 Ga. App. 183, 254 S.E.2d 144 (1979).

62. Both convictions were supported by the same evidence.

63. Statutory double jeopardy is set out in GA. CODE ANN. § 26-506, -507 (1977).

64. The court construed the legislative intent as affecting only successive prosecutions for state crimes.

65. 244 Ga. at 289, 260 S.E.2d at 7.

66. "Although the Criminal Code may deal only with violations of the laws of the state, violations of municipal ordinances are criminal offenses for constitutional purposes." *Id.*

67. *Id.* at 290, 260 S.E.2d at 7. Here the court borrowed from the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 304 (1932).

68. The court overruled in part Barber v. State, 146 Ga. App. 523, 246 S.E.2d 510 (1978). In still another survey-period case, Diamond v. State, 151 Ga. App. 690, 261 S.E.2d 434 (1979), the court of appeals held that when a municipality has, under authority of GA. CODE ANN. § 68A-804 (1980), decreased the speed limit below that of the state limit, any violation of the state statute and of the municipal ordinance may, at the discretion of the local prosecutor, be charged as a violation of statute or ordinance and a state court has jurisdiction of the offenses.

Macon v. Smith.[69] Sustaining the validity of the ordinance, however, the supreme court construed it "to prohibit only those words, expressions or acts which have a direct tendency to cause immediate acts of violence by the person to whom the speech or act is addressed."[70] So construed, the court concluded, the ordinance was neither vague nor unconstitutional under the first amendment.[71]

Liability. The municipality's responsibility for its injurious acts remained a subject highly susceptible to litigation during this survey period.[72] That susceptibility manifested itself from a variety of perspectives and in a spectrum of settings.

In a somewhat traditional vein, the supreme court granted certiorari in *Fry v. City of Atlanta*[73] in order to unanimously and expressly agree with a bare majority of the court of appeals[74] that the hiring, firing, and demotion of police officers are "governmental in nature," thus entailing municipal immunity from tort liability.[75]

There was also the usual activity revolving around responsibility for street and sidewalk defects. In *Clark v. Raymond J. Pitts, Inc.*,[76] for instance, the court of appeals reversed a summary judgment for the municipality (and other defendants) in an action by a child who fell into an excavation.[77] When a contractor left an unbarricaded pile of sand on a sidewalk, the sand having been taken from an excavation in the public street,[78] the court deemed municipal liability to the injured child a ques-

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69. 244 Ga. 157, 259 S.E.2d 90 (1979). The ordinance stated: "It shall be unlawful for any person to act in a violent, turbulent, boisterous, indecent or disorderly manner or to use profane, vulgar, or obscene language in the city, tending to disturb good order, peace, and dignity in said city."

70. *Id.* at 159, 259 S.E.2d at 92. The court viewed its construction to require "fighting words or acts."

71. Even so, the court held the defendant's conduct—"shooting a bird" with a sign of the fingers—not to violate the ordinance.

72. *See generally* R.P. SENTELL, THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA (3d ed. 1980).

73. 243 Ga. 517, 255 S.E.2d 48 (1979).

74. City of Atlanta v. Fry, 148 Ga. App. 269, 251 S.E.2d 90 (1978). *See* Sentell, *Local Government Law*, 31 MERCER L. REV. 155, 165 (1979).

75. In the same traditional vein, but for the opposite result, *see* City Council of Augusta v. Lee, 153 Ga. App. 94, 264 S.E.2d 683 (1980), in which the court of appeals reaffirmed its decision in Columbus v. Hadley, 130 Ga. App. 599, 203 S.E.2d 872 (1974), that the operation of a public transportation system is a "ministerial function" for which a municipality can be held liable in respect to the torts of its agents and servants.

76. 151 Ga. App. 192, 259 S.E.2d 189 (1979).

77. Allegedly, the child climbed upon the sandpile, the pile began to crumble, and the child was swept into the excavation.

78. The court distinguished cases in which the plaintiff had left the public sidewalk and entered the construction site prior to receiving injury.

tion for the jury.[79] In contrast, the supreme court possessed no qualms over a summary judgment for the municipality in *Tamas v. Columbus*,[80] a wrongful death action for a child who fell into a creek below a bridge.[81] Reviewing the plaintiff's allegations of municipal negligence in failing to erect barriers, signs, or warning devices,[82] the court distinguished between improper maintenance and failure to maintain. "We find the present case to be an example of discretionary nonfeasance on the part of the defendant city,"[83] said the court, and held, as a matter of law, that the municipality was not liable.[84]

The most prolific press of claims against municipalities in recent years have sounded in "nuisance,"[85] but last year's survey raised the possibility that the supreme court may be having second thoughts on the matter.[86] Manifestation of that possibility continued this year as the court again reversed the court of appeals on the point.[87] In *City of Bowman v. Gunnells*,[88] the supreme court rendered summary judgment against an allegation that a municipality created a nuisance when, after notice of malfunction, it failed to replace a bulb in a traffic light.[89] Emphasizing that only two hours had transpired between the malfunction and the plaintiff's injury, the court maintained that under its earlier guidelines the charge clearly fell short of a nuisance. Moreover, the court elaborated, nuisance,

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79. The court also found "without merit" the municipality's contention that the young plaintiff's conduct, in light of his knowledge, constituted contributory negligence which barred his recovery as a matter of law.

80. 244 Ga. 200, 259 S.E.2d 457 (1979).

81. The plaintiff alleged that her daughter was traveling across the bridge, ventured down a steep slope, and fell into the creek.

82. The plaintiff charged the municipality with both negligence and creating a "continuing nuisance."

83. 244 Ga. at 202, 259 S.E.2d at 458.

84. The court quoted GA. CODE ANN. § 69-302 (1976): "Where municipal corporations are not required by statute to perform an act, they may not be held liable for exercising their discretion in failing to perform the same."

In still another sidewalk situation, Broadnax v. City of Atlanta, 149 Ga. App. 611, 612, 255 S.E.2d 86, 87 (1979), involving the tilting of a steel plate covering a hole in the sidewalk, the court of appeals rejected the plaintiff's *res ipsa loquitur* contention as follows: "Before the doctrine of *res ipsa loquitur* can be applied, it must first be shown that the defendant was responsible for the condition of the sidewalk which caused the injury, and [plaintiff] presented no evidence to establish this fact."

85. *See generally* Sentell, *Municipal Liability in Georgia: The "Nuisance" Nuisance*, 12 GA. ST. B.J. 11 (1975), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 843 (3d ed. 1977).

86. *See* Sentell, *Local Government Law*, 31 MERCER L. REV. 155, 165-67 (1979).

87. City of Bowman v. Gunnells, 148 Ga. App. 27, 251 S.E.2d 39 (1978).

88. 243 Ga. 809, 256 S.E.2d 782 (1979).

89. The plaintiff alleged injury at an intersection collision because of the malfunctioning light.

like pornography, "cannot be defined but you know it when you see it."[90]

Even the court of appeals could not "see it" in *Barnett v. City of Albany*,[91] an action alleging the creation of a municipal nuisance by allowing a fallen tree to obscure a stop sign for approximately twelve to sixteen hours prior to plaintiff's intersection collision.[92] The court found the evidence deficient in showing the municipality's commission of an act creating the condition or its failure to perform a duty to rectify the situation.[93]

Another traditional source of municipal responsibility, though not sounding in tort, is that of eminent domain;[94] on two occasions the supreme court considered that source in the context of the Georgia Relocation Assistance and Land Acquisition Policy Act of 1973.[95] The plaintiffs in *Clifton v. Berry*[96] utilized that statute[97] to seek to mandamus the municipality to institute condemnation proceedings against their properties for an airport expansion program.[98] The court's response was both negative and affirmative. On the one hand, mandamus could not issue because the plaintiffs possessed an adequate legal remedy through inverse condemnation proceedings. On the other hand, the complaint stated a claim for relief as an inverse condemnation and the court reversed a summary judgment for the municipality. The court's decision in *Clifton* does not establish that the statute can never serve as the basis for mandamus, of course, and that point is illustrated by *Jackson v. Alford*.[99] Thus, plaintiffs in *Jackson* successfully relied upon the statute to mandamus the municipality's payment of attorney and appraisal fees incurred when the municipality instituted and subsequently dismissed condemnation proceedings against the plaintiffs' properties.[100] The court found "no merit" in the municipality's argument that the statute did not apply "where the condemnation proceeding was not formally abandoned, but only

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90. 243 Ga. at 811, 256 S.E.2d at 784.

91. 149 Ga. App. 331, 254 S.E.2d 481 (1979).

92. The court also noted testimony that the limbs had been trimmed so that the sign could be seen by approaching drivers.

93. The court thus affirmed the trial judge's grant of the municipality's motion for summary judgment.

94. *See* R.P. SENTELL, THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 124-32 (3d ed. 1980).

95. GA. CODE ANN. ch. 99-37 (1980).

96. 244 Ga. 78, 259 S.E.2d 35 (1979).

97. GA. CODE ANN. § 99-3708(7)-(8) (Supp. 1980).

98. The plaintiffs alleged that the municipality had already condemned 90% of the property in the subject area, thus leaving the plaintiffs living in a "ghost town."

99. 244 Ga. 125, 259 S.E.2d 68 (1979).

100. Plaintiffs had employed counsel and answered the proceeding prior to notice of its dismissal.

dismissed."[101]

A facet not receiving its typical share of judicial attention this year was the *ante litem* notice requirement—the statutory mandate of notice of claim to the municipality within six months of the event.[102] Indeed, the mandate's only mention was that which the court of appeals afforded in *Lockaby v. City of Cedartown.*[103] There the court summarily affirmed the trial judge's finding that the plaintiff had failed to properly raise the requirement's constitutionality during trial[104] and thus the question could not be considered on appeal.[105]

Zoning. The supreme court's yearly consideration of municipal zoning can be illustrated in three distinct factual contexts. *Martin v. Mayor & Council of Royston*[106] reversed a trial judge's refusal to mandamus the mayor and council to remove a mobile home parked in violation of municipal zoning ordinances.[107] Discounting the point that the zoning enforcement office had not been made a party to the suit,[108] the court reasoned that the office was only an administrative unit of the municipal government and under the supervision and control of the mayor and council.[109]

In *Payne v. Borkat,*[110] the court engaged in further judicial evolution of the general statute which declares that "covenants restricting lands to certain uses shall not run for more than twenty years in municipalities which have adopted zoning laws. . . . "[111] First, the court rejected the contention that the statute applied to use retrictions but not to building restrictions.[112] Both restrictions, the court held, became unenforceable in

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101. 244 Ga. at 127, 259 S.E.2d at 69.

102. GA. CODE ANN. § 69-308 (1976). *See* R.P. SENTELL, THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 133-60 (3d ed. 1980); Sentell, *Georgia Municipal Tort Liability: Ante Litem Notice,* 4 GA. L. REV. 134 (1969), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 793 (3d ed. 1977).

103. 151 Ga. App. 281, 259 S.E.2d 683 (1979). The case involved a fall in the street, and the plaintiff conceded that she had not provided the municipality with the required notice.

104. For discussion of the issue of constitutionality, *see* Sentell, *Ante Litem Notice: Cause for Pause,* URB. GA. OCT. 1978, at 24.

105. Indeed, the court of appeals noted that it would have been without jurisdiction of the case had the issue been properly raised below.

106. 244 Ga. 669, 261 S.E.2d 707 (1979).

107. Plaintiffs alleged that the appeals board of the planning and zoning commission had voted that the mobile home was in violation of zoning ordinances.

108. This had been the trial judge's reason for refusing the mandamus.

109. Thus, a judgment requiring the mayor and council to enforce the ordinance would operate upon the enforcement unit.

110. 244 Ga. 615, 261 S.E.2d 393 (1979).

111. GA. CODE ANN. § 29-301 (1969). The plaintiffs sought to free their lots from restrictive covenants in their deeds of 1946 by urging that in 1958 the lots came under the control of municipal zoning ordinances. The ordinances permitted the uses which they wished to make of their lots.

112. The court observed that both restrictive covenants and zoning ordinances contain

municipalities having zoning laws for more than twenty years. Second, the court also rejected a constitutional challenge to the statute. Rather, "the broad zoning powers given to counties and municipalities override the state and federal constitutional provisions against the passage of laws impairing the obligation of contracts."[113]

The period would be incomplete without yet another effort by the court to grapple with the ramifications wrought by its epic 1975 zoning decision in *Barrett v. Hamby*.[114] The occasion was *Village Centers, Inc. v. City of Atlanta*,[115] a challenge by property owners to the municipality's refusal to rezone to a commercial classification.[116] In reversing the trial judge,[117] a majority of the supreme court adumbrated his error as follows: "In this case, the trial court evaluated the specific proposed use for the land rather than reviewing the constitutionality of the present zoning classification."[118] Under the appropriate *Barrett* approach, the court instructed, the evidence demanded a finding that present zoning amounted to an unconstitutional deprivation of property.[119]

B. Counties

Home Rule. "Home rule" is a conceptual coat of many colors in local government law,[120] and this survey period witnessed two material decisions, cutting in opposite directions, in the domain of county government. The primary challenge in *Smith v. Board of Commissioners of Roads and Revenues*[121] went to the county's power to contract with a private corpo-

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building and use restrictions.

113. 244 Ga. at 618-19, 261 S.E.2d at 395.

114. 235 Ga. 262, 219 S.E.2d 399 (1975). *See also* the discussion of zoning in the section dealing with counties *infra*.

115. 244 Ga. 43, 257 S.E.2d 894 (1979).

116. The plaintiffs wished to develop a shopping center.

117. The judge had upheld the municipality's decision.

118. 244 Ga. at 44, 257 S.E.2d at 895. "The function of the trial court in a zoning appeal is to determine if the present zoning is constitutional, not to scrutinize any other proposed uses." *Id.*

119. In contrast, the court, in Westbrook v. Board of Adjustment, 245 Ga. 15, 262 S.E.2d 785 (1980), found no reason to overturn the trial judge's denial of rezoning to one whose lot would increase substantially in value but which was located in an almost exclusive residential area.

120. *See generally* Sentell, *Home Rule Benefits or Homemade Problems for Georgia Local Government?*, 4 GA. ST. B.J. 317 (1968); Sentell, *"Home Rule": Its Impact on Georgia Local Government Law*, 8 GA. ST. B.J. 277 (1972); (both reprinted in R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 385, 399 (3d ed. 1977)). *See also* Sentell, *Local Government "Home Rule": A Place to Stop?*, 12 GA. L. REV. 805 (1978); Sentell, *The Express Exclusions from Home Rule Powers*, URB. GA. Feb. 1978, at 13.

121. 244 Ga. 133, 259 S.E.2d 74 (1979).

ration to provide fire protection services to the county.[122] Rejecting that challenge, the supreme court relied upon "Amendment 19" of the Georgia Constitution which authorizes local governments to exercise "powers" and provide "services" in respect to "fire protection."[123] "Having had the authority to provide services of this nature," said the court, the governing authorities "had the duty and discretion to examine the methods available to implement that goal and select that method which they determined most effectively and efficiently provided fire protection."[124] With the county's basic authority thus established, the court proceeded to deny arguments that the contract illegally provided county property for use by the private corporation;[125] that the contract was voided by the corporation's profit-making purposes;[126] that the contract illegally infringed upon the civil service system;[127] and that the contract was void for vagueness.[128] Accordingly, the court denied the challengers' petition for injunctive relief.

By virtue of its other decision, in *Wood v. Gwinnett County*,[129] the supreme court supplied fresh gloss, limiting in nature, to the authority conferred by the 1966 county "home rule" provision of the constitution.[130] Acting under that provision, which empowers the county to "amend or repeal the local acts applicable to its governing authority,"[131] the county commissioners had adopted a resolution amending a local statute which created the "County Public Facilities Authority."[132] Assuming its traditional posture of strict construction,[133] the court focused upon the nature of the local statute and invalidated the resolution. The statute, the court

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122. The county had terminated its own fire department and entered into a contract with a private Arizona corporation for the services.

123. GA. CONST., art. IX, § 4, ¶ 2, GA. CODE ANN. § 2-6102 (1977).

124. 244 Ga. at 138, 259 S.E.2d at 78. The court emphasized that it was not deciding upon the wisdom of the contract but only its legality.

125. The court held that providing fire stations and equipment to the corporation did not violate the county commissioners' duty to control county property, nor did it grant a "gratuity" to the corporation.

126. The court said that authority to enter such contracts "would be emasculated if profit and the profit motive were sufficient grounds to invalidate them." 244 Ga. at 141, 259 S.E.2d at 79.

127. The court said that civil service did not apply to county determinations to terminate services based on budgetary concerns.

128. The court viewed the intent of the contracting parties to be "fairly clear." 244 Ga. at 144, 259 S.E.2d at 81.

129. 243 Ga. 833, 257 S.E.2d 258 (1979).

130. *See* 1965 GA. LAWS 752.

131. GA. CONST., art. IX, § 2, ¶ 1, GA. CODE ANN. § 2-5901(b) (1977).

132. The authority had been created to provide fire stations, and the resolution purported to add other types of buildings and facilities to its jurisdiction.

133. "Counties are creatures whose limited powers must be strictly construed." 243 Ga. at 834, 257 S.E.2d at 259.

specified, was not one "applicable to the governing authority," but rather one creating a separate political subdivision.[134] Amendment of the statute, therefore, was not within the county governing authority's "home rule" powers.[135]

Officers and Employees. Fundamental to an office of local government is the qualification of the holder of that office. In *Ramsey v. Powell*,[136] the supreme court was required to plumb that fundamental for an elected member of a county school board who, upon his guilty plea, had been sentenced for false swearing.[137] Observing the constitution's disqualification of persons convicted of a crime "involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary,"[138] the court considered the defendant's contention that the trial judge had reduced his conviction to a misdemeanor.[139] Conceding the existence of authorizing statutory language of that thrust,[140] the court nevertheless construed the reduction to be of punishment and not class of crime.[141] Consequently, the court affirmed the trial judge's order of disqualification.

Highsmith v. Clark[142] yielded a similar determination for a county commissioner who was also a part-time federal magistrate. Under a statutory declaration of ineligibility for "[p]ersons holding any office of profit or trust under the Government of the United States,"[143] the court discounted the commissioner's claim of an exception on the ground that the federal position was only a part-time one. Although part-time, said the court, the position was one of profit or trust and was not temporary. Accordingly, the court affirmed the trial judge's decision that the commissioner's office was vacant.[144]

Terminations, dismissals, and nonrenewals were apparently numerous during the year, and several were litigated. The court of appeals was able to resolve the issue of *Barrow v. Polk County*[145] by finding evidence that

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134. The court noted that the facilities authority was not a mere arm of the governing authority and that its debts were not debts of the county.

135. The court thus reversed the trial judge's dismissal of the challenger's petition.

136. 244 Ga. 745, 262 S.E.2d 61 (1979).

137. The action had been brought by a citizen and taxpayer in quo warranto.

138. GA. CONST., art. II, § 2, ¶ 1, GA. CODE ANN. § 2-501 (1977).

139. The trial judge had stated his reduction as one from felony to misdemeanor.

140. *E.g.*, GA. CODE ANN. §§ 27-2501 and 2527 (1978).

141. The court said "it has been held repeatedly that it is the punishment, rather than the offense itself, which is reduced, and that 'it is not the punishment imposed in a given case but the punishment that may be imposed that characterizes the crime.'" 244 Ga. at 746, 262 S.E.2d at 62.

142. 245 Ga. 158, 264 S.E.2d 1 (1980).

143. GA. CODE ANN. § 89-101(4) (1980).

144. The action was one in quo warranto.

145. 152 Ga. App. 149, 262 S.E.2d 514 (1979).

the county building inspector's employment was at will and not for a term. That evidence in turn supported the trial judge's rejection of the inspector's complaint of the county's termination of his employment. The court reached the same conclusion regarding a county detective in *Vansant v. Cobb County Police Department*,[146] but only after examination of several points of procedure. As to alleged bias on the part of the civil service board, the court observed that the one member challenged at the hearing was one of the two members who finally voted in favor of the employee. Upholding the validity of the termination,[147] the court discounted the constitutional importance of a hearing before rather than after the initial dismissal,[148] and rejected the necessity of findings of fact and conclusions of law by the board.[149] Similarly, in *Cavander v. DeKalb County Merit System Council*,[150] the court sustained the validity of a county police officer's dismissal by approving the sufficiency of the termination notice. A requirement of written notice stating specific reasons for dismissal was satisfied, the court held, by a notice which charged an excessive use of leave and an inability to cope with job pressures.[151]

Finally, *Long County Board of Education v. Owen*[152] presented objections by a county school principal to the county's nonrenewal of his contract. At the hearing, the school board had supplied a list of seventeen charges[153] and, following the principal's efforts to discredit those charges, upheld its own decision of nonrenewal. In the absence of the principal's challenge to the board on grounds of bias, held the court of appeals, the State Board of Education and the superior court had both erred in considering that challenge for the first time on appeal. Otherwise, the court explained, the principal would have been afforded a "second bite of the apple."[154]

Openness. One leg in the tripod of the modern movement for "open-

146. 151 Ga. App. 220, 259 S.E.2d 205 (1979).

147. The county's letter of termination charged insubordination and refusal to take a polygraph examination.

148. The court found no violation of due process.

149. At least this was true, the court said, in the absence of requirements in statutes, ordinances, or regulatory rules.

150. 151 Ga. App. 108, 258 S.E.2d 763 (1979).

151. In Russell v. Hughes, 244 Ga. 634, 261 S.E.2d 584 (1979), the supreme court held that a county tax assessor invalidly terminated on February 28 was entitled to compensation until his second termination on May 9, but that his increase in earnings from self employment during that period should be in mitigation of the county's liability.

152. 150 Ga. App. 245, 257 S.E.2d 212 (1979).

153. This was in accord with GA. CODE ANN. § 32-2103(c) (Supp. 1980).

154. 150 Ga. App. at 247, 257 S.E.2d at 214. That is, he could contest the validity of the charges themselves and, upon failing in that endeavor, then challenge on grounds of impartiality.

ness" in government is that of "open meetings."[155] Georgia's "Sunshine Law" contains the following provision: "Any action contesting a resolution, rule, regulation or formal action on the ground of noncompliance with this law must be commenced within 90 days of the date the resolution, rule or regulation was passed or the formal action was taken."[156]

Worthy v. Paulding County Hospital Authority[157] presented the following situation: On September 18 the authority decided to submit an application for an addition to its facilities and this decision was spread upon the minutes of its public meeting.[158] On September 27, the administrator actually submitted the application. The plaintiff filed suit under the "Sunshine Law" on December 22, contending that the ninety-day period of challenge did not commence until September 27. Denying the plaintiff's contention, the court held that the authority's "formal action" occurred on the day of the decision and not that of the application.[159]

Contracts. The Georgia county's contracting capabilities are limited at several junctures, and those limitations in turn contribute to determining the status of one who contracts with the county.[160] Several decisions during the survey period make this point.

In *PMS Construction Co. v. DeKalb County*,[161] the supreme court undertook the task of balancing the statutory provision that "[e]very county is a body corporate, with power to sue and be sued in any court,"[162] against the statutory provision that "[a] county is not liable to suit for any cause of action unless made so by statute."[163] The long-settled construction of this ostensible paradox, said the court, was to permit "suits against counties based on contracts made pursuant to legislative authorization."[164] In this case that construction rendered the county amenable to suit on a contract for the erection of a tennis center.[165] Moreover, the court sustained a count in the suit seeking "the reasonable value of

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155. The others are "disclosure" and "open records." For discussion, *see* Sentell, *The Omen of "Openness" in Local Government Law*, 13 GA. L. REV. 97 (1978).

156. GA. CODE ANN. § 40-3301(a) (1975).

157. 243 Ga. 857, 257 S.E.2d 271 (1979).

158. The authority first reached this decision in an executive session of the same date.

159. The court thus affirmed the trial judge's refusal to enjoin the authority from continuing with its application.

160. For treatment of some of those limitations, *see* Sentell, *Some Legal Aspects of Local Governmental Purchasing in Georgia*, 16 MERCER L. REV. 371 (1965), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 599 (3d ed. 1977).

161. 243 Ga. 870, 257 S.E.2d 285 (1979).

162. GA. CODE ANN. § 23-1501 (1971).

163. GA. CODE ANN. § 23-1502 (1971).

164. 243 Ga. at 871, 257 S.E.2d at 287.

165. The court located the county's authority to contract for the building of the tennis center in GA. CODE ANN. § 69-602 (1976).

work performed and materials furnished."[166] Although recovery against counties for implied contracts was not possible, conceded the court,[167] this count sounded in "restitution" and constituted an alternative remedy for breach of an express contract.[168] Finally, the court also admitted statutory law requires county contracts to be in writing and entered on the minutes,[169] but held that since passage of the Civil Practice Act this is a matter of proof at trial and not of pleading.[170]

Later during the period, the court was forced to distinguish *PMS Construction Co.* in *Lester Witte & Co. v. Rabun County.*[171] There the plaintiff partnership contracted to perform accounting services for the county, but the county minutes made no mention of a reservation for plaintiff to charge more than the stated fees in unusual circumstances.[172] Affirming a dismissal of the plaintiff's effort to mandamus the county to enter upon the minutes an alleged oral agreement for higher fees, the court emphasized that such an agreement was not prima facie valid because it was not in writing.[173] Unlike the written contract covering all terms sued on in *PMS Construction Co.,* observed the court, an oral modification was an illegal and unenforceable agreement. The court also rejected the plaintiff's contention that the contract constituted the county auditor who, as a public official, was exempt from the recording requirement. The court concluded that a partnership could not be deemed a "public official" within the meaning of such an exemption.[174]

The court of appeals utilized the minutes requirement to declare invalid a county contract in *Commercial Credit Corp. v. Mason.*[175] In that case, the plaintiff alleged the construction of a sewage treatment facility pursuant to the contract as well as its lack of responsibility for a tap-on

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166. 243 Ga. at 372, 257 S.E.2d at 287.

167. *I.e.,* there could be no recovery against the county in *quantum meruit.*

168. "The object of the remedy of restitution is to return the injured party to the position he occupied *before* his performance, i.e. to restore him to the pre-contract status quo. Restitution is as truly a remedy for breach as is a judgment for damages." 243 Ga. at 872, 257 S.E.2d at 288 (citations omitted).

169. GA. CODE ANN. § 23-1701 (1971).

170. "If the contract is now on the minutes, PMS need only show this at trial. If the contract has not yet been entered on the minutes, PMS is, of course, entitled to amend its complaint to seek mandamus for entry of the contract on the minutes." 243 Ga. at 871, 257 S.E.2d at 287.

171. 245 Ga. 382, 265 S.E.2d 4 (1980).

172. The minutes noted only the character of the work to be performed and the quoted prices.

173. Thus, it could not be mandamused upon the minutes.

174. Justice Bowles concurred only in the judgement, and Chief Justice Nichols and Justice Hill dissented.

175. 151 Ga. App. 443, 260 S.E.2d 352 (1979).

fee to the county.[176] Assuming *arguendo* that an otherwise valid written contract existed, the court emphasized that the plaintiff had failed to show entry on the county minutes and thus could maintain no contract action against the county.[177]

Griffin v. Chatham County[178] depicted the striking episode of a county's attempt to mandamus its own sheriff to receive and house municipal prisoners pursuant to a contract under which the county had agreed to perform this service for the municipality.[179] Pointing to statutes both general and special, the supreme court sustained the contract, considered the sheriff's duty to be clearly imposed, and affirmed issuance of the mandamus against him.[180]

Legislation. Of the Georgia Constitution's proscriptions which impact upon legislation dealing peculiarly with local government, none has played a more crucial role than the following famous mandate: "Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law."[181] Of the dual directions encompassed by the mandate, the latter, the restriction upon special laws, has probably received more judicial and popular attention.[182] The first command is equally important, however, and over the years the courts have established a number of tests for determining compliance with it. During the survey period, the supreme court illustrated utilization of one of those tests.

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176. The county contended that no binding contract ever existed between the parties.

177. The court affirmed the trial judge's declaration of the contract's invalidity.

178. 244 Ga. 628, 261 S.E.2d 570 (1979).

179. The sheriff argued the absence of a duty to accept the prisoners and the absence of power in the county commissioners to require him to do so.

180. "The sheriff's duty is clear and it was not error to issue the writ of mandamus." 244 Ga. at 630, 261 S.E.2d at 572.

In still another "contract" episode, Forest Managers, Inc. v. Wilkes County, 152 Ga. App. 639, 263 S.E.2d 478 (1979), the court of appeals reversed a directed verdict for the county, upon the suit of a subcontractor, when the county had failed to obtain a performance bond from the contractor as required by statute. The court concluded that the subcontractor had provided evidence of the contractor's "insolvency" so as to authorize recovery from the county.

181. GA. CONST. art. I, § 2, ¶ 7, GA. CODE ANN. § 2-207 (1977). For history of the evolution of this provision, *see* Sentell, *The Validity of Statutes Pertaining to Georgia County Commissioners: An Exercise in Constitutional Interpretation*, 15 MERCER L. REV. 258 (1963), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 199 (3d ed. 1977).

182. *See, e.g.*, Sentell, *When is a Special Law Unlawfully Special?*, 27 MERCER L. REV. 1167 (1976), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 177 (3d ed. 1977). *See also*, Sentell, *Unlawful Special Laws: A Postscript on the Proscription*, 30 MERCER L. REV. 319 (1978).

Strickland v. Richmond County[183] presented a challenge to the validity of a statute applying "in all counties having a population between 145,000 and 165,000,"[184] prohibiting water companies from increasing their rates without prior approval of the county governing authority.[185] Invalidating that population statute as a general law without uniform operation throughout the state, the court employed the test of "reasonable relation."[186] Thus, "it has not been shown," the court elaborated, "why the customers of a water company in counties of the particular size stated are more in need of this price control and approval than in larger or small counties."[187] Accordingly, the statute was deemed to have "no logical basis with reference to the population classification made."[188]

Powers. The county's power to act constituted the focal point of a number of contests during the year,[189] contests highly diversified in nature. In general, public health and enjoyment were the objects of attention in *City of Covington v. Newton County*[190] and in *Rockdale County v. Mitchell's Used Auto Parts, Inc.*[191] The first case raised the issue of the county's authority to impose charges upon the municipality for the dumping of garbage in the county's sanitary landfill.[192] The supreme court relied upon "Amendment 19" of the Georgia Constitution to sustain the county power.[193] Moreover, given the municipality's two-year practice of paying the charges, the court held that an "implied contract" existed between the parties.[194] The second case presented an attack upon a

183. 243 Ga. 462, 254 S.E.2d 844 (1979).

184. *Id.* at 413, 254 S.E.2d at 845.

185. A county sought to enjoin a private water company from increasing rates when no proper approval had been obtained.

186. "Whether or not classification by population bears a reasonable relation to the subject matter of the statute depends largely upon the facts of each particular case. A classification is valid if it relates to the subject matter of the legislation and is not unreasonable or arbitrary." 243 Ga. at 463-64, 254 S.E.2d at 845.

187. *Id.* at 464, 254 S.E.2d at 846.

188. *Id.* It should be noted that the population statute litigated in this case had been enacted in 1975. The 1976 Constitution now expressly prohibits bracketed population statutes dealing with 15 broadly specified subjects, including "distribution of water." GA. CONST. art. IX, § 4, ¶ 2 (1976), GA. CODE ANN. § 2-6102 (1977).

189. *See generally* Sentell, *Discretion in Georgia Local Government Law*, 8 GA. L. REV. 614 (1974), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 651 (3d ed. 1977).

190. 243 Ga. 476, 254 S.E.2d 855 (1979).

191. 243 Ga. 465, 254 S.E.2d 846 (1979).

192. The rates were set forth in a county ordinance.

193. GA. CONST. art. IX, § 4, ¶ 2, GA. CODE ANN. § 2-6102 (1977). The court held the amendment to empower the county to contract with the municipality for such services and to determine and fix reasonable charges.

194. 243 Ga. 476, 254 S.E.2d 855 (1979). The court rejected both due process and equal protection contentions.

county ordinance requiring a fence and buffer space around open storage and junkyard businesses. The court denoted the regulation as one of a traditional police power character but limited by the constitutional requirement of reasonableness. Thus, the ordinance was not unconstitutional on its face, even for pre-existing businesses, but the objectors could present evidence of unconstitutional application.[195]

Perhaps the most effective manner of squelching internal county dissention, certainly the most traumatic, was that indicated by *Rabun County Recreation Board v. Jarrard*.[196] Upon the county recreation board's complaint that the county commissioners had failed to provide operational funds, the commissioners enacted a resolution abolishing the board.[197] The court of appeals held that under the material general statutes the commissioners possessed the power of dissolution and that the dissolution in turn divested the recreation board of its capacity as a legal entity.[198] Consequently, the board's effort to mandamus the commissioners was a nullity.[199]

Roads. *Horton v. Wayne County*[200] engaged the familiar rule that implied dedication of a roadway to a county may be established by the owner's acquiescence in public use and county maintenance.[201] Reviewing evidence that for almost twenty years the county had graded the road surface and had installed a culvert, that parts of the roadway were used by the general public, and that the owner had repeatedly objected to the county's actions, the supreme court sustained the trial judge's refusal of a directed verdict for the owner.[202]

Schools. The Georgia Constitution directs that "school tax funds shall be expended only for the support and maintenance of public schools, public education, and activities incidental or necessary thereto, including

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195. Thus, the court remanded the case for a hearing. In unrelated litigation, Russell v. Smokerise Bath & Racquet Club, 243 Ga. 724, 256 S.E.2d 457 (1979), the court rejected a county's argument that a "no lights" condition attached to a permit granted for the construction of two new tennis courts in 1973 also applied to two courts operated by the grantee prior to 1973.

196. 150 Ga. App. 56, 256 S.E.2d 661 (1979).

197. The resolution had been enacted prior to the hearing on the board's petition for writ of mandamus.

198. The court said that under GA. CODE ANN. § 69-612.2 (1976), it was expressly declared not mandatory that the local government maintain the recreation system.

199. In unrelated litigation, Holland v. State, 151 Ga. App. 189, 259 S.E.2d 187 (1979), the court of appeals construed the "State Court Act," 1970 Ga. Laws 679, to require a criminal accusation to be supported by an affidavit and to take precedence over a special statute which arguably allowed the solicitor to proceed in the state court without an affidvait.

200. 243 Ga. 789, 256 S.E.2d 775 (1979).

201. The case presented an action by the owner to enjoin the county from entering upon the roadway.

202. The jury had determined that implied dedication had operated.

school lunch purposes."[203] Arising from that limiting language, the issue that *Fletcher v. Russell*[204] carried to the court of appeals was whether school tax funds could be expended for pickup and disposal of garbage from school cafeterias and for school crossing guards.[205] In response, the court drew a line of demarcation. On the one hand, the court viewed garbage disposal as incidental to the authorized school lunch program and held the school district to have both the power and the obligation to pay for the disposal service which the county rendered.[206] On the other hand, the court deemed control of pedestrians and motor vehicles a "governmental function" and the responsibility of the county.[207] Accordingly, "the expenditure of school tax funds for the payment of school crossing guards would not be authorized."[208]

The supreme court then granted certiorari only in respect to the issue of school crossing guards and reversed the court of appeals on that point.[209] Finding no duty on the part of the county,[210] nor any prohibition on the part of the school district, the court evaluated the school superintendent's testimony as follows:[211]

> This and other evidence was amply sufficient to support the trial court's ruling that a school crossing guard might properly be determined by a school board to be an activity necessary or incidental to the support and maintenance of public schools and public education under the Constitution of Georgia. . . .[212]

In *Concerned School Patrons v. Ware County Board of Education*,[213] the supreme court designated the issue one of power to spend collected taxes rather than the power to levy taxes. There, the court rejected an

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203. GA. CONST. art. VIII, § 7, ¶ 1, GA. CODE ANN. § 2-5501 (1977).

204. 151 Ga. App. 229, 259 S.E.2d 212 (1979).

205. The county commissioners sought a declaratory judgment on the legality of the expenditures and hence the school district's responsibility for these services provided by the county.

206. The court relied upon GA. CODE ANN. § 32-909 (1976).

207. 151 Ga. App. at 231, 259 S.E.2d at 214. The court relied upon GA. CODE ANN. § 32-853 (1976).

208. *Id.* On this point, the court reversed the trial judge.

209. Russell v. Fletcher, 244 Ga. 854, 262 S.E.2d 138 (1979).

210. Rather, the county's only duty was to identify school crossings and advise the school systems of state laws and safety standards. The court relied upon GA. CODE ANN. § 32-853.

211. At the trial the superintendent had testified that he considered the safety of the children to be a necessary service.

212. 244 Ga. at 855, 262 S.E.2d at 139. The court expressly did not decide that the school district owed the county for traffic safety services, nor that the district was required to provide such services.

213. 245 Ga. 202, 263 S.E.2d 925 (1980).

effort by county taxpayers to enjoin the board of education from contracting for the construction of athletic facilities. Noting the board's budget contained sufficient uncommitted funds for the project, and emphasizing the absence of a contention that school tax levies had exceeded the twenty mill limitation,[214] the court deemed the board free to use such funds "for any purpose provided by statute, within the constitutional parameters of our state educational system."[215]

Financial expenditures for county schools was also the focus of *In re Thomas County Commission*,[216] an action for compensation by an accountant who had been appointed by the grand jury to a citizens committee to investigate the school system's financial records.[217] The court of appeals determined that the accountant was "appointed" rather than "employed" and that he was entitled to compensation for his services as a member of the citizens committee.[218] Moreover, the court approved compensation at the same rate as the accountant charged in his business: "To deny compensation at a customary rate would, in effect, make it virtually impossible for a grand jury to conduct a searching investigation into the financial affairs of county officials."[219]

Taxation. Confirming the wisdom of the adage that the more things change the more they remain the same, during this era the supreme court continued its confrontation with the 1975 Local Option Sales Tax Act.[220] It was in *City Council of Augusta v. Mangelly*[221] that a majority of the court administered the lethal blow.[222] "The central issue" in that case, the court formulated, was "whether the Georgia Constitution is violated

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214. GA. CONST. art. VIII, § 7, ¶ 1, GA. CODE ANN. § 2-5501 (1977).

215. 245 Ga. at 204, 263 S.E.2d at 927. The court relied upon GA. CODE ANN. §§ 32-601a, -602a, and -909 (1976).

216. 152 Ga. App. 332, 262 S.E.2d 604 (1979).

217. The trial court had ordered the county commission to pay the compensation.

218. 152 Ga. App. at 334, 262 S.E.2d at 606. The court relied upon GA. CODE ANN. § 59-310 (1965).

219. *Id.* at 335, 262 S.E.2d at 606. More miscellaneous in nature, in DeKalb County School System v. White, 244 Ga. 454, 260 S.E.2d 853 (1979), the supreme court held that a father's express waiver of his son's eligibility to play high school football in his senior year, so that the son could repeat the eighth grade pursuant to the father's wishes, was a binding agreement. The court thus rejected the father's action to have the son declared eligible to play football in his senior year.

220. 1975 Ga. Laws 984 (current version at GA. CODE ANN. § 91A-4601 to 4610 (1980)). For last year's episode, *see* Martin v. Ellis, 242 Ga. 340, 249 S.E.2d 23 (1978), *treated in* Sentell, *Local Government Law*, 31 MERCER L. REV. 155, 174-75 (1979). *Ellis* invalidated the "differential rollback" provision of the statute but held the remainder of the statute constitutional.

221. 243 Ga. 358, 254 S.E.2d 315 (1979).

222. Basically, the complaints were leveled by taxpayers in unincorporated areas seeking to prevent their counties from distributing any of the tax proceeds to included municipalities.

by the Act's scheme of allowing counties to tax and to distribute a portion of the tax proceeds to cities."[223] That issue could be resolved, the court proceeded, by examining the purposes for which the constitution permits county taxation.[224] That examination in turn revealed that "taxation by counties for the purpose of sharing the resulting revenue with cities" was not included.[225] The court conceded the existence of a catch-all phrase, permitting county taxation for "such other purposes as may be authorized by the General Assembly,"[226] but then held the general assembly itself devoid of the power in issue.[227] Indeed, "it can never be a valid county purpose to provide revenue to a municipality, because municipalities are not citizens of nor creatures of counties—they are an entirely different form of government."[228]

With the sales tax statute now declared unconstitutional in its entirety, what disposition was to be made of the tax funds already collected by the State Revenue Commissioner but not yet distributed to counties and municpalities? Under the general rule that unconstitutional statutes are void from the inception, the funds had been illegally collected and thus belonged to the taxpayers.[229] In *Strickland v. Newton County,*[230] the court avoided that result by proclaiming an "exception" to the void-from-inception precept,[231] and held its *Mangelly* decision prospective from the date that decision became the judgment of the trial court. Moreover, the court then advanced to the conclusion that "the litigant counties" were entitled to all funds held by the Revenue Commissioner on that date.[232]

Immediately upon invalidation of the 1975 statute, the general assembly enacted the 1979 Local Option Sales Tax Act.[233] The latter statute created 159 special tax districts in the state (coterminous with county boundaries), authorized imposition of the tax within those districts, and provided that the county and municipalities within the district were to

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223. 243 Ga. at 360, 254 S.E.2d at 318. The court viewed the imposition as plainly a county, rather than a state, tax.

224. GA. CONST. art. IX, § 5, ¶ 2, GA. CODE ANN. § 2-6202 (1977).

225. 243 Ga. at 361, 254 S.E.2d at 318-19.

226. *Id.*

227. For this conclusion, the court relied upon GA. CONST. art. VII, § 2, ¶¶ 1, 4, GA. CODE ANN. §§ 2-4701 to 4704 (1977).

228. 243 Ga. at 362, 254 S.E.2d at 319.

229. *See generally* Sentell, *Unconstitutionality in Georgia: Problems of Nothing,* 8 GA. L. REV. 101 (1974), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 149 (3d ed. 1977).

230. 244 Ga. 54, 258 S.E.2d 132 (1979).

231. *Id.* at 55, 258 S.E.2d at 133. The court cited its prior decision in Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976).

232. The court reasoned that "the plaintiff counties in these suits are entitled to the fruits of the holding that this Act is unconstitutional." 244 Ga. at 55, 258 S.E.2d at 134.

233. GA. CODE ANN. § 91A-4601 to 4610 (1980).

agree upon distribution of the proceeds. In *Board of Commissioners of Taylor County v. Cooper*,[234] a taxpayers' action promptly challenged the constitutionality of the new statute, and a unanimous supreme court rejected the variety of attacks embodied in that challenge. The court first diluted some of the language in its *Mangelly* opinion by holding that the General Assembly "does not need constitutional authorization to levy a tax or to authorize the levy of a tax by a county."[235] In this case, however, that point was not crucial, for the court held "Amendment 19"[236] of the constitution to authorize the 1979 statute.[237] So viewed, the special district tax was not a county tax being distributed to municipalities as prohibited by *Mangelly*, nor was the permitted local negotiation of the distribution of the proceeds an unconstitutional delegation of legislative authority.[238] Accordingly, the court reversed the trial judge's determination of unconstitutionality.[239]

As usual, most of the tax litigation reflected disagreements over *ad valorem* property taxation, and several cases focused upon local tax officials administering the controversial system. *Allen v. Norris*,[240] for instance, involved a taxpayer's petition to remove county tax assessors from office, and the court of appeals affirmed the trial judge's refusal to do so. Reviewing the statutory grant of discretion,[241] the court held that the judge had not abused that discretion by refusing to remove assessors who had failed to perform their statutory duty of submitting the tax digest to the county tax commissioner.[242]

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234. 245 Ga. 251, 264 S.E.2d 193 (1980).

235. *Id.* at 253, 264 S.E.2d at 196. Thus, said the court, "the issue is not whether the tax is authorized by the Constitution but whether it is prohibited." *Id.* Holding that it was not, the court said the tax could be sustained as a "joint city-county tax" within the inherent power of the general assembly.

236. GA. CONST. art. IX, § 4, ¶ 2, GA. CODE ANN. § 2-6102 (1977).

237. From this perspective, said the court, the tax could be sustained as a constitutionally authorized "special district tax."

238. The court said the statute created the districts, authorized imposition of the tax, and specified purposes for which the proceeds would be spent; it could leave distribution to the units within the authority levying the tax.

239. The court additionally rejected the attack upon the 1979 statute's application within areas where a referendum had approved the 1975 tax. The court said those elections existed as facts which the legislature could recognize and thus the "grandfathering" of areas in this manner was not unconstitutional.

240. 151 Ga. App. 305, 259 S.E.2d 701 (1979). This case was decided under GA. CODE ANN. tit. 92 (1974) which has been repealed and replaced by GA. CODE ANN. tit. 91A (1980).

241. GA. CODE ANN. § 92-6909 (1974) (current version at GA. CODE ANN. § 91A-1439 (1980)).

242. The assessors had presented evidence of the magnitude of their task and their diligent efforts to meet deadlines even though they were six days late in completing the tax digest. This was conceded to be a violation of GA. CODE ANN. § 92-6917 (1974) (current version at GA. CODE ANN. § 91A-1444 (1980)).

Removal was also the issue in *Spell v. Blalock*,[243] specifically the power of the county administrator to discharge the chief tax appraiser. In the absence of contrary statutes, the supreme court held that under rules and regulations of the State Revenue Commissioner, the appraisal staff was to be employed by the county tax assessors and was subject to their removal power rather than that of the county commissioners or administrator.[244]

The official involved in the remaining case, *Nobles v. Long County*,[245] was a county tax collector seeking to recover commissions on 1976 taxes collected in 1977. Reversing the court of appeals,[246] the supreme court explained that the taxes, when collected, were currently due and that the reason for the late collection was beyond the control of the tax collector.[247] Thus, even though a local statute placed the collector on a salary basis as of January 1, 1977,[248] the court held that to deny him the commissions in issue "would deprive him of compensation for his work during 1976."[249]

Aside from the administering officials, several of the property taxation controversies dealt more substantively with the precise nature of the property interest subject to the imposition and with the value placed upon that interest. *Allright Parking, Inc. v. Joint City-County Board of Tax Assessors*,[250] for instance, highlighted the historic distinction between a taxable estate in land and a nontaxable usufruct.[251] Reviewing rather extensively the terms of a lease,[252] the supreme court determined that the presumptive estate for years created by the period of the agreement[253] was rebutted by restrictions imposed upon the lessee's use of the premises.[254] Denoting that use a "circumscribed and limited" one,[255] the

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243. 243 Ga. 459, 254 S.E.2d 842 (1979).

244. The court said those rules and regulations were adopted pursuant to GA. CODE ANN. § 92-7012(a) (1974) (current version at GA. CODE ANN. § 91A-1444 (1980)).

245. 243 Ga. 442, 254 S.E.2d 829 (1979).

246. Long County v. Nobles, 147 Ga. App. 768, 250 S.E.2d 512 (1978).

247. The court noted an extensive reassessment of property within the county in 1976, numerous delaying appeals, and that tax notices were not mailed until December, 1976.

248. Prior to that time, he had been compensated on a commission basis.

249. 243 Ga. at 443, 254 S.E.2d at 830.

250. 244 Ga. 378, 260 S.E.2d 315 (1979).

251. For discussion of that distinction, *see* Sentell, *Caesar Confronts Caesar: Local Government Property Taxation and Local Government Property*, 31 MERCER L. REV. 293 (1979).

252. The lease agreement was between the Metropolitan Atlanta Rapid Transit Authority and a private business enterprise.

253. That period was a term of 35 years, thus triggering the presumption of an estate declared by GA. CODE ANN. § 61-101 (1979) for leases of five or more years.

254. *E.g.*, the court noted that under the lease MARTA possessed the discretion of precluding the lessee from using any or all portions of the premises during the construction and operation of public projects.

court found only the characteristics of a usufruct and declared the lessee's interest not subject to *ad valorem* taxation.

Statutory law directs that in determining the fair market value of property for purposes of taxation, the tax assessors are to consider the existing use of the property.[256] In *Cobb County Board of Tax Assessors v. Sibley*,[257] the supreme court explained that existing use is by no means the exclusive factor, that "real property is unique," and that "the extent to which existing use affects its value is dependent upon a great variety of other factors."[258] Nevertheless, the court affirmed the trial judge's conclusion that the defendant assessors had failed to consider the existing use of the land in issue and sustained his order of reassessment.[259]

The court of appeals conferred additional attention upon the "existing use" direction in *Martin v. Liberty County Board of Tax Assessors*.[260] In that case, the property owner leased timber land to a paper company for a 35-year term, received substantial rental payments during the first four years, but agreed to only nominal payments for the remainder of the term. Because the owner had also agreed to pay all taxes on the land, the court said his tax liability was based upon the fair market value of the fee—"the unity of his and his lessee's interests in the property."[261] In determining that value, the court rejected the owner's contention that "existing use" equated existing rents received: "He would have the artifically low rental that he currently receives under the lease used to establish the 'fair market value' of the property for taxation purposes."[262] Rather, the court issued the following formulation:

> "Use" of the property for tax assessment purposes refers to the activity or occupation which is pursued on the property and not to the taxpayer's election as to how the fee shall be divided in pursuit of that "use" nor the income derived as the result of that election.[263]

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255. 244 Ga. at 387, 260 S.E.2d at 321. The court relied upon GA. CODE ANN. § 85-803 (1978), which specifies that "an estate for years carries with it the right to use in as absolute a manner as a greater estate."

256. GA. CODE ANN. § 92-5702 (1976).

257. 244 Ga. 404, 260 S.E.2d 313 (1979).

258. *Id.* at 405, 260 S.E.2d at 315.

259. The court noted the trial judge's findings that the value of vacant land was determined by the sale price of lands not accurately reflective of other vacant lands and that the assessors relied upon the property's highest and best use.

260. 152 Ga. App. 340, 262 S.E.2d 609 (1979).

261. *Id.* at 342, 262 S.E.2d at 611. Otherwise, said the court, the owner had conveyed a taxable estate for years.

262. *Id.* at 342, 262 S.E.2d at 612. The court said that approach would result in a "tax penalty" for owners who leased their property for amounts in excess of its value and a "tax windfall" for those leasing property for amounts below its value.

263. *Id.* at 343, 262 S.E.2d at 612.

Accordingly, the court affirmed tax assessments which considered the existing use of the property to be the commercial production of timber.

To a striking degree, local amendments to the Georgia Constitution virtually preclude a uniform approach to county taxation. Two cases before the supreme court during the year reconfirmed that point. In *DeKalb County v. Hinson*,[264] the court sustained an order mandamusing the county to pay to the county board of education one-half of the net revenue collected from an excise tax upon the sale of mixed drinks. Under a 1972 local amendment to the constitution,[265] held the court, excise taxes collected by virtue of a 1977 general statute[266] must be so distributed.[267] Of similar general thrust but in distinctive factual context, *Great Northern Nekoosa Corp. v. Board of Tax Assessors*[268] presented the claim of exemption from *ad valorem* taxation for an enlargement to the taxpayer's paper mill facilities. Under a local amendment to the constitution,[269] the court found the exemption both constitutionally valid[270] and applicable to the claimant's enlargement.[271]

Liability. The age-old struggle of injured claimants to hurdle the barrier of county tort immunity continued unabated during the past year. *Greenway v. DeKalb County*[272] appropriately illustrated that struggle via an action for the wrongful death of plaintiff's child killed while playing in a county refuse container.[273] The plaintiff's tactic for avoiding the bar of immunity consisted of an argument that the county illegally monopolized sanitation service for non-industrial users and should be responsible for its torts in doing so. The court of appeals was unpersuaded. It noted the county's statutory authority to provide the service and concluded that "sovereign immunity here protects the county as a matter of law."[274]

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264. 243 Ga. 623, 255 S.E.2d 722 (1979).

265. GA. CONST. art. VIII, § 7, ¶ 1, GA. CODE ANN. § 2-5501 (1977).

266. GA. CODE ANN. § 58-1087 (Supp. 1980).

267. The court thus rejected the county's contention that the amendment did not apply to future authorizing legislation.

268. 244 Ga. 624, 261 S.E.2d 346 (1979).

269. GA. CONST. art. VII, § 1, ¶ 4, GA. CODE ANN. § 2-4604 (1977).

270. The court held the tax classification well within the state's leeway and thus not violative of equal protection. In so holding, the court noted that it was not deciding "the more difficult question of whether a county has any standing to challenge a state constitutional provision on fourteenth amendment grounds." 244 Ga. at 625, 261 S.E.2d at 347.

271. The court rejected the county taxing officials' contention that the amendment only granted the discretion of providing the exemption.

272. 151 Ga. App. 556, 260 S.E.2d 552 (1979).

273. The container was owned by the county and located at the plaintiff's apartment complex.

274. 151 Ga. App. at 558, 260 S.E.2d at 554. The court quoted GA. CODE ANN. § 23-1502 (1971) that "a county is not liable to suit for any cause of action unless made so by statute," and said that no statute existed for this case.

The claimant's excepting tactic in *Ingram v. Baldwin County*[275] was more successful, at least to the extent of escaping a summary judgment.[276] In that case, plaintiff alleged two separate overflows of raw sewage into her home[277] and based her complaint upon the "taking-or-damaging" provision of the Georgia Constitution.[278] Although agreeing that the provision constitutes an exception to county immunity, the court emphasized the requirement of more than an isolated occurrence or act. Reviewing evidence of the two separate sewage invasions and of the county's prior knowledge of the malfunction,[279] the court reasoned that a jury could find "a taking or damaging of appellant's property for a public purpose."[280]

Even in the limited instances of possible county liability, statutory law declares that "all claims against counties must be presented within 12 months after they accrue and become payable, or the same are barred."[281] In *Cobb v. Board of Commissioners of Roads & Revenue*,[282] a majority of the court of appeals rejected the contention that this presentation requirement was inapplicable when a county waived its immunity for motor vehicles[283] by obtaining liability insurance as authorized by the constitution[284] and statutes.[285] The court was also forceful as to what the presentation statute would not permit: "Formal, written notice is required . . . and notice to the county's liability insurer does not satisfy the statute."[286]

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275. 149 Ga. App. 422, 254 S.E.2d 429 (1979).

276. The court reversed the trial judge's grant of the county's motion.

277. Plaintiff alleged that the overflows occurred two days apart and that they rendered her home uninhabitable.

278. GA. CONST. art. I, § 3, ¶ 1, GA. CODE ANN. § 2-301 (1977).

279. Plaintiff alleged the county's knowledge for five days before two later overflows occurred.

280. 149 Ga. App. at 423, 254 S.E.2d at 430. *See also* Anderson v. Columbus, 152 Ga. App. 772, 264 S.E.2d 251 (1979), where the court of appeals employed the same approach to an action by landowners against the consolidated municipal-county government and the county airport commission for damages resulting from the overflow of a drainage system. Again the court deemed the evidence to demonstrate the necessary elements of a taking-or-damaging action and reversed the trial judge's grant of a summary judgment.

281. GA. CODE ANN. § 23-1602 (1971).

282. 151 Ga. App. 472, 260 S.E.2d 496 (1979).

283. This case involved the plaintiff's collision with a county vehicle.

284. GA. CONST. art. IX, § 6, ¶ 2, GA. CODE ANN. § 2-6302 (1977).

285. GA. CODE ANN. § 56-2437 (1977). The court observed that it had rejected this argument in the somewhat similar situation regarding municipalities in Perdue v. City Council of Augusta, 137 Ga. App. 702, 225 S.E.2d 62 (1976). For discussion of this area of Georgia law, *see* Sentell, *Tort Liability Insurance in Georgia Local Government Law*, 24 MERCER L. REV. 651 (1973), *reprinted in* R.P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 811 (3d ed. 1977).

286. 151 Ga. App. at 473, 260 S.E.2d at 497. "The fact that the County's liability insurer may have taken investigation of the case does not constitute the presentation of the claim to the County as required by Code § 23-1602." The court affirmed a summary judgment in

Another attempted detour around county immunity is the effort to sue individually the officers and employees themselves.[287] In *Smith v. Hancock*,[288] for instance, the plaintiff sought damages from a former superior court judge and the district attorney for allegedly mistreating her husband in a prior civil proceeding.[289] As to the judge, the court of appeals summarily applied the doctrine of judicial immunity for acts in his judicial capacity.[290] The district attorney's status was less clear in Georgia law, the court conceded, but well established elsewhere; he was protected by the same immunity as the judge.[291]

On considerably different facts, the supreme court reached the same result in *Hennessy v. Webb*.[292] There, the plaintiff sought to hold the county school principal liable for injury to a minor child from a dangerous condition at the school. Reversing the court of appeals,[293] the supreme court conceded the personal liability of public officers at common law but qualified as follows: "A different rule prevails in instances where an officer or agent of the state is sued in his official capacity or where such officers are sued for acting in areas where they are vested with discretion and empowered to exercise judgment in matters before them."[294] The court viewed the plaintiff as charging the principal with a negligent exercise of authorized discretion,[295] and held the defendant entitled to

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favor of the county on the ground of plaintiff's non-compliance with the presentation statute.

287. *See generally*, Sentell, *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979).

288. 150 Ga. App. 80, 256 S.E.2d 627 (1979).

289. Plaintiff charged that the judge wrongfully dismissed her husband's counterclaim and that the district attorney refused to recover court records allegedly stolen by the court reporter.

290. Similarly, in Haze Edwards Elec. Co. v. Turvey, 153 Ga. App. 173, 264 S.E.2d 706 (1980), the court affirmed a directed verdict for members of a county electric board sued individually for denying approval of plaintiff's electric work. The court said that in the absence of a showing that the defendants acted corruptly or maliciously, they enjoyed immunity for the honest exercise of judgment.

291. The court thus affirmed the dismissal of both defendants. In Cotton States Mut. Ins. Co. v. Crosby, 244 Ga. 456, 260 S.E.2d 860 (1979), an action against two employees of a county school district for their failure to safeguard school premises where plaintiff's daughter was raped, the supreme court was concerned primarily with insurance coverage. The court determined that a policy exclusion for "bodily injury" excluded damages resulting from the rape itself but did not exclude damages for the alleged detention following the rape.

292. 245 Ga. 329, 264 S.E.2d 878 (1980).

293. 150 Ga. App. 326, 257 S.E.2d 315 (1979).

294. 245 Ga. at 330, 264 S.E.2d at 879.

295. The court emphasized the absence of an allegation that the principal acted wilfully, wantonly, or outside the scope of his authority.

governmental immunity.[296]

Zoning. The progeny of *Barrett v. Hamby*,[297] mentioned in the treatment of municipal zoning,[298] is even more intimidating in county law. Again this year, the supreme court supplied more decisional fuel for the analytical flames.

DeKalb County v. Flynn[299] presented a property owner's efforts to obtain rezoning from the single family residential classification.[300] Reviewing the county's appeal from an adverse decision,[301] the supreme court diagramed the typical procedure as follows: the original zoning enjoys an initial presumption of validity; the property owner overcomes that presumption by showing significant detriment and an insubstantial relation to public interests; the burden then shifts to the county to justify the original zoning. The court concluded that in this case, once the owner had adequately rebutted the presumption,[302] the county had erred in attempting to carry its burden by showing "any evidence" supporting the zoning.[303] Again, in *Barrett v. Hal W. Lamb & Associates, Inc.*,[304] the court reviewed the evidence and affirmed a trial judge's conclusion that the present residential zone amounted to an unconstitutional "taking" of the plaintiff's property.[305] Under the guidelines of *Barrett v. Hamby*, the court emphasized, the county's refusal to rezone the property for commercial use was invalid.

In contrast, the court drew the line upon the property owner's rezoning attempt in *Pennington v. Rockdale County*.[306] In showing only a diminu-

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296. Chief Justice Nichols and Justice Hill dissented.

297. 235 Ga. 262, 219 S.E.2d 399 (1975).

298. *See* text accompanying n. 114.

299. 243 Ga. 679, 256 S.E.2d 362 (1979).

300. He sought an "office and distribution" zone.

301. The trial court had held the present zoning to amount to an unconstitutional taking of the owner's land.

302. The owner demonstrated considerable commercial development in the area, busy highways, and a substantial financial offer conditioned upon the property's being rezoned.

303. Citing *Barrett*, the court said "this has not been the law since at least 1975." 243 Ga. at 680, 256 S.E.2d at 363. The county had urged that increased truck traffic resulting from the rezoning might increase danger to school children but the court observed that the property owner might assist in alleviating that danger. "We add that the county has the duty and obligation to work with property owners to allow them the highest and best use of their property, by considering on its own motion ways in which the county's objections to a proposed development could be eased by county action." *Id.* at 681, 256 S.E.2d at 364.

304. 243 Ga. 567, 255 S.E.2d 61 (1979).

305. The court enumerated findings that the subject property almost adjoined a commercial area, that a purchase price four times greater could be obtained if the property was rezoned, that residential zoning had caused development of the property to stagnate, and that proper solutions could be found to traffic and neighboring residential problems.

306. 244 Ga. 743, 262 S.E.2d 59 (1979). Of the plaintiff's 54 "residential-agricultural" acres, he sought to rezone 15 acres to "commercial."

tion in value of a part of his property[307] and failing to offer evidence that the property was unsuitable for its present zone,[308] the owner had not succeeded in carrying his burden of rebutting the original presumption of validity.[309] Under the "birthright case" of *Barrett v. Hamby*, explained the court, "the property owner is required to show serious and significant injury to himself in order to satisfy the burden of proof which is upon him."[310]

Reversing the usual order of things, the property owner in *East Lands, Inc. v. Floyd County*[311] protested the county's decision to zone rather than its refusal to do so. The challenged action, taken pursuant to petitions from other property owners in the vicinity, prevented the plaintiff and its optionee from constructing an apartment complex.[312] Condemning the county's action, the supreme court noted that only two percent of the county's unincorporated area was under any zoning restrictions whatsoever,[313] and denigrated the action as "akin to spot zoning."[314] Under general statutory law, said the court, zoning must be "in accordance with a comprehensive plan,"[315] and any other prior court decisions[316] that local governments possessed unlimited authority to spot zone "were at least impliedly overruled by *Barrett v. Hamby*."[317]

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307. The plaintiff showed that the property's value would more than double if rezoned.

308. Indeed, the court noted, the plaintiff did not question the suitability of his remaining acres for the "residential-agricultural" zone.

309. "While it is not necessary for the property to be totally useless for the purposes zoned, it is necessary that the damage to the owner be significant." 244 Ga. at 744, 262 S.E.2d at 60.

310. *Id.* For another rejection of the property owner's effort, even though testimony indicated a ten-fold increase in value by rezoning, *see* Hubert Realty Co. v. Cobb County Bd. of Comm'rs, 245 Ga. 236, 264 S.E.2d 179 (1980).

311. 244 Ga. 761, 262 S.E.2d 51 (1979).

312. Both the plaintiff and optionee had expended considerable sums in developing the property, and the county commissioners had overridden the recommendation of the county planning commission in adopting the zoning measure in issue.

313. The court also noted evidence that the county took zoning action in the area only when zoning petitions were filed.

314. 244 Ga. at 763, 262 S.E.2d at 52.

315. GA. CODE ANN. § 69-1207 (1976). The court rejected the contention that GA. CODE ANN. § 69-1208 (1976) authorized the type of spot zoning here presented. That statute, the court said, "is intended to give local governing authorities the leeway to engage in creativity and flexibility in the zoning process. It should not be read as a license to discriminate." 244 Ga. at 765, 262 S.E.2d at 54.

316. *E.g.*, Bible v. Marra, 226 Ga. 154, 173 S.E.2d 346 (1970).

317. 244 Ga. at 765, 262 S.E.2d at 54. Now, said the court, they were expressly overruled. For at least one survey-period decision not explicitly invoking *Barrett*, *see* Fayette County v. Seagraves, 245 Ga. 196, 264 S.E.2d 13 (1980), in which the court held that in calculating the value of a "structure" constituting a nonconforming use, "adjunctive items attached thereto," such as a septic tank, well pump, and utility connections, were to be included.

II. LEGISLATION

A. *Elections*

Via the following pronouncement, the 1980 general assembly explicitly extended the Campaign and Financial Disclosure Act[318] into the local electoral process: "Further, it is the policy of this State to require public disclosure of campaign contributions and expenditures when such are designed to bring about the approval or rejection by the voters of any proposed question which is to appear on the ballot in any county or municipal election."[319] Implementing that policy, the Act specified steps to be taken by "campaign committees" instrumental in the local elections.[320]

In municipal elections, the legislature empowered the election superintendent to determine challenges to the qualifications of candidates and upon a determination that the candidate is not qualified, to withhold the name of the candidate from the ballot.[321]

B. *Recall*

Typically, the 1980 session was the recipient of pleas for refinement of the general assembly's 1979 creation, the Public Officers Recall Act.[322] Responding to those pleas, the legislature effected rather extensive amendments, including the definition of "sponsors,"[323] the number of petitioners necessary for recall,[324] a method of determining the sufficiency of the application and petition,[325] the method of providing signatures,[326] and a change of the recall petition form.[327]

C. *Openness*

The 1980 general assembly further developed the theme of openness in government in two respects. First, the legislature amended the "Open Meetings Act,"[328] applicable to both counties and municipalities, to re-

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318. GA. CODE ANN. § 40-3801 to 3811 (Supp. 1980).

319. GA. CODE ANN. § 40-3802 (Supp. 1980).

320. GA. CODE ANN. § 40-3806(g)(1) (Supp. 1980). The statute requires the committee to file reports of contributions or expenditures which exceed $500.

321. GA. CODE ANN. § 34A-303(b) (Supp. 1980). The statute expressly reserves the rights of the candidate or the challenger to appeal the superintendent's determination to the superior court.

322. GA. CODE ANN. § 89-1901 to 1918 (1980).

323. GA. CODE ANN. § 89-1903 (Supp. 1980).

324. GA. CODE ANN. § 89-1904 (Supp. 1980).

325. GA. CODE ANN. § 89-1905 (Supp. 1980).

326. GA. CODE ANN. § 89-1907 (Supp. 1980).

327. GA. CODE ANN. § 89-1906 (Supp. 1980).

328. GA. CODE ANN. § 40-3301 to 3303 (1975).

quire that "every person present and authorized to vote on any issue considered at such meetings shall openly and publicly vote in the affirmative or the negative or openly and publicly abstain from voting."[329]

Second, the legislature added to that same statute a mandate that news media representatives must be admitted to the meetings[330] and that "visual and sound recording during open meetings by representatives of the news media shall be permitted at each public meeting."[331]

D. Health

On several unrelated subjects, the 1980 legislative session yielded provisions designed to foster the public health, welfare, and enjoyment.

The general assembly authorized both municipalities and counties to administer and enforce statutes, rules, regulations, ordinances, and codes related to the prevention and suppression of fires, explosions, and the like.[332] More specifically, in the event of such emergencies, local government fire services are empowered to enter property, turn off utilities, prevent public street blockage, confiscate necessary supplies and equipment, and evacuate buildings and areas.[333]

On another public health front, the legislature announced a finding of a critical need for facilities furnishing comprehensive services required by elderly persons.[334] Pursuant to that need, the legislature created in and for each county and municipality a "Residential Care Facilities for the Elderly Authority," and empowered those authorities to provide for loans, to issue revenue bonds, and to pledge assets, funds, and properties in effectuating care for the elderly.[335]

In an enactment designated the "Georgia Historic Preservation Act,"[336] the general assembly established a uniform procedure for municipal and county historic preservation ordinances which seek to prohibit changes in exterior architectural features of historic properties and districts. The procedure may be varied by the local governing authority's issuance of a certificate of appropriateness, and the statute exempts from coverage lo-

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329. GA. CODE ANN. § 40-3301(a) (Supp. 1980).

330. GA. CODE ANN. § 40-3301(c) (Supp. 1980).

331. *Id.*

332. GA. CODE ANN. § 92A-3801 (Supp. 1980).

333. GA. CODE ANN. § 92A-3802 (Supp. 1980). The statute delegates power to local governments to enact ordinances, regulations, fire, and life safety codes as necessary to carry out the granted powers.

334. GA. CODE ANN. § 99-5002 (Supp. 1980).

335. GA. CODE ANN. §§ 99-5004, -5006 (Supp. 1980). The statute requires that before an authority can transact business or exercise powers, the municipal or county governing authority must adopt a resolution declaring the need for an authority.

336. GA. CODE ANN. § 23-2601(a) to 2612(a) (Supp. 1980).

cal governments which have adopted ordinances relating to planning and zoning for historic purposes.[337]

Finally, the legislature increased from 125 dollars to 250 dollars the amount a county may expend for the burial of a pauper.[338]

E. Officers and Employees

The 1980 general assembly attempted yet again to perfect criminal strictures in respect to local government officers and employees who make sales to the local government.[339] This version of the prohibition applies to the sale of both real and personal property; and covers sales to the local government, an agency of the local government, and to a political subdivision for which local taxes for education are levied by the local government. The statute declares exemptions for personal property sales of less than 200 dollars per calendar quarter; for personal property sales made pursuant to sealed competitive bids; and for real property sales for which a specified disclosure was made.[340]

From a somewhat different perspective, the legislature also established protection from tort liability for certain officers and employees. It declared officers and employees of county and municipal fire departments immune from liability "for any act or acts done while actually fighting a fire or performing duties at the scene of an emergency, except for wilful negligence or malfeasance."[341]

Finally, local government workers' compensation programs were expressly covered by a statute which authorizes group self-insurance by groups of municipalities, counties, school boards, and hospital authorities.[342] The statute also provides for regulation of the group self-insurance funds by the Secretary of State.[343]

F. Contracts

Prior to 1980 statutes imposed upon counties the obligation of requiring bonds from certain contractors, when the work involved was more than 1,500 dollars in amount.[344] By virtue of 1980 legislation, the excep-

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337. Those ordinances adopted prior to March 31, 1980.

338. GA. CODE ANN. § 23-2304 (Supp. 1980).

339. GA. CODE ANN. § 23-2306(b) (Supp. 1980).

340. The statute describes the fashion in which the disclosure is to be made, as well as its content.

341. GA. CODE ANN. § 3-1004.2 (Supp. 1980).

342. GA. CODE ANN. § 114-601(a) to 632(a) (Supp. 1980).

343. GA. CODE ANN. § 114-604a (Supp. 1980). The statute is not effective until July 1, 1981, and no funds can begin operations prior to January 1, 1982.

344. GA. CODE ANN. § 23-1704 (1971).

tion was raised from 1,500 dollars to 5,000 dollars.[345]

G. Regulation

In continuing to deal with the problem of uninsured motorists, the 1980 general assembly expressly empowered municipalities to enact ordinances which adopt by reference the provisions of state statutes prohibiting the operation of uninsured motor vehicles.[346] Offenses which may then violate both statute and ordinance "may, at the discretion of the local law enforcement officer or prosecutor" be charged as a violation of either.[347]

H. Finances

In a wide variety of contexts, the 1980 general assembly devoted considerable attention to the financial interests of local governments. One noteworthy illustration was the establishment of basic budget procedures, and the requirement of audits of local government finances at specified periods.[348]

Perhaps even more important was the "Local Government Investment Pool Act."[349] This statute authorizes local government investment of funds and creates an investment pool under the ultimate administration of the State Depository Board. The Board is empowered to assist local governments in developing cash management policies and in making investments.[350]

By virtue of still another enactment, the term "revenue" which appears in the Revenue Bond Law was broadened to include funds received as grants from the federal government, the state, "or any instrumentality or agency of the foregoing in aid of such undertaking."[351]

Previously, counties receiving state funds for state prisoners in county correctional institutions could use those funds only for the operation and maintenance of the institution. A 1980 statute expands county authority "to use such money so paid to supplant county funds or previously levels of county funding for the county correctional institution."[352]

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345. GA. CODE ANN. § 23-1704 (Supp. 1980). The amendment does provide that the county may, if it wishes, require bonds for contracts involving work costing less than $5,000.

346. 1980 Ga. Laws 1428.

347. GA. CODE ANN. § 56-3415b(b) (Supp. 1980). The statute specifies that once tried for either violation, no person shall thereafter be tried in any court for the same offense. GA. CODE ANN. § 56-3415b(d).

348. GA. CODE ANN. § 23-3601 to 3610 (Supp. 1980).

349. GA. CODE ANN. § 23-3501 to 3508 (Supp. 1980).

350. This statute is not effective until January 1, 1981.

351. GA. CODE ANN. § 87-802(e) (Supp. 1980). The intent that such funds be included must be stated in the resolution authorizing the issuance of the bonds.

352. GA. CODE ANN. § 77-312(c) (Supp. 1980).

Finally, the general assembly amended the Urban Redevelopment Law to modify interest rates on bonds issued by municipalities under that law and to authorize the sale of those bonds "to an institution insured by an agency of the Federal Government at private sale at not less than par."[353]

I. Taxation

The 1980 general assembly spoke forcefully and prohibitively on one projected idea of municipal taxation: "Except as may be authorized by general law, no municipality may levy any tax upon an individual for the privilege of working within or being employed within the limits of such municipality."[354]

353. GA. CODE ANN. § 69-1110(d) (Supp. 1980).

354. GA. CODE ANN. § 91-6014 (Supp. 1980). The statute denied any intent of prohibiting municipalities from levying authorized taxes or license fees in effect on January 1, 1980.