Mercer Law Review

Volume 73
Number 1 *Annual Survey of Georgia Law*

Article 4

12-2021

Administrative Law

Chelsea M. Lamb

Moses M. Tincher

Matthew M. White

Hannah M. Couch

Administrative Law

Chelsea M. Lamb*

Moses M. Tincher**

Matthew M. White***

Hannah M. Couch****

I. INTRODUCTION

This Article surveys cases from the Georgia Supreme Court and the Georgia Court of Appeals from June 1, 2020, through May 31, 2021, in which principles of administrative law were a central focus of the case.[1] Review of decisions by administrative agencies will be the first topic discussed, followed by cases discussing discretionary appeals, followed by cases discussing procedural requirements, with scope of authority to follow. The Article will conclude with cases discussing statutory construction.

II. REVIEW OF DECISIONS BY ADMINISTRATIVE AGENCIES

In *Trejo-Valdez v. Associated Agents*,[2] Jose Trejo-Valdez (the Worker) injured his back while working for Associated Agents (the Company) and filed a worker's compensation claim for his injuries. The injury occurred as the Worker was carrying a marble bathtub up a flight of stairs and the

*Associate, Baker & Hostetler LLP. University of Georgia (B.A., 2010); Mercer University School of Law (J.D., 2015). Member, State Bar of Georgia.

**Associate, Troutman Pepper Hamilton Sanders LLP. Emory University (B.A., 2014); Mercer University School of Law (J.D., 2017). Member, State Bar of Georgia.

*** Associate, Troutman Pepper Hamilton Sanders LLP. University of Georgia (B.A., 2016); Mercer University School of Law (J.D., 2019). Member, State Bar of Georgia.

**** Associate, Troutman Pepper Hamilton Sanders LLP. University of Georgia (B.A., 2013); Mercer University School of Law (J.D., 2018). Member, State Bar of Georgia.

1. For an analysis of administrative law during the prior Survey period, *see* Chelsea M. Lamb, Moses M. Tincher, and Matthew M. White, *Administrative Law, Annual Survey of Georgia Law*, 72 MERCER L. REV. 1 (2020).

2. 357 Ga. App. 461, 850 S.E.2d 863 (2020).

bathtub fell on him. After having two back surgeries, the Worker's doctor recommended a spinal cord stimulator placement (the Treatment).[3]

Two doctors suggested the Treatment, two believed there was no basis for the Treatment, and one suggested a temporary trial of the Treatment. The Worker's Compensation Board (the Board) Administrative Law Judge (the ALJ) initially rejected the recommended Treatment because the preponderance of the evidence did not establish that the Worker needed the Treatment "at this time."[4] The ALJ then designated a new doctor, recognizing that the Worker was entitled to ongoing medical benefits and that the course of his treatment could change. The new doctor subsequently recommended a temporary trial of the Treatment, which the ALJ approved.[5]

Upon approval, the Company filed a notice of controvert arguing (1) res judicata barred the Treatment because the ALJ initially denied it, and (2) regardless of whether the Treatment was denied, it was neither reasonable nor necessary. The ALJ held (1) res judicata did not bar the claims because worker's compensation cases constantly evolve with new questions of fact, and (2) the Company bore the burden of proof as to whether the treatment was reasonable and necessary. The Company appealed and the Board's Appellate Division affirmed the ALJ's decision.[6]

The Company then appealed the decision to the Superior Court of Dekalb County. The superior court reversed the Board's decision, holding (1) the Board erroneously placed the burden of proof upon the Company, and (2) res judicata barred the claims regardless.[7]

After the Georgia Court of Appeals granted the Worker's application for discretionary appeal, the Worker appealed the superior court's decision. The Georgia Court of Appeals held (1) res judicata did not bar the Worker's claims, and (2) the Company bore the burden of proving the treatment was not reasonable or necessary.[8]

As to the first issue, while the court stated that, although res judicata applies to worker's compensation claims where the issues are identical, the issues here (decided by the ALJ in two separate orders) were not identical—although the same treatment was considered in each—because new medical issues arose, including a new doctor and new suggested courses of treatment, and holding otherwise would "foreclose

3. *Id.* at 461, 850 S.E.2d at 865.
4. *Id.* at 462, 850 S.E.2d at 865.
5. *Id.*
6. *Id.* at 463, 850 S.E.2d at 866.
7. *Id.* at 463–64, 850 S.E.2d at 866.
8. *Id.* at 469, 850 S.E.2d at 869.

any additional treatment following an ALJ's award."[9] The court stated that this position would "confound[] the underlying purpose of the Worker's Compensation Act[,]" which should be liberally construed.[10]

Regarding the second issue, the court of appeals stated the plain language of State Board of Worker's Compensation Rule 205(d)(1)[11] placed the burden of proof on the Company.[12] Citing O.C.G.A. § 34-9-104(b),[13] the court stated: "In issues concerning a change in condition for the worse . . . the burden of proof rests with the claimant."[14] But in cases like this in which "medical treatment is controverted on the grounds that the treatment is not reasonably necessary,"[15] the court, citing State Board of Worker's Compensation Rule 205(d)(1), stated that "'the burden of proof shall be on the employer.'"[16] The court thus reversed the superior court's ruling.[17]

In *Doctors Hospital of Augusta, LLC v. Department of Community Health*,[18] the Georgia Department of Community Health (the Department) granted MCG Health, Inc. d/b/a/ Georgia Regents Medical Center (Georgia Regents) a Certificate of Need (CON) to build a new short-stay hospital. Doctors Hospital of Augusta, LLC (DHA) had competed against Georgia Regents for the CON and lost. "Although the applications differed in terms of location, size, and overall cost, each proposed construction of a new, 100-bed short-stay facility" in Columbia County, which did not have a hospital and whose government pledged to fund more than twenty percent of the costs. DHA petitioned the Superior Court of Fulton County for review, which affirmed the Department's

---

9. *Id.* at 465–67, 850 S.E.2d at 867–68.

10. *Id.* at 467, 850 S.E.2d at 868.

11. STATE BOARD OF WORKER'S COMPENSATION, r. 205(d)(1) (2019).

12. *Trejo-Valdez*, 357 Ga. App. at 468, 850 S.E.2d at 869.

13. O.C.G.A. § 34-9-104(b) (2020).

14. *Trejo-Valdez*, 357 Ga. App. at 467, 850 S.E.2d at 868.

15. *Id.* at 468, 850 S.E.2d at 868. The Worker included two arguments that were not enumerated as error, so the court refused to consider them but "nevertheless" rendered them moot in light of its decision on the res judicata issue: "(1) finding that the [Treatment] was not medically necessary; and (2) requiring him to plead a change in condition in order to revisit the disapproval of his [Treatment]." *Id.* at 468, 850 S.E.2d at 869. Chief Judge McFadden concurred specially in part as to this issue. *Id.* at 469, 850 S.E.2d at 869 (McFadden, C.J., concurring in part). He disagreed with the majority's position that the Worker's "failure to enumerate as error his additional arguments precludes [the court's] review of those arguments" because "[p]arties often include summaries of their arguments in their enumerations of error[,] . . . [b]ut they are not required." *Id.* at 470, 850 S.E.2d at 870 (McFadden, C.J., concurring in part).

16. *Id.* at 467–68, 850 S.E.2d at 868.

17. *Id.* at 469, 850 S.E.2d at 869.

18. 356 Ga. App. 428, 847 S.E.2d 614 (2020).

holding.[19] After granting the Department's application for discretionary appeal, the Georgia Court of Appeals heard the case.[20] It held the Department correctly awarded the CON to Georgia Regents based in part on tie-breaker considerations.[21]

"Entities seeking to establish a new healthcare service or facility in Georgia generally must apply for a CON."[22] The Department, which administers Georgia's CON program, reviews CON applications "in light of 17 general considerations"[23] listed under O.C.G.A. § 31-6-42(a).[24] The Department has adopted administrative rules and regulations regarding these considerations,[25] including an exception when the facility "is a sole community provider and more than twenty percent (20%) of the capital cost of any new, replacement or expanded facility is financed by the county governing authority[,]" pursuant to O.C.G.A. § 31-6-21(b)(8).[26]

DHA made multiple arguments considered on appeal. First, DHA argued the Department's county-financed exception contravened the CON statutory scheme and was unreasonable because it did not further the health-planning purposes of the CON program, rendering the exception invalid.[27] The court was not convinced.[28] It held that nothing in the CON statutory scheme forbade such an exception. Although the Department normally must abide by a numerical need methodology, the court held that the Department correctly applied the county-financed exception.[29] Further, the court found that the exception has been part of the scheme "since the rule became effective in 2005," and that the General Assembly's acquiescence to the rule "is evidence that the rule came within its intent as expressed by the Code[.]"[30] The court also held the purpose behind the exception was to balance many policy considerations, and the county-funded exception "reflects commitment to economic development and a desire to make communities more attractive places to live and work."[31]

---

19. *Id.* at 428–29, 847 S.E.2d at 616–17.
20. *Id.* at 428, 847 S.E.2d at 616.
21. *Id.*
22. *Id.* at 429, 847 S.E.2d at 617.
23. *Id*.
24. O.C.G.A. § 31-6-42(a) (2020).
25. *Drs. Hosp. of Augusta, LLC*, 356 Ga. App. at 430, 847 S.E.2d at 617.
26. *Id.* at 430–31, 847 S.E.2d at 618 (citing O.C.G.A. § 31-6-21(b)(8) (2021)).
27. *Id.* at 431, 847 S.E.2d at 618–19.
28. *Id.* at 432, 847 S.E.2d at 618.
29. *Id.* at 431, 847 S.E.2d at 618.
30. *Id.* at 432, 847 S.E.2d at 619.
31. *Id.* at 433, 847 S.E.2d at 619.

Second, DHA argued MCG Health's application did not meet the needs of the hospital because the Department previously denied CON applications for a free-standing emergency room in the area.[32] However, the court held the Department "was authorized to conclude that Georgia Regent's CON application met the general need requirements for a new short-stay hospital" because considerations for an acute care hospital differ from considerations regarding a free-standing emergency room, and the evidence supported that finding.[33]

Third, DHA argued that the Department failed to conduct an alternatives analysis—required under O.C.G.A. § 31-6-42 and the Department's accompanying regulation—to see whether alternatives to the hospital might suffice.[34] But the court noted the Department found that "[t]here [were] no existing alternatives to [Georgia Regents'] project except for maintaining the status quo, which would not adequately serve the needs of the service area."[35] The court refused to "substitute [its] own judgment for that of the Department" and held the Department "conducted a detailed existing alternatives analysis."[36]

Fourth, DHA argued that the Department improperly applied the "tie breaker" considerations required when, such as here, all CON applications meet the general and service-specific CON criteria.[37] Tie breaker or "priority" considerations include the past and present records of the facility and other facilities in Georgia owned by the same parent organization "regarding the provision of service to all segments of the population, particularly including Medicare, Medicaid, minority patients and those patients with limited or no ability to pay[.]"[38] The Department found that Georgia Regents should receive three grounds of priority consideration, while DHA received none. The court held the Department considered all relevant records and found "no error" made by the Department.[39]

Finally, DHA argued the superior court applied the wrong standard of review, but the court of appeals found that any error made by the lower court was immaterial because the appellate court reviews the final

32. *Id.* at 433, 847 S.E.2d at 620.
33. *Id.* at 433–34, 847 S.E.2d at 620.
34. *Id.* at 434, 847 S.E.2d at 620.
35. *Id.* at 434–35, 847 S.E.2d at 620.
36. *Id.*
37. *Id.* at 435, 847 S.E.2d at 621.
38. *Id.* at 436, 847 S.E.2d at 621.
39. *Id.*

agency decision, not the superior court's review of that decision.[40] Accordingly, the court affirmed the Department's decision.[41]

III. DISCRETIONARY APPEALS

In *CKCG Healthcare Services v. Georgia Department of Community Health*,[42] the Georgia Department of Community Health investigated two licensed private home providers and found that the providers improperly used nursing assistants against department rules and state law, both of which prevent "the use of unlicensed independent contractors to provide home care services."[43]

The two providers jointly filed a declaratory judgment action in Fulton County Superior Court to argue that the relevant statute—O.C.G.A. § 31-7-300[44]—does not prohibit the use of nursing assistants to provide home care services and that the Department's regulations conflicted with the relevant statute.[45] The superior court denied the petition, holding "that the statute does not allow the use of certified nursing assistants as independent contractors to provide home health care services, that the department's regulations [were] consistent with the statute" in question, and that the providers violated both state law and department rules when the providers used certified nursing assistants as independent contractors to provide home health care services. The providers thereafter filed a direct appeal, which the Department moved to dismiss on the grounds that the appeal failed "to comply with the mandatory application procedures of O.C.G.A. § 5-6-35."[46] The Georgia Court of Appeals agreed that the appeal must be dismissed for failing to meet the requirements of O.C.G.A. § 5-6-35.[47]

In so deciding, the court stated that "O.C.G.A. § 5-6-35(a)(1) requires an application for [a]ppeals from decisions of the superior courts reviewing decisions of state and local administrative agencies."[48] It explained that "[a]n act of an administrative agency is a 'decision' within the meaning of this statute only when it is a determination of an 'adjudicative nature,'" and that "[d]eterminations of an adjudicative

40. *Id.* at 437–38, 847 S.E.2d at 622.

41. *Id.* at 438, 847 S.E.2d at 622.

42. 357 Ga. App. 76, 849 S.E.2d 803 (2020).

43. *Id.* at 76, 849 S.E.2d at 804.

44. O.C.G.A. § 31-7-300 (2021).

45. *CKCG Healthcare Services,* 357 Ga. App. at 76–77, 849 S.E.2d at 804.

46. *Id.* at 77, 849 S.E.2d at 804.

47. *Id.* at 77, 849 S.E.2d at 804–05.

48. *Id.* at 77, 849 S.E.2d at 805 (quoting Schumacher v. City of Roswell, 301 Ga. 635, 636–37, 803 S.E.2d 66 (2017)).

nature, [unlike those of a legislative nature], are immediate in application, specific in application, and commonly involve an assessment of facts about the parties and their activities, businesses, and properties."[49]

With these principles in mind, the court decided that the Department's determinations were adjudicative in nature because they involved an investigation and assessment of facts about the providers, and that the Department's determinations were immediate and specific in application to the providers because they assessed specific violations of Department rules and directed immediate corrective action.[50] Given that the providers appealed from the superior court's decision reviewing adjudicative decisions of the Department, the court held that the providers "were required . . . to bring their appeal by way of an application for discretionary review" pursuant to O.C.G.A. § 5-6-35(a)(1). Because the providers failed to do so, the court held that it was without appellate jurisdiction and dismissed the appeal.[51]

In *Clay v. Douglasville-Douglas County Water and Sewer Authority*,[52] Robert Clay (Clay) sought to construct an auto repair shop on a less than one-acre piece of land in the City of Douglasville (the City). Clay submitted building plans to the Douglasville-Douglas County Water and Sewer Authority (WSA) that showed the building would create less than 5,000 square feet of water-impervious surface area that would not fall within state regulations requiring water treatment systems. The WSA did not accept or reject Clay's building plans, but rather marked-up the plans to note that the plans created more than 5,000 square feet of new or replaced impervious water surface, and therefore, the construction needed to comply with water treatment regulations.[53]

Thereafter, Clay requested a variance from WSA's regulations mandating water treatment on the new property. The WSA denied Clay's variance request, stating that the requirements came from the State of Georgia and that the WSA is required to enforce them under its Municipal Separate Storm Sewer System Permit from the State. Clay then filed suit in superior court arguing that the WSA wrongfully applied its regulations, because the regulations at issue were superseded by federal and state law. Moreover, Clay asserted that application of the

49. *Id.* (quoting *Schumacher*, 301 Ga. at 637, 803 S.E.2d at 69).

50. *Id.* at 77, 849 S.E.2d at 805.

51. *Id.*

52. 357 Ga. App. 434, 848 S.E.2d 733 (2020).

53. *Id.* at 434–35, 848 S.E.2d at 735.

regulations amounted to "an inverse condemnation of his property and that the defendants acted fraudulently and in bad faith."[54]

The WSA and City moved to dismiss Clay's complaint on several grounds, which the superior court ultimately granted, holding that "the WSA has correctly applied the regulations to Mr. Clay's plans, and therefore he does not have a case for inverse condemnation."[55] The superior court further held that "the species of 'taking' that Mr. Clay has alleged is via the government's use of regulatory or police powers, not eminent domain[,]" and therefore, "he has not made out a case that what is proposed here is a 'taking' of his property." Thereafter, Clay filed a direct appeal.[56]

Notably, even though neither party raised the issue, the Douglas County Superior Court inquired into whether it had jurisdiction over the case, and ultimately determined it did not.[57] In so holding, it began by stating that O.C.G.A. § 5-6-34(a)(1)[58] requires that plaintiffs file an application for discretionary appeal when seeking review of a superior court judgment that reviewed the decision of an administrative agency.[59] Given that, the court inquired into whether there was (1) a decision (2) of an administrative agency (3) that was subject to review by the superior court. In doing so, the court explained that a "'decision,' as it is used with reference to administrative agencies, is a determination of an adjudicative nature."[60] The court further explained that no formal adjudicative procedure is required and that an administrative determination is deemed adjudicative if "it is particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect."[61] The court specified that adjudicative decisions are "immediate in application, specific in application, and commonly involve an assessment of facts about the parties and their activities, businesses, and properties."[62]

Applying this standard, the court determined that the WSA's decision to deny Clay's variance request was an adjudicative determination, because the WSA "simply determined that based on the size of Clay's

54. *Id.* at 435, 848 S.E.2d at 735.

55. *Id.* at 435–36, 848 S.E.2d at 736.

56. *Id.* at 436, 848 S.E.2d at 736.

57. *Id.*

58. O.C.G.A. § 5-6-34(a)(1) (2021).

59. *Clay*, 357 Ga. App. at 436, 848 S.E.2d at 736.

60. *Id.* (quoting State v. International Keystone Knights of the Ku Klux Klan, 299 Ga. 392, 399, 788 S.E.2d 455, 462 (2016)).

61. *Id.* at 436, 848 S.E.2d at 736 (quoting Intl. Keystone Knights of the Ku Klux Klan, 299 Ga. at 401, 788 S.E.2d at 463).

62. *Id.* at 436, 848 S.E.2d at 736.

property and the specifics of his proposed construction plans that the applicable stormwater regulations barred Clay from proceeding without taking corrective measures and that WSA was not authorized to grant a variance."[63] Put differently, "WSA's denial was based on the particulars of Clay's proposal and the decision pertained to Clay's property alone."[64]

The court also held that WSA is a local administrative agency for the purposes of O.C.G.A. § 5-6-35(a)(1) despite the term "local administrative agency" not being defined in the Appellate Practice Act because it falls within the common legal usage of the term "administrative agency."[65] Indeed, the court explained that, among other things, the WSA's establishment as a "public body corporate" with "power[s] to contract with the City with respect to a water and sewage system," and its "authority to implement a stormwater management program," pursuant to an intergovernmental agreement with the City warranted its conclusion that the WSA is a local administrative agency for the purposes of O.C.G.A. § 5-6-35(a)(1).[66]

With respect to whether Clay's action in the superior court sought "review" of the WSA's decision requiring a discretionary appeal under O.C.G.A. § 5-6-35(a)(1), the court noted that its prior decision in *Brownlow v. City of Calhoun*,[67] which held that a final judgment in an action filed in superior court principally on the theory on inverse condemnation was subject to direct appeal "failed to fully address the degree to which trial court judgments that arise out of administrative agency decisions are subject to the discretionary appeal procedure."[68] The court stated that Georgia Supreme Court decisions decided after *Brownlow* "shed light on which cases are subject to discretionary review, as well as a decision that addresses the nature of inverse condemnation claims in general."[69] In explaining this, the court focused on five points.[70]

First, the court, looking at the substance of the underlying proceedings and not just the relief sought, found that at a "basic level," the superior court reviewed the agency's decision because it addressed the issue that Clay brought before the court.[71]

---

63. *Id*.
64. *Id.*
65. *Id.* at 437, 848 S.E.2d at 736.
66. *Id.* at 437, 848 S.E.2d at 736–37.
67. 198 Ga. App. 710, 402 S.E.2d 788 (1991).
68. *Clay*, 357 Ga. App. at 438, 848 S.E.2d at 737.
69. *Id*.
70. *See Id.* at 438–40, 848 S.E.2d at 737–38.
71. *Id.* at 438, 848 S.E.2d at 737.

Second, the court noted that the Georgia Supreme Court has held that "one factor to be considered [i]n determining whether a discretionary appeal is required is whether the appellant has already been heard in two tribunals on the relevant issues, once by the administrative agency and once by the superior court."[72] In applying this principle, the court opined that Clay's argument was addressed both by the agency and the superior court, which supported requiring discretionary appeal.[73]

Third, the court cited *Mortgage Alliance Corp. v. Pickens County*,[74] for the proposition that actions "'couched in terms of an inverse condemnation [action] are subject to the same . . . deadlines as all [the] appeals of administrative agency decisions.'"[75] The court concluded that from this principle, it "follows that a judgment by a superior court in an inverse condemnation action arising out of an administrative agency decision constitutes an appeal of that decision."[76] Looking to Clay's claim, the court concluded that because it implicitly asserted that WSA's denial of the requested variance resulted in an unconstitutional taking in the form of inverse condemnation, Clay "necessarily sought a review of the WSA decision" in superior court.[77]

Fourth, the court of appeals looked to the Georgia Supreme Court's decision in *Schumacher v. City of Roswell*,[78] which clarified earlier decisions regarding discretionary appeals.[79] Specifically, looking to *Schumacher*, the court determined that *O.S. Advertising Co. of Georgia v. Rubin*,[80] which involved the Georgia Supreme Court dismissing an appeal of a constitutional claim rooted in an administrative agency's denial of an individual variance request, was analogous to Clay's claim in that Clay's claim involved "the denial of an individual variance request even though his superior court action was couched in terms of inverse condemnation."[81]

Finally, the court found that *Brownlow's* conclusion, namely that "'the word 'condemnation' as it appears in the exceptions to the rule of O.C.G.A. § 5-6-35 (a)(1) was intended by the legislature to except 'inverse' as well as classic condemnation cases therefrom[,]'" is no longer

72. *Id.*

73. *Id.* at 438, 848 S.E.2d at 737–38.

74. 294 Ga. 212, 751 S.E.2d 51 (2013).

75. *Clay,* 357 Ga. App. at 438–39, 848 S.E.2d at 738 (citing *Mortgage Alliance Corp.*, 294 Ga. at 215–16, 751 S.E.2d at 54).

76. *Id.* at 439, 848 S.E.2d at 738.

77. *Id.*

78. 301 Ga. 635, 803 S.E.2d 66 (2017).

79. *Clay*, 357 Ga. App. at 439, 848 S.E.2d at 738.

80. 267 Ga. 723, 482 S.E.2d 295 (1997).

81. *Clay*, 357 Ga. App. at 439, 848 S.E.2d at 738.

controlling.[82] The court reasoned that *Brownlow* relied on an outdated reading that inverse condemnation actions are not subject to discretionary appeals, a conclusion that the Georgia Supreme Court criticized on the basis that inverse condemnation actions relate to concerns different than those relevant to eminent domain.[83]

Taken altogether, the court held that Clay was required to file an application for discretionary review rather than file a direct appeal and therefore dismissed Clay's claim.[84] The court also held that its decision in *Brownlow* "must be disapproved to the extent it holds otherwise."[85]

In *Jordan v. Department of Natural Resources, Environmental Protection Division*,[86] elevated levels of a known carcinogen, ethylene oxide, were detected in certain areas of Atlanta and linked to Sterigenics, U.S., LLC's medical-sterilization operations in Cobb County. In August 2019, the Department of Natural Resources, Environmental Protection Division (the EPD) entered into a consent order with Sterigenics in an attempt to stop the release of ethylene oxide. Notably, the EPD finalized the consent order without any public notice or input.[87]

The appellants, who lived near Sterigenics facility, filed a complaint seeking declaratory relief, arguing that the consent order was invalid because it was issued prior to the required notice and comment period. The EPD moved to dismiss the complaint, arguing that the appellants failed to state a claim under O.C.G.A. § 50-13-10[88] and, therefore, "failed to identify a means of overcoming sovereign immunity."[89] The Fulton County Superior Court granted the EPD's motion to dismiss and held that a declaratory judgment was improper given that the "parties' rights had already accrued, and there was no future uncertainty for either party."[90]

Thereafter, the appellants filed a timely notice of appeal.[91] On appeal, the EPD argued that the appellants were not entitled to a direct appeal from the dismissal of their petition of declaratory relief and that the

82. *Id.* (quoting *Brownlow*, 198 Ga. App. at 712, 402 S.E.2d at 790).
83. *Id.* at 439–40, 848 S.E.2d at 738.
84. *Id.* at 440, 848 S.E.2d at 739.
85. *Id.*
86. 357 Ga. App. 625, 851 S.E.2d 214 (2020).
87. *Id.* at 625, 851 S.E.2d at 217.
88. O.C.G.A. § 50-13-10 (2021).
89. *Jordan*, 357 Ga. App. at 625–26, 851 S.E.2d at 217.
90. *Id.* at 626, 851 S.E.2d at 217.
91. *Id.*

appellants were instead required to apply for a discretionary appeal following the procedures provided in O.C.G.A. § 5-6-35.[92]

The Georgia Court of Appeals first noted that O.C.G.A. § 5-6-35(a)(1) requires an application to appeal "from decisions of the superior court reviewing *decisions* of . . . state and local administrative agencies."[93] In doing so, the court explained that even though the word "decisions" is not defined in O.C.G.A. § 5-6-35, the Georgia Supreme Court has interpreted the term, in the instant context, to mean an agency "determination of an adjudicative nature."[94] The court further explained that a decision is adjudicatory in nature if it is "immediate in application, is specific in application, and commonly involves an assessment of facts about the parties and their activities, businesses, and properties"[95] as opposed to determinations that are "'quintessentially executive in nature' such as 'the day-to-day management of agency personnel and resources, the dissemination of information to the public, the undertaking of law enforcement and compliance investigations, and prosecutorial determinations to initiate or decline to bring enforcement proceedings.'"[96]

Looking to the facts of the case, the court determined that the consent order was immediate and specific in application and, therefore, adjudicative in nature because it involved "an assessment of Sterigenic's activities, business, and properties, all of which are key features of an adjudicative decision."[97] After deciding that the subject matter underlying the action, that is, the consent order, was an adjudicative decision by an agency, the court looked to whether two tribunals had already adjudicated the case.[98] In doing so, the court noted that the intent of O.C.G.A. § 5-6-35(a)(1) was to provide appellate courts the discretion to decline to hear an appeal where two tribunals had already adjudicated the case.[99]

Importantly, the "'rationale for requiring a discretionary application does not apply where the person who seeks to appeal was not a party to the administrative proceedings' at issue."[100] Because Georgia courts look to parties in administrative proceeding in the generic sense of whether

92. *Id.*

93. *Id.* (citing O.C.G.A. § 5-6-35(a)(1) (2021)) (emphasis added).

94. *Id.* (quoting *Keystone Knights*, 299 Ga. at 399, 788 S.E.2d at 462).

95. *Id.* (quoting Wolfe v. Bd. of Regents of the Univ. System of Ga., 300 Ga. 223, 228, 794 S.E.2d 85, 89 (2016)).

96. *Id.* (quoting *Keystone Knights*, 299 Ga. at 400-01(4)(a), 788 S.E.2d at 455).

97. *Id.* at 627, 851 S.E.2d at 218.

98. *Id.* at 628, 851 S.E.2d at 218.

99. *Id.*

100. *Id.* 628, 851 S.E.2d at 218–19 (quoting Ladzinske v. Allen, 280 Ga. 264, 265, 626 S.E.2d 83, 85 (2006)).

the challenger participated (or could have participated but purposefully did not) in the administrative proceedings at issue, the court turned its focus on whether the appellants had standing to participate "in some level of administrative proceedings before filing their declaratory judgment action in the superior court."[101]

The court began this analysis by looking to relevant statutes, namely O.C.G.A. § 12-2-2(c)(2)(A), which provides that:

> Any person who is aggrieved or adversely affected by any order or action of the director shall, upon petition to the director within 30 days after the issuance of such order or the taking of such action, have a right to a hearing before an administrative law judge of the Office of State Administrative Hearings . . . acting in place of the Board of Natural Resources . . . [102]

And that:

> Persons are "aggrieved or adversely affected" . . . where the challenged action has caused or will cause them injury in fact and where the injury is to an interest within the zone of interests to be protected or regulated by the statutes that the director is empowered to administer and enforce . . . [103]

The court explained that the plain-language standing requirements of the statute had not been extensively explored by Georgia courts but are materially identical to the two-part "zone of interest" test articulated by the United States Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*,[104] and adopted by the Georgia Supreme Court in *Amdahl Corporation v. Georgia Department of Administrative Services.*[105] The court went on to explain that, under the two-part test, "a complainant has standing if the complainant alleges that the challenged action has caused him injury in fact and if the complainant is asserting an interest arguably within the zone of interests to be protected by the statute."[106]

---

101. *Id.* at 628, 851 S.E.2d at 219.

102. O.C.G.A. § 12-2-2(c)(2)(A) (2021); *see Jordan*, 357 Ga. App. at 628–29, 851 S.E.2d at 219.

103. *Jordan*, 357 Ga. App. at 628–29, 851 S.E.2d at 219 (quoting O.C.G.A. § 12-2-2(c)(3)(A) (2021)).

104. 397 U.S. 150, 153–54 (1970).

105. 260 Ga. 690, 398 S.E.2d 540 (1990); *Jordan*, 357 Ga. App. at 629, 851 S.E.2d at 219.

106. *Jordan*, 357 Ga. App. at 629, 851 S.E.2d at 219 (quoting *Amdahl Corp.*, 260 Ga. at 696, 398 S.E.2d at 545).

The court then inquired into whether the appellants had alleged an injury-in-fact.[107] The court noted that the appellants had alleged that they lived near the Sterigenics facility know to emit ethylene oxide, and that they were likely inhaling the airborne chemical as a consequence. The court also noted that the appellants claimed the "emissions level proposed in the consent order will 'still exceed[] the acceptable annual risk level by 12 to 24 times' under state guidelines, thus posing a continued and ongoing danger," and that the EPD acted on the consent order without first allowing residents the notice and opportunity to comment.[108] Taken together, the court determined that these allegations were sufficient to establish an injury-in-fact.[109]

After determining that the appellants had sufficiently alleged an injury-in-fact, the court turned to whether "'the complainant is asserting an interest arguably within the zone of interests to be protected by the statute.'"[110] In doing so, the court noted that the zone of interest test is not one that is meant to be "especially demanding" and is rather designed "to deny review where a party's interests are 'marginally related to or inconsistent with the purposes implicit in the statute.'"[111] The statute relevant to this analysis, that is, the statute that formed the basis for the consent order is O.C.G.A. § 12-9-1 et. seq.,[112] which is known as the "The Georgia Air Quality Act."[113] Per the court, the Act aims to "preserve, protect, and improve air quality . . . to prevent the significant deterioration of air quality and to attain and maintain ambient air quality standards so as to safeguard the public health, safety, and welfare consistent with providing for maximum employment and full industrial development of the state."[114]

Looking to the facts of the case, the court opined that the EPD is tasked with the administration and enforcement of the Georgia Air Quality Act and that the EPD is generally required to provide the public with notice and opportunity to comment and provide information regarding the proposed issuance of consent orders, like the order at issue. [115] Because the appellants' alleged injury was the result of continuing

107. *Id.* at 629–30, 851 S.E.2d at 219–20.

108. *Id.* at 630, 851 S.E.2d at 220.

109. *Id.*

110. *Id.* (quoting *Amdahl Corp.*, 260 Ga. at 696, 398 S.E.2d at 545).

111. *Id.* at 631, 851 S.E.2d at 220 (quoting Clarke v. Securities Indus. Ass'n., 479 U.S. 388, 399 (II) (1987)).

112. O.C.G.A. § 12-9-1, et. seq. (2021).

113. *Jordan*, 357 Ga. App. at 631, 851 S.E.2d at 220.

114. *Id.* (quoting O.C.G.A. § 12-9-2 (2021)).

115. *Id.*

ethylene oxide emissions and the EPD's failure to provide notice and the opportunity to comment, the court determined that it "is clear that the complaint asserts injuries that fall within the zone of interests protected by the relevant statutes and regulations."[116] Given the court's conclusions, it held that the appellants were required to apply for discretionary appeal pursuant to O.C.G.A. § 5-6-35 and because the appellants failed to do so, the court dismissed the appellants' appeal.[117]

In *Thomas County v. WH Group 2, LLC*,[118] WH Group submitted plans to develop a subdivision that would include rental units to the Thomas County Director of Planning and Zoning, but the Director refused to submit the plans to the Thomas County Board of Commissioners on the basis that the area was not zoned for rental units. After making another request that the plans be submitted to the Board of Commissioners, WH Group filed a petition for a writ of mandamus and complaint for declaratory judgment in superior court requiring the plans to be submitted to the county and declaring the restriction on rental units illegal. The Thomas County Superior Court found that there was no zoning restriction on the land and ordered the county to process WH Group's plans. In reaching its decision, the superior court found that the county's only official zoning document did not indicate any conditions on the designation sought by WH Group and rejected Thomas County's "reliance on unrecorded meeting minutes as a basis for imposing a rental restriction."[119] Thomas County appealed the superior court's decision thereafter.[120]

On appeal, the Georgia Court of Appeals looked to O.C.G.A. § 5-6-35(a)(1) in deciding whether Thomas County was required to file an application for discretionary appeal on the basis that the appeal was from the decision of a superior court reviewing a decision of state or local administrative agency.[121] In doing so, the court noted that it had to determine whether a "state or local administrative agency" had made a "decision" as contemplated in O.C.G.A. § 5-6-35(a)(1) and whether the superior court reviewed said decision.[122]

The court first concluded that the Director's action was an action by a local administrative agency for the purposes of O.C.G.A. § 5-6-35(a)(1).[123]

116. *Id.* at 632, 851 S.E.2d at 220–21.
117. *Id.* at 632, 851 S.E.2d at 221.
118. 359 Ga. App. 201, 857 S.E.2d 94 (2021).
119. *Id.* at 201–02, 857 S.E.2d at 96.
120. *Id.* at 202, 857 S.E.2d at 96.
121. *Id.*
122. *Id.* (quoting O.C.G.A. § 5-6-35(a)(1)).
123. *Id.*

In doing so, the court looked to Georgia Supreme Court precedent and noted that if "the underlying subject matter of a mandamus petition concerns an administrative ruling which is reviewed by a superior court, a direct appeal will not lie. And this rule applies to appeals of local governmental department decisions even if no administrative appeal was taken."[124] In applying this principle, the court noted that the Director is the head of Thomas County's planning and zoning department and "is responsible for reviewing plans and specifications to ensure they comply with rules or restrictions imposed by the Board of Commissioners."[125] Given this, the court concluded that the Director refusing to forward the WH Group's plans to the Board of Commissioners acted as a local administrative department.[126]

The court next turned to whether the Director made a "decision."[127] In doing so, the court explained that "decision," as used in O.C.G.A. § 5-6-35(a)(1), refers to an administrative determination that is adjudicative rather than executive or legislative in nature.[128] The court further explained that administrative determinations that are adjudicative in nature "are immediate in application, specific in application, and commonly involve an assessment of facts about the parties and their activities, businesses, and properties" and do not require formal adjudicative procedures.[129] The court concluded that the Director's action was adjudicative in nature and, therefore, a "decision" given that the Director's refusal to forward WH Group's plans was a determination to "reject a single submission submitted by a specific applicant, and it had the immediate and particular consequence of disallowing that applicant from obtaining the necessary approval to proceed with its development."[130] Put differently, the "decision was not based on general considerations, but was predicated on the allowed use of a particular parcel of land and was therefore a determination of an adjudicative nature."[131]

The final point the court considered was whether the superior court reviewed the Director's decision.[132] In its consideration, the court noted

---

124. *Id.* at 202, 857 S.E.2d at 96 (quoting Selke v. Carson, 295 Ga. 628, 629, 759 S.E.2d 853, 854 (2014)).

125. *Id.* at 202, 857 S.E.2d at 96.

126. *Id.*

127. *Id.*

128. *Id.* at 202–03, 857 S.E.2d at 96–97.

129. *Id.* at 203, 857 S.E.2d at 97 (quoting *Keystone Knights*, 299 Ga. at 401(4)(a), 788 S.E.2d at 463).

130. *Id.*

131. *Id.*

132. *Id.*

that, when reviewing the nature of the proceedings in the superior court, the court generally "look[s] to the substance of the proceedings, not merely the form of relief sought."[133] On this point, the court explained 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 administrative decision to resolve the merits of the case."[134] In applying this principle, the court observed that WH Group "directly attacked the director's decision in the mandamus claim that it filed in superior court,"[135] and sought a writ compelling Thomas County to process and approve the plans WH Group submitted as consistent with the appropriate zoning designation. Given this, the court concluded that the superior court reviewed the administrative decision.[136]

Given its conclusions that Thomas County's appeal was from the decision of a superior court reviewing a decision of state or local administrative agency, the court held that Thomas County was required by O.C.G.A. § 5-6-35(a)(1) to file its appeal via an application for discretionary appeal.[137] The court further held that Thomas County's failure to do so necessitated the dismissal of its direct appeal.[138]

IV. PROCEDURAL REQUIREMENTS

In *Dessalines v. Department of Human Services*,[139] Germany Dessalines (Dessalines) refused to allow the Division of Family and Children Services (DFCS) of the Georgia Department of Human Services (DHS) to "assess or aid her 17-year-old autistic child after an incident at school in September 2018."[140] Because of this incident, DFCS placed Dessalines' name on a child abuse registry. Dessalines appealed the decision to an administrative law judge (ALJ), who affirmed the decision.[141]

Dessalines then filed a petition for judicial review in the Superior Court of Gwinnett County. She attached a certificate of service to her petition stating that she had served DFCS's attorney, which was the

133. *Id.* (quoting *Keystone Knights*, 299 Ga. at 407, 788 S.E.2d at 467).

134. *Id.* at 203, 857 S.E.2d at 97 (quoting *Keystone Knights*, 299 Ga. at 408, 788 S.E.2d at 468).

135. *Id.*

136. *Id.* at 204, 857 S.E.2d at 97.

137. *Id.*

138. *Id.*

139. 356 Ga. App. 826, 849 S.E.2d 673 (2020).

140. *Id.* at 826–27, 849 S.E.2d at 674.

141. *Id.* at 826, 849 S.E.2d at 674.

private attorney from the ALJ proceeding who was serving as a special assistant attorney general (SAAG), and the Clerk of the Office of State Administrative Hearings via U.S. Mail and electronic service. "The electronic service consisted of an e-mail stating the docket number and notifying the recipient of statutory electronic service of the following attached documents: case initiation form, summons, petition for judicial review, and certificate of service." The following day, the SAAG emailed Dessalines stating she received her email.[142]

The SAAG then filed a response to the petition and a motion to dismiss. In her motion, the SAAG argued that she was not authorized to accept service on behalf of DFCS and "that personal service [upon the Commissioner of DHS] was required but had not been achieved."[143]

Dessalines then filed a sheriff's entry of service showing "non est" for an attempt to personally serve Gerlda Hines.[144] She noted: "Wrong commissioner as Defendant unable to accept service per A. Johnson (Executive Assistant)."[145] In her response to the SAAG's motion, Dessalines outlined her service attempts and argued "personal service is not required by law."[146] The superior court granted the motion, holding (1) personal service was required under O.C.G.A. § 9-11-4(e)(5)[147], and (2) electronic service was not consented to until after the petition was filed.[148]

The Georgia Court of Appeals granted Dessalines' application for discretionary review and heard her appeal.[149] She argued personal service was not required, and the court agreed. In its reasoning, the court focused on whether the appeal to superior court was an original action under the Georgia Child Protection Act (CPA) or more akin to the superior court sitting as an appellate decisionmaker under the Georgia Administrative Procedure Act (APA).[150] The court, citing former O.C.G.A. § 49-5-181 of the CPA, noted that the procedures for an appeal to the superior court "shall be substantially the same as those for judicial review of contested cases under Code Section 50-13-19 [of the

142. *Id.*

143. *Id.*

144. *Id.* at 826, 849 S.E.2d at 674–75; *Hines is Commissioner of the DHS*, GEORGIA DEPARTMENT OF HUMAN SERVICES, https://dhs.georgia.gov/organization/about/gerlda-b-hines (last accessed Aug. 31, 2021).

145. *Dessalines*, 356 Ga. App. at 826, 849 S.E.2d at 675.

146. *Id.* at 827–28, 849 S.E.2d at 675.

147. O.C.G.A. § 9-11-4(e)(5) (2021).

148. *Dessalines*, 356 Ga. App. at 828, 849 S.E.2d at 675.

149. *Id.* at 828, 849 S.E.2d at 675.

150. *Id.* at 828–30, 849 S.E.2d at 675–76.

APA] . . . ."[151] O.C.G.A. § 50-13-19,[152] as previously construed by the court in *Schuman v. Department of Human Services*,[153] provides that service by mail, as opposed to personal service, is sufficient.[154] It thus held that "the additional step of personal service on the Commissioner of Human Services was not required."[155] Accordingly, the court reversed the lower court.[156]

V. SCOPE OF AUTHORITY

In *Georgia Professional Standards Commission v. Wilson-Williams*,[157] a student reported to her teacher that her father had been "touching" her.[158] The teacher immediately reported the allegation to Wilson-Williams—the school's principal. Instead of reporting the matter right away to the police, the principal decided to "wait until the following day to take any action." Before school the next morning, the student's father raped her. Because the principal did not report the alleged abuse right away, the Georgia Professional Standards Commission revoked the principal's educator's certificate.[159]

After the principal contested the agency's finding, an Administrative Law Judge (ALJ) found that "although Wilson-Williams had 'not violated O.C.G.A. § 19-7-5, which requires mandatory reporters to report suspected abuse within twenty-four hours, Dougherty County School System's policy required immediate reporting by a principal to the police with no grace period.'"[160]

Rather than adopt the Commission's penalty, the ALJ reduced the penalty from absolute forfeiture to a two-year suspension. The principal appealed the agency's finding to the superior court arguing that the state statute, which allows a twenty-four-hour grace period, preempted the local school system policy. The superior court agreed and the reversed the ALJ's decision, holding that the local school system's policies "must bend and yield" to the state's mandatory reporting statute, which provides that "when a reporter learns of possible child abuse, she must report it 'immediately, but in no case later than 24 hours from the time

151. *Id.* at 828, 849 S.E.2d at 675.
152. O.C.G.A. § 50-13-19 (2021).
153. 354 Ga. App. 509, 841 S.E.2d 218 (2020).
154. *Dessalines*, 356 Ga. App. at 829, 849 S.E.2d at 675.
155. *Id.* at 829, 849 S.E.2d at 675–76.
156. *Id.* at 831, 849 S.E.2d at 676.
157. 355 Ga. App. 493, 844 S.E.2d 559 (2020).
158. *Id.* at 494, 844 S.E.2d at 561.
159. *Id.*
160. *Id.* at 494–95, 844 S.E.2d at 561–62.

there is reasonable cause to believe that suspected child abuse has occurred.'"[161] Thereafter, the Commission appealed the superior court's decision.[162]

On appeal, the Commission argued that the superior court erred in granting Wilson-Williams relief on the issue of preemption, as Wilson-Williams did not raise the defense during the administrative hearing. More specifically, the Commission argued that the superior court "was prohibited from considering whether Georgia's mandatory reporting law preempts the school system's policy on reporting" due to Wilson-Williams failing to raise the defense during the administrative hearing.[163]

The Georgia Court of Appeals agreed with the Commission.[164] It its analysis, the court explained that:

> [w]hether the defense of preemption is jurisdictional and thus not waivable or waivable is a question of law we review de novo . . . The defense of preemption is waivable where it merely dictates a different choice of law. Here, the preemption defense is not jurisdictional because a successful preemption defense under O.C.G.A. § 19-7-5 would dictate only a change in law, not a change in forum.[165]

The court went on to explain that O.C.G.A. § 20-2-1160(e)[166] provides, in relevant part, that "[n]either the state board nor the superior court shall consider any question in matters before the local board nor consider the matter *de novo*, and the review by the state board or the superior court shall be confined to the record,"[167] and that, therefore, "[a]s an appellate body, the Superior Court of [Dougherty] County (like the State Board of Education) was not authorized to consider matters which had not been raised before the local board."[168]

Looking to the facts of the case, the court opined that there was no indication that Wilson-Williams raised the issue of preemption or argued that she had reported the abuse within twenty-four hours as required by state law at the local board level or in her appeal to the State Board.[169]

---

161. *Id.* at 495, 844 S.E.2d at 562.

162. *Id.*

163. *Id.* at 496, 844 S.E.2d at 562.

164. *Id.*

165. *Id.* (quoting Jones v. Sabal Trail Transmission, 336 Ga. App. 513, 516, 784 S.E.2d 865, 868 (2016).

166. O.C.G.A. § 20-2-1160(e) (2021).

167. *Georgia Professional Standards Commission*, 355 Ga. App. at 496, 844 S.E.2d at 562 (quoting O.C.G.A. § 20-2-1160(e)).

168. *Id.* (quoting Sharpley v. Hall County Bd. of Ed., 251 Ga. 54, 55(1), 303 S.E.2d 9, 10 (1983)).

169. *Id.* at 497, 844 S.E.2d at 562–63.

Rather, the court noted that its review of the record showed that Wilson-Williams first asserted the preemption argument during her appeal to the superior court.[170] Given this, the court found that the superior court was not authorized to consider the issue, meaning it erred in reversing the ALJ's decision on that rationale. Consequently, the court reversed the superior court's judgement.[171]

VI. STATUTORY CONSTRUCTION

In *Cobb Hospital, Inc. v. Emory-Adventist, Inc.*,[172] the plaintiff-hospitals brought a declaratory judgment action seeking to declare that Emory Healthcare, Inc.'s (Emory) acquisition of Emory-Adventist Hospital violated the Hospital Acquisition Act (HAA). The Superior Court of Cobb County denied plaintiffs' request for relief, to which plaintiffs appealed.[173] The Georgia Court of Appeals affirmed the trial court's finding.[174]

First, before addressing whether Emory's acquisition of Emory-Adventist constituted a transaction to which the HAA applies, the court explicated the fundamental rules of statutory construction.[175] These rules require courts "to construe the statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage."[176] The court further explained that a statute "should be read according to its natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending its operation."[177]

Applying these rules, the court observed that Georgia's HAA applies "any time the sale, purchase, or lease, of 50 percent or more of the assets of a hospital owned, controlled, or operated by a nonprofit entity occurs."[178] Under this Act, the entity for sale and the acquiring entity are both subject to the notification and public hearing requirement if in fact

170. *Id.* at 497, 844 S.E.2d at 563.

171. *Id.*

172. 357 Ga. App. 617, 851 S.E.2d 208 (2020), *cert. denied*, No. S21C0473 (Jun. 21, 2021).

173. *Id.* at 617, 851 S.E.2d at 209.

174. *Id.*

175. *Id.* at 618–19, 851 S.E.2d at 210–11.

176. *Id.* at 618–19, 851 S.E.2d at 210.

177. *Id.* at 619, 851 S.E.2d at 211.

178. *Id.* at 619, 851 S.E.2d at 211.

a transaction has occurred.[179] The court observed that under the HAA, an "acquisition" means:

> a purchase or lease by an acquiring entity of the assets of a hospital which is owned, controlled, or operated by a nonprofit corporation and which meets one or more of the following conditions: (A) Constitutes a purchase or lease of 50 percent or more of the assets of a *hospital having a permit under this chapter*.[180]

The court then interpreted the plain and clear definitions of "acquisition," "permit," and "hospital" under the statute, as well as under the Department of Community Health's regulations and related statutes, to conclude that Emory-Adventist did not constitute a hospital under the HAA because it was no longer operating and had surrendered its permit.[181] Thus, the court concluded that because Emory did not engage in a transaction of a hospital having a permit, it did not violate the HAA when acquiring Emory-Adventist.[182]

In *Premier Health Care Investments, LLC v. UHS of Anchor, L.P.*,[183] the Georgia Department of Community Health (Department) promulgated a rule—known as the "Psychiatric Rule"—that required licensed hospitals with a psychiatric/substance-abuse program authorized by a Certificate of Need (CON) to obtain an additional CON "to redistribute its inpatient beds in excess of those identified in its CON to operate a psychiatric/substance-abuse program, but within its total licensed bed capacity."[184] The Georgia Court of Appeals held that the Department was authorized to promulgate such a rule to create a category of institutional health services requiring a CON even when such category is not listed in the relevant statute, O.C.G.A. § 31-6-40(a),[185] and the Georgia Supreme Court disagreed.[186]

The Court first examined the "plain text of O.C.G.A. § 31-6-40(a)," which requires a CON for "any new institutional health service" and specifically prescribes that "[n]ew institutional health services include . . . [a]ny increase in the bed capacity of a health care facility[.]"[187] In so doing, the court relied on the fundamental principles that "we must

179. *Id.* at 619–20, 851 S.E.2d at 211.
180. *Id.* at 622, 851 S.E.2d at 213 (emphasis added).
181. *Id.* at 622–23, 851 S.E.2d at 213.
182. *Id.* at 624, 851 S.E.2d at 214.
183. 310 Ga. 32, 849 S.E.2d 441 (2020)
184. *Id.* at 32, 849 S.E.2d at 443.
185. O.C.G.A. § 31-6-40(a) (2021).
186. *Premier Health Care Investments, LLC*, 310 Ga. at 32, 849 S.E.2d at 443.
187. *Id.* at 37, 849 S.E.2d at 446.

afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would."[188] Also, while the search for statutory meaning typically ends when the statutory text is clear and unambiguous, when the language is not obvious on its face, then courts should employ other "tools of construction" to interpret and resolve its meaning.[189]

The court observed that the statute, particularly the term "include" or "including," was not clear and unambiguous as it was open to two plausible interpretations—both as a term of limitation and as a term of expansion, depending on the context.[190] In the context of the relevant statute, in which the word "include" is followed by seven specifically enumerated examples, the court, applying a textual and contextual approach, concluded that the term introduces an "exhaustive list" of "new institutional health services" for which a CON is required.[191]

The court also reasoned that a broader construction of the term would render specific phrases in the statute "superfluous" insofar as "it would have been wholly unnecessary for the legislature to state that the general phrase encompasses [so many] particular acts, if the list were meant to be illustrative instead of an exhaustive list of specific new institutional health services for which a CON is required."[192] The court also stressed the importance that a statute "should be construed to make all its parts harmonize and to give a sensible and intelligent effect to each part."[193]

Other tools of construction implemented by the court to discern the statute's meaning included statutory history as well as the canon of constitutional doubt.[194] The court concluded that because the term "include" may lead to two plausible interpretations, the controlling interpretation is the one that avoids raising serious questions about the constitutionality of the General Assembly's delegation of rulemaking authority to the Department.[195] Accordingly, applying the various tools of construction, the court held that O.C.G.A. § 31-6-40(a) "provides an exhaustive list of new institutional health services for which a CON is

188. *Id.* at 39, 849 S.E.2d at 447 (citing Deal v. Coleman, 294 Ga. 170, 172–73(1)(a), 751 S.E.2d 337, 341 (2013)).

189. *Id.* at 39, 849 S.E.2d at 448.

190. *Id.* at 39–40, 849 S.E.2d at 448.

191. *Id.* at 43, 849 S.E.2d at 450.

192. *Id.* at 44, 849 S.E.2d at 451.

193. *Id.*

194. *Id.* at 48, 849 S.E.2d at 453–54.

195. *Id.* at 48–49, 849 S.E.2d at 454.

required."[196] Thus, to the extent the Psychiatric Rule purported to require a new CON for redistribution of psychiatric/substance-abuse beds in a facility which has already secured CON approval to operate a psychiatric/substance-abuse inpatient program within its total licensed bed capacity, the court determined the Rule exceeds the Department's rulemaking authority.[197]

In *Georgia Government Transparency and Campaign Finance Commission v. New Georgia Project Action Fund*,[198] the Government Transparency and Campaign Finance Commission (Commission), suspecting that the campaign of gubernatorial candidate, Stacey Abrams, had improperly coordinated with several third-party nonprofit organizations for the campaign's material benefit, issued administrative subpoenas to investigate its claim. The Commission then moved the Fulton County Superior Court to compel the defendants to fully comply with the subpoenas. In a one-paragraph order, the superior court denied the motion, stating that it lacked jurisdiction. On appeal, the Commission argued that it may seek judicial enforcement of its administrative subpoenas under the Georgia Administrative Procedure Act (APA).[199] The Georgia Court of Appeals agreed.[200]

First, it recognized the fundamental principles of statutory interpretation: that the statutory texts must be afforded its "plain and ordinary meaning," that courts must view the statutory text in the context in which it appears, and that courts must "read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would."[201] Further, the court of appeals explained that where the statutory text is "clear and unambiguous," the statute is given its "plain meaning," and the "search for statutory meaning generally ends."[202]

With these principles in mind, the court noted that the APA "is meant to provide a procedure for administrative determination and regulation where expressly authorized by law or otherwise required by the Constitution or a statute of this state."[203] Next, it examined the key statutory provision under the APA:

196. *Id.* at 55, 849 S.E.2d at 458.
197. *Id.* at 55–56, 849 S.E.2d at 458–59.
198. 359 Ga. App. 32, 856 S.E.2d 733 (2021).
199. *Id.* at 32–33, 856 S.E.2d at 734.
200. *Id.* at 33, 856 S.E.2d at 734.
201. *Id.*
202. *Id.* at 33, 856 S.E.2d at 735.
203. *Id.*

> In proceedings before the agency, the hearing officer, or any representative of the agency authorized to hold a hearing, if any party or an agent or employee of a party . . . neglects to produce, after having been ordered to do so, any pertinent book, paper, or document . . . the agency, hearing officer, or other representative shall have the same rights and powers given the court under Chapter 11 of Title 9, the "Georgia Civil Practice Act." If any person . . . refuses as specified in this subsection, the agency, hearing officer, or other representative may certify the facts to the superior court of the county where the offense is committed for appropriate action, including a finding of contempt.[204]

The court of appeals explained that in order to address whether the Commission may seek judicial enforcement of its subpoenas under the APA, the court must determine two issues: (1) whether the phrase "proceedings before the agency" encompasses the Commission's preliminary investigation; and (2) whether the Commission's subpoena "ordered" the defendants to produce the requested materials.[205]

Regarding the first issue, because the APA does not provide a clear meaning of the phrase "proceedings before the agency," the court looked to other portions of the APA to help glean the meaning of the phrase.[206] For instance, the court observed that a substantial portion of the APA when involving a "contested case" expressly referred to "*a proceeding* . . . determined *by an agency*[.]"[207] While the defendants argued that "proceedings before the agency" are essentially a "contested case" that refer to a more formal adjudicating proceeding, the court was not convinced.[208] The court explained that the General Assembly could have expressly used that same term but instead chose to use "proceedings before the agency," and thus, the court held it "must give meaning to this choice of words," and that the phrase "proceedings before the agency" is not merely a substitute for the term "contested case," particularly when viewing the APA as a whole.[209]

In addition to viewing the language in the context in which it appears, the court of appeals looked to the plain meaning of the language itself.[210] Specifically, relying on various definitions of "proceedings" as well as "administrative proceedings," the court concluded that while

204. *Id.* at 33–34, 856 S.E.2d at 735 (quoting O.C.G.A. § 50-13-13(b) (2021)).
205. *Id.* at 34, 856 S.E.2d at 735.
206. *Id.* at 34, 856 S.E.2d at 735–36.
207. *Id.* at 34, 856 S.E.2d at 736.
208. *Id.*
209. *Id.* at 34–35, 856 S.E.2d at 736.
210. *Id.*

"proceedings before the agency" could be understood as a more formal process including a contested case, they could also be understood to encompass an agency's investigations, such as the one the Commission undertook in this case.[211]

Regarding the second issue of whether, for purposes of the APA, the subpoenas may "order" the defendants to produce the requested documents, the court of appeals again relied on the plain definitions of the word "order."[212] When used in the context of ordering or commanding a person or party to produce a "book, paper, or document" as stated in the APA, the court explained that the statutory language could be interpreted as an agency order compelling the production of information or documents through administrative subpoenas, such as the ones issued here.[213]

Any other reading, the court held "would require that an agency, as a prerequisite to seeking relief in the superior court, issue some unspecified formal order to compel compliance with its own subpoena after a person or party has already neglected to comply with an agency's demand for the production of materials."[214] Accordingly, applying the fundamental principles of statutory construction, the court of appeals reversed the trial court's order and concluded that O.C.G.A. § 50-13-13(b) "affords the Commission authority to seek enforcement of its administrative subpoenas in the superior court[.]"[215]

In *Grand Canyon Education, Inc. v. Ward*,[216] the Georgia Court of Appeals addressed the issue of whether an arbitration agreement was unenforceable under the Borrower Defense Regulations, such that the defendant-university could not compel arbitration of the plaintiff's claims.[217] The Gwinnett County Superior Court found that the Borrower Defense Regulations prohibited the enforcement of the arbitration clause. On appeal, the university contended that the federal regulations do not preclude arbitration of the plaintiff's claims because these claims do not qualify as "borrower defense claims."[218] Before addressing this argument, the court of appeals explained the governing framework and purpose behind the regulations, which is to "protect student loan borrowers from misleading, deceitful, and predatory practices of, and

211. *Id* at 35–36, 856 S.E.2d at 736–37.
212. *Id.* at 36–37, 856 S.E.2d at 737.
213. *Id.* at 37, 856 S.E.2d at 737.
214. *Id.*
215. *Id.* at 37–38, 856 S.E.2d at 738.
216. 358 Ga. App. 412, 855 S.E.2d 415 (2021).
217. *Id.* at 412–13, 855 S.E.2d at 416–17.
218. *Id.* at 414, 855 S.E.2d at 417.

failures to fulfill contractual promises by, institutions participating in the [United States Department of Education's] student aid programs," and to protect taxpayer dollars.[219]

Next, the court of appeals examined the plain language of the federal regulations.[220] Specifically, 34 C.F.R. § 685.300[221] provides that an institution of higher education subject to the Borrower Defense Regulations "will not . . . rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim."[222] The regulations also define a "borrower defense claim" as "a claim that is or could be asserted as a borrower defense as defined in § 685.222(a)(5), including a claim other than one based on § 685.222(c) or (d) that may be asserted under § 685.22(b) if reduced to judgment[.]"[223] The university interpreted the term "including a claim other than" to mean that the plaintiff's claims for breach of contract and misrepresentation are expressly excluded from the categories of "borrower defense claims" covered by the regulations.[224] The plaintiff, on the other hand, argued that the phrase "including a claim other than" simply clarifies that a claim other than a breach of contract or misrepresentation can also be asserted and that "non[-]breach of contract and non-misrepresentation are borrower defense claims so long as they could be asserted as borrower defenses under § 685.222(b) if reduced to judgment."[225]

In addressing the parties' respective arguments, the court of appeals explicated that courts should "construe regulations and other regulatory materials in much the same way we interpret statutes."[226] That is, the first step is to begin the interpretation of the regulation with its text to give effect to the natural and plain meaning of its words. The court also observed that courts may look to the regulation's purpose "as well as the broader regulatory and statutory context of which it is a part."[227] Applying this principle, the court first considered both the definition of the term "include" as well as Eleventh Circuit authority addressing the exact same issue facing the court to conclude that "including" is used "in

219. *Id.*
220. *Id.* at 414, 855 S.E.2d at 417.
221. 34 C.F.R. § 685.300 (2020).
222. *Grand Canyon Education, Inc.*, 358 Ga. App. at 415, 855 S.E.2d at 418.
223. *Id.* at 415–16, 855 S.E.2d at 418.
224. *Id.* at 416–17, 855 S.E.2d at 419.
225. *Id.* at 417, 855 S.E.2d at 419.
226. *Id.*
227. *Id.*

an expansive sense" to encompass breach of contract and misrepresentation claims.[228]

The court also explained that the university's exclusionary reading of the regulations "would gut the regulations' protections," particularly in light of the regulations' stated purpose of protecting student borrowers and taxpayer dollars.[229] In short, relying on both statutory interpretation principles as well as persuasive authority, the court of appeals affirmed the trial court's conclusion that the plaintiff's "breach of contract and misrepresentation claims fall within the breadth of borrower defense claims" under the federal regulations, and, thus, the plaintiff's claims were not subject to arbitration.[230]

228. *Id.* at 418, 855 S.E.2d at 419–20.

229. *Id.* at 418–19, 855 S.E.2d at 420.

230. *Id.* at 420–21, 855 S.E.2d at 421.