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Administrative Law

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Administrative Law

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I. INTRODUCTION

This Article surveys cases from the Georgia Supreme Court and the Georgia Court of Appeals from June 1, 2016 through May 31, 2017 in which principles of administrative law were a central focus of the case.[1] The Article first discusses the exhaustion of administrative remedies, followed by decisions by state administrative agencies, then on to scope of authority, statutory construction, a review of administrative decisions, and concludes with a brief review of enactments from the 2017 regular session of the Georgia General Assembly.

II. EXHAUSTION OF ADMINISTRATIVE DECISIONS

Georgia Power Co. v. Cazier[2] (*Cazier I*) was revisited in 2016 in *Cazier v. Georgia Power Co.*[3] (*Cazier II*), where the Georgia Court of Appeals again held that Georgia Power customers were not challenging the Georgia Public Service Commission's (PSC) decisions or rules, but rather

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1. For an analysis of administrative law during the prior survey period, see Jennifer B. Alewine, Courtney E. Ferrell & Erin G. Watstein, *Administrative Law, Annual Survey of Georgia Law*, 68 MERCER L. REV. 59 (2016).

2. 321 Ga. App. 576, 740 S.E.2d 458 (2013).

3. 339 Ga. App. 506, 793 S.E.2d 668 (2016).

Georgia Power's improper calculations of municipal franchise fees.[4] The customers thus did not have to exhaust their administrative remedies since they were challenging a private party.[5] The court reasoned that section 46-2-90 of the Official Code of Georgia Annotated (O.C.G.A.),[6] which states companies that do not follow PSC standards are liable to their customers, "stands in contrast to other provisions of Title 46, which expressly provide for administrative petitions or hearings."[7] Because the Fulton County Superior Court ruled that the PSC's rulings defining terms used to calculate municipal franchise fees were ambiguous and the customers were required to apply to the PSC to explain these meanings, the court of appeals vacated and remanded the trial court's decision for a second time.[8]

III. DECISIONS BY ADMINISTRATIVE AGENCIES

In *State v. International Keystone Knights of the Ku Klux Klan, Inc.*,[9] the Georgia Supreme Court dismissed an appeal by the Georgia Department of Transportation (the Department) for lack of jurisdiction under the Appellate Practice Act[10] due to the Department's failure to request appellate review.[11] The Keystone Knights filed a complaint alleging the Department wrongfully denied the group's Adopt-A-Highway application based in part on the content of the group's speech. The Department filed a motion to dismiss, asserting sovereign immunity and challenging the appropriateness of the remedies sought as the Keystone Knights could have sought judicial review under the Administrative Procedure Act.[12] The Fulton County Superior Court denied the Department's motion to dismiss, and the Department filed a notice of appeal with the court of appeals.[13] After accepting the case on transfer from the court of appeals for subject-matter jurisdiction, the supreme court subsequently ruled that it lacked jurisdiction over the

4. *Id.* at 506–07, 793 S.E.2d at 669–70.
5. *Id.* at 509, 793 S.E.2d at 671.
6. O.C.G.A. § 46-2-90 (2017).
7. *Cazier I*, 339 Ga. App. at 509, 740 S.E.2d at 671.
8. *Id.* at 509–10, 740 S.E.2d at 671–72.
9. 299 Ga. 392, 788 S.E.2d 455 (2016).
10. O.C.G.A. § 5-6-35(a) (2017).
11. *Int'l Keystone Knights*, 299 Ga. at 392, 788 S.E.2d at 457.
12. O.C.G.A. §§ 50-13-1–23 (2017); *Int'l Keystone Knights*, 299 Ga. at 394, 788 S.E.2d at 459.
13. *Int'l Keystone Knights*, 299 Ga. at 396, 788 S.E.2d at 460.

Department's appeal because the appeal was from a decision of the superior court reviewing a decision of a state administrative agency.[14]

The Appellate Practice Act provides that there is no appeal of right from the judgment of a superior court reviewing a decision of a state administrative agency; rather, appellate review must take place by way of an application for discretionary review.[15] In *Keystone Knights*, the court provided guidance on how to determine what is a "state administrative agency" under O.C.G.A § 5-6-35(a), what is an agency "decision," and what constitutes a review by a superior court of such agency decision.[16] Although no party disputed that the Department was an administrative agency, the Department argued that its denial of an Adopt-A-Highway application was not a decision because a decision refers to a determination that is made by way of a formal adjudicative procedure.[17] The court agreed that a decision under O.C.G.A § 5-6-35(a) must be adjudicative in nature and be specific and immediate, not general or prospective in application.[18] Nevertheless, the court rejected the Department's argument because court precedents show that a "decision" does not require formal adjudicative procedures.[19] Although the court acknowledged that statutory law or due process may require formal adjudicative procedures, the court held that, for the purposes of O.C.G.A. § 5-6-35(a)(1),[20] "such procedures are not essential to a 'decision.'"[21] As applied in *Keystone Knights*, the court held that the Department Commissioner's denial of the Adopt-A-Highway application was a decision of a state administrative agency for the purposes of O.C.G.A § 5-6-35(a)(1) because the Commissioner had the authority to speak, act, and make determinations on behalf of the Department.[22]

The court also rejected the Department's argument that the superior court's judgment was not a decision reviewing an agency decision.[23] The court stated that if a party to a judicial proceeding "attacks or defends the validity of an administrative ruling and seeks to prevent or promote the enforcement thereof, the trial court must necessarily 'review' the

14. *Id.* at 408, 788 S.E.2d at 468.
15. O.C.G.A. § 5-6-35(a).
16. *Int'l Keystone Knights*, 299 Ga. at 399, 788 S.E.2d at 462.
17. *Id.*
18. *See id.* at 404, 788 S.E.2d at 465.
19. *Id.* at 399–400, 788 S.E.2d at 462.
20. O.C.G.A. § 5-6-35(a)(1) (2017).
21. *Int'l Keystone Knights*, 299 Ga. at 406, 788 S.E.2d at 466.
22. *Id.* at 407, 788 S.E.2d at 467.
23. *Id.* at 408, 788 S.E.2d at 468.

administrative decision [to resolve the merits of the case]."[24] The Department also argued that the judgment from which it appealed was not entered in a proceeding under the Administrative Procedures Act or any statute authorizing judicial review of its denial of the Keystone Knight's application.[25] In rejecting the State's position, the court held that when it "consider[s] the nature of the proceedings in the superior court for the purposes of OCGA § 5-6-35(a)(1)," it looks to "the substance of those proceedings, not merely the form of the relief sought."[26] Therefore, "[n]otwithstanding that the proceedings and judgment below were only for injunctive and declaratory relief, the proceedings and judgment amounted to a review of a decision to deny a particular Adopt-A-Highway application."[27] In conclusion, the court held that, because the Department appealed a decision of a superior court reviewing a decision of a state administrative agency, it was required under O.C.G.A. § 5-6-35(a)(1) to file an application for discretionary review to seek appellate review.[28]

A few months later, in *Wolfe v. Board of Regents of the University System of Georgia*,[29] the Georgia Supreme Court reiterated the necessity of filing an application for discretionary appeal pursuant to O.C.G.A. § 5-6-35(a)(1) when a party appeals a superior court's affirmation of an adjudicative agency decision.[30] The president of Georgia Southern University, Brooks A. Keel, fired Lorne Wolfe, a tenured professor, for violation of university policies. Following the denial of Wolfe's application to review his termination by the Board of Regents of the University System of Georgia (Board of Regents), Wolfe filed suit in the Fulton County Superior Court for breach of contract and mandamus against President Keel and the Board of Regents seeking reinstatement and other relief. The superior court granted the motion for summary judgment filed by the Board of Regents, which Wolfe appealed to the Georgia Supreme Court.[31] To determine whether it had jurisdiction and whether a discretionary application to appeal was required under O.C.G.A. § 5-6-35(a)(1), the court applied the guidance laid out in

24. *Id.* (quoting Ferguson v. Composite State Bd. of Med. Exam'rs, 275 Ga. 255, 257–58, 564 S.E.2d 715, 718 (2002)).

25. *Id.*

26. *Id.* at 407, 788 S.E.2d at 467.

27. *Id.* at 408, 788 S.E.2d at 468.

28. *Id.*

29. 300 Ga. 223, 794 S.E.2d 85 (2016).

30. *Id.* at 226–27, 794 S.E.2d at 89.

31. *Id.* at 223, 794 S.E.2d at 86.

Keystone Knights to determine whether (i) a state administrative agency, (ii) made a decision, (iii) that was reviewed by the superior court.[32]

The supreme court held that the Board of Regents is a state administrative agency with statutory authority to discontinue or remove professors as the good of an institution may require and make rules and regulations for the performance of its duties.[33] The Board of Regents exercised its authority when it adopted the standards of conduct and procedural policies for universities which applies when entering into and terminating contracts of employment with professors.[34] Next, the court determined that the Board of Regents made a "decision" in terminating Wolfe.[35] Consistent with the holding in *Keystone Knights*, the decision was adjudicative in nature rather than executive or legislative because "it was based on an assessment of the particular facts surrounding a single person's past conduct, it involved an application of [the] Board [of Regents'] rules and policies to that conduct, and it had the immediate and specific consequence of terminating Wolfe's contract."[36]

Finally, the court determined the decision of the superior court was one that reviewed the decision of the Board of Regents.[37] The court rejected Wolfe's argument that the superior court did not review an agency decision because it failed to mention the Board of Regents' denial of Wolfe's application for discretionary review of President Keel's decision to terminate him.[38] The procedures adopted by the Board of Regents authorized a university president to terminate a professor's contract.[39] The Board of Regents exercised its discretion not to review President Keel's decision when it declined Wolfe's application, thereby making his decision to terminate the operative decision of the agency.[40] Further, the court reiterated its holding in *Keystone Knights* that "[i]f a party to a judicial proceeding 'attacks or defends the validity of an administrative ruling and seeks to prevent or promote the enforcement thereof, the trial court must necessarily "review" the administrative decision (to resolve the merits of the case).'"[41] The court summarized that "Wolfe's complaint asked the superior court to review a decision of a state administrative

32. *Id.* at 227, 794 S.E.2d at 89.

33. *Id.*

34. *Id.*

35. *Id.* at 228, 794 S.E.2d at 90.

36. *Id.* at 228, 794 S.E.2d at 89–90.

37. *Id.* at 228, 794 S.E.2d at 90.

38. *Id.* at 228–29, 794 S.E.2d at 90.

39. *Id.* at 229, 794 S.E.2d at 90.

40. *Id.*

41. *Id.* at 230, 794 S.E.2d at 91 (alteration in original) (quoting *Int'l Keystone Knights*, 299 Ga. at 408, 788 S.E.2d at 468).

agency; the superior court reviewed that decision" and denied relief, and Wolfe appealed that decision to the supreme court.[42] As a result, Wolfe was required to file a discretionary application to appeal under O.C.G.A. § 5-6-35(a)(1).[43]

IV. SCOPE OF AUTHORITY

In *Bender v. Southtowne Motors of Newnan, Inc.*,[44] the Georgia Court of Appeals held that where a private right of action is only authorized by statute, a party's failure to follow the implementing rules and regulations, but not the statute, does not itself authorize a private right of action against the offending party.[45] The Benders filed suit claiming Southtowne Motors violated the Georgia Lemon Law[46] by selling them a car without appropriately disclosing that the car had been reacquired by the manufacturer due to certain defects.[47] A private right of action under the Georgia Lemon Law is only available under O.C.G.A. § 10-1-790(a)[48] if a seller of a reacquired vehicle fails to provide clear and conspicuous written notice to the prospective buyer of the vehicle's reacquisition and nature of any alleged nonconformity.[49] At the time of purchase, the Benders signed a form stating the car had been repurchased by the manufacturer due to certain listed defects and nonconformities. The Benders testified that they briefly reviewed the form, understood that the car had been repurchased by the manufacturer for defects, signed the form, and sought confirmation that the defects had been repaired.[50] The court held the Benders were clearly and conspicuously informed in writing that the car was reacquired by the manufacturer and the nature of the defects that led to the reacquisition.[51]

Nevertheless, the Benders argued that Southtowne Motors's disclosure was insufficient and failed to comply with the rules and regulations which, under the authority of O.C.G.A. § 10-1-795,[52] had been set forth by the attorney general.[53] While the court agreed that these

42. *Id.* at 231, 794 S.E.2d at 91.
43. *Id.*
44. 339 Ga. App. 439, 793 S.E.2d 618 (2016).
45. *Id.* at 447, 793 S.E.2d at 624.
46. O.C.G.A. § 10-1-780–98 (2017).
47. *Bender*, 339 Ga. App. at 439, 793 S.E.2d at 620.
48. O.C.G.A. § 10-1-790(a) (2017).
49. *Bender*, 339 Ga. App. at 443–44, 793 S.E.2d at 622–23.
50. *Id.* at 440, 793 S.E.2d at 620–21.
51. *Id.* at 445, 793 S.E.2d at 623.
52. O.C.G.A. § 10-1-795 (2017).
53. *See id.*; *Bender*, 339 Ga. App. at 445, 793 S.E.2d at 624.

rules and regulations imposed additional requirements on sellers like Southtowne, it disagreed that the failure to follow them creates a private right of action not otherwise available under the statute.[54] O.C.G.A. § 10-1-790(a)(1)[55] only requires conspicuous written notice, not that such notice be provided on a particular form or the form be given to the purchaser within a set amount of time.[56] The court reiterated that just because "the statute specifically authorizes the enactment of the rules and regulations to implement and enforce the provisions of the statute does not mean this language can be read more expansively than the plain terms allow."[57] As a result, the court affirmed the trial court's grant of summary judgment against the Benders in part, holding that the Georgia General Assembly did not intend to authorize a buyer's private right of action under the Georgia Lemon Law and Fair Business Practices Act[58] against sellers who adhere to the statutory disclosures but simply failed to comply with the additional requirements imposed by the implementing rules and regulations.[59]

In *New Cingular Wireless PCS, LLC v. Georgia Department of Revenue*,[60] internet service providers (the Providers) brought suit against the Georgia Department of Revenue (the Department) for refusing to refund sales taxes erroneously paid by the Providers' customers for wireless internet service access. The DeKalb County Superior Court granted the Department's motion to dismiss, and the Providers appealed. The Providers challenged the trial court's determination that the Providers must first refund their customers before seeking a refund from the Department.[61] Pursuant to O.C.G.A. § 48-2-35,[62] a taxpayer must be refunded any and all taxes that are determined to have been erroneously or illegally assessed and collected.[63] However, the Department's own regulations require a provider to affirmatively show that the tax had been refunded to the consumer prior to receiving a refund from the Department.[64] The Providers argued that the Department's interpretation of its regulation is not supported by its plain language and

54. *Bender*, 339 Ga. App. at 447, 793 S.E.2d at 624.
55. O.C.G.A. § 10-1-790(a)(1) (2017).
56. *Bender*, 339 Ga. App. at 447, 793 S.E.2d at 625.
57. *Id.*
58. O.C.G.A. §§ 10-1-390–408 (2017).
59. *Bender*, 339 Ga. App. at 447, 793 S.E.2d at 625.
60. 340 Ga. App. 316, 797 S.E.2d 190 (2017).
61. *Id.* at 316, 797 S.E.2d at 191.
62. O.C.G.A. § 48-2-35 (2017).
63. *Id.*
64. Ga. Comp. R. & Regs. 560-12-1-.25(2) (2017).

is unreasonable.[65] The Department enacted this refund procedure regulation pursuant to its "explicit statutory authority to 'promulgate regulations for the *enforcement* of the Public Revenue Code and the collection of revenues thereunder.'"[66] Further, precedent supports judicial deference afforded to 'the agency's interpretation of rules and regulations it has enacted to fulfill the function given it by the legislative branch.'"[67] The court held that the Department's interpretation of its rules and regulations were reasonable and affirmed the trial court's dismissal because the Providers failed to refund consumers prior to seeking a refund from the Department.[68]

In *City of Cumming v. Flowers*,[69] the Georgia Supreme Court clarified that, under O.C.G.A. § 5-4-1,[70] the appropriate procedure by which a local zoning board's quasi-judicial decision on a variance request may be appealed to the superior court is by a petition for certiorari.[71] In doing so, the court overturned a line of precedent, including *Jackson v. Spalding County*,[72] to the extent the precedent cases stated it was appropriate to appeal a quasi-judicial variance decision by mandamus when the local zoning ordinance does not provide for a petition by certiorari.[73] The City of Cumming's Board of Zoning Appeals (the Board) granted Kerley Family Homes, LLC (Kerley) a variance for building townhomes too close to adjoining property in violation of the city's zoning ordinance. Neighboring homeowners (Homeowners) harmed by the variance filed a complaint in the Forsyth County Superior Court against the City of Cumming, the Board, and members of the Board (the City) seeking a writ of mandamus to compel the Board to comply with the law and an injunction to enjoin Kerley from violating the law. The City and Kerley filed a motion to dismiss that the parties agreed to treat as a motion for summary judgment. The superior court denied the motion for summary judgment, and the City and Kerley appealed.[74]

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65. *New Cingular Wireless*, 340 Ga. App. at 319, 797 S.E.2d at 193.

66. *Id.* at 319, 797 S.E.2d at 193–94 (quoting Ga. Dep't of Revenue v. Ga. Chemistry Council, Inc., 270 Ga. App. 615, 616, 607 S.E.2d 207, 208 (2004)).

67. *Id.* at 319–20, 797 S.E.2d at 194 (quoting Pruitt Corp. v Ga. Dep't of Cmty. Health, 284 Ga. 158, 159, 664 S.E.2d 223, 225 (2008)).

68. *Id.* at 320, 797 S.E.2d at 194.

69. 300 Ga. 820, 797 S.E.2d 846 (2017).

70. O.C.G.A. § 5-4-1 (2017).

71. *Flowers*, 300 Ga. at 820, 797 S.E.2d at 848.

72. 265 Ga. 792, 462 S.E.2d 361 (1995).

73. *Flowers*, 300 Ga. at 820, 797 S.E.2d at 848.

74. *Id.* at 820–21, 797 S.E.2d at 849.

O.C.G.A. § 5-4-1(a)[75] provides that quasi-judicial decisions of local entities must be appealed by a petition of certiorari.[76] In *Jackson*, the supreme court held that a zoning variance decision was quasi-judicial and subject to certiorari review under O.C.G.A. § 5-4-1, but also held that mandamus is the proper method to appeal a variance decision "[w]hen the zoning ordinance fails to prescribe a method of judicial review."[77] In *Flowers*, the court determined that the Board made a quasi-judicial decision in ruling on Kerley's requested variance and considered "whether the facts applied to a specific piece of property warrant relief from [the] zoning ordinance."[78] As such, the Board's quasi-judicial decision was subject to certiorari review under O.C.G.A. § 5-4-1, prompting the court to reexamine the *Jackson* line of precedent also permitting review by mandamus.[79] The court reiterated that "in conformance with the text of the mandamus statute, 'if there be a specific remedy by certiorari, the right of mandamus will not lie.'"[80] The court determined the certiorari-versus-mandamus analysis was straightforward and held the Homeowners' mandamus claim was improper.[81]

The court then overruled the *Jackson* line of precedent to the extent those cases permitted challenge by mandamus because the cases offered no justification for the exception, were inconsistent in application, and were based on unsound reasoning.[82] The court interpreted *Jackson* to permit a city or county to effectively follow the local ordinance rather than O.C.G.A. § 5-4-1 in deciding how a variance decision must be appealed.[83] Determining such an outcome contrary to the Georgia Constitution, which holds general laws are supreme over local ordinances, the court overruled *Jackson* and similar cases because they improperly created means of appeal to the superior court, including direct appeals, that are not authorized by statute.[84]

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75. O.C.G.A. § 5-4-1(a) (2017).

76. *Id.*

77. *Jackson*, 265 Ga. at 792–93, 462 S.E.2d at 363.

78. *Flowers*, 300 Ga. at 823, 797 S.E.2d at 850.

79. *Id.* at 825, 797 S.E.2d at 851–52.

80. *Id.* at 825, 797 S.E.2d at 852 (quoting City of Statesboro v. Dickens, 293 Ga. 540, 542, 748 S.E.2d 397, 400 (2013)).

81. *Id.*

82. *Id.* at 827–28, 831, 797 S.E.2d at 853, 856.

83. *Id.* at 829, 797 S.E.2d at 854.

84. *Id.* at 831, 797 S.E.2d at 855.

V. STATUTORY CONSTRUCTION

In *Inglett & Stubbs International, Ltd. v. Riley*,[85] Inglett, an international electrical contractor based in Smyrna, Georgia, sought a refund of $1.9 million in sales tax from the Georgia Department of Revenue (the Department). In connection with several construction and installation projects for the United States Department of the Army in Afghanistan, Inglett purchased materials that were delivered and stored in Smyrna. Despite initially paying the sales tax on these materials, Inglett subsequently sought a refund from the Department claiming that it was a "reseller," rather than a "consumer," liable for sales tax under Georgia law. Inglett appealed after the Department, the Georgia Tax Tribunal, and the Fulton County Superior Court denied Inglett's refund in turn.[86]

Pursuant to O.C.G.A. §§ 48-8-30(b)(1)[87] and 48-8-2(31),[88] every purchaser of tangible personal property in Georgia is liable for a 4% sales tax on the purchase price so long as the sale is for any purpose other than resale.[89] Therefore, whether a purchaser is classified as an end-use consumer or reseller is critical in assessing sales tax liability.[90] The Administrative Law Judge for the Tax Tribunal, whom the superior court affirmed on appeal, found Inglett to be "a consumer liable for sales tax, rather than a reseller."[91] Reviewing the prior decisions *de novo*, the Georgia Court of Appeals rejected Inglett's argument that it was a reseller rather than a retail consumer.[92] As decided by the court of appeals in *J.W. Meadors & Co. v. State*,[93] sales to contractors are sales to consumers.[94] Further, as codified in O.C.G.A. § 48-8-63(b),[95] each person who "contracts to furnish tangible personal property and to perform services under the contract within this state shall be deemed to be the consumer . . . and shall pay the sales tax imposed by this article at the time of the purchase."[96] In *Inglett*, the court held that the contractor-as-consumer rule applied to Inglett because, in carrying out its contractual

85. 339 Ga. App. 375, 791 S.E.2d 642 (2016).
86. *Id.* at 375–76, 791 S.E.2d at 643.
87. O.C.G.A. § 48-8-30(b)(1) (2017).
88. O.C.G.A. § 48-8-2(31) (2017).
89. O.C.G.A. §§ 48-8-30(b)(1), 48-8-2(31).
90. *Inglett*, 339 Ga. App. at 377, 791 S.E.2d at 644.
91. *Id.* at 376, 791 S.E.2d at 643.
92. *Id.* at 377, 791 S.E.2d at 643–44.
93. 89 Ga. App. 583, 80 S.E.2d 86 (1954).
94. *Id.* at 584, 80 S.E.2d at 87.
95. O.C.G.A. § 48-8-63(b) (2017).
96. *Id.*

responsibilities, Inglett performed work and services in Georgia by purchasing and storing property in the state.[97]

VI. REVIEW OF ADMINISTRATIVE DECISIONS

In a strong recognition of the authority of final decisions made by state agencies, the Georgia Court of Appeals held in *Tanner Medical Center, Inc. v. Vest Newnan, LLC*,[98] that its duty is not to consider whether the record supports the trial court's decision, but instead whether the record supports the agency's decision.[99] In *Tanner*, the Department of Community Health (DCH) denied Vest Newnan a certificate of need to establish an inpatient psychiatric hospital.[100] A certificate of need is required by statute[101] and the program for acquiring a certificate of need is overseen by the DCH and granted based on several factors, including area population and use of existing services.[102] The court of appeals previously stated that "[t]he DCH rules promulgated to administer the [certificate of need] program are detailed and lengthy" and that administrative review is highly specialized.[103] In *Tanner*, Vest Newnan was denied a certificate of need and "appealed DCH's denial with Coweta County and the City of Newnan intervening in the action on [Vest Newnan's] behalf."[104] The hearing officer affirmed the DCH's denial after a *de novo* administrative hearing, holding Vest Newnan did not show a need for a new psychiatric inpatient program, and such a service "would constitute an unnecessary duplication of services, would have an unreasonable effect on payors, [and] would not foster improvements or innovations" among other issues.[105] Vest Newnan appealed to the DCH Commissioner who affirmed the hearing officer's decision and adopted it as a final order.[106] Vest Newnan and the City petitioned for judicial review and the Coweta County Superior Court reversed the DCH's decision, concluding "that the service-specific need rule is unconstitutional on its face, and that the 'adverse impact' and 'relationship to the delivery system analysis' rests upon the

97. 339 Ga. App. at 378–79, 791 S.E.2d at 645.

98. 337 Ga. App. 884, 789 S.E.2d 258 (2016).

99. *Id.* at 887, 789 S.E.2d at 261.

100. *Id.* at 884, 789 S.E.2d at 259–60.

101. O.C.G.A. § 31-6-40(a)(1) (2017).

102. *See* Palmyra Park Hosp. v. Phoebe Sumter Med. Ctr., 310 Ga. App. 487, 488, 714 S.E.2d 71, 73 (2011).

103. *Id.* at 491–92, 714 S.E.2d at 75.

104. *Tanner*, 337 Ga. App. at 886, 789 S.E.2d at 260.

105. *Id.* at 886, 789 S.E.2d at 261.

106. *Id.*

unconstitutional service-specific need rule."[107] The Coweta County Superior Court further held "that the manner in which DCH reviewed Vest's application was arbitrary and capricious because the [initial] DCH reviewer did not take notes during his review or perform any need or adverse impact analysis.[108]

The court of appeals first held that it would not apply a *de novo* standard of review, but instead would determine "whether 'substantial evidence' supports the agency's findings of fact, and whether the conclusions of law drawn from those findings of fact are sound."[109] The court then evaluated whether the DCH had reviewed Vest Newnan's application in an arbitrary and capricious manner.[110] The court determined there was "no requirement in the statutory framework of the [certificate of need] program or elsewhere in the DCH rules requiring the reviewer to take notes or perform his own need and adverse impact analysis."[111] Thus, the trial court "erred in concluding that the procedure employed by DCH was arbitrary and capricious on this ground."[112] The court further held the DCH had complied with its own procedures in requiring additional information regarding architectural and construction costs, and that Vest Newnan was given the opportunity to submit such requested information, resulting in another error where the trial court found DCH had acted arbitrarily and capriciously.[113]

Finally, the court held that where a certificate of need applicant fails to establish no adverse impact on other regional service providers, the application may be denied by the DCH and should not be overruled by a reviewing court.[114] The court's duty is not to consider whether the record supports the trial court's decision, but instead whether the record supports the agency's decision.[115] Vest Newnan's application had a projected patient volume that was largely dependent on the redirection of admissions from existing providers to attain its projected level of utilization, which would have an adverse impact on other existing service

107. *Id.*

108. *Id.* at 886–87, 789 S.E.2d at 261.

109. *Id.* at 887, 789 S.E.2d at 261 (quoting *Palmyra Park Hosp.*, 310 Ga. App. at 488, 714 S.E.2d at 72).

110. *Id.* at 889, 789 S.E.2d at 262.

111. *Id.* at 889, 789 S.E.2d at 263.

112. *Id.* at 890, 789 S.E.2d at 263.

113. *Id.* at 890–91, 789 S.E.2d at 263.

114. *Id.* at 893, 789 S.E.2d at 265.

115. *Id.*

providers.[116] The court held the decision was not arbitrary and capricious because the DCH's decision was rational.[117]

In another certificate of need case, *Medical Center of Central Georgia v. Hospital Authority of Monroe County*,[118] the Georgia Court of Appeals held that where an agency has discretion to initiate investigations of possible violations of statutes or agency rules, and declines to do so, a reviewing court cannot order such an investigation.[119] In this case, the Medical Center of Central Georgia (MCCG) submitted a letter of non-renewability request (LNR) to the DCH seeking determination that its acquisition of certain medical equipment in an off-campus medical facility did not require a certificate of need. The Hospital Authority of Monroe County (MCH) objected to MCCG's request, and asked the DCH to perform an investigation. However, the DCH granted the LNR to MCCG, finding that the equipment was for hospital use. MCH requested a hearing, and MCCG moved for and was granted summary judgment because there was no genuine issue of material fact as to whether the proposed equipment purchase was for use in a hospital. MCH requested a review of the decision, but the DCH Commissioner affirmed the decision that MCCG did not need a certificate of need. The Monroe County Superior Court then reversed the DCH's decision, concluding the DCH exceeded its statutory authority, abused its discretion by not conducting an investigation, and ordered an investigation.[120]

The court of appeals noted that the DCH is authorized to administer Georgia's certificate of need program and held that O.C.G.A. § 31-6-45[121] gives the DCH discretion to make public or private investigations to determine whether provisions of that program have been violated.[122] Moreover, the court noted that O.C.G.A. § 31-6-44.1[123] only allows superior courts to affirm, remand, reverse, or modify the final decision of an agency.[124] Therefore, the court of appeals reversed the superior court's decision requiring the DCH to perform an investigation into MCH's allegations against MCCG.[125]

116. *Id.* at 892–93, 789 S.E.2d at 264.
117. *Id.* at 890–91, 893, 789 S.E.2d at 263, 265.
118. 340 Ga. App. 499, 798 S.E.2d 42 (2017).
119. *Id.* at 507, 798 S.E.2d at 49.
120. *Id.* at 501–03, 798 S.E.2d at 45–47.
121. O.C.G.A. § 31-6-45 (2017).
122. *Med. Ctr. of Cent. Ga.*, 340 Ga. App. at 507, 798 S.E.2d at 49.
123. O.C.G.A. § 31-6-44.1 (2017).
124. *Med. Ctr. of Cent. Ga.*, 340 Ga. App. at 507, 798 S.E.2d at 49.
125. *Id.*

Finally, in *Kennestone Hospital, Inc. v. Cartersville Medical Center, Inc.*,[126] the Georgia Court of Appeals again evaluated the DCH's final decision to award a certificate of need.[127] In *Kennestone*, the court reiterated the importance of ruling within the timelines established by O.C.G.A. § 31-6-44.1, which requires the court reviewing the DCH's decision to hear the case within 120 days of the filing of the case unless the hearing has been continued, and then within 30 days after the continued hearing.[128] The court held that, because the superior court did not enter its order within the required time, the DCH's decision to grant the certificate of need stands.[129]

In *Cherokee County Board of Tax Assessors v. Mason*,[130] the Georgia Court of Appeals evaluated an appeal to renew a Conservation Use Valuation Assessment (CUVA).[131] Milford Mason applied for and obtained a CUVA in 1993 and 2003. However, Mason's 2013 application for renewal of the CUVA was denied by the Cherokee County Board of Tax Assessors (the Board) under the reasoning that Mason had no timber management plan, did not continuously and actively manage his poplar stands, and owned a rental house on the lot. Mason sought review of the Board's decision in the Crawford County Superior Court, which conducted a *de novo* review, reversed the Board's decision, and determined Mason was entitled to a CUVA.[132] On the Board's first appeal, the court of appeals remanded the case because the superior court did not use the factors set forth in O.C.G.A. § 48-5-7.4[133] to determine if his property was eligible for renewal.[134] The superior court again determined that Mason was eligible, the Board appealed for a second time, and the court of appeals affirmed the superior court's decision.[135] The court noted that the superior court did not consider all the factors in determining whether Mason was entitled to a CUVA; because the list was non-exhaustive, the superior court's decision was affirmed.[136]

In *Welcker v. Georgia Board of Examiners of Psychologists*,[137] the Georgia Court of Appeals held that where an administrative agency's

126. 341 Ga. App. 28, 798 S.E.2d 381 (2017).
127. *Id.*
128. *Id.* at 30, 798 S.E.2d at 383.
129. *Id.* at 32, 798 S.E.2d at 384.
130. 340 Ga. App. 889, 798 S.E.2d 32 (2017).
131. *Id.* at 889, 798 S.E.2d at 34.
132. *Id.* at 891–92, 798 S.E.2d at 34–36.
133. O.C.G.A. § 48-5-7.4 (2017).
134. *Mason*, 340 Ga. App. at 891, 798 S.E.2d at 34–35.
135. *Id.* at 889–92, 798 S.E.2d at 34–36.
136. *Id.* at 893, 798 S.E.2d at 36.
137. 340 Ga. App. 853, 798 S.E.2d 368 (2017).

construction of its own rule is not plainly erroneous based on the plain language of the rule, the court must defer to the agency's interpretation.[138] In that case, the court upheld the Georgia Board of Examiners of Psychologists' denial of an application for a license to practice psychology due to failure to satisfy a residency requirement because courts must defer to an agency's interpretation and application of its own rules.[139] The court also held that the agency's decision cannot be overturned based on an abuse of discretion if there is some evidence to support the agency's application of the rule.[140] Furthermore, if no administrative hearing is required by law, then there is no contested case that is subject to judicial review.[141] The court also noted that a waiver may only be granted if denying a license would cause substantial hardship, which is defined by O.C.G.A. § 50-13-9.1(b)(1)[142] as significantly impairing the ability of the applicant to continue to function in the regulated practice.[143]

Judge Miller, joined by Judge Reese, dissented to the majority's opinion, stating that the Board's current interpretation of its rule was not in effect at the time the individual became subject to the Board's rules or even began her education.[144] Judge Miller thus concluded that the individual was entitled to her license.[145] Judge McFadden, joined by Judge Reese, also dissented, and held that the individual "made a prima facie showing of substantial hardship" and good faith to avoid the hardship.[146] Judge McFadden stated he believed incurring substantial debt qualified as substantial hardship and, therefore, the license should be granted.[147]

VII. RECENT LEGISLATION

This survey period saw a consistent number of enactments with major changes to administrative agencies during the Georgia General Assembly's regular session. The following are the more prominent measures that have been enacted:

138. *Id.* at 854, 798 S.E.2d at 370.
139. *Id.* at 859, 798 S.E.2d at 373.
140. *Id.* at 855, 798 S.E.2d at 371.
141. *Id.* at 856, 798 S.E.2d at 371.
142. O.C.G.A. § 50-13-9.1(b)(1) (2017).
143. O.C.G.A. § 50-13-9.1(b)(1); *Welcker*, 340 Ga. App. at 860, 798 S.E.2d at 374.
144. *Welcker*, 340 Ga. App. at 861–62, 798 S.E.2d at 374–75 (Miller, J., dissenting).
145. *Id.* at 862, 798 S.E.2d at 375.
146. *Id.* at 862–63, 798 S.E.2d at 375 (McFadden, J., dissenting).
147. *Id.* at 863–64, 798 S.E.2d at 376.

1) Last year's more controversial Judicial Qualifications Commission was revisited with the creation of "The Judicial Qualifications Commission Improvement Act of 2017," which substantially revises matters in connection with the Commission.[148]

2) "The First Priority Act—Helping Turnaround Schools Puts Students First" Act was created to provide for a system of supports and assistance for the lowest-performing schools identified as in the greatest need of assistance.[149]

3) The former Agricultural Education Advisory Commission has been recreated.[150]

4) The Commissioner of Agriculture may now issue a variance or waiver to certain rules and regulations of the Department of Agriculture.[151]

5) The Office of Cardiac Care has been established within the Department of Public Health.[152]

6) The State Road and Tollway Authority is now allowed to enter into credit enhancement or liquidity agreements with private entities to allow for funding for road projects through issuance of bonds.[153]

7) The Georgia Emergency Management and Homeland Security Agency is required to establish a state-wide system to facilitate the transport and distribution of essentials in commerce during a state of emergency declared by the Governor. [154]

8) The Council on American Indian Concerns is now attached to the Department of Natural Resources for administrative purposes.[155]

9) The Georgia Geospatial Advisory Council has been recreated.[156]

10) The definition of "agency" has been expanded for purposes relating to the Georgia Technology Authority, and the Act provides for the

148. Ga. H.R. Bill 126, Reg. Sess., 2017 Ga. Laws 157 (codified at O.C.G.A. §§ 15-1-21, 15-9-2.1 (2017)).

149. Ga. H.R. Bill 338, Reg. Sess., 2017 Ga. Laws 75 (codified at O.C.G.A. §§ 20-2-73, 20-2-83, 20-2-2063.20-2, 20-2-2067.1, 20-14-41, 14-43-49.4 (2017)).

150. Ga. H.R. Bill 437, Reg. Sess., 2017 Ga. Laws 111 (codified at O.C.G.A. § 20-14-90 (2017)).

151. Ga. S. Bill 78, Reg. Sess., 2017 Ga. Laws 619 (codified at O.C.G.A. § 26-2-34 (2017)).

152. Ga. S. Bill 102, Reg. Sess., 2017 Ga. Laws 302 (codified at O.C.G.A. §§ 31-11-130–139 (2017)).

153. Ga. S. Bill 183, Reg. Sess., 2017 Ga. Laws 760 (codified at O.C.G.A. §§ 32-10-60, 32-10-63, 32-10-65.2, 32-10-68, 32-10-73, 32-10-107 (2017).

154. Ga. H.R. Bill 405, Reg. Sess., 2017 Ga. Laws 740 (codified at O.C.G.A § 38-3-58 (2017)).

155. Ga. H.R. Bill 153, Reg. Sess., 2017 Ga. Laws 212 (codified at O.C.G.A. § 44-12-280 (2017)).

156. Ga. H.R. Bill 183, Reg. Sess., 2017 Ga. Laws 216 (codified at O.C.G.A. §§ 50-8-300–01 (2017)).

establishment of standard technology policies by the authority to be used by all agencies unless waived.[157]

157. Ga. S. Bill 117, Reg. Sess., 2017 Ga. Laws 467 (codified at O.C.G.A. §§ 50-25-1, 50-25-4 (2017)).