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Local Government Law

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by R. Perry Sentell, Jr.*

> No matter how well you indoctrinate the Mayor and Council in exercising discretionary powers in an objective manner, someone always seems to cut to the chase and ask the wrong question. For example, I've admonished Councils for years not to show favoritism at zoning hearings, particularly to impassioned pleas for opposition by their constituents who, of course, never address the objective standards of the zoning ordinance. Yet, recently, after a noted zoning lawyer so eloquently presented his development client's proposal for rezoning, the only question the Mayor asked was, "Has your client got any kinfolks living here?"[1]

It is humanly impossible to take the "local" out of "local government law!"

I. MUNICIPALITIES

A. *Officers and Employees*

The appellate courts focused upon a number of controversies turning upon the duties, powers, and status of municipal officers and employees.

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1. R. PERRY SENTELL, JR., LOCAL GOVERNMENT LAW: LITE 21 (1997). For a more substantive "profile" of local government law—those who practice it and the practice itself—see R. PERRY SENTELL, JR., A PROFILE: THE PEOPLE AND THE PRACTICE OF GEORGIA LOCAL GOVERNMENT LAW (GMA Press 1994). *See also* R. Perry Sentell, Jr., *Lawyers Who Represent Local Governments*, 23 GA. ST. B.J. 58 (1986); R. Perry Sentell, Jr., *Georgia Local Government Law: A Reflection on Thirty Surveys*, 46 MERCER L. REV. 1 (1994); R. Perry Sentell, Jr., *Local Government Litigation: Some Pivotal Principles*, 55 MERCER L. REV. 1 (2003); R. Perry Sentell, Jr., *Appellate Conflicts in Local Government Law: The Disagreements of a Decade*, 56 MERCER L. REV. 1 (2004).

In *Duty Free Air & Ship Supply Co. v. City of Atlanta*,[2] the Georgia Supreme Court purportedly launched a "narrow query" into a successful bidder's effort to mandamus the city's execution of an airport duty-free concessions contract.[3] A majority of the court emphasized the material general statute's[4] intent that the statute be supplemented by a municipal code section[5] that "'[c]learly . . . gives the Mayor a choice to sign or not to sign a prepared contract.'"[6] The mayor's failure to sign, the court deduced, constituted "'an act of discretion,'"[7] and "[m]andamus cannot compel such a discretionary act."[8]

Mayoral power, yet again, triumphed in *Housing Authority of the City of Macon v. Ellis*,[9] a case challenging the mayor in appointing a member of the city housing authority without council confirmation.[10] Rejecting the attack, the Georgia Court of Appeals focused upon the general statute's direction that "the mayor shall appoint five persons as commissioners of the authority"[11] and declared the appointment power "unconditional."[12] As the court reasoned, "The statute requires that the mayor 'appoint' not 'nominate.'"[13]

In at least two instances, municipal school system employees sought correction of perceived mistreatment. In *Brawner v. Marietta City Board*

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2. 282 Ga. 173, 646 S.E.2d 48 (2007).

3. *Id.* at 173, 646 S.E.2d at 49. The plaintiff contended that the mayor's remaining actions were ministerial and suitable for the grant of mandamus. *Id.*

4. O.C.G.A. § 36-91-20(a) (2006 & Supp. 2008).

5. ATLANTA, GA., CODE OF ORDINANCES § 2-176 (2008).

6. *Duty Free Air & Ship Supply Co.*, 282 Ga. at 174, 646 S.E.2d at 50 (emphasis omitted) (quoting Common Cause/Ga. v. City of Atlanta, 279 Ga. 480, 482, 614 S.E.2d 761, 764 (2005)).

7. *Id.* (quoting *Common Cause/Ga.*, 279 Ga. at 483, 614 S.E.2d at 764). The court said that the mayor had no specific duty to execute a contract. *Id.*

8. *Id.* at 175, 646 S.E.2d at 50. In a dissenting opinion, two justices denied that the city code made the mayor's signing of every contract discretionary and urged that the plaintiff was entitled to a writ of mandamus. *Id.* at 178, 646 S.E.2d at 52 (Carley, J., dissenting). On the problems encountered with the remedy of mandamus in local government law generally, see R. PERRY SENTELL, JR., MISCASTING MANDAMUS IN GEORGIA LOCAL GOVERNMENT LAW (Univ. of Ga. 1989).

9. 288 Ga. App. 834, 655 S.E.2d 621 (2007).

10. *See id.* at 835, 655 S.E.2d at 622-23. The housing authority had refused to seat an appointee because the mayor had failed to submit his choice to the city council, and the mayor sought a declaration that his appointment power was subject to no such limitation. *Id.*

11. O.C.G.A. § 8-3-50(a)(1) (2004).

12. *Ellis*, 288 Ga. App. at 836, 655 S.E.2d at 623.

13. *Id.* The court said that "[i]f the housing authority is to obtain the relief it seeks, it must do so in the Georgia General Assembly." *Id.* Accordingly, the court affirmed the trial court's grant of summary judgment in favor of the mayor. *Id.*

of Education,[14] the court of appeals took the fairly unusual step of overruling a teacher termination decision by a city school board subsequently affirmed by both the Georgia State Board of Education (the Board) and the trial court.[15] Reviewing the Board's finding of insubordination for the teacher's failure to provide a fitness-for-duty report before returning to work,[16] the court emphasized that the teacher (on disability leave) had merely attended a part of a pre-planning day at the school without providing the necessary report.[17] That conduct, the court determined, afforded no evidence of insubordination.[18] Rather, the teacher had only "returned to the workplace; she did not return to work."[19] Thus reversing the termination, the court emphasized that "a 'return to work' requires more than being physically present at the job site."[20]

An elementary school principal likewise prevailed in *Hall v. Nelson*[21] against a school system's nonrenewal of his contract and the system's subsequent remedial action (under the state board's order of reinstatement)[22] in assigning the former principal to teach seventh grade math.[23] Under applicable state law,[24] the supreme court declared that the trial judge had correctly reversed the system's actions[25] and

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14. 285 Ga. App. 10, 646 S.E.2d 89 (2007).

15. *Id.* at 16, 646 S.E.2d at 93.

16. *Id.* at 11, 646 S.E.2d at 90. Failing to provide such a report was in violation of announced school policy. *Id.*

17. *Id.* at 15-16, 646 S.E.2d at 93. Evidence showed that the plaintiff had signed in as present at the meeting and was later issued a check in payment for the half-day worked. *Id.* at 12, 646 S.E.2d at 91.

18. *Id.* at 16, 646 S.E.2d at 93.

19. *Id.*

20. *Id.* Two judges dissented, emphasizing the court's "any evidence" standard of review. *See id.* at 16-18, 646 S.E.2d at 93-94 (Andrews, P.J., dissenting).

21. 282 Ga. 441, 651 S.E.2d 72 (2007).

22. *Id.* at 441, 651 S.E.2d at 73. The state board of education had reversed the system's nonrenewal and ordered the plaintiff's reinstatement, an order affirmed by the superior court. *Id.*

23. *See id.* at 455, 651 S.E.2d at 76. His appointment to the teaching position carried a reduced gross wage. *Id.* at 441, 651 S.E.2d at 73.

24. O.C.G.A. § 20-2-942(c)(1) (2005). This statute, the supreme court held, provides a clear legal right to assignment in an administrative position. *Hall*, 282 Ga. at 445, 651 S.E.2d at 76.

25. *Hall*, 282 Ga. at 445-46, 651 S.E.2d at 76. The court rejected the defendant's exhaustion of administrative remedies contention, observing that it would have been futile for the plaintiff to participate in a hearing before the system school board. *Id.* at 443, 651 S.E.2d at 75.

mandamused the system's reinstatement of the plaintiff to an administrative position.[26]

The attempted removal of municipal officers attracted the attention of the appellate courts on at least two occasions. *City of College Park v. Wyatt*[27] featured a quo warranto action[28] by a former member of the city's business and industrial development authority, complaining of her removal by the mayor and council on the ground that she did not reside in a specified ward.[29] The supreme court emphasized that neither the authority's enabling legislation[30] nor its bylaws required ward residence,[31] and the court promptly sustained the trial judge's reversal: "[I]t is clear that the City removed [the petitioner] without cause and that it lacked the power to do so."[32]

Local procedure likewise failed the court of appeal's review in *Ciccio v. City of Hephzibah*,[33] a case presenting a city commissioner's removal for admitting guilt in 2006 under charges filed against him in 2004 for "theft by receiving."[34] Narrowly defining the city charter's removal provisions for "misfeasance or malfeasance in office,"[35] the court read these provisions to include only "an 'official act' or one done 'under the color of . . . office.'"[36] Here, the commissioner's "conduct of maintaining

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26. *Id.* at 445-46, 651 S.E.2d at 76. The supreme court did require that the trial court clarify its order to show only that the plaintiff must be reinstated to an administrative position and not necessarily to that of principal. *Id.* at 446, 651 S.E.2d at 76. One justice dissented, urging that contempt constituted the proper procedure rather than an action in mandamus. *Id.*, 651 S.E.2d at 77 (Melton, J., dissenting).

27. 282 Ga. 479, 651 S.E.2d 686 (2007).

28. For treatment of this ancient writ of quo warranto as the traditional means of trying title to public office, see R. PERRY SENTELL, JR., THE WRIT OF QUO WARRANTO IN GEORGIA LOCAL GOVERNMENT LAW (Univ. of Ga. 1987).

29. *Wyatt*, 282 Ga. at 479, 651 S.E.2d at 688. The petitioner had been appointed to the authority for a four-year term only one year prior to her removal. The defendant's only tendered reason for the removal was the petitioner's failure to reside in Ward 2. *Id.*

30. 1980 Ga. Laws 2071.

31. *Wyatt*, 282 Ga. at 480, 651 S.E.2d at 688. The only requirement for appointment consisted of the appointee's prior residence in the municipality for a period of six months. *Id.* at 479-80, 651 S.E.2d at 688 (citing 1980 Ga. Laws 2071).

32. *Id.* at 479-80, 651 S.E.2d at 688. The court declared that the trial court erred in ordering the authority to establish removal procedures: It was up to the authority "to determine whether it deems it necessary to enact regulations for the removal of its members, and a court cannot compel it to do so." *Id.* at 481, 651 S.E.2d at 689.

33. 289 Ga. App. 134, 656 S.E.2d 245 (2008).

34. *See id.* at 134, 656 S.E.2d at 245. The plaintiff was elected to the commission in 2003, took office in January 2004, and was charged in February 2004 with offenses allegedly committed in 2003. He pleaded guilty to those charges in 2006 as a result of which the commission unanimously voted his removal. *Id.*

35. CITY OF HEPHZIBAH CHARTER § 19, *available at* 1982 Ga. Laws 4801, 4815.

36. *Ciccio*, 289 Ga. App. at 135, 656 S.E.2d at 246.

his innocence prior to pleading guilty in 2006 was indisputably not an 'official act' or one done 'under the color of his office' as a member of the Commission," nor did it prevent him "from performing his duties as a member of the Commission."[37]

B. *Regulation*

Municipal regulatory efforts accounted for several controversies during the survey period.[38] *City of Homerville v. Touchton*[39] presented the plaintiffs' effort to mandamus municipal issuance of a beer and wine license under an ordinance that the city revoked and replaced while the mandamus action was pending.[40] Reversing the trial court's actions in deciding the case under the original ordinance, the supreme court minced no hesitations: "'Regardless of what is the rule in the area of zoning, the rule in the area of liquor licensing is that the standards to be applied are those existing at the time of the hearing on the license

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37. *Id.* The court thus reversed the trial judge's action in affirming the commission's decision of removal. *Id.* at 136, 656 S.E.2d at 246.

Yet another period case, *Jones v. Albany Herald Publishing Co.*, 290 Ga. App. 126, 658 S.E.2d 876 (2008), featured a former city clerk's defamation action against a newspaper and its reporter who published false matter concerning the plaintiff's involvement in a criminal proceeding. *See id.* at 126, 658 S.E.2d at 878. First, the court of appeals determined that the controversy was one of public concern, that the plaintiff was pivotally involved, and that the publication related to the plaintiff's participation. *Id.* at 130-31, 658 S.E.2d at 881. Accordingly, the plaintiff was a "limited-purpose public figure" who must show "actual malice" to recover for libel. *Id.* at 131, 658 S.E.2d at 881-82. Second, the court held that the defendants' misstatements and corrections emerged from "a reasonable inference" from the indictment and evidenced no awareness of probable falsity or serious doubts of accuracy. *Id.* at 133, 658 S.E.2d at 882-83. "This evidence does not demonstrate malice, only neglect." *Id.*, 658 S.E.2d at 883. Consequently, the court reversed the trial judge's denial of summary judgment for the defendants. *Id.* For historical perspective on defamation in the local government context, see R. Perry Sentell, Jr., *Defamation in Georgia Local Government Law: A Brief History*, 16 GA. L. REV. 627 (1982).

38. For treatment of the municipal regulatory power in an assortment of contexts, see R. Perry Sentell, Jr., *"Ascertainable Standards" versus "Unbridled Discretion" in Local Government Regulation*, 41 GA. COUNTY GOV'T MAG. 19 (Dec. 1989); R. Perry Sentell, Jr., *Discretion in Georgia Local Government Law*, 8 GA. L. REV. 614 (1974); R. Perry Sentell, Jr., *Local Government Law and Liquor Licensing: A Sobering Vignette*, 15 GA. L. REV. 1039 (1981); R. Perry Sentell, Jr., *Reasoning by Riddle: The Power to Prohibit in Georgia Local Government Law*, 9 GA. L. REV. 115 (1974).

39. 282 Ga. 237, 647 S.E.2d 50 (2007).

40. *See id.* at 237, 647 S.E.2d at 51. The plaintiffs applied for a beer and wine license that the city denied; the plaintiffs sought mandamus. The city revoked the 1978 alcohol ordinance and adopted a 2006 replacement. On reconsideration, the city again denied the application; the trial court held a hearing and, under the 1978 ordinance, granted the mandamus. *Id.*

application rather than at the time the application is filed.'"[41] Accordingly, the court remanded the case for consideration under the replacement ordinance.[42]

Nguyen v. State[43] featured a request for habeas corpus for the petitioner's municipal court conviction of violating city ordinances governing business permits and hours of operation.[44] Preliminarily approving the petitioner's direct appeal,[45] the supreme court then turned to the merits: "We also disagree with the habeas court's [decision] that, because [the petitioner] was not sentenced to a term of imprisonment or a suspended or probated sentence, she was not entitled to counsel as a matter of constitutional right."[46] Quoting a statutorily assured right to counsel in enumerated municipal court cases, the court declared that (1) the statute's applicability in this case, and (2) "whether [the petitioner] was advised of her right to counsel and knowingly and intelligently waived that right are matters for determination in the habeas court."[47]

Municipal mistakes under the infamous "red light camera" statute[48]—erroneously adding a surcharge to the authorized civil monetary penalty[49]—drew a Section 1983[50] substantive due process challenge in

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41. *Id.* at 238, 647 S.E.2d at 52 (quoting Jackson v. Three Aces Co., 249 Ga. 395, 396, 291 S.E.2d 522, 523 (1982)).

42. *Id.* at 238-39, 647 S.E.2d at 52. "Because the trial court erroneously applied only the 1978 ordinance, its judgment must be reversed and the case remanded for review of the City Council's decision pursuant to the 2006 ordinance." *Id.*

43. 282 Ga. 483, 651 S.E.2d 681 (2007).

44. *See id.* at 483, 651 S.E.2d at 682. The petitioner had been sentenced to pay a fine of $200. *Id.*

45. *See id.* at 485-86, 651 S.E.2d at 683-84. The court reasoned that "limited state judicial power was not exercised in the case at bar since [the petitioner] was tried only for violations of municipal ordinances. Accordingly, the municipal court was not a state court in this case, and [the petitioner] is entitled under OCGA § 9-14-22(a) to a direct appeal from the habeas court's dismissal of her petition for habeas relief." *Id.*, 651 S.E.2d at 684.

46. *Id.* at 487, 651 S.E.2d at 685.

47. *Id.* (quoting O.C.G.A. § 36-32-1(f) (2006)). The court reversed the judgment and remanded the case to the habeas court. *Id.*

48. O.C.G.A. § 40-6-20 (2007 & Supp. 2008).

49. *See* City of Duluth v. Morgan, 287 Ga. App. 322, 322-23, 651 S.E.2d 475, 476 (2007). Following a subsequent Attorney General's opinion (Unofficial Opinion U2005-4) declaring the additional surcharge invalid, the city ceased its practice and returned undispersed collected charges, but the plaintiff never received his money. *Id.*

50. 42 U.S.C. § 1983 (2000). For background on the federal statute's modern assault on local governments, see R. PERRY SENTELL, JR., GEORGIA LOCAL GOVERNMENT LAW'S ASSIMILATION OF *MONELL*: SECTION 1983 AND THE NEW "PERSONS" (Michie Co. 1984); R. Perry Sentell, Jr., *Local Government and Constitutional Torts: In the Georgia Courts*, 49 MERCER L. REV. 1 (1997).

City of Duluth v. Morgan.[51] In response, the court of appeals rejected the plaintiff's advancement of a "strict scrutiny" analysis to his claim[52] and instead applied the less restrictive "shocking the conscience" test.[53] Under that test, the court concluded that the city made its mistake in good faith and that its actions did not shock the contemporary conscience.[54] Accordingly, the trial court had erred in denying summary judgment for the municipality.[55]

C. *Contracts*

The court of appeals considered municipal contracting capabilities from a variety of perspectives. For instance, *Clark v. Fitzgerald Water, Light & Bond Commission*[56] appropriately illustrated those capabilities as typically governed by intermeshing state and city legislative strictures.[57] In *Clark* a municipal utilities commission charged a developer with breach of contract, seeking to recover costs for providing water and sewer lines to the developer's subdivision.[58] Rejecting the defendant's position that the commission lacked charter authority to sue or be sued,[59] the court relied instead upon the charter's grant of the

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51. 287 Ga. App. 322, 651 S.E.2d 475 (2007).

52. *Id.* at 324, 651 S.E.2d at 477. It was the city's action that allegedly violated the plaintiff's due process rights and not the enacted legislation itself—"thus we reject [the plaintiff's] argument that a strict scrutiny analysis should be applied here." *Id.*

53. *Id.* The alleged violation consisted of the executive decision to construe the statute to allow additional surcharges, said the court, and the appropriate question was whether the conduct was so outrageous as to shock the contemporary conscience. *Id.* (quoting Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999)).

54. *Id.* at 325, 651 S.E.2d at 478. Relying on the standards of *Carr v. Tatangelo*, 338 F.3d 1259, 1271 (11th Cir. 2003), the court asserted that "[t]here is simply nothing in the City's actions that 'shocks the conscience.'" *Id.*

55. *Id.*

56. 286 Ga. App. 36, 648 S.E.2d 654 (2007). The supreme court reversed this decision in *Clark v. Fitzgerald Water, Light & Bond Commission*, 284 Ga. 12, 663 S.E.2d 237 (2008), on June 30, 2008.

57. *See generally* R. Perry Sentell, Jr., *The Legislative Process in Georgia Local Government Law*, 5 GA. L. REV. 1 (1970); R. Perry Sentell, Jr., *Local Government and Contracts that Bind*, 3 GA. L. REV. 546 (1969); R. Perry Sentell, Jr., *Local Government Litigation: Some Pivotal Principles*, 55 MERCER L. REV. 1 (2003).

58. *Clark*, 286 Ga. App. at 36, 648 S.E.2d at 655. The parties entered into the written contract in 1994; the commission provided the water and sewage lines to the subdivision and brought this action for costs of installation in 2003. *Id.*

59. *Id.* at 37, 648 S.E.2d at 655. The defendant had charged that the commission was an improper party plaintiff. *See id.*

contract power: "'[T]he ability to contract evidences a separate legal entity with the implied power to sue and be sued over contracts.'"[60]

Water utilities also provoked litigation in *Operations Management International, Inc. v. City of Forsyth*.[61] The case instanced the municipality's suit for the defendant's breach of contract by failing to keep a water plant in operating condition, with the defendant counterclaiming for unpaid fees.[62] As agreed, the parties enlisted the services of an arbitrator who found the defendant liable, the city responsibile for fees, and a net award to the city.[63] Upon the defendant's appeal from the arbitration (and its confirmation by the trial judge),[64] the court surmised as follows: "The purpose of arbitration is to avoid resorting to the courts for dispute resolution."[65] In keeping with that purpose, an award could be vacated only "'pursuant to . . . specific statutory grounds.'"[66] Reviewing the defendant's enumerated errors on the part of the arbitrator,[67] the court noted no "statutory grounds for vacating an award."[68]

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60. *Id.* (alteration in original) (quoting Foskey v. Vidalia City Sch., 258 Ga. App. 298, 302, 574 S.E.2d 367, 371 (2002)). The court did, however, rebuff the commission's complaint that the jury had reduced its prejudgment interest: "'After the jury dispersed, the trial court was without authority to add additional interest.'" *Id.*, 648 S.E.2d at 656 (quoting Voxcom, Inc. v. Boda, 221 Ga. App. 619, 620, 472 S.E.2d 155, 156 (1996)).

61. 288 Ga. App. 469, 654 S.E.2d 438 (2007).

62. *See id.* at 470, 654 S.E.2d at 440. The parties entered into the agreement in 1991, and the disagreement arose in 2005. *Id.* at 469, 654 S.E.2d at 440.

63. *Id.* at 470, 654 S.E.2d at 440.

64. *See id.* In the trial court, the city moved to have the award confirmed, and the defendant sought to modify or vacate it. *Id.*

65. *Id.* (citing Hardin Constr. Group v. Fuller Enters., 265 Ga. 770, 771, 462 S.E.2d 130, 131 (1995)). Generally, "'the role of the trial court should be limited so that the purpose of avoiding litigation by resorting to arbitration is not frustrated.'" *Id.* (quoting *Hardin Constr. Group*, 265 Ga. at 771, 462 S.E.2d at 131).

66. *Id.* (quoting *Hardin Constr. Group*, 265 Ga. at 771, 462 S.E.2d at 131). The court listed the grounds enumerated in O.C.G.A. §§ 9-9-13 to -14. *Id.* (citing O.C.G.A. §§ 9-9-13 to -14 (2007)).

67. *See id.* at 470-71, 654 S.E.2d at 441. The record did not show that the arbitrator had ignored the terms of the contract, and the award exceeding the defendant's contractual responsibility for repairs resulted from its failure to make necessary repairs as needed and required by the contract. *Id.* at 471, 654 S.E.2d at 441. "In any event, we note that courts must not decide the correctness of the arbitrator's contract interpretation, only whether his decision draws its essence from the contract." *Id.* at 473, 654 S.E.2d at 442 (citing U.S. Intermodal & Thunderbolt Express v. Ga. Pac. Corp., 267 Ga. App. 832, 833, 600 S.E.2d 800, 801 (2004)).

68. *Id.* at 473, 654 S.E.2d at 442. The court thus affirmed the judgment of the trial court. *Id.*

An award of attorney fees dominated *City of Lilburn v. Astra Group, Inc.*,[69] a breach of contract action arising from the renovation of a municipal park.[70] Affirming a jury award against the city,[71] the court examined statutory prerequisites for attorney fees[72] and held that there was "some evidence" of the following conduct: (1) the city misrepresented to the plaintiff contractor that tests showed no problems from an underlying landfill and then breached its duty to pay additional job site costs incurred because of the landfill; (2) the city breached its agreement to re-evaluate the plaintiff's request for payment on the increased overhead costs; and (3) the city's paramount concern centered upon holding the project within budget.[73] Accordingly, a jury could find that the city's bad faith, stubborn litigiousness, and actions caused the plaintiff "unnecessary trouble and expense."[74]

DeKalb County v. City of Decatur[75] featured a suit by cities for the county's alleged breach of a purported "intergovernmental contract" relating to the distribution of funds from the Homestead Option Sales and Use Tax (HOST).[76] Rather than examining the county's alleged

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69. 286 Ga. App. 568, 649 S.E.2d 813 (2007).

70. *See id.* at 568-69, 649 S.E.2d at 814. The plaintiff general contractor sued the municipality for designated payments and attorney fees, and the jury rendered both awards. *Id.* at 570, 649 S.E.2d at 815.

71. *Id.* at 572, 649 S.E.2d at 817. The court emphasized its employment of the "any evidence" standard of review: "'An award of attorney fees under OCGA § 13-6-11 will be affirmed if there is any evidence to support it.'" *Id.* at 570, 649 S.E.2d at 816 (quoting Charter Drywall Atlanta v. Discovery Tech., 271 Ga. App. 514, 517, 610 S.E.2d 147, 150 (2005)).

72. O.C.G.A. § 13-6-11 (1981 & Supp. 2008). "'Attorney fees are recoverable under [the statute] when a party has acted in bad faith, has been stubbornly litigious, or has subjected the other party to unnecessary trouble and expense.'" *Astra Group, Inc.*, 286 Ga. App. at 570, 649 S.E.2d at 815 (quoting *Charter Drywall Atlanta*, 271 Ga. App. at 517, 610 S.E.2d at 150).

73. *Astra Group, Inc.*, 286 Ga. App. at 571-72, 649 S.E.2d at 816.

74. *Id.* at 572, 649 S.E.2d at 816. Accordingly, the court affirmed the trial court's judgment against the municipality. *Id.*, 649 S.E.2d at 817.

75. 287 Ga. App. 370, 651 S.E.2d 774 (2007).

76. *See id.* at 370, 651 S.E.2d at 775-76. "The HOST statute, OCGA § 48-8-100 et seq., creates 159 special tax districts coterminous with the geographical boundaries of each county in the state." *Id.*, 651 S.E.2d at 776 (citing O.C.G.A. § 48-8-102(a) (2005 & Supp. 2008)). Under the statute, the court explained, at least eighty percent of revenues generated by the authorized sales and use tax (on voter approval) must be used for residential property tax relief, and a maximum of twenty percent may be used for capital outlay projects. *Id.* (citing O.C.G.A. §§ 48-8-102(c)(1), -104(c) (2005 & Supp. 2008)). Here, the county and its cities had entered a forty-nine-year agreement for the twenty percent disbursements, and the cities now charged the county with breach of contract in miscalculating the payments. The county defended that the forty-nine-year agreement was an invalid intergovernmental contract. *Id.* at 371, 651 S.E.2d at 776.

violations, the court focused instead upon the preliminary issue: Did the agreement qualify under the Georgia Constitution's provision for an intergovernmental contract?[77] As authorized by that provision, "'the contract must pertain to the provision of services,'"[78] a requirement this agreement did not fulfill: "Because a contract for the sharing of tax revenues is not a contract pertaining to the provision of 'services,' the agreement at issue here does not constitute a valid intergovernmental contract."[79] Accordingly, the trial court had erred in denying the county's motion for summary judgment.[80]

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77. *See id.* at 372-73, 651 S.E.2d at 777; GA. CONST. art. IX, § 3, para. 1(a) (1983). Otherwise, the court explained, the contract would violate the constitution's local government indebtedness limitations, GA. CONST. art. IX, § 5, para. 1(a), as well as the "binding contracts" prohibition of O.C.G.A. § 36-30-3(a) (2006). *See DeKalb County*, 287 Ga. App. at 372, 651 S.E.2d at 777. "The Intergovernmental Contracts Clause creates an exception to these limitations." *Id.*

78. *DeKalb County*, 287 Ga. App. at 372, 651 S.E.2d at 777 (quoting Greene County Sch. Dist. v. Greene County, 278 Ga. 849, 851, 607 S.E.2d 881, 882 (2005)).

79. *Id.* at 374, 651 S.E.2d at 778.

80. *Id.* at 375, 651 S.E.2d at 779. Another municipal tax controversy of the survey period, *City of Atlanta v. Hotels.com*, 288 Ga. App. 391, 654 S.E.2d 166 (2007), featured the city's action against seventeen online travel companies for failure to remit hotel and occupancy taxes that the city is entitled to collect under the general enabling statute (O.C.G.A. § 48-13-50 to -63 (2005)) and the city's hotel and motel tax occupancy ordinance (ATLANTA, GA., CODE OF ORDINANCES § 146-76 to -89 (2008)). *See Hotels.com*, 288 Ga. App. at 391-92, 654 S.E.2d at 168. Affording those measures an in pari materia construction, the court held the city subject to the "exhaustion doctrine," which requires specified administrative steps (the so-called "estimate, assessment, and written notice" requirements) before filing suit. *See id.* at 393, 397, 654 S.E.2d at 169-70, 172. "Such a rule makes particular sense in the tax context, where public policy and judicial economy counsel in favor of allowing questions of tax assessment and collection to first be resolved at the local level." *Id.* at 393, 654 S.E.2d at 169. Thus, the court concluded, "the trial court did not err in dismissing the City's complaint in light of its failure to comply with these three procedural requirements prior to bringing suit against the online travel companies." *Id.* at 397, 654 S.E.2d at 172. *See generally* R. PERRY SENTELL, JR., STATUTORY CONSTRUCTION IN GEORGIA: THE DOCTRINE OF IN PARI MATERIA (Univ. of Ga. 1996).

Finally, in *City of Atlanta v. WH Smith Airport Services, Inc.*, 290 Ga. App. 206, 659 S.E.2d 426 (2008), the court of appeals reviewed a jury verdict finding that the city had breached a rent abatement agreement in a lease of retail concessions space in the city-owned airport because of the lessee's decreased sales resulting from security measures following the September 11, 2001 terrorist attacks. *Id.* at 206-07, 695 S.E.2d at 427. Examining the lease's abatement section, as well as material testimony and records in the case, the court held that there was "some evidence" of two crucial factors: (1) government security measures imposed on September 11 "severely reduced the number of enplanements at Concourse A for longer than seven days," *Id.* at 209, 659 S.E.2d at 429; and (2) "the government-imposed security measures caused material harm to [the plaintiff's] retail business in the Atrium." *Id.* at 210, 659 S.E.2d at 429. Thus, "the jury was entitled to conclude that the City breached Section 11 of the Lease by failing to abate a 'just proportion' of [the plaintiff's] rent from September 2001 to 2004." *Id.*

D. Finances

In its much noted and noteworthy disposition of *Woodham v. City of Atlanta*,[81] the Georgia Supreme Court turned considerable turbulence in the domain of municipal finance. The case featured a municipal citizen's intervention in a city bond validation proceeding to finance a city "BeltLine Redevelopment Plan" (BeltLine Plan) and create a "Tax Allocation District" (TAD).[82] Specifically, the intervenor challenged the local school system's pledge of ad valorem school taxes to assist in funding the project.[83] A unanimous supreme court summarily reviewed the "Educational Purpose Clause" of the Georgia Constitution[84] and conclusively invalidated the proposal: "[S]chool taxes cannot be used to fund the BeltLine Plan which provide[d] a benefit to all citizens, and which has little, if any, nexus to the actual operation of public schools in the city."[85]

E. Liability

The municipal liability issue surfaced continuously and pervasively throughout the survey period—en masse, the instances rang most of the changes on the scale of governmental responsibility.[86] In two cases, the court of appeals directly confronted the basic and historic doctrine of

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81. 283 Ga. 95, 657 S.E.2d 528 (2008).

82. *See id.* at 95, 657 S.E.2d at 529. The city ordinance adopted the redevelopment plan, "a 25-year project which 'proposes to combine greenspace, trails, transit, and new development along 22 miles of historic rail segments that encircle the urban core' of [the city]." *Id.* at 96, 657 S.E.2d at 529 (quoting Section One of the Redevelopment Plan *available at* ATLANTA, GA., CODE OF ORDINANCES § 16-36.002 (2008)).

83. *Id.* at 96, 657 S.E.2d at 530. "The school system, by resolution, agreed to participate in the BeltLine Plan by consenting to pledge a portion of tax increments derived from the educational ad valorem property taxes levied and collected within the BeltLine TAD, subject to certain conditions." *Id.* The trial court had validated the bonds. *Id.* at 95, 657 S.E.2d at 529.

84. GA. CONST. art. VIII, § 6, para. 1(b). "School tax funds shall be expended only for the support and maintenance of public schools, public vocational-technical schools, public education, and activities necessary or incidental thereto, including school lunch purposes." *Id.*

85. *Woodham*, 283 Ga. at 97, 657 S.E.2d at 530. Reversing the trial judge, the court held that "school tax funds levied and collected by the school system cannot constitutionally be applied to benefit the BeltLine project." *Id.*, 657 S.E.2d at 530-31.

86. For a perspective on municipal liability issues, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA (4th ed. 1988); R. Perry Sentell, Jr., *Georgia Local Government Tort Liability: The "Crisis" Conundrum*, 2 GA. ST. U. L. REV. 19 (1985); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993); R. Perry Sentell, Jr., *Local Government Liability Litigation: Numerical Nuances*, 38 GA. L. REV. 633 (2004).

sovereign (or "governmental") immunity—the results contrasted instructively. First, in *Weaver v. City of Statesboro*,[87] the plaintiffs sued the municipality for injuries from a collision with a city policeman driving in the wrong lane while rushing to direct traffic at an intersection.[88] On the one hand, the court concluded, the accident arose from a "governmental" rather than "ministerial" function, entitling the city to sovereign immunity.[89] On the other hand, the city had undisputedly exercised its statutory authority to purchase motor vehicle liability insurance[90] and thereby "waived its sovereign immunity."[91]

Second, *Gilbert v. City of Jackson*[92] presented a property owner's claim for flood damage resulting from alleged municipal negligence in repairing a culvert.[93] In this case the plaintiff also maintained that the city waived its immunity by virtue of a liability insurance policy.[94] This time, however, the court held that the plaintiff's proof of the policy (a letter identifying an agency as administering the city's insurance program) was fatally defective: "[T]he letter . . . does not suffice to show that the City had insurance."[95] Accordingly, the court rejected the plaintiff's argument of waiver, and sovereign immunity prevailed.[96]

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87. 288 Ga. App. 32, 653 S.E.2d 765 (2007).

88. *Id.* at 32, 653 S.E.2d at 767. The officer had been directed to a downtown intersection blocked by traffic from a parade. Finding the right lane of traffic blocked a mile from the intersection, the officer proceeded into the empty left lane where he eventually struck the plaintiffs' vehicle. *Id.*

89. *See id.* at 34-35, 653 S.E.2d at 768 (citing O.C.G.A. § 36-33-1(b) (2006)). It was "well established," the court asserted, that city police work constituted a "governmental function." *Id.* at 34, 653 S.E.2d at 768.

90. *Id.* at 35, 653 S.E.2d at 769 (citing O.C.G.A. § 33-24-51(a) (2005)). This statute "authorizes a city to purchase liability insurance for personal injury or property damage arising by reason of the city's ownership, maintenance, operation, or use of any motor vehicle." *Id.*

91. *Id.* at 36, 653 S.E.2d at 769. "Because the City waived its sovereign immunity by purchasing the GIRMA policy, the trial court erred in granting the City summary judgment." *Id.* The immunity waiver operates to the extent of the amount of the insurance. *Id.* at 35, 653 S.E.2d at 769 (citing Gilbert v. Richardson, 264 Ga. 744, 751-52, 452 S.E.2d 476, 481 (1994)). For treatment, see R. Perry Sentell, Jr., *Tort Liability Insurance in Georgia Local Government Law*, 24 MERCER L. REV. 651 (1973).

92. 287 Ga. App. 326, 651 S.E.2d 461 (2007).

93. *See id.* at 326, 651 S.E.2d at 462. The plaintiff complained that subsequent to the repairs, the water around her property "backed up and her ditches overflowed, leaving waves of trash and straw on her property." *Id.*

94. *Id.* at 327, 651 S.E.2d at 463. The plaintiff relied upon O.C.G.A. § 36-33-1 (2006). *Gilbert*, 287 Ga. App. at 327, 651 S.E.2d at 463.

95. *Gilbert*, 287 Ga. App. at 327, 651 S.E.2d at 463.

96. *See id.* at 328, 651 S.E.2d at 463. The court thus affirmed the trial judge's grant of summary judgment to the municipality on the issue of waiver. *Id.* As for the plaintiff's additional charge of negligence in the construction of the drainage pipe as a part of a public

Another liability limiting precept controlled the court's decision in *City of Toccoa v. Pittman*.[97] There, a restaurant—sued for the death of a bystander killed as a result of a fight that migrated to the restaurant from a nearby pool hall[98]—filed a third party complaint against the municipality. The city, the restaurant maintained, had over a period of time negligently permitted the pool hall's unlawful operation, this negligence eventually leading to the incident at issue.[99] Reversing the trial judge, the court sustained the city's tender of the "public duty doctrine":[100] "The duty owed by the City to enforce its ordinances as to any unlawful activity at [the pool hall] runs to the public in general and not to any particular member of the public."[101] Thus, "[t]he City was entitled to summary judgment on the negligence claim."[102]

Claimants frequently seek to bypass municipal tort immunity by urging the exceptional doctrine of municipal nuisance. That doctrine, successfully maintained, historically trumps governmental immunity and offers a route to recovery.[103] The tactic found survey-period

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road (and hence liability under O.C.G.A. § 32-4-93(a) (2006)), the court reasoned that once the city showed its work was done in compliance with municipal standards, the plaintiff must come forward with some evidence of negligence in pipe installation. *Gilbert*, 287 Ga. App. at 328, 651 S.E.2d at 463. "This," the court said, "she did not do." *Id.* Finally, the court rejected out of hand the plaintiff's nuisance contention. *See id.* at 328-29, 651 S.E.2d at 464.

97. 286 Ga. App. 213, 648 S.E.2d 733 (2007).

98. *Id.* at 213, 648 S.E.2d at 735. City police had dispersed a disruptive crowd outside the pool hall late at night and, once the officers departed, the fight resumed inside the nearby restaurant. The bystander was watching the fight from outside the restaurant when the plate glass window broke and a shard of glass struck him in the leg, killing him. *Id.*

99. *Id.* at 213-14, 648 S.E.2d at 735. The restaurant alleged that the city negligently failed to enforce its business and liquor license regulations in regards to the pool hall and thus allowed the unruly and violent crowd to form at the restaurant. *Id.*

100. *Id.* at 214, 648 S.E.2d at 736. The court stated,

> Under the public duty doctrine, liability does not attach where the duty owed by the governmental unit runs to the public in general and not to any particular member of the public, except where there is a special relationship between the governmental unit and the individual giving rise to a particular duty owed to that individual.

Id. (citing Clive v. Gregory, 280 Ga. App. 836, 839, 635 S.E.2d 188, 192 (2006)). For perspective, see R. Perry Sentell, Jr., *Georgia's Public Duty Doctrine: The Supreme Court Held Hostage*, 51 MERCER L. REV. 73 (1999).

101. *Pittman*, 286 Ga. App. at 215, 648 S.E.2d at 736.

102. *Id.* at 216, 648 S.E.2d at 737.

103. For perspective on the nuisance exception to governmental immunity, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 117-34 (4th ed. 1988); R. Perry Sentell, Jr., *Municipal Liability in Georgia: The "Nuisance" Nuisance*, 12 GA. ST. B.J. 11 (1975).

illustration in *City of Atlanta v. Broadnax*,[104] an action for the flooding of streets and homes in the plaintiffs' neighborhood.[105] "[The plaintiffs] charge[d] the city with [the] maintenance of a nuisance resulting from recurrent flooding of the . . . neighborhood through the years due to [drainage system] overflow."[106] Reviewing the record, the court of appeals explicated both context and conclusion as follows: "[T]here is evidence from which the jury could have found that the city approved development resulting in increased surface water runoff and maintained . . . drainage system infrastructure that proved inadequate to contain the runoff while on notice of recurrent flooding in the area."[107] Additionally, "the jury could also have found that the city's failure to remove trash and yard debris from the . . . neighborhood, notwithstanding continuing homeowner complaints, was a contributing factor to recurrent flooding."[108] That evidence, the court held, "was sufficient to charge the city with maintenance of a nuisance."[109]

A claimant's nuisance success, however, is subject to prominent qualifications[110]—as several controversies (two previously noted) well indicate. In *Gilbert v. City of Jackson*[111]—the flooding action for negligent culvert repair—the plaintiff's additional charge of nuisance received the shortest of shrift: The claimant "has failed to come forward with any evidence of misfeasance exceeding mere negligence."[112] Likewise, *City of Toccoa v. Pittman*[113] suffered a failed nuisance contention regarding the city's failure to regulate a pool hall: "There is

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104. 285 Ga. App. 430, 646 S.E.2d 279 (2007).

105. *See id.* at 430, 646 S.E.2d at 282.

106. *Id.* The court also stated the following:

> The homeowners asserted that the city's drainage infrastructure could no longer convey storm water runoff fast enough to prevent flooding of private property during heavy rains, because the existing pipes had not been replaced with larger pipes and the system lacked a sufficient number of storm drain inlets or catch basins to capture surface water.

Id. at 431, 646 S.E.2d at 282.

107. *Id.* at 433-34, 646 S.E.2d at 284.

108. *Id.* at 434, 646 S.E.2d at 284. "Although trash removal is a government function, recovery based on a nuisance as opposed to mere negligence theory is not barred." *Id.*

109. *Id.* Accordingly, on the issue of nuisance, "the trial court did not err in denying the city's motion for directed verdict." *Id.*, 646 S.E.2d at 285.

110. *See* R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 125-34 (4th ed. 1988).

111. 287 Ga. App. 326, 651 S.E.2d 461 (2007).

112. *Id.* at 329, 651 S.E.2d at 464. "To be liable for creating or maintaining a nuisance, a municipality must be chargeable with the following: the defect or degree of misfeasance exceeds mere negligence." *Id.* at 328, 651 S.E.2d at 464 (emphasis omitted) (citing Hibbs v. City of Riverdale, 267 Ga. 337, 338, 478 S.E.2d 121, 122 (1996)).

113. 286 Ga. App. 213, 648 S.E.2d 733 (2007).

no evidence that the City performed a continuous or regularly repetitious act or created a continuous or regularly repetitious condition which caused [the victim's] injury."[114] Finally, the plaintiff in *Heller v. City of Atlanta*[115] unsuccessfully charged a municipal nuisance resulting from a city employee's deficient inspection of tires on a taxi in which the plaintiff's wife was killed.[116] Once again, the nuisance limitation loomed large: "[T]here is no evidence that taxicabs with insufficient tread on their tires routinely passed City inspections and thereafter were involved in collisions that caused injury."[117]

Yet another immunity limitation inheres in the Georgia constitution's prohibition on the taking of private property for public purposes without "just and adequate compensation"[118] (popularly designated "inverse condemnation").[119] The plaintiff in *City of Atlanta v. Sig Samuels Laundry & Dry Cleaning*[120] invoked that prohibition to claim compensation for the city's installation of a sidewalk on the city's own right-of-way.[121] Because the sidewalk would eliminate space that his customers used for parking, the plaintiff alleged an unconstitutional taking of his property.[122] Turning a deaf ear to the claim, the supreme court denied that a compensable taking occurs "[when] the complained of

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114. *Id.* at 217, 648 S.E.2d at 737. "To be liable for creating or maintaining a nuisance, a municipality must be chargeable with the following: . . . the act complained of is of some duration and the maintenance of the act or defect must be continuous or regularly repetitious." *Id.* at 216, 648 S.E.2d at 737 (citing *Hibbs*, 267 Ga. at 338, 478 S.E.2d at 122).

115. 290 Ga. App. 345, 659 S.E.2d 617 (2008).

116. *See id.* at 345, 350-51, 659 S.E.2d at 619, 622-23. The inspector certified the taxicab's safety one day preceding the occasion on which the vehicle, with "zero tread on the rear tires," spun out of control on a wet highway and crashed into a tree thereby killing the plaintiff's wife who was riding as a passenger in the cab. *Id.* at 346-47, 659 S.E.2d at 620.

117. *Id.* at 350, 659 S.E.2d at 622. "Here, there is no evidence that the City knew that inspectors were giving a passing grade to dangerous tires–other than the ones on the taxicab [in issue]. The trial court did not err in granting summary judgment to the City on the nuisance claim." *Id.* at 351, 659 S.E.2d at 623.

118. *See* GA. CONST. art. I, § 3, para. I(a).

119. For treatment of the inverse condemnation limitation, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 134-43 (4th ed. 1988).

120. 282 Ga. 586, 652 S.E.2d 533 (2007).

121. *See id.* at 586, 652 S.E.2d at 534. Municipal ownership of the right-of-way appeared uncontested. *See id.* at 587, 652 S.E.2d at 534.

122. *See id.* at 586, 652 S.E.2d at 534. "The primary parking at [the plaintiff's business] is a parking pad . . . directly in front of the building and within the City's right-of-way." *Id.* The trial court had sustained plaintiff's claim, holding his measure of damages to be "any diminution in the market value of the property by reason of such interference." *Id.*

government activity merely interferes with a property owner's desire to use a city right-of-way for additional parking."[123] The court thus reversed the trial judge's award of compensation.[124]

The court of appeals confronted three municipal assertions of claimants' insufficient compliance with the "ante litem notice mandate"—the prohibition of claims for monetary damages unless written notice is provided to the municipality within six months of the offending event.[125] In *Jacks v. City of Atlanta*,[126] a subcontractor successfully surmounted that assertion by showing that the city had paid its contractor on June 3, upon the latter's assurance that it would pay all subcontractors.[127] Upholding the subcontractor's July 22 notice of claim to the city,[128] the court reasoned as follows: "Since [the subcontractor's] claim arose when both [the contractor] and the City refused to pay him after June 3, . . . the trial court erred when it granted the City partial summary judgment under [the ante litem statute]."[129]

The ante litem notice mandate expressly provides that "[t]he running of the statute of limitations shall be suspended during the time that the demand for payment is pending before [the governing authorities] without action on their part."[130] That provision proved pivotal in *Simon v. City of Atlanta*,[131] a case entailing the following scenario: The

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123. *Id.* at 587, 652 S.E.2d at 534. "Indeed, 'a property right to park in a city [right-of-way] does not exist either as an incident of the right of access or independently of that right.'" *Id.* (alteration in original) (quoting Metro. Atlanta Rapid Transit Auth. v. Datry, 235 Ga. 568, 576, 220 S.E.2d 905, 911 (1975)).

124. *Id.* at 588, 652 S.E.2d at 535. "The trial court therefore erred in finding that [the plaintiff] should be compensated for a taking in connection with the City's planned installation of the sidewalk." *Id.* at 587-88, 652 S.E.2d at 535.

125. O.C.G.A. § 36-33-5 (2006). For treatment of the mandate, its history, and the circumstances of its applicability, see R. PERRY SENTELL, JR., THE LAW OF MUNICIPAL TORT LIABILITY IN GEORGIA 145-74 (4th ed. 1988); R. Perry Sentell, Jr., *Georgia Municipal Tort Liability: Ante Litem Notice*, 4 GA. L. REV. 134 (1969); R. Perry Sentell, Jr., *Ante Litem Notice: Cause for Pause*, URBAN GA. MAG., Oct. 1978, at 24. For a recent analysis of modern developments, see monograph, R. PERRY SENTELL, JR., ANTE LITEM NOTICE: RECENT PERSPECTIVES (2006).

126. 284 Ga. App. 200, 644 S.E.2d 150 (2007).

127. *See id.* at 202, 644 S.E.2d at 152. The plaintiff subcontractor sought payment from the municipality for work done on a city park. The plaintiff's claim arose from the city's failure to properly obtain payment and performance bonds from the project's contractor. *Id.* at 200, 644 S.E.2d at 151.

128. *See id.* at 201, 203, 644 S.E.2d at 151, 153. "Where there is some evidence that the contractor is solvent as of a particular time, the subcontractor's claim will be held as arising no earlier than that time." *Id.* at 202, 644 S.E.2d at 152.

129. *Id.* at 202, 644 S.E.2d at 152.

130. O.C.G.A. § 36-33-5(d) (2006).

131. 287 Ga. App. 119, 650 S.E.2d 783 (2007).

plaintiff suffered arrest on August 12, 2001 and notified the city of his police brutality claim on December 3, 2001.[132] The city eventually denied the police brutality claim on March 3, 2003, and the plaintiff filed suit on April 14, 2004.[133] Rejecting the city's plea of a time-barred action under the two-year statute of limitations,[134] the court reasoned that the fifteen months of the claim's pendency before the city must be subtracted from the thirty-two months between accrual of the plaintiff's case and his filing of suit.[135] "Since the remaining period is seventeen months, or substantially less than two years, [the plaintiff's] complaint is not time-barred."[136]

The municipality finally prevailed on the issue in *Harris-Jackson v. City of Cochran*,[137] a personal injury action arising from the plaintiff's vehicle striking a negligently maintained manhole cover.[138] On grounds that the claimant's notice "merely established that [the claimant] sustained damage to her vehicle,"[139] the court deemed the notice clearly deficient: "[N]otice of property damage is not sufficient to apprise the City of a personal injury claim."[140]

The plaintiffs also directed claims against municipal officers themselves, claims typically implicating the doctrine of official immunity.[141] Under that principle, officers sued in their "individual capacities" enjoy "qualified" or official immunity for "discretionary functions" performed

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132. *Id.* at 119, 121, 650 S.E.2d at 784, 785. "The letter details the events at issue over three pages, and was clearly sufficient to alert the City of [the plaintiff's] claim." *Id.* at 121, 650 S.E.2d at 785.

133. *Id.* at 120, 650 S.E.2d at 784-85.

134. *See* O.C.G.A. § 9-3-33 (2007).

135. *Simon*, 287 Ga. App. at 121, 650 S.E.2d at 786.

136. *Id.* The court thus reversed the trial judge's grant of the city's motion to dismiss. *Id.* at 122, 650 S.E.2d at 786.

137. 287 Ga. App. 722, 652 S.E.2d 607 (2007).

138. *See id.* at 722, 652 S.E.2d at 608. "[The plaintiff] sued the City . . ., alleging she was injured when her car struck a negligently maintained manhole cover." *Id.*

139. *Id.* at 724, 652 S.E.2d at 609. The plaintiff's purported notice stated that she "struck a manhole with an unsecured cover. The cover flipped up underneath the vehicle causing extensive damage to the vehicle." *Id.* at 723, 652 S.E.2d at 609.

140. *Id.* at 724, 652 S.E.2d at 609. Accordingly, "it cannot be said that [the plaintiff] substantially complied with [the ante litem notice statute]." *Id.*

141. For background on the doctrine and analysis of its status in the courts, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979); R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27 (1988); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993); R. Perry Sentell, Jr., *"Official Immunity" in Local Government Law: A Quantifiable Confrontation*, 22 GA. ST. U. L. REV. 597 (2006).

without malice or intent.[142] Officers sued individually for "ministerial functions" enjoy no such immunity for their negligent conduct.[143] During the survey period, the court of appeals applied the discretionary classification (hence immunity) in the following contexts: (1) a city electrical superintendent's decision to insulate certain electrical lines rather than de-energize or relocate them;[144] (2) a municipal police officer's decision to rush to his assigned duty of directing traffic at a congested intersection;[145] and (3) conduct by members of a municipal governing authority charged as unreasonable delay in providing water to a developer's subdivision.[146] In contrast, the court designated as ministerial (hence liability if negligent) a city vehicle inspector's

142. *See generally* the works cited *supra* note 141.

143. *See generally* the works cited *supra* note 141.

144. *See* Golden v. Vickery, 285 Ga. App. 216, 645 S.E.2d 695 (2007). The plaintiff, a contractor's employee, was injured on a lift when his metal bucket came in contact with the city's high voltage line that the defendant had decided to insulate upon notice of the plaintiff's presence in the area. *Id.* at 216, 645 S.E.2d at 696. The court reasoned that the High Voltage Safety Act, O.C.G.A. § 46-3-33(2) (2004), "clearly gives the owner or operator of high-voltage electric lines discretion in deciding what protective measures to take." *Golden*, 285 Ga. App. at 221, 645 S.E.2d at 698. Thus, the defendant had been exercising a discretionary function and enjoyed official immunity from liability for his alleged negligence. *Id.*

145. *See* Weaver v. City of Statesboro, 288 Ga. App. 32, 653 S.E.2d 765 (2007). The plaintiffs sued for injuries from a collision with the officer who was driving in the wrong lane while rushing to direct traffic at an intersection. *Id.* at 32, 653 S.E.2d at 767. Said the court, "Concluding that the circumstances constituted an emergency in that a hazardous condition needed to be quickly eliminated, [the officer] was performing a discretionary function when he decided to rush to his assignment at the crossing intersection to direct the traffic." *Id.* at 39, 653 S.E.2d at 771. Thus, the officer enjoyed official immunity from the plaintiffs' claim. *Id.*

146. *See* King v. Comfort Living, Inc., 287 Ga. App. 337, 651 S.E.2d 484 (2007). The plaintiff sued for damages allegedly caused by the delay, charging members of the governing authority with failing to perform their duties to administer the work of the water department. *Id.* at 338, 651 S.E.2d at 486-87. The court asserted that "[c]learly, the mayor and council's action in voting to provide water service to the subdivision was discretionary," *id.* at 340, 651 S.E.2d at 488, and that no date certain was set for completion of the job, and that the delays were caused by the contractor, *id.* at 340-41, 651 S.E.2d at 488. Thus, the members enjoyed official immunity from the plaintiff's charges. *See id.* Finally, the court also rejected the plaintiff's Section 1983 action for a violation of federal due process because there was "no evidence that the mayor and council or the Town had an intentional, deliberate policy of delaying the extension of water service once they had agreed to provide it." *Id.* at 341, 651 S.E.2d at 489. For treatment of the "constitutional tort" in Georgia local government law, see R. PERRY SENTELL, JR., GEORGIA LOCAL GOVERNMENT LAW'S ASSIMILATION OF MONELL: SECTION 1983 AND THE NEW "PERSONS" (1984); R. Perry Sentell, Jr., *Local Government and Constitutional Torts: In the Georgia Courts*, 49 MERCER L. REV. 1 (1997).

examination of tire treads on a taxicab.[147] The court emphasized that state law "mandates minimum tread depth for passenger vehicles"[148] and that the inspector's "tasks were simple, absolute, and definite; hence they were ministerial."[149] Accordingly, the inspector "[was] not entitled to official immunity."[150]

F. Zoning

Hagemann v. City of Marietta[151] arose from a property owner's suit for declaratory judgment charging the city with unlawfully rezoning adjacent property.[152] The city responded with a counterclaim alleging the plaintiff's suit constituted abusive litigation by attempting to impede a municipal redevelopment plan to be funded through a Tax Allocation District (TAD).[153] In turn, the plaintiff attacked the counterclaim as violative of Georgia's anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute[154] and as insufficiently substantiated by the requisite city verifications.[155] Reviewing those verifications, the court of appeals first noted that there had been no final termination of the

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147. Heller v. City of Atlanta, 290 Ga. App. 345, 349, 659 S.E.2d 617, 621 (2008). The plaintiff sued a city vehicle inspector for the death of the plaintiff's wife who was killed when the taxicab in which she was riding spun out of control on a wet overpass and crashed into a tree. *Id.* at 345, 659 S.E.2d at 619. The cab's tires "had little or no tread, but the vehicle had passed a mandatory [city inspection] the previous day." *Id.* The inspector claimed the protection of official immunity. *See id.* at 346, 659 S.E.2d at 619.

148. *Id.* at 349, 659 S.E.2d at 621 (citing O.C.G.A. § 40-8-74(e)(1) (2007)) (requiring "not less than 2/32 inch tread measurable in all major grooves.") The defendant, "as a city vehicle for hire inspector, was required to check for minimum tread depth." *Id.*

149. *Id.*, 659 S.E.2d at 622.

150. *Id.* "[H]e may be held liable if a jury determines that he performed his tasks negligently." *Id.*

151. 287 Ga. App. 1, 650 S.E.2d 363 (2007).

152. *See id.* at 1, 650 S.E.2d at 365. The plaintiff alleged a violation of both the city code and the Zoning Procedures Law, O.C.G.A. §§ 36-66-1 to -6 (2006). *Hagemann*, 287 Ga. App. at 1, 650 S.E.2d at 365.

153. *Hagemann*, 287 Ga. App. at 1-2, 650 S.E.2d at 365-66. The city alleged that it adopted a comprehensive redevelopment plan and established a Tax Allocation District (TAD), that the plaintiff's suit could impede the bond financing, and that the plaintiff's suit was an effort to obtain zoning concessions from owners of the rezoned property for his personal and private gain. *Id.* Indeed, the city's attorney complained that "[w]ith a lawsuit pending, there can be [] no TAD financing, and no lender is going to touch this project as long as this lawsuit is pending." *Id.* at 3, 650 S.E.2d at 366.

154. O.C.G.A. § 9-11-11.1 (2006).

155. *Hagemann*, 287 Ga. App. at 2, 650 S.E.2d at 366. "[The city's] counterclaims, the record shows, were filed in response to the declaratory judgment action. Thus, the anti-SLAPP statute requires verification of the counterclaims." *Id.* at 6, 650 S.E.2d at 368.

plaintiff's action (a prerequisite to an abusive litigation claim)[156] and that "neither the city's attorney nor its mayor could have reasonably believed" that the counterclaims were legally warranted.[157] The court thus concluded that the plaintiff's original challenge sought a "redress of grievances" within the ambit of the anti-SLAPP statute,[158] that the city verifications were false, and that "[t]he trial court erred by not striking the counterclaims as violative of the anti-SLAPP statute."[159]

II. COUNTIES

A. *Elections*

Good local government assumes valid local elections conducted legally and, hopefully, exuding the appearance of propriety. Election challenges drew the Georgia Supreme Court's attention throughout the survey period. *McIntosh County Board of Elections v. Deverger*[160] featured a candidate's challenge to a county commissioner election that the contestant had lost by four votes.[161] Affirming the trial court's order of a new election, the supreme court upheld the judge's conclusion that one voter was shown to have voted in the wrong district and was thus improperly disenfranchised.[162] Additionally, three absentee ballots by voters officially registered to vote for more than ten years were

156. *Id.* at 6, 650 S.E.2d at 369. "[A]ssertion of an abusive litigation claim requires, among other things, 'the final termination of the proceeding in which the alleged abusive litigation occurred.'" *Id.*, 650 S.E.2d at 368-69 (quoting O.C.G.A. § 51-7-84(b) (2000)).

157. *Id.* at 7, 650 S.E.2d at 369.

158. *Id.* at 6, 650 S.E.2d at 368.

159. *Id.* at 7, 650 S.E.2d at 369. Another zoning controversy of the period, *City of St. Marys v. Fulford*, 286 Ga. App. 506, 649 S.E.2d 807 (2007), went off on procedural grounds. There, the trial court had determined that the plaintiff property owner had met applicable city zoning requirements, and thus the council had acted arbitrarily in denying his request to approve a minor subdivision. *Id.* at 507, 649 S.E.2d at 808. Granting discretionary appeal, the court of appeals emphasized that no city ordinances appeared in the record or in the evidence and that no judicial notice could be taken of them. *Id.* In order for the trial judge to determine that the plaintiff had met the zoning requirements, the court asserted, "the ordinances setting forth those requirements needed to be properly before it." *Id.* at 508, 649 S.E.2d at 808-09. Accordingly, the court reversed the judge's order. *Id.*, 649 S.E.2d at 809.

160. 282 Ga. 566, 651 S.E.2d 671 (2007).

161. *See id.* at 566, 651 S.E.2d at 672.

162. *Id.* at 567, 651 S.E.2d at 673. For this conclusion, the court held that the trial judge had legally declined to accept oral testimony (that the voter had actually voted in the correct district) over the official record of the election. *Id.* The official record indicated that the voter had voted in the incorrect district. *Id.*

presumed valid,[163] and the court held that those voters were also improperly disenfranchised.[164] "Given the four-vote margin of victory in the challenged race, the wrongful rejection of the . . . four votes was sufficient to place the results of the election in doubt."[165]

The challenger in *Kendall v. Delaney*[166] enjoyed less success on the merits of his contest but managed to escape the trial judge's imposition of attorney fees.[167] In *Kendall* a candidate for the county board of education lost the election by a 54-vote margin and charged that 136 absentee ballots had been collected and mailed by unauthorized persons.[168] The trial court denied the plaintiff's challenge and subsequently granted the victor's request for attorney fees.[169] The supreme court appraised the evidence as "challenging a sufficient number of ballots to affect the result of the election"[170] and not lacking "'any justiciable issue of law or fact [such] that it could not be reasonably believed that a court would accept the asserted claim.'"[171] Consequently, the court reversed the award of attorney fees.[172]

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163. *See id.* at 567-68, 651 S.E.2d at 673-74. For that presumption, the court relied on O.C.G.A. § 21-2-522.1 (2008): "[W]e hold that the rebuttable presumption of legality created by [the statute] applies to the absence of a registration card as well as to the existence of an unsigned registration card." *McIntosh County Bd. of Elections*, 282 Ga. at 567, 651 S.E.2d at 673.

164. *McIntosh County Bd. of Elections*, 282 Ga. at 567-68, 651 S.E.2d at 673-74.

165. *Id.* at 568, 651 S.E.2d at 674.

166. 283 Ga. 34, 656 S.E.2d 812 (2008).

167. *See id.* at 36, 656 S.E.2d at 814.

168. *Id.* at 34, 656 S.E.2d at 813. The challenger relied on O.C.G.A. § 21-2-385(a) (2008), the statute enumerating the persons authorized to mail the absentee ballots of physically disabled electors. *Kendall*, 283 Ga. at 34, 656 S.E.2d at 813.

169. *Kendall*, 283 Ga. at 34, 656 S.E.2d at 812-13. The supreme court had affirmed the trial judge's decision on the merits for the defendant in *Kendall v. Delaney*, 282 Ga. 482, 483, 651 S.E.2d 685, 686 (2007).

170. *Kendall*, 283 Ga. at 36, 656 S.E.2d at 814.

171. *Id.* at 34, 656 S.E.2d at 813 (quoting O.C.G.A. § 9-15-14(a) (2006)).

172. *Id.* at 36, 656 S.E.2d at 814. "Although the superior court . . . found otherwise, the evidence was such that a trier of fact would have been authorized to find that at least 12 ballots, in addition to the 42 cited by the superior court, had been handled by persons not authorized to do so under OCGA § 21-2-385(a)." *Id.*, 656 S.E.2d at 813-14.

Yet another electorally-rooted controversy, *McKinney v. State*, 282 Ga. 230, 647 S.E.2d 44 (2007), featured the defendants' criminal indictment under the Georgia Ethics in Government Act, O.C.G.A. § 21-5-9 (2008), for failing to register and file disclosure reports with the State of Georgia Ethics Commission after organizing an independent committee to oppose the election of a candidate for county commissioner. *See McKinney*, 282 Ga. at 230, 647 S.E.2d at 44. Reversing the trial court, the supreme court held that venue is proper in the county where the ethics commission is located and not the county of the election. *Id.* at 232, 647 S.E.2d at 45-46. "[U]nder the statute as it is currently written [containing no express criminal venue provision], the only proper venue in this case was

B. Power

In *Fulton County v. State*,[173] the county appealed the trial judge's order that it pay costs associated with the defense of an indigent defendant in a capital murder trial.[174] Searching for "'a clear provision of the law'"[175] sanctioning the payment, the supreme court analyzed the material statute.[176] The statute "calls for a county to pay itemized expenses that are incurred ordinarily in a courtroom proceeding, as well as for the payment of 'similar items.' But 'similar items' cannot be deemed to include unusual expenses, i.e., expenses which are not typically incurred at trial."[177] As for the items here in issue—telephone conversations at the jail and digital presentation of demonstrative evidence—[178] these "are not the type of expenses that can be expected to be incurred ordinarily in a trial in superior court."[179]

Fulton County, the county where the State Ethics Commission is located and the disclosure reports . . . are required to be filed." *Id.*, 647 S.E.2d at 46.

Finally, the unethical conduct featured in *Georgia Peace Officers Standards & Training Council v. Anderson*, 290 Ga. App. 91, 658 S.E.2d 840 (2008), fastened upon a county sheriff who appealed his administrative decertification as a peace officer for fabricating a report of an accident and then refusing to aid investigators or take them to the scene of the alleged accident. *See id.* at 91-92, 658 S.E.2d at 841-42. Reviewing the evidence supporting the decertifying agency's decision, the court of appeals observed that the sheriff's "assertion of the right against self-incrimination cannot shield [the sheriff] from an inquiry into the effect of that assertion on his job performance." *Id.* at 93, 658 S.E.2d at 842. Accordingly, the sheriff's refusal to take the officers to the alleged scene "does not implicate the right against self-incrimination as a matter of law," and his "refusal to cooperate [in the investigation] amounted to unprofessional conduct sufficient to justify decertification." *Id.* at 93-94, 658 S.E.2d at 843 (citing O.C.G.A. § 35-8-7.1(a)(6) (2006 & Supp. 2008) (defining unprofessional conduct)).

173. 282 Ga. 570, 651 S.E.2d 679 (2007).

174. *Id.* at 570, 651 S.E.2d at 680.

175. *Id.* at 571, 651 S.E.2d at 681 (quoting Freeney v. Geoghegan, 177 Ga. 142, 145, 169 S.E. 882, 884 (1933)).

176. *Id.* (citing O.C.G.A. § 15-6-24 (2008)).

177. *Id.* (quoting O.C.G.A. § 15-6-24(a)).

178. *Id.* at 572, 651 S.E.2d at 681. More specifically, the items in issue were "the costs of transcribing telephone conversations made by or to [the accused] at the jail and of presenting demonstrative evidence in the courtroom in a digital format." *Id.* at 570, 651 S.E.2d at 680.

179. *Id.* at 572, 651 S.E.2d at 681. "It follows that the trial court erred in ordering [the county] to pay these costs." *Id.*

On an unrelated subject but similarly turning on the issue of county power, the supreme court in *Hicks v. Khoury*, 283 Ga. 407, 658 S.E.2d 616 (2008), rejected a petition by county residents contending that an amended intergovernmental agreement entered into by the county commissioners was inconsistent with the purpose approved by voters in a special local option sales tax referendum. *See id.* at 407, 409, 658 S.E.2d at 617, 618-19.

C. *Regulation*

The survey period continued to unfold challenges to county regulatory measures.[180] A typical prerequisite to these challenges is "standing" on the part of the challengers, a requirement declared lacking in at least two instances. First, *Catoosa County v. R.N. Talley Properties*[181] featured a landowner and prospective tenant who desired to build an asphalt plant in an industrial zone and who attacked the county's requirement for a special use permit as facially unconstitutional.[182] Although conceding the possibility of a facial vagueness attack,[183] the supreme court emphasized that except in first amendment settings, a showing of standing is necessary.[184] Here, the challengers "did not seek a special use permit, and a building permit was not actually

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Examining both the referendum resolution and the amended agreement, the supreme court held that the allocation of funds in the agreement (to begin the project by upgrading a municipal facility) was not inconsistent with the referendum purpose of constructing water, sewer, and waste water lines for citizens in both the incorporated and unincorporated areas, "but merely seeks to accomplish the same end set forth in the first intergovernmental agreement, namely, an extension of water and sewer service throughout [the county], via different means." *Id.* at 409, 658 S.E.2d at 618.

Finally, the Georgia Court of Appeals in *Powell v. Wheeler County*, 290 Ga. App. 508, 659 S.E.2d 893 (2008), held that the county did not exercise its power to contract by virtue of rejecting a tax appraiser's written employment contract (issued by the board of tax assessors) but later paying the appraiser for work performed. *Id.* at 509-10, 659 S.E.2d at 894. In these circumstances, the court of appeals reasoned, county payment constituted neither approval nor ratification of the contract, and the appraiser occupied only the status of an employee-at-will. *Id.* at 510, 659 S.E.2d at 894.

180. For treatment of local government regulatory power in an assortment of contexts, see R. Perry Sentell, Jr., *"Ascertainable Standards" versus "Unbridled Discretion" in Local Government Regulation*, 41 GA. COUNTY GOV'T MAG. 19 (Dec. 1989); R. Perry Sentell, Jr., *Discretion in Local Government Law*, 8 GA. L. REV. 614 (1974); R. Perry Sentell, Jr., *Local Government Law and Liquor Licensing: A Sobering Vignette*, 15 GA. L. REV. 1039 (1981); R. Perry Sentell, Jr., *Reasoning by Riddle: The Power to Prohibit in Georgia Local Government Law*, 9 GA. L. REV. 115 (1974).

181. 282 Ga. 373, 651 S.E.2d 7 (2007).

182. *See id.* at 373-74, 651 S.E.2d at 8-9. The plaintiffs applied for a building permit but asserted a facial constitutional challenge to the ordinance requiring the special use permit. The trial court held that the provisions were unconstitutionally vague on their face in allotting the county uncontrolled discretion. *Id.*

183. *See id.* at 374, 651 S.E.2d at 9. On this point, the court expressly overruled its previous decision in *Sustakovitch v. State*, 249 Ga. 273, 274, 290 S.E.2d 77, 78 (1982). *R.N. Talley Properties*, 282 Ga. at 374, 651 S.E.2d at 9.

184. *R.N. Talley Properties*, 282 Ga. at 375, 651 S.E.2d at 10. "Most fundamentally, that analysis begins with standing." *Id.*

granted or denied. Therefore, . . . they lack standing to make a constitutional attack thereon."[185]

The Georgia Court of Appeals reached a similar result in *Newton County Home Builders Ass'n v. Newton County*,[186] which featured the county and state homebuilders associations' attack upon the county's development impact fee ordinance.[187] The plaintiffs sought both an interlocutory injunction and the county's creation of an escrow account for the deposit of previously collected impact fees.[188] Acknowledging actions for prospective relief inuring to the benefit of all injured association members,[189] the court distinguished the plaintiffs' request: Here "the damage[s] [sought] are not common to the entire [association] membership, nor shared by all in equal degree."[190] Additionally, even the members impacted "will also be affected in varying degrees depending on the amount [the county] determined they owed."[191] Accordingly, "the homebuilders associations cannot make the showing necessary for standing without the participation of their members."[192]

County environmental measures anchored two instances of litigation, one in each appellate court. In *DeKalb County v. Buckler*,[193] property owners challenged the county's historic preservation commission's denial of an application to re-plat certain lots on the ground that the commission lacked the necessary seven members.[194] In response, the court of

185. *Id.* The court thus reversed the lower court's decision of unconstitutionality. *Id.*

186. 286 Ga. App. 89, 648 S.E.2d 420 (2007).

187. *See id.* at 89-90, 648 S.E.2d at 420-21. The county adopted the ordinance pursuant to O.C.G.A. §§ 36-71-1 to -13 (2006), requiring payment of an impact fee at the time the county issued a building permit. *Newton County*, 286 Ga. App. at 89, 648 S.E.2d at 420 (citing O.C.G.A. §§ 36-71-1 to -13).

188. *Newton County*, 286 Ga. App. at 90, 648 S.E.2d at 421. The plaintiffs requested identification of the escrow account as a common fund for recoveries in the event the fees were invalidated. *Id.*

189. *See id.* "'Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.'" *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 515 (1975)).

190. *Id.* at 91, 648 S.E.2d at 421 (citing *Warth*, 422 U.S. at 515-16). The court stressed that the associations' members included not only home builders but also real estate agents, attorneys, banks, and others: "Many of those members are unaffected by the impact fees." *Id.*

191. *Id.* Moreover, the court asserted, the associations sought to recover impact fees paid by nonmembers: "They cannot recover fees on behalf of unaffiliated nonparties." *Id.*, 648 S.E.2d at 422.

192. *Id.*, 648 S.E.2d at 421-22. The court thus affirmed the trial court's grant of the county's motion for partial summary judgment. *Id.* at 91-92, 648 S.E.2d at 422.

193. 288 Ga. App. 346, 654 S.E.2d 193 (2007).

194. *Id.* at 346, 654 S.E.2d at 194. The owners had purchased three adjacent lots in the historic district and sought a certificate of appropriateness for subdividing the property

appeals reasoned that although the material county ordinance provided that the commission "'shall consist of seven (7) members,'"[195] the ordinance did not specify "that failure to have seven active members on the [commission] invalidates [its] decision."[196] Here, the commission consisted of four active members,[197] a quorum of the prescribed seven. This quorum (four) was present at the meeting, and a majority (three) of that quorum voted to deny the application.[198] Thus, the court reversed the challengers' partial summary judgment.[199]

R&J Murray, LLC v. Murray County[200] presented a property owner's effort to mandamus county verification that the plaintiff's proposed landfill complied with the county's Solid Waste Management Plan (SWMP).[201] Considering previously approved factors the county might consider in developing its SWMP,[202] the trial court approved consideration of the manner in which the plaintiff's landfill might impact the county's existing landfill.[203] Affirming that approach,[204] the supreme

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into five lots. *Id.* at 347, 654 S.E.2d at 194.

195. *Id.* at 348, 654 S.E.2d at 195 (quoting DEKALB COUNTY, GA. CODE § 13.5-3 (2008)).

196. *Id.* at 349, 654 S.E.2d at 195. The court stressed that neither the ordinance nor the state enabling statute, O.C.G.A. § 44-10-24(a) (2002), levied such a result. *Buckler*, 288 Ga. App. at 349, 654 S.E.2d at 195. The latter statute only required establishment of a county historic preservation commission that "'shall determine'" the members, "'which shall be at least three.'" *Id.* at 348, 654 S.E.2d at 195 (quoting O.C.G.A. § 44-10-24(a)).

197. *Buckler*, 288 Ga. App. at 347, 654 S.E.2d at 194. The commission had not possessed the specified seven members for the preceding four years. *Id.* at 349, 654 S.E.2d at 195.

198. *Id.* at 349, 654 S.E.2d at 196. "According to the [commission] bylaws, decisions of the preservation commission shall be by a majority of those members present and voting, a quorum being present." *Id.* at 348, 654 S.E.2d at 195 (internal quotation marks omitted). Additionally, the court noted, both the ordinance and bylaws provided that members serve until their successors are appointed and qualified; thus, "[w]hoever the missing members are, the ordinance and bylaws provide that they continue to serve." *Id.* at 349, 654 S.E.2d at 195.

199. *Id.*, 654 S.E.2d at 196.

200. 282 Ga. 740, 653 S.E.2d 720 (2007).

201. *See id.* at 740, 653 S.E.2d at 721. This verification was sought under the mandate of O.C.G.A. § 12-8-24(g) (2006).

202. *R&J Murray, LLC*, 282 Ga. at 740, 653 S.E.2d at 721. The court noted that this constituted the second appellate appearance of the litigation and its former determination: "[W]e ruled that 'in its determination of a proposed facility's consistency with the SWMP[,] . . . a local government is authorized to consider any relevant factor that it properly considered in developing its SWMP, as defined by the statutory and regulatory scheme.'" *Id.* at 741-42, 653 S.E.2d at 721-22 (ellipsis and second alteration in original) (quoting Murray County v. R&J Murray, LLC, 280 Ga. 314, 318, 627 S.E.2d 574, 578 (2006)).

203. *Id.* at 741, 653 S.E.2d at 722. The trial court had noted, inter alia, that development of an additional landfill in the county might render the existing landfill financially unable to continue operations, and that the "sustainablility of a landfill is

court also sustained the lower court in rejecting the plaintiff's argument of economic protectionism.[205] "Here, the provision in the SWMP for a one-landfill strategy, though based on economic considerations, is established in the record as being directed toward legitimate goals unrelated to protectionism."[206] Accordingly, the plaintiff had shown no county abuse of discretion and merited no mandamus.[207]

County sign ordinances attracted contentions of unconstitutionality in at least two survey period episodes. *Coffey v. Fayette County*[208] originated with an attack (seeking both injunction and damages) against a 1999 ordinance restricting signs in residential districts to one per lot and to a size not exceeding six square feet. Upon the trial court's declaration that certain provisions of the ordinance were unconstitutional, the county amended the measure in 2005 to excise the invalid parts and then moved to dismiss the attack as moot.[209] Reversing the trial judge's dismissal, the court of appeals asserted that the 2005 amendment "does not moot a claim for damages based on enforcement of the prior version of the ordinance."[210]

In *Fulton County v. Galberaith*,[211] the supreme court invoked the First Amendment[212] against a county ordinance that prohibited off-premises advertising in areas zoned commercial[213] but exempted

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related to the protection, health, and safety of persons and furthers the purposes of the Solid Waste Management Act." *Id.*

204. *Id.* at 743, 653 S.E.2d at 723. "Since factors related to the financial support of the Murray County landfill were considered in the SWMP, they were properly considered in making the determination that R&J's proposed facility would be inconsistent with the SWMP." *Id.* at 742, 653 S.E.2d at 723.

205. *Id.* at 743, 653 S.E.2d at 723.

206. *Id.* "[T]here is no evidence of record suggesting that adoption of the one-landfill strategy was motivated by a desire to monopolize the waste management business." *Id.*

207. *Id.* One justice concurred specially. *Id.* at 743-46, 653 S.E.2d at 723-25 (Melton, J., concurring specially).

208. 289 Ga. App. 153, 656 S.E.2d 262 (2008).

209. *Id.* at 153-54, 656 S.E.2d at 263.

210. *Id.* at 155, 656 S.E.2d at 264. "The enforcement of an unconstitutional sign ordinance may give rise to a claim for damages against a governmental entity." *Id.* (citing SMD, LLP v. City of Roswell, 252 Ga. App. 438, 440, 555 S.E.2d 813, 816 (2001)).

211. 282 Ga. 314, 647 S.E.2d 24 (2007).

212. U.S. CONST. amend. I.

213. *Galberaith*, 282 Ga. at 314, 647 S.E.2d at 26. "[O]ff-premise advertising is not permitted under the ordinance, which allows only on-premise advertising in areas zoned commercial." *Id.* The plaintiffs had applied to place outdoor signs on commercially zoned property and had appealed the county's denial to the superior court, which declared the ordinance in violation of the First Amendment. *Id.* at 315, 647 S.E.2d at 26.

particular signs on a case-by-case determination.[214] The court reasoned that commercial speech not involving illegal conduct, and not being fraudulent or misleading, could not be declared "presumptively illegal."[215] Accordingly, the court forcefully condemned the ordinance's "broad sweep" as follows: "Banning all signs, including all commercial signs, and then deciding on a case-by-case basis which ones will be permitted is the antithesis of the narrow tailoring that is required under the First Amendment."[216]

Finally, the county's targeted regulatory efforts in *GeorgiaCarry.org, Inc. v. Coweta County*[217] prohibited firearms on "'[c]ounty recreation facilities, sports fields, or any surrounding areas being property of the county.'"[218] Reversing the trial court's rejection of the challengers' attack, the court of appeals invoked the doctrine of state preemption.[219] The "plain language" of the material state statute[220] "expressly precludes a county from regulating 'in any manner [the] . . . carrying . . . of firearms.'"[221] Consequently, the trial judge had erred in granting the county's motion for summary judgment.[222]

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214. *Id.* at 318, 647 S.E.2d at 28. "The ordinance also lists various types of signs, both commercial and noncommercial, that the County will allow landowners to place on their own property or the property of others if they first obtain a permit, pay a fee and comply with detailed restrictions applicable to each category." *Id.* at 317, 647 S.E.2d at 28.

215. *Id.* at 318, 647 S.E.2d at 28. "A ban on commercial speech must directly advance the asserted governmental interest, and the prohibition must be tailored so that it sweeps no more broadly than is necessary to achieve that interest." *Id.*

216. *Id.* at 319, 647 S.E.2d at 28. "[W]e conclude that the broad sweep and basic structure of the [county] ordinance, whereby all signs are presumed to be illegal and are then permitted only on a case-by-case determination, does not comport with the First Amendment." *Id.* Subsequently, in *Granite State Outdoor Advertising, Inc. v. City of Roswell*, 283 Ga. 417, 658 S.E.2d 587 (2008), the supreme court denied its decision in *Galberaith* to afford sign and billboard owners standing to attack provisions of a sign ordinance that had not caused them injury. *See id.* at 421, 658 S.E.2d at 590. Having been validly denied permits under ordinance regulations of size and height, the court held, plaintiffs possessed no standing to challenge the entire sign ordinance. *Id.* "Accordingly, we conclude that the trial court made no error when it held [that the challengers] had standing to contest only those provisions of the sign ordinance that had caused injury to [them]." *Id.*

217. 288 Ga. App. 748, 655 S.E.2d 346 (2007).

218. *Id.* at 748-49, 655 S.E.2d at 347 (quoting COWETA COUNTY, GA., CODE § 46-33 (2008)).

219. *See id.* at 748, 655 S.E.2d at 346.

220. O.C.G.A. § 16-11-173 (2007).

221. *GeorgiaCarry.org, Inc.*, 288 Ga. App. at 749, 655 S.E.2d at 347 (alteration and ellipses in original) (quoting O.C.G.A. § 16-11-173(b)(1)).

222. *Id.* "Under these circumstances, the preemption is express, and the trial court erred in concluding otherwise." *Id.*

D. Openness

"Openness" concerns in local government administration center largely upon the matters of open meetings and open records.[223] The latter matter confronted the court of appeals in the intriguing survey period controversy of *Smith v. DeKalb County*.[224] There, the Georgia secretary of state intervened to restrain the county's release to a citizen (under the Open Records Act)[225] of the CD-ROM concerning the Fourth Congressional District 2006 primary and runoff elections.[226] For two reasons, the court concluded that computer disks constituted an exception to the mandate of the Open Records Act.[227] Initially, the secretary of state is statutorily charged with supervising all state elections,[228] and statutes require that county custodians maintain election CD-ROMs under seal for twenty-four months.[229] Accordingly, the sought-after disk "is not an open record subject to disclosure."[230] Additionally, the court emphasized, the disk enjoyed the Open Records Act's declared exemption for "'material which if made public could compromise security against sabotage, criminal, or terroristic acts.'"[231] Consequently, "the record supports the [trial] court's finding that [the citizen] is not entitled to a copy of the CD-ROM under the Open Records Act."[232]

E. Liability

The litigation of county liability enjoyed its persistent popularity during the scrutinized survey period[233]—despite claimants remaining

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223. For perspective, see R. Perry Sentell, Jr., *The Omen of "Openness" in Local Government Law*, 13 GA. L. REV. 97 (1978).

224. 288 Ga. App. 574, 654 S.E.2d 469 (2007).

225. O.C.G.A. §§ 50-18-70 to -77 (2006).

226. *Smith*, 288 Ga. App. at 574-75, 654 S.E.2d at 470-71. "According to [the plaintiff's] request, [a] review of the entire GEMS backup CD-ROM(S) for both elections is the only way . . . to undertake a complete audit." *Id.* at 575, 654 S.E.2d at 470 (ellipsis and second alteration in original) (internal quotation marks omitted).

227. *See id.* at 576-77, 654 S.E.2d at 471-72.

228. *Id.* at 576, 654 S.E.2d at 471 (citing O.C.G.A. §§ 21-2-30 to -32, -50 (2008)).

229. *Id.* at 577-78, 654 S.E.2d at 471-72 (citing O.C.G.A. § 21-2-500(a) (2008)).

230. *Id.* at 577, 654 S.E.2d at 472 (citing O.C.G.A. § 50-18-70(b) (2006)).

231. *Id.* (quoting O.C.G.A. § 50-18-72(a)(15)(A)(iv) (2006 & Supp. 2008)).

232. *Id.* at 578, 654 S.E.2d at 472.

233. For perspective on the issues involved, see R. Perry Sentell, Jr., *Georgia Local Government Tort Liability: The "Crisis" Conundrum*, 2 GA. ST. U. L. REV. 19 (1985); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993); R. Perry Sentell, Jr., *Local Government Liability Litigation: Numerical Nuances*, 38 GA. L. REV. 633 (2004).

largely unrewarded for their innovative efforts. Indeed, two of the controversies convincingly echoed the intransigence of historic sovereign immunity. Accordingly, *Chisolm v. Tippins*[234] featured a parent's suit against a county school district for its alleged denial of access to his child's educational records.[235] In response, the court of appeals scarcely broke its analytical stride: "'It is well established that, in the absence of some special circumstance, claims against a public school district . . . are barred by sovereign immunity.'"[236]

The court instanced the same doctrinal complacency in *Rutherford v. DeKalb County*,[237] in which the claimant alleged negligence for personal injuries incurred in a fall on a defective water meter.[238] Suffering the plaintiff's notable contention of liability for "a proprietary function," the court exhibited an abiding patience: "The distinction between governmental and proprietary functions applies . . . not to counties, but to cities."[239] Again, therefore, "[the plaintiff's] negligence claim [was] barred by sovereign immunity."[240] As for the claimant's additional action in nuisance, the court reminded that a county nuisance must equate to "inverse condemnation" to entail county responsibility[241] and that personal injury "'does not constitute personal property'" that can be condemned.[242]

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234. 289 Ga. App. 757, 658 S.E.2d 147 (2008).

235. *See id.* at 757, 658 S.E.2d at 150. Additionally, the plaintiff alleged that the defendants had rejected his request for a full evaluation of his daughter in order to rule out a learning disorder. *Id.*

236. *Id.* at 759, 658 S.E.2d at 151 (quoting Crisp County Sch. Dist. v. Pheil, 231 Ga. App. 139, 140, 498 S.E.2d 134, 136 (1998)). "Accordingly, the trial court properly dismissed [the plaintiff's] tort claims against the . . . County School District." *Id.*

237. 287 Ga. App. 366, 651 S.E.2d 771 (2007).

238. *Id.* at 366, 651 S.E.2d at 772. The plaintiff "was injured when she stepped on a [county] water meter cover as she was walking across an easement in front of her home." *Id.*

239. *Id.* at 368, 651 S.E.2d at 773.

240. *Id.* at 369, 651 S.E.2d at 774. "A county's immunity is thus complete unless waived by statute, and includes protection from suits involving claims of negligence, such as the one here." *Id.* at 367-68, 651 S.E.2d at 773 (citing Schulze v. DeKalb County, 230 Ga. App. 305, 306-07, 496 S.E.2d 273, 275 (1998)).

241. *Id.* at 369, 651 S.E.2d at 774. Under the Georgia Constitution, "a county may be held liable through inverse condemnation when a nuisance amounts to a taking of property for public purposes." *Id.* (citing GA. CONST. art. I, § 3, para. 1; Howard v. Gourmet Concepts Intl., 242 Ga. App. 521, 524, 529 S.E.2d 406, 410 (2000)). For analysis of a county's unique nuisance responsibility, see R. Perry Sentell, Jr., *Georgia County Liability: Nuisance or Not?*, 43 MERCER L. REV. 1 (1991).

242. *Rutherford*, 287 Ga. App. at 369, 651 S.E.2d at 774 (quoting *Howard*, 242 Ga. App. at 524, 529 S.E.2d at 410). The court thus affirmed the trial judge's dismissal of the plaintiff's nuisance claim. *Id.*

A complaint in inverse condemnation similarly failed the water supplier in *Jones v. Putnam County*,[243] as it objected to the county's competition in selling water to the plaintiff's customers.[244] There, the court of appeals summarily followed the lead of the supreme court: "'[G]overnmental action which causes or results in an individual's loss of business, standing alone, does not constitute a constitutional 'taking' of property which gives rise to any right to receive compensation from the sovereign.'"[245]

In *Williams v. Whitfield County*,[246] the claimant argued that the county waived tort immunity. The case featured a motorcyclist's action for an accident on county roads at an insufficiently guarded construction site.[247] The plaintiff maintained that an excavator parked at the site constituted an insured "motor vehicle" that operated to waive the county's tort immunity.[248] In response, the court analyzed the motor vehicle liability insurance statute[249] and emerged with mixed conclusions.[250] On the one hand, it agreed "that the excavator qualifies as a 'motor vehicle'" for purposes of insurance waiver.[251] Contrarily, "the excavator was not being used as a motor vehicle at the time of [the

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243. 289 Ga. App. 290, 656 S.E.2d 912 (2008).

244. *See id.* at 292-93, 656 S.E.2d at 914. The plaintiff had provided exclusive water services to the residents of a subdivision since the mid-1970s until the county began servicing the area in 2005. However, the plaintiff did not possess a no-compete agreement with the county. *Id.* at 290-91, 656 S.E.2d at 913.

245. *Id.* at 291, 656 S.E.2d at 913 (alteration in original) (quoting Amos Plumbing & Elec. Co. v. Bennett, 261 Ga. 810, 811, 411 S.E.2d 490, 491 (1992)). Accordingly, the court affirmed the trial court's grant of summary judgment to the county. *Id.* at 293, 656 S.E.2d at 914.

246. 289 Ga. App. 301, 656 S.E.2d 584 (2008).

247. *See id.* at 301, 656 S.E.2d at 585. The plaintiff alleged that he reacted to a "road closed" barricade by braking and sliding along the graveled road shoulder and off a steep embankment. He charged the county with negligence in failing to provide sufficient warning signs. *Id.* at 301-02, 656 S.E.2d at 585.

248. *Id.* at 303-04, 656 S.E.2d at 587. The county had hired a private contractor to perform the construction work, and the contractor owned and operated a "tracked Caterpillar excavator" in doing the job. As a part of its agreement with the county, the contractor maintained an automobile liability insurance policy that listed the excavator. At the time of the accident, the excavator was parked some three-hundred feet away from the barricade. *Id.* at 302, 656 S.E.2d at 586.

249. O.C.G.A. § 33-24-51 (2005) (authorizing the local government to waive its immunity by purchasing liability insurance for damages arising "by reason of ownership, maintenance, operation, or use of" its motor vehicles). For treatment, see R. Perry Sentell, Jr., *Tort Liability Insurance in Georgia Local Government Law*, 24 MERCER L. REV. 651 (1973). The plaintiff's accident occurred prior to the 2002 amendment of the statute. *Williams*, 289 Ga. App. at 303, 656 S.E.2d at 586.

250. *See Williams*, 289 Ga. App. at 303, 305, 656 S.E.2d at 586-88.

251. *Id.*, 656 S.E.2d at 587.

plaintiff's] accident."[252] Rather, the vehicle's mere presence at the scene played no part in the incident producing the plaintiff's injuries, and the vehicle's liability insurance coverage resulted in no waiver of the county's sovereign immunity.[253]

Another waiver effort came to naught in *DeKalb State Court Probation Department v. Currid*,[254] an action for the death of a probationer who fell from a county sanitation truck while performing community service.[255] The plaintiffs sought liability under the Community Service Act,[256] urging that the statute waived county immunity for "'gross negligence, recklessness, or willful misconduct.'"[257] Rejecting the contention, the court of appeals emphasized the Georgia constitution's restrictive formulation: The Georgia constitution allows waiver only by a statute "'which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.'"[258] Because "the Community Service Act does not specifically provide either that sovereign immunity is waived or the extent of the waiver,"[259] the court refused to "read into the [statute] a waiver of [the] County's sovereign immunity."[260]

The plaintiffs of the period fashioned considerable litigation directly against county officers or employees themselves.[261] The plaintiffs in

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252. *Id.* at 305, 656 S.E.2d at 587.

253. *Id.*, 656 S.E.2d at 587-88. Alternatively, the court emphasized the private contractor's sole responsibility for the work and its ownership and operation of the excavator. *Id.*, 656 S.E.2d at 588. "Therefore, it was not a motor vehicle for which the county had provided liability insurance coverage pursuant to OCGA § 33-24-51(a) or that would waive the county's sovereign immunity under OCGA § 33-24-51(b)." *Id.* The court thus affirmed the trial judge's grant of summary judgment for the county. *Id.*

254. 287 Ga. App. 649, 653 S.E.2d 90 (2007).

255. *See id.* at 649, 653 S.E.2d at 91.

256. O.C.G.A. §§ 42-8-70 to -74 (1997).

257. *Currid*, 287 Ga. App. at 650, 653 S.E.2d at 92 (quoting O.C.G.A. § 42-8-71(d) (1999)). Section 42-8-71(d) states, "This limitation of liability does not apply to actions on the part of any agency or community service officer which constitutes gross negligence, recklessness, or wilful misconduct." O.C.G.A. § 42-8-71(d). The plaintiffs alleged the county's gross negligence, recklessness, and willful indifference to the decedent's safety "in assigning him unsafe community service work." *Currid*, 287 Ga. App. at 650, 653 S.E.2d at 91.

258. *Currid*, 287 Ga. App. at 651, 653 S.E.2d at 93 (quoting GA. CONST. art. I, § 2, para. 9(e)).

259. *Id.* at 652, 653 S.E.2d at 93.

260. *Id.* at 653, 653 S.E.2d at 94. Accordingly, the court reversed the lower court in entering judgment on a jury verdict favoring the plaintiffs. *Id.* at 654, 653 S.E.2d at 95.

261. For treatment of personal liability litigation in local government law, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979); R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law:*

Gregory v. Clive,[262] for example, targeted the county building inspector's failure to inspect a new barn that subsequently collapsed in a wind gust.[263] In defense, the inspector sought protection by the public duty doctrine—a principle limiting an official's legal duty only to the general public rather than to any individual.[264] Here, the supreme court granted certiorari to review the court of appeals determination that "the public duty doctrine is limited to the police protection activities of law enforcement officers."[265] Reviewing its decision giving birth to the doctrine,[266] as well as that decision's progeny,[267] the court confirmed the principle's limitation: "The public duty doctrine . . . addresses only the provision of police protection services traditionally done by police law enforcement personnel."[268] Accordingly, the doctrine afforded no protection to the building inspector.[269]

Nichols v. Prather[270] provided the court of appeals an occasion for redrawing a pivotal distinction in actions against county officers. The case—a claim for the death of one struck by a speeding deputy sheriff[271]—drew complaints against the deputy and sheriff in their dual

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The Haunting Hiatus of Hennessy, 40 MERCER L. REV. 27 (1988); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993); R. Perry Sentell, Jr., *"Official Immunity" in Local Government Law: A Quantifiable Confrontation*, 22 GA. ST. U. L. REV. 597 (2006).

262. 282 Ga. 476, 651 S.E.2d 709 (2007).

263. *See id.* at 476, 651 S.E.2d at 709. The defendant inspected the plaintiffs' newly constructed home but not the barn that then collapsed in a storm, injuring the plaintiffs. *Id.*

264. *Id.* at 477, 651 S.E.2d at 710. Under the public duty doctrine, "'liability does not attach where the duty owed by the governmental unit runs to the public in general and not to any particular member of the public [except where there is] a special relationship between the governmental unit and the individual giving rise to a particular duty owed to that individual.'" *Id.* (alterations in original) (quoting City of Rome v. Jordan, 263 Ga. 26, 27, 426 S.E.2d 861, 862 (1993)). For analysis, see R. Perry Sentell, Jr., *Georgia's Public Duty Doctrine: The Supreme Court Held Hostage*, 51 MERCER L. REV. 73 (1999).

265. *Gregory*, 282 Ga. at 476, 651 S.E.2d at 709 (citing Clive v. Gregory, 280 Ga. App. 836, 841, 635 S.E.2d 188, 193 (2006)).

266. *See Jordan*, 263 Ga. 26, 426 S.E.2d 861.

267. *See, e.g.*, Rowe v. Coffey, 270 Ga. 715, 515 S.E.2d 375 (1999); Hamilton v. Cannon, 267 Ga. 655, 482 S.E.2d 370 (1997). The court also noted the now overruled court of appeals decision in *City of Lawrenceville v. Macko*, 211 Ga. App. 312, 439 S.E.2d 95 (1993), extending the doctrine to building inspectors. *Gregory*, 282 Ga. at 478, 651 S.E.2d at 710.

268. *Gregory*, 282 Ga. at 478, 651 S.E.2d at 711 (citing *Rowe*, 270 Ga. at 716, 515 S.E.2d at 376).

269. *See id.*, 651 S.E.2d at 710-11. The court deemed it unnecessary to formulate a precise definition of "police services." *Id.*, 651 S.E.2d at 711.

270. 286 Ga. App. 889, 650 S.E.2d 380 (2007).

271. *See id.* at 890, 650 S.E.2d at 382-83. The deputy struck the decedent after midnight as she walked across a highway from a restaurant to her car. The deputy was

capacities.[272] The suits against the officers in their official capacities, the court delineated, comprised "essentially [suits] against the county"[273] itself and enjoyed the county's sovereign immunity. Here, however, the county's liability insurance on the police car operated to waive that immunity to the extent of the insurance.[274] In contrast, the suit against the deputy in his individual capacity stood subject to the ministerial versus discretionary dichotomy.[275] That dichotomy first necessitated a jury's determination of the deputy's precise acts at the time he struck the decedent.[276] Should the trial court then classify those acts as discretionary, the deputy would enjoy official immunity.[277]

Other cases involved only "individual liability" claims and thus turned exclusively upon the ministerial versus discretionary distinction. *Murphy v. Bajjani*[278] featured an action against school officials and personnel for severe injuries inflicted by one high school student upon

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driving approximately seventy-five miles per hour in the center of the turn lane and had activated neither his siren nor blue lights. *Id.*

272. *Id.*, 650 S.E.2d at 383. Preliminarily, the court held that the sheriff and deputy were not "state officers or employees" under the Georgia Tort Claims Act, O.C.G.A. §§ 50-21-20 to -37 (2006), for purposes of this case. *Nichols*, 286 Ga. App. at 893, 650 S.E.2d at 385. For perspective on the statute, see R. Perry Sentell, Jr., *Tort Claims Against the State: Georgia's Compensation System*, 32 GA. L. REV. 1103 (1998).

273. *Nichols*, 286 Ga. App. at 893, 650 S.E.2d at 385 (citing Gilbert v. Richardson, 264 Ga. 744, 746 n.4, 452 S.E.2d 476, 478 n.4 (1994)).

274. *Id.* at 895, 650 S.E.2d at 386. In respect to both the sheriff and the deputy, "sovereign immunity is waived under OCGA § 33-24-51 to the extent the county purchased . . . liability insurance on the car." *Id.* at 894, 650 S.E.2d at 385. Of course, "the county's liability insurer will necessarily pay for any judgment against [the sheriff and the deputy] in their official capacities in this case." *Id.* at 895, 650 S.E.2d at 386. For perspective on the local government motor vehicle liability insurance statute, see R. Perry Sentell, Jr., *Tort Liability Insurance in Georgia Local Government Law*, 24 MERCER L. REV. 651 (1973).

275. *See Nichols*, 286 Ga. App. at 895-96, 650 S.E.2d at 386-87. For background, see R. Perry Sentell, Jr., *Georgia Local Government Officers: Rights for Their Wrongs*, 13 GA. L. REV. 747 (1979); R. Perry Sentell, Jr., *Individual Liability in Georgia Local Government Law: The Haunting Hiatus of Hennessy*, 40 MERCER L. REV. 27 (1988); R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993); R. Perry Sentell, Jr., *"Official Immunity" in Local Government Law: A Quantifiable Confrontation*, 22 GA. ST. U. L. REV. 597 (2006).

276. *Nichols*, 286 Ga. App. at 896, 650 S.E.2d at 387. Here, "a jury issue remains as to what [the deputy] was doing at the time he collided with [the decedent]." *Id.*

277. *Id.* at 897, 650 S.E.2d at 387. "Once the factual issues are resolved, the trial court can then determine whether [the deputy] is entitled to official immunity." *Id.* "We note that, even if [the deputy] is entitled to official immunity for claims against him in his individual capacity, that immunity does not extend to [the sheriff]." *Id.* at 897 n.9, 650 S.E.2d at 387 n.9 (citing *Gilbert*, 264 Ga. at 753-54, 452 S.E.2d at 483-84).

278. 282 Ga. 197, 647 S.E.2d 54 (2007).

another.[279] The court of appeals had determined that failure to produce a statutorily mandated plan[280] for curbing school violence violated a ministerial duty for which the defendants enjoyed no official immunity.[281] Reversing, the supreme court elucidated the material statute in an entirely different light:

> [The statute] is a textbook example of the difference between statutorily-mandated action and a ministerial act, as it clearly requires that action be taken and sets forth parameters for the action to be taken, but the action required is not "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty" that is the hallmark of a ministerial duty. Rather, the statutory mandate that a school safety plan be created calls for the plan's creator to exercise a discretionary duty . . . since the statute requires the creation of a school safety plan that has three goals . . . that addresses preparedness for five specified threats to school safety.[282]

Accordingly, "the mandated [statutory] action . . . is a discretionary duty" entitling the defendants to official immunity.[283]

The court of appeals arrived at the same conclusion in *Chisolm v. Tippens*,[284] which featured a parent's action against school employees for denial of access to his child's educational records.[285] The court

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279. *See id.* at 197, 647 S.E.2d at 55-56.

280. *See* O.C.G.A. § 20-2-1185(a) (2005).

281. *Bajjani*, 282 Ga. at 197, 647 S.E.2d at 56. The court of appeals thus held that the defendants were not entitled to a judgment on the pleadings. *Id.*

282. *Id.* at 199-200, 647 S.E.2d at 57 (internal citations omitted) (quoting Leake v. Murphy, 284 Ga. App. 490, 495, 644 S.E.2d 328, 333 (2007); Leake v. Murphy, 274 Ga. App. 219, 221, 617 S.E.2d 575, 578 (2005)). Indeed, the supreme court noted that in the latter survey period case (Leake II), the court of appeals itself had "determined that the third sentence of OCGA § 20-2-1185(a) (stating that the school safety plan 'shall be prepared with input from students. . . , parents . . . , teachers, . . .' and other groups of individuals) imposed a discretionary duty upon the board and superintendent" and that plaintiffs' negligence claim was barred by official immunity. *Id.* at 199 n.2, 647 S.E.2d at 57 n.2 (ellipses in original).

283. *Id.* at 200, 647 S.E.2d at 57-58. Additionally, the court held that a penal statute (O.C.G.A. § 20-2-1184 (2005)) requiring the reporting of proscribed acts on school grounds did not create a civil cause of action, and that "neither the Eighth Amendment nor the Due Process Clause of the Fourteenth Amendment can serve as the basis for a ministerial duty on the part of school employees to provide medical care to [the student]." *Id.* at 203, 647 S.E.2d at 59.

284. 289 Ga. App. 757, 658 S.E.2d 147 (2008).

285. *See id.* at 757, 658 S.E.2d at 150. The plaintiff's claim against the school district, dismissed for sovereign immunity, was previously noted. *See* text accompanying *supra*

summarily rejected the plaintiff's position that "decisions by school officials regarding the evaluation, placement, or delivery of educational services . . . are ministerial."[286] Rather, "[s]uch decisions are purely discretionary and must be performed with actual malice to be actionable."[287] None of the plaintiff's allegations evidenced actual malice, the court concluded, and the defendant employees enjoyed official immunity from the complaint.[288]

F. Zoning

The period's zoning controversies included *DeKalb County v. Cooper Homes*,[289] which involved the plaintiff builder's efforts to construct five homes.[290] When the county zoning board of appeals (ZBA) denied the plaintiff's application for side yard setback variances, the plaintiff petitioned the superior court for review. The plaintiff also sought a mandamus against the county planning and development department, which had denied his application for building permits. Granting the mandamus, the trial court reasoned that the plaintiff was under no obligation to exhaust his administrative remedies by first appealing the permit's denial to the ZBA. This appeal, the court found, would constitute a "futile act," requiring a decision of the same issue by the same body that had denied the variances.[291]

Granting the county's application for discretionary review,[292] the supreme court disagreed that the plaintiff's appeal of the denial of the building permits would have constituted a "useless act."[293] On the contrary, the ZBA's determination of the variance issue required five

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note 237.

286. *Chisolm*, 289 Ga. App. at 760, 658 S.E.2d at 152.

287. *Id.*

288. *Id.* "None of these alleged acts shows the malicious, wilful, or wanton conduct necessary to overcome defendants' claim of immunity." *Id.* The court likewise rejected the plaintiff's reliance on assorted statutes as either immaterial to the plaintiff's claims or failing to provide civil actions for damages. *See id.* at 760-62, 658 S.E.2d at 152-53. The court thus affirmed the trial court's dismissal of the plaintiff's action. *Id.* at 762, 658 S.E.2d at 153.

289. 283 Ga. 111, 657 S.E.2d 206 (2008).

290. *See id.* at 111-12, 657 S.E.2d at 207. The plaintiff sought "to build five residences on ten legal nonconforming lots of record." *Id.* at 111, 657 S.E.2d at 207.

291. *Id.* at 111-12, 657 S.E.2d at 207-08.

292. *Id.* at 112, 657 S.E.2d at 208. "[W]e were particularly concerned with the trial court's determination that it was unnecessary for [the plaintiff] to exhaust its administrative remedies before applying for a writ of mandamus, and whether it was appropriate to issue a writ of mandamus." *Id.*

293. *Id.* at 113, 115, 657 S.E.2d at 208, 209.

findings set forth in the county's zoning code.[294] In contrast, the ZBA's decision on the building permits would have depended upon whether they fell within an exception to the county's zoning ordinance.[295] Accordingly, "the issue which would have been presented to and decided by the ZBA in an appeal of the denial of building permits by the county's planning and development [department] was not the same issue decided by the ZBA in the denial of interior side yard setback variances."[296] The trial court had thus erred in granting plaintiff's mandamus prior to his exhaustion of administrative remedies.[297]

III. LEGISLATION

The 2008 Georgia General Assembly yielded a spate of legislation impacting local governments—mention of only a few measures will illustrate the range of subjects covered.[298]

The legislature moved to restrict the times when local governments can hold special elections for taxes, bonds, and the like:[299] Those

294. *Id.* at 113, 657 S.E.2d at 209 (citing DEKALB COUNTY, GA., CODE § 27-916(a) (2008)). "In reviewing the application for variances, the ZBA could grant a variance only after making the five findings set forth in Section 27-916(a) of the zoning chapter of the county code." *Id.*

295. *Id.* at 115, 657 S.E.2d at 209 (citing DEKALB COUNTY, GA., CODE § 27-960(d) (2008)). "[T]he trial court determined the planning and development department's rationale for denial was not appropriate because, the trial court found, [the plaintiff's] application fell within an exception to the requirement of a land development permit, . . . [namely] Section 27-960(d) of the zoning ordinance." *Id.* at 114, 657 S.E.2d at 209.

296. *Id.* at 115, 657 S.E.2d at 209.

297. *Id.* "Consequently, the trial court erred when it applied the 'futile act' exception to the requirement that administrative remedies be exhausted before mandamus be sought, and erred when it addressed the merits of the mandamus petition and granted the writ of mandamus." *Id.*

Another zoning controversy of the era, *Henry v. Cherokee County*, 290 Ga. App. 355, 659 S.E.2d 393 (2008), turned upon the county ordinance's nonconforming use provision. *See id.* at 355, 659 S.E.2d at 394. Under that provision, the court of appeals held that the original property owner could later expand his nonconforming automobile salvage yard to his entire lot and was not confined to the part of the lot upon which he had previously operated. *Id.* at 357, 659 S.E.2d at 395-96. Conversely, a subsequent purchaser of a part of the lot could not go beyond the nonconforming use to install a car shredder operation thereon. *Id.* at 358, 659 S.E.2d at 396.

298. Information on the measures summarized is drawn from a helpful paper, "Final Legislative Report," published by the Association County Commissioners of Georgia (May 2008).

299. Ga. H.R. Bill 296, Reg. Sess. (2008). These include elections for special purpose local option sales taxes, tax allocation districts, general obligation bonds, homestead exemptions, and liquor restrictions. *Id.*

referendums are limited to March or November of odd-numbered years and to the primary dates in even-numbered years.[300]

Property taxes drew legislative attention on several fronts. For example, interest rates on funds due to taxpayers following a property tax appeal must equal the rate of interest on funds owed by taxpayers to tax commissioners.[301] Additionally, taxpayers who violate conservation use covenants are afforded thirty days in which to correct the violation, and governments are empowered to renew existing conservation covenants after 2012.[302] Finally, the legislature created a new conservation use program for forest tracts of at least two hundred acres.[303] Authorized covenants on the tracts would continue for fifteen years, and increases in the subject property values would be limited to a maximum of three percent a year.[304]

A revision of the Hotel Motel Tax Code[305] empowers local governments to increase their tax rate from five percent without seeking specific legislative approval.[306] Rather, the government may simply adopt a local act increasing the rate, with the additional rate revenues being split between tourism promotion and tourism capital projects.[307]

The General Assembly emulated other states in creating a revolving loan fund for local governments—a state infrastructure bank for transportation needs.[308] Local governments may apply to the bank for financial assistance[309] with such transportation projects as roads,

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300. *Id.* The measure postpones its effective date to January 1, 2010. *Id.*

301. Ga. H.R. Bill 1081, Reg. Sess. (2008). The commissioner must pay the appeal refund within sixty days. *Id.*

302. *Id.*

303. Ga. H.R. Bill 1211, Reg. Sess. (2008); Ga. H.R. Res. 1276, Reg. Sess. (2008). There is no maximum acreage limit. *See* Ga. H.R. Bill 1211.

304. *Id.* The state would reimburse counties for lost revenues, and the new program would be effective on January 1, 2009, pending passage in a statewide referendum of November 2008. *Id.* Yet another delayed effective-date measure was Ga. S. Res. 996, Reg. Sess. (2008), calling for a constitutional amendment authorizing the General Assembly to empower school boards to contribute a portion of their ad valorem taxes to Tax Allocation Districts. *Id.* The purpose of this amendment is to counter the Georgia Supreme Court's decision in *Woodham v. City of Atlanta*, 283 Ga. 95, 657 S.E.2d 528 (2008), prohibiting such school system contributions. Again, the amendment will take effect on January 1, 2009 as a result of the amendment's passage in a statewide referendum held in November 2008. Ga. S. Res. 996.

305. Ga. H.R. Bill 1168, Reg. Sess. (2008).

306. *See id.*

307. *Id.* The revision does not affect local governments already imposing tax rates greater than five percent. *See id.*

308. Ga. H.R. Bill 1019, Reg. Sess. (2008).

309. *Id.* This includes loans to the local government. *Id.*

bridges, airports, rail facilities, and the like, with the fund receiving its initial capitalization from the 2009 state budget.[310]

State legislators reflected increasing concerns with several aspects of local government safety. A prominent example of that concern materialized in a statute requiring local school districts to survey and identify railroad crossings used by school buses that do not possess "active warning devices."[311] Moreover, the districts must attempt to reduce the number of school bus routes passing over crossings that are not equipped with active warning devices (such as flashing light signals, bells, automated gates, and the like);[312] and the Georgia State Department of Transportation (DOT) must employ the districts' surveys in its efforts to prioritize its attention to railroad crossing upgrades.[313]

Conversely, legislative concern also yielded a statute restricting local government safety efforts.[314] Emanating from public complaints over "red-light cameras," the statute imposes several requirements: (1) prior to installing a camera, the local government must conduct engineering studies; (2) the government must apply for a camera permit from the DOT; (3) the permit must show that all other safety measures have been exhausted; and (4) the DOT must review the permit every three years.[315] Additionally, the DOT is authorized to audit revenues generated by the camera, review public complaints, and revoke the permit upon the government's violation of the rules.[316]

Likewise focusing upon local government traffic regulation, the General Assembly prohibited governments from levying additional taxes or fees against insurance companies for the governmental expense of public safety responses to motor vehicle accidents.[317]

Still other local government regulatory efforts garnered the legislative designation of illegality.[318] Thus, the government is expressly prohibited from issuing backdated licenses, permits, or other authorizations in

310. *Id.*

311. Ga. H.R. Bill 426, Reg. Sess. (2008).

312. *Id.*

313. *Id.*

314. Ga. H.R. Bill 77, Reg. Sess. (2008).

315. *Id.*

316. *Id.* Upon permit revocation, the local government must remit all revenues to the state until the matter is rectified. *Id.*

317. Ga. S. Bill 348, Reg. Sess. (2008). Exceptions include EMS responses and fees billed to an insured individual. *Id.*

318. Ga. H.R. Bill 975, Reg. Sess. (2008). That is, the specified regulatory efforts are expressly declared unlawful. *See id.*

territory formerly but no longer within the government's regulatory jurisdiction.[319]

Finally, the 2008 General Assembly reacted to Georgia's prolonged drought with a variety of enactments. Three of those measures well portray the diversity and range of legislative consideration afforded the emergency. One statute requires that local water utilities must apply to the Georgia State Environmental Protection Division (EPD) for permission to adopt any drought water restrictions beyond state-mandated restrictions.[320] In turn, aggrieved parties may appeal the EPD's approval of the local utility's application.[321] A second enactment specifies conditions under which "gray water" can be used for watering private lawns and plants.[322] The statute requires that local health boards adopt the specified conditions and empowers local governments to punish violators.[323] In contrast, the third measure adopts a broader perspective by creating a Water Supply Division in state government[324] and assigns the Division such duties as siting water reservoirs and creating a reservoir fund for grants and loans.[325] Additionally, the statute encourages private contracting for constructing reservoirs with a view toward facilitating the permitting process.[326]

IV. CONCLUSION

It is humanly and legally impossible to take the "local" out of "local government law!"

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319. *Id.* That is, areas now outside the local government as a result of such territorial procedures as incorporation, annexation, deannexation, or the like. *Id.*

320. Ga. H.R. Bill 1281, Reg. Sess. (2008).

321. *Id.* This statutory requirement is in addition to the state's mandated ten percent cut in water usage by local governments.

322. Ga. S. Bill 463, Reg. Sess. (2008). This includes water discharged from bathtubs, showers, clothes washers, and the like. *Id.*

323. *Id.* The prescribed punishment consists of fines up to $100. *Id.*

324. Ga. S. Bill 342, Reg. Sess. (2008). The Division is to implement the Water Supply Act. *Id.*

325. *Id.* The statute's long-range goal envisions $100 million per year in state funding for ten years. *See id.*

326. *Id.* The statute provides tax credits for water-saving technology. *Id.*

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