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Ken E. Jarrard

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by Ken E. Jarrard*

I. CONTRACTS

A. *Multiyear Agreements and Proprietary Functions*

Georgia law provides, "One council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government."[1] "In addition to ordinances, the prohibition applies to contracts entered into by municipalities."[2] "To the extent that a governmental contract impinges on a municipality's ability to legislate freely, the contract is ultra vires and void."[3] This statute contains an exception providing that the terms and conditions otherwise required for a county or city to enter into a multiyear agreement do not apply with respect to "contracts arising out of their proprietary functions."[4] Little guidance historically has existed regarding what constitutes a county's or municipality's "proprietary" function within the confines of section 36-60-13 of the Official Code of Georgia Annotated (O.C.G.A.).[5]

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* Founding Partner of Jarrard & Davis, LLP, Cumming, Georgia. Middle Tennessee State University (B.S., 1990); University of Tennessee, Knoxville (M.P.A., 1992; J.D., cum laude, 1995). Member, State Bars of Georgia and Tennessee.

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1. O.C.G.A. § 36-30-3(a) (2012).
2. Unified Gov't of Athens-Clarke Cnty. v. Stiles Apartments, Inc., 295 Ga. 829, 833, 764 S.E.2d 403, 407 (2014).
3. *Id.* at 833, 764 S.E.2d at 407 (quoting City of McDonough v. Campbell, 289 Ga. 216, 217, 710 S.E.2d 537, 538 (2011)).
4. O.C.G.A. § 36-60-13(j) (2012 & Supp. 2015).
5. O.C.G.A. § 36-60-13 (2012 & Supp. 2015).

The survey period from June 1, 2014 to May 31, 2015[6] witnessed a degree of illumination on this critical issue. In *Unified Government of Athens-Clarke County v. Stiles Apartments, Inc.*,[7] the Georgia Supreme Court considered whether a multiyear contract providing that a parking lot would be jointly constructed on private and public property for use by the private party was ultra vires because it bound future councils.[8] The court framed the pertinent issues as follows:

> (1) Is the contract governmental in nature and hence subject to the prohibition, or proprietary and hence not subject to the prohibition? (2) If governmental in nature, is the contract subject to an exception? (3) If not, is the contract subject to ratification and has it been ratified? (4) If not, is the municipality estopped from relying on the statutory prohibition?[9]

The court was persuaded that the underlying rationale for the parking lot "was to relieve traffic congestion on a public street via the construction and maintenance of a sidewalk and parking area."[10] The court, relying on authority from 1968,[11] held that the "construction and maintenance of a street in a safe condition for travel are corporate/proprietary functions not subject to the prohibition against binding successor councils."[12] Consequently, the supreme court held that the multiyear agreement was not subject to the prohibition against binding successor councils and was not, therefore, ultra vires.[13]

B. Plain Language of a Contract

Within that same vein, *Jackson County v. Upper Oconee Basin Water Authority*[14] serves as a strong admonition to review agreements carefully to ensure that the obligations of the parties are clearly identified, particularly within the realm of a long-term agreement where conditions can change.[15] This warning is especially true within the

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6. For an analysis of Georgia local government law during the prior survery period, see Kirk Fjelstul, *Local Government Law, Annual Survey of Georgia Law*, 66 MERCER L. REV. 135 (2014).

7. 295 Ga. 829, 764 S.E.2d 403 (2014).

8. *Id.* at 832, 833, 764 S.E.2d at 407.

9. *Id.* at 833, 764 S.E.2d at 408 (quoting City of Powder Springs v. NMM Props., Inc., 253 Ga. 753, 756-57, 325 S.E.2d 155, 158 (1985)).

10. *Id.*

11. Town of Fort Oglethorpe v. Phillips, 224 Ga. 834, 165 S.E.2d 141 (1968).

12. *Stiles Apartments*, 295 Ga. at 833, 764 S.E.2d at 408 (citing *Phillips*, 224 Ga. at 837, 165 S.E.2d at 143-44).

13. *Id.*

14. 330 Ga. App. 11, 766 S.E.2d 488 (2014), *cert. applied for.*

15. *Id.* at 14, 15, 16, 766 S.E.2d at 491, 492.

context of intergovernmental agreements, which can last up to fifty years.[16] In *Upper Oconee Basin Water Authority*, the County entered into a contract with the Water Authority allowing the County to withdraw a maximum quantity of water equal to the "EPD approved Established Yield."[17] The relevant contract defined Established Yield of the Georgia Department of Natural Resources Environmental Protection Division (EPD) to mean "the maximum rate of withdrawal which can be sustained during critical dry periods as established by a mathematical simulation of the reservoir operation as it would have occurred during the worst historic drought for which applicable streamflow records are available."[18] Also, the agreement did not name the party responsible for conducting the simulation or provide for when the simulation should be conducted. The County claimed a right to force a recalculation of the Established Yield with new drought data that was not available at the time of the original agreement.[19]

The court disagreed, determining such a right did not exist under the plain language of the contract and that once the EPD approved the initial Established Yield, there was no obligation to recalculate that amount.[20] The court concluded "the Agreement does not include a provision requiring the Authority to conduct multiple simulations based upon changing data," and, therefore, "the Authority could not be in breach of an obligation to recalculate the Established Yield when such an obligation does not exist under the plain language of the Agreement."[21]

C. *Termination or No-Damage Clauses for Delays*

The Georgia Court of Appeals in *Effingham County v. Roach*[22] confirmed that a practitioner must precisely articulate what delays and causes for delays are intended to be enforceable and operational when drafting termination or no-damages clauses because no relief will be afforded to delays or their causes when not set forth with specificity.[23] In *Roach*, the County entered into an agreement to bring water and sewer services to a developer's property. The County never provided

16. *Id.* at 12, 766 S.E.2d at 490.

17. *Id.*

18. *Id.* (quoting Upper Oconee Basin Water Auth. v. Jackson, 305 Ga. App. 409, 411, 699 S.E.2d 605, 607 (2010)).

19. *Id.* at 13, 766 S.E.2d at 491, 492.

20. *Id.* at 16, 766 S.E.2d at 492.

21. *Id.* at 15, 16, 766 S.E.2d at 492.

22. 329 Ga. App. 805, 764 S.E.2d 600 (2014), *reconsideration denied* (Nov. 20, 2014), *cert. denied*, 2015 Ga. LEXIS 222 (2015).

23. *Id.* at 815, 764 S.E.2d at 608.

water or sewer service to the development and, instead, engaged in protracted discussions with the City of Rincon about which governmental entity would provide the service. The developer sued the County for breach of contract.[24]

The County based its primary contractual defense on the contract's termination or no-damage clause, which provided:

> In no event shall the County be held liable to the Developer for consequential damages or economic losses arising from delayed performance; provided, however, that in the event the County fails to timely perform its obligations under this Agreement after written notice of default from the Developer, then Developer shall be entitled to complete the County's construction obligations hereunder . . . .[25]

The developer neither gave the described notice nor attempted to complete the work.[26] Nonetheless, the Georgia Court of Appeals held that the relevant contractual provision did not relieve the County from liability.[27]

Relying on *Department of Transportation v. Arapaho Construction, Inc.*,[28] the court held that "termination or no-damage clauses will not be applied to delays or their causes not contemplated by the parties."[29] Furthermore, "such provisions . . . must be clear and unambiguous, [and] specific in what they purport to cover."[30] Here, the developer "presented evidence suggesting that the delay in providing [water and sewer utilities] to [the property] was caused, at least in part, by the County's protracted discussions" with another city "about which governmental entity was going to provide [water and sewer utilities] to [the property]."[31] Because the termination or no-damage clause did not "specify

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24. *Id.* at 805, 809, 764 S.E.2d at 603, 604.

25. *Id.* at 815, 764 S.E.2d at 608.

26. *Id.*

27. *Id.* at 816, 764 S.E.2d at 608.

28. 257 Ga. 269, 357 S.E.2d 593 (1987).

29. *Roach*, 329 Ga. App. at 815, 764 S.E.2d at 608 (quoting *Arapho Contr.*, 257 Ga. at 270, 357 S.E.2d at 594).

30. *Id.* (alterations in original) (quoting *Arapaho Constr.*, 257 Ga. at 270, 357 S.E.2d at 594). In *Arapaho Construction*, a bridge contractor overcame a no-damage contractual provision with the Georgia Department of Transportation (GDOT) that only authorized termination when a court ordered injunction prevented the contractor from working on a project. 257 Ga. at 270, 357 S.E.2d at 594. Because the GDOT attempted to utilize that provision to terminate the contract when the GDOT had not secured necessary right-of-way, the supreme court held that the termination provision was not sufficiently specific and unambiguous to cover the GDOT's failure to provide the bridge contractor with the necessary right-of-way to conduct its work. *Id.*

31. *Roach*, 329 Ga. App. at 815-16, 764 S.E.2d at 608.

this type of delay," the court of appeals determined that there was "an issue of fact for the jury."[32]

II. INSURANCE AND CONTRACTS

Ayers v. Ass'n of County Commissioners of Georgia-Interlocal Risk Management Agency[33] involved a Stephens County deputy sheriff, assigned to the Mountain Judicial Circuit Narcotics Criminal Investigation and Suppression Team (the NCIS Team), who shot and killed a man. The NCIS Team was established in Stephens, Habersham, and Rabun Counties under intergovernmental agreements. Georgia Interlocal Risk Management Agency (GIRMA) separately insured each of the three counties under identical insurance policies. In an effort to maximize the available insurance coverage, the plaintiff (the decedent's spouse) claimed that each of the three insurance policies provided separate coverage for the actions of the Stephens County deputy.[34]

In response, GIRMA filed an action seeking a declaratory judgment that the insurance policy only applied to the Stephens County claims.[35] Applying the well-settled rule that ambiguities in insurance contracts will be construed in favor of the insured (in this case, the deputy sheriff, who would benefit from having more insurance coverage for the claim against him), the court of appeals concluded that, due to the joint creation and control of the NCIS Team by representatives of all counties, the Stephens County deputy was, for insurance purposes, an "officer" of all three counties and, thus, covered by all three GIRMA insurance policies.[36] While this case primarily involved construction of provisions of insurance contracts, it serves as a reminder of the potential risks that must be considered at the commencement of intergovernmental arrangements involving the joint or shared use of personnel.

III. TAXATION

A. *Sales Involving Government Entities*

In *CPF Investments, LLLP v. Fulton County Board of Assessors,*[37] the Georgia Court of Appeals addressed whether a county board of assessors

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32. *Id.* at 816, 764 S.E.2d at 608.

33. 332 Ga. App. 230, 771 S.E.2d 743 (2015), *cert. denied*, 2015 Ga. LEXIS 583 (2015).

34. *Id.* at 230, 771 S.E.2d at 745.

35. *Id.* at 231, 771 S.E.2d at 745.

36. *Id.* at 235, 236, 771 S.E.2d at 748, 749. The court of appeals also held that the language of the GIRMA policies did not prohibit stacking the insurance coverage under those policies. *Id.* at 239-40, 771 S.E.2d at 750-51.

37. 330 Ga. App. 744, 769 S.E.2d 159 (2015).

may treat sales involving governmental entities differently for valuation purposes than for private party sales.[38] The real property at issue originally sold for $420,000 in 2002. It was subsequently purchased in a 2010 foreclosure sale for $271,735, immediately conveyed to the Federal Home Loan Mortgage Corporation (Freddie Mac) for the same price, and finally sold to CPF Investments, LLLP (CPF) for $207,000 in 2011. Irrespective of the 2010 and 2011 sales prices, the County Board of Assessors (Board) appraised the property at $370,400 for the 2012 tax year.[39] CPF appealed the appraisal to the superior court pursuant to O.C.G.A. § 48-5-311,[40] asserting that O.C.G.A. § 48-5-2(3)[41] required the property to be appraised at the 2011 sales price for 2012.[42] The trial court disagreed, finding that the 2011 sale did not reflect the fair market value of the subject property or qualify as an arm's length, bona fide sale under O.C.G.A. § 48-5-2(3) because, as a government agency, Freddie Mac's purchase and sale was not self-interested.[43]

In support of its position, CPF submitted an affidavit to the court, stating that CPF and Freddie Mac were unaffiliated and the 2011 sale was an arm's length transaction, entered into in good faith and without fraud or deceit.[44] The Board submitted its own affidavit, alleging that governmental entities acted in the public's interest, rather than the governmental entities' interest and that, pursuant to O.C.G.A. § 48-5-274,[45] the Department of Revenue considers such sales invalid when conducting its own ratio studies.[46] Reversing and remanding the case for summary judgment in favor of CPF, the court of appeals held that the Board's allegations that governmental agency sales were not arm's length, bona fide sales were unsupported by evidence and, therefore, insufficient to rebut CPF's testimony that the sale was indeed at arm's length and without fraud.[47]

B. Thirty-Day Deadline For Filing Ad Valorem Tax Appeals

In *Dickey v. Fulton County Board of Tax Assessors*,[48] the court of appeals continued to strictly apply the thirty-day deadline—which it first

38. *Id.* at 746, 769 S.E.2d at 161.
39. *Id.* at 745, 769 S.E.2d at 160.
40. O.C.G.A. § 48-5-311 (2010 & Supp. 2015).
41. O.C.G.A. § 48-5-2(3) (2010 & Supp. 2015).
42. *CPF Inv., LLLP*, 330 Ga. App. at 745, 749, 769 S.E.2d at 160, 162.
43. *Id.* at 746, 769 S.E.2d at 160, 161.
44. *Id.* at 745, 769 S.E.2d at 160.
45. O.C.G.A. § 48-5-274 (2010 & Supp. 2015).
46. *CPF Inv., LLLP*, 330 Ga. App. at 747-48, 769 S.E.2d at 161-62.
47. *Id.* at 749, 750, 769 S.E.2d at 163.
48. 333 Ga. App. 345, 776 S.E.2d 480 (2015), *reconsideration denied* (July 21, 2015).

established in *Webb v. Board of Tax Assessors of Madison County*[49]—for filing ad valorem tax appeals under O.C.G.A. § 48-5-311.[50] Pursuant to O.C.G.A. § 48-5-311(g)(2), appeals from county board of equalization (BOE) decisions shall be made by filing and mailing written notice of appeal with the county board of assessors "within 30 days from the date on which the decision of the [BOE], hearing officer, or arbitor is delivered."[51] Notice of the BOE decision shall be mailed to each party[52] and, pursuant to the pre-2015 version of O.C.G.A. § 48-5-311(o), notice shall also be served upon the taxpayer's attorney.[53]

In *Dickey*, the taxpayer filed notice of appeal from the BOE decision thirty-three days after the decision letter had been mailed to her. The County Board of Assessors (Board) moved for summary judgment because the taxpayer's failure to timely file notice of appeal deprived the court of jurisdiction. The taxpayer argued that the time period for filing a notice of appeal was merely directory and, in the alternative, the thirty-day limitations period was inapplicable because the BOE failed to provide notice of its decision to the taxpayer's authorized representative, Property Tax Advisers, LLC (PTA).[54]

The trial court granted summary judgment to the Board and the court of appeals affirmed, holding that the "statutory limitation on the period of time in which an appeal from a judicial decision may be taken is jurisdictional" and further noting that PTA was not a law firm and did not employ any licensed attorneys.[55] It is manifest in O.C.G.A. § 48-5-311 that the legislature intended to create a clear distinction between a non-lawyer representative and an attorney because this code section specifically authorizes non-attorney representatives to appear before the BOE and make proof of service of a notice of appeal to the county board of assessors,[56] whereas O.C.G.A. § 48-5-311(o) required the notice be served only upon the taxpayer's attorney, omitting any reference to the taxpayer's representatives or employees.[57]

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49. 142 Ga. App. 784, 236 S.E.2d 925 (1977).
50. *Dickey*, 383 Ga. App. at 347, 776 S.E.2d at 481.
51. O.C.G.A. § 48-5-311(g)(2).
52. O.C.G.A. § 48-5-311(e)(6)(D)(i).
53. O.C.G.A. § 48-5-311(o) (2010).
54. *Dickey*, 333 Ga. App. at 346-47, 347, 776 S.E.2d at 481.
55. *Id.* at 347, 776 S.E.2d at 481 (quoting *Webb*, 142 Ga. App. at 784, 236 S.E.2d at 725).
56. *See* O.C.G.A. § 48-5-311(e)(6)(A).
57. O.C.G.A. § 48-5-311(o) (pre-2015 amendment stating that "actions shall instead be provided to such attorney").

IV. IMMUNITY

A. *Statutory Immunity*

In *Wyno v. Lowndes County*,[58] the Georgia Court of Appeals considered whether statutory immunity provided by the Responsible Dog Ownership Law (RDO)[59] contravened article I, section 2, paragraph 9(d) of the Georgia Constitution[60] through the immunity granted to county employees in their official capacity for the negligent performance of a ministerial duty.[61] In *Wyno*, the plaintiff brought a lawsuit against Lowndes County and four county animal control officers after his neighbor's unrestrained and "habitually loose" dog attacked and killed his wife.[62] The plaintiff alleged that the county employees previously responded to multiple complaints that the neighbor's dogs "growled and lunged at children and adults . . . [and] bit a child in the face," but that the county employees negligently failed to take any action against the owner.[63] The plaintiff contended that the animal control officers' failure to perform their ministerial duties, which included enforcing state and local animal control laws, internal policies, and other duties, worked as a waiver of official immunity. Additionally, the plaintiff argued that the RDO statutory immunity was in derogation of the Georgia Constitution article I, section 2, paragraph 9(d) to the extent that it grants immunity to county employees in their official capacity for the negligent performance of a ministerial duty. Upon motion by the County, the trial court dismissed all claims against the governmental defendants in their official and individual capacities, finding the claims were barred by sovereign immunity, official immunity, and, in the alternative, by statutory immunity under the RDO.[64]

The court of appeals affirmed the trial court's dismissal of the claims against the County and the employees in their official capacity under the RDO.[65] Despite the qualification the immunity applies to claims for "failing to enforce the provisions of this article," the court held that, based on the introductory statement of legislative intent, the immunity applied to all local government officials and employees for injuries

58. 331 Ga. App. 541, 771 S.E.2d 207 (2015), *cert. denied*, 2015 Ga. LEXIS 465 (2015).
59. O.C.G.A. §§ 4-8-20 to -33 (2010 & Supp. 2015).
60. GA. CONST. art. I, § 2, para. 9(d).
61. *Wyno*, 331 Ga. App. at 543, 771 S.E.2d at 209.
62. *Id.* at 541, 543, 771 S.E.2d at 208, 209.
63. *Id.* at 543, 771 S.E.2d at 209.
64. *Id.* at 543, 546, 771 S.E.2d at 209, 211.
65. *Id.* at 542, 771 S.E.2d at 208.

inflicted by dangerous dogs.[66] However, the court did not reach the most interesting aspect of *Wyno*—that is, the extent to which the RDO may have provided a de facto immunity to county employees where there may have otherwise been an official immunity waiver. The plaintiff argued that if the RDO provided a de facto immunity where the Georgia Constitution otherwise afforded none, the RDO must be held unconstitutional.[67] The outcome of that question will have to wait for another day because the court of appeals remanded the case back to the trial court to enter a specific order on this issue and to determine the outcome of the individual capacity claims against the animal control officers.[68]

B. Official Immunity

In *Williams v. Pauley*,[69] the Georgia Court of Appeals reviewed the official immunity defense within the context of a police officer's effort to impound a stray horse from the roadway.[70] In *Williams*, the defendant, a county police officer, responded to a 911 call reporting a horse was loose on the highway. Because he had no assistance, the officer was not able to confine or otherwise corral the horse on his own. When the officer left the scene to seek assistance, the horse strayed onto the highway, causing a fatal collision. There were no protocols or instructions guiding officers on how to deal with a stray horse, or other livestock, that posed a potential vehicular hazard.[71]

The decedent's husband brought a wrongful death claim against the officer in his individual capacity. The officer filed a motion for summary judgment, asserting official immunity as a complete bar to the claim.[72] The trial court denied the officer's motion, finding that prior to a court's ruling on the question of immunity, the jury should resolve "genuine issue[s] of material fact . . . on whether or not [the officer] attempted to take action or simply took no action at all."[73]

The Georgia Court of Appeals reversed, holding that the action was barred by official immunity because the record was clear that the officer's actions in attempting to remove the horse were discretionary, requiring the officer "to exercise personal deliberation and judgment to

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66. *Id.* at 544, 771 S.E.2d at 210.
67. *Id.* at 546, 771 S.E.2d at 211.
68. *Id.*
69. 331 Ga. App. 129, 768 S.E.2d 546 (2015), *reconsideration denied* (Mar. 12, 2015), *cert. denied*, 2015 Ga. LEXIS 385 (2015).
70. *Id.* at 129-30, 768 S.E.2d at 547.
71. *Id.* at 131, 132, 133, 768 S.E.2d at 547, 548, 549.
72. *Id.* at 129, 130, 768 S.E.2d at 547.
73. *Id.* at 133, 768 S.E.2d at 549 (ellipsis in original) (quoting the trial court).

reach reasoned conclusions about how to accomplish a task for which there were no specific directions."[74] Although O.C.G.A. § 4–3–4(a)[75] required the officer to impound the stray horse, it lacked specific instructions for accomplishing the task and, therefore, the statutory mandate to remove the horse did not render the officer's actions ministerial.[76]

Cooley v. Bryant[77] is among the rare cases where, for the purpose of official immunity, the lack of a written policy was not determinative of whether an act was ministerial or discretionary.[78] In *Cooley,* an inmate at the Muscogee County Prison was injured while cutting grass at a park in connection with an inmate work detail. The supervisor in charge of the work detail was a correctional officer responsible for overseeing inmates and inspecting the equipment to ensure it was operational. While no written policy governed such inspections, the record contained evidence that the Parks and Recreation Department had an unwritten policy requiring correctional officers to take defective equipment to the shop when maintenance was required. On the day of the incident, the mower's safety lever, which normally required the operator to manually hold the lever to keep the mower running, had been disconnected.[79] As the inmate was mowing, the mower "hit a hole, dug into the ground, and flipped up sideways," causing serious injuries.[80]

The inmate filed suit against the work-detail supervisor individually and in his official capacity for negligent inspection and maintenance of the mower. The supervisor filed a motion for summary judgment, arguing, inter alia, that the individual capacity claims against him were barred by the doctrine of official immunity. The trial court denied the supervisor's motion, finding that the inspection and maintenance of the lawnmower was a ministerial duty, and, therefore, the inmate's claims were not barred by official immunity.[81]

On appeal, the supervisor argued that his duty to inspect and maintain the mower was discretionary rather than ministerial—thus entitling him to official immunity—because no written policy governed how he conducted inspections. However, both the supervisor and the director of the Department of Parks and Recreation agreed that an

74. *Id.*
75. O.C.G.A. § 4-3-4(a) (2013).
76. *Williams*, 331 Ga. App. at 134, 768 S.E.2d at 549.
77. 331 Ga. App. 718, 771 S.E.2d 411 (2015), *cert. denied*, 2015 Ga. LEXIS 522 (2015).
78. *Id.* at 718, 771 S.E.2d at 412-13.
79. *Id.* at 718, 719, 722, 771 S.E.2d at 412, 413, 415.
80. *Id.* at 719-20, 771 S.E.2d at 413.
81. *Id.* at 720, 771 S.E.2d at 413-14.

unwritten policy existed, requiring the supervisor to take faulty mowers to the shop for repairs upon becoming aware of any defects.[82] Citing this unwritten policy, the court noted that "if the jury concludes that [the supervisor] was aware of [any] defect, then the unwritten department policy merely dictated that he complete a simple task: that is, to take the lawnmower to the maintenance shop for repair."[83] In that event, the court held that the duty to take the lawnmower to the shop for repairs would be transformed into a ministerial duty and, thus, defeat the supervisor's entitlement to official immunity.[84] The case was remanded for a jury to determine whether the supervisor was aware of the relevant defects.[85]

C. Sovereign Immunity

The court in *Georgia Department of Corrections v. Couch*[86] considered whether the Georgia Tort Claims Act (GTCA),[87] under the "offer of settlement" provision, O.C.G.A. § 9-11-68(b)(2),[88] impliedly waived the sovereign immunity of the Georgia Department of Corrections (Department) in connection with attorney fees awarded to an inmate.[89] In *Couch,* an inmate's lawsuit proceeded to trial after the Department rejected the inmate's offer to settle his tort action for $24,000. A jury then returned a verdict in favor of the inmate in the amount of $105,417, and, therefore, the trial court awarded attorney fees pursuant to the "offer of settlement" provision of O.C.G.A. § 9-11-68(b)(2).[90]

In upholding the award of attorney fees, the Georgia Supreme Court observed that "[i]mplied waivers of governmental immunity should not be favored," but noted, nonetheless, that "[t]his does not mean . . . that the Legislature must use specific 'magic words' such as 'sovereign immunity is hereby waived' in order to create a specific statutory waiver of sovereign immunity."[91] Additionally, the court noted that the "clear purpose" of the attorney fees provisions in O.C.G.A. § 9-11-68(b) was "to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation," thereby

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82. *Id.* at 722, 771 S.E.2d at 415.
83. *Id.* at 723, 771 S.E.2d at 416.
84. *Id.* at 723, 771 S.E.2d at 415-16.
85. *Id.* at 723, 771 S.E.2d at 416.
86. 295 Ga. 469, 759 S.E.2d 804 (2014), *reconsideration denied* (July 11, 2014).
87. O.C.G.A. §§ 50–21–20 to -37 (2013 & Supp. 2014).
88. O.C.G.A. § 9-11-68(b)(2) (2015).
89. *Couch*, 295 Ga. at 469, 759 S.E.2d at 806.
90. *Id.*
91. *Id.* at 473-74, 759 S.E.2d at 809 (alterations in original) (quoting *Colon*, 294 Ga. at 95, 751 S.E.2d at 310).

advancing the "strong public policy of encouraging negotiations and settlements."[92] In view of the foregoing considerations, the court stated, "While payments of attorney fees and litigation expenses under O.C.G.A. § 9-11-68(b) are not made as compensation for a tort 'claim,' they are made as an incident of a party's inappropriate conduct in the underlying tort *action*."[93]

In *Board of Regents of the University System of Georgia v. Winter*,[94] the court of appeals examined what written communications suffice to form a written contract that sovereign immunity does not bar an action thereunder.[95] Winter, a British citizen, engaged in extensive correspondence with representatives of the University of Georgia regarding post-doctorate employment in the College of Veterinary Medicine. That correspondence included a written formal offer of employment, as well as emails from a University of Georgia representative stating she was glad Winter chose to join their laboratory. Winter executed several documents associated with such employment, including an intellectual property agreement. Ultimately, Winter was unable to secure an appropriate visa from the U.S. Citizenship and Immigration Services, and the University of Georgia informed Winter that it was withdrawing its "offer" of employment for that reason. Winter then filed suit for breach of contract.[96] The trial court denied the Board of Regents' motion for summary judgment, but the court of appeals reversed, holding that sovereign immunity barred Winter's claims.[97]

Noting that both the Georgia Constitution and statutory law provide that the state's sovereign immunity is waived for breach of written contract actions,[98] the court of appeals held that no such written contract existed here.[99] First, "[t]he parties clearly did not enter into a formal, traditional written agreement that both parties signed."[100] Next, the court examined whether the parties "entered into signed contemporaneous writings sufficient to establish a written contract."[101] The court stated that a nine-week delay between the written offer of

92. *Id.* at 470-71, 759 S.E.2d at 807 (quoting Smith v. Baptiste, 287 Ga. 23, 29, 694 S.E.2d 83, 88 (2010)).

93. *Id.* at 476, 759 S.E.2d at 811 (emphasis in original).

94. 331 Ga. App. 528, 771 S.E.2d 201 (2015).

95. *Id.* at 532, 771 S.E.2d at 205 (discussing waiver of sovereign immunity defined by GA. CONST. art. I, § 2, para. 9(c)).

96. *Id.* at 528-29, 531, 771 S.E.2d at 203, 204.

97. *Id.* at 531, 535, 771 S.E.2d at 204, 207.

98. GA. CONST. art. I, § 2, para. 9(c); *see also* O.C.G.A. § 50-21-1(a) (2013).

99. *Winter*, 331 Ga. App. at 532-33, 771 S.E.2d at 205.

100. *Id.* at 532, 771 S.E.2d at 205.

101. *Id.* at 532-33, 771 S.E.2d at 205.

employment and Winter's signing of various new-employee documentation "strongly suggests that those documents are not contemporaneous."[102] In addition, the court concluded that the later written documents related to a "completely separate activity"—the finalization of administrative details related to Winter's employment—rather than the memorialization of an agreement for employment in the first place.[103]

In *City of Atlanta v. Mitcham,*[104] the Georgia Supreme Court provided a primer on several core concepts of local government law, including the differing sovereign immunity standards for counties and cities, and the often-conflated concepts of ministerial functions and ministerial duties.[105] Mitcham brought a negligence action against the City of Atlanta and its police chief in his official capacity, claiming that Mitcham was injured as a result of the City's failure to monitor his diabetic condition while he was an inmate in the city jail. The trial court denied the defendants' motion to dismiss on sovereign immunity grounds.[106] Relying largely on *Cantrell v. Thurman,*[107] the court of appeals affirmed the denial of that motion, holding that pursuant to O.C.G.A. § 36-33-1(b),[108] "the provision of medical care to inmates . . . was a ministerial act and, because it was a ministerial act, sovereign immunity was waived . . . ."[109] In reversing the court of appeals, the supreme court pointed out the differing constitutional sources for municipal and county sovereign immunity.[110] Where *Cantrell* dealt with the sovereign immunity provision found in article I, section 2, paragraph 9(c) of the Georgia Constitution,[111] the "municipal corporations are protected by sovereign immunity pursuant . . . [to] Article IX, Section II, Paragraph IX, unless that immunity is waived by the General Assembly."[112] Such a waiver by the General Assembly is found in

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102. *Id.* at 533, 771 S.E.2d at 206.

103. *Id.* at 534, 771 S.E.2d at 206.

104. 296 Ga. 576, 769 S.E.2d 320 (2015).

105. *See id.* at 582, 582-83, 769 S.E.2d at 326.

106. *Id.* at 576, 771 S.E.2d at 322.

107. 231 Ga. App. 510, 499 S.E.2d 416 (1998), *overruled in part by* Tattnall Cnty. v. Armstrong, 333 Ga. App. 46, 51, 775 S.E.2d 573, 575 (2015).

108. O.C.G.A. § 36-33-1 (2012).

109. *Mitcham,* 296 Ga. at 576-77, 769 S.E.2d at 323 (quoting City of Atlanta v. Mitcham, 325 Ga. App. 481, 484, 751 S.E.2d 598, 601 (2013)).

110. *Id.* at 581-82, 789 S.E.2d at 325.

111. *See* GA. CONST. art. I, § 2, para. 9(e): "Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies." *Id.* The supreme court has held that counties constitute "departments [or] agencies" of the state for purposes of sovereign immunity. *See, e.g.,* Gilbert v. Richardson, 264 Ga. 744, 452 S.E.2d 476 (1994).

112. *Mitcham*, 296 Ga. at 577, 769 S.E.2d at 322-23.

O.C.G.A. § 36-33-1(b), and the court stated, "This provision has for more than a century been interpreted to mean that municipal corporations are immune from liability for acts taken in performance of a governmental function but may be liable for the negligent performance of their ministerial duties."[113]

Without providing any further clarification on the general test, the supreme court noted that the appellate courts have frequently held the operation of a jail, and the care and treatment of inmates, "are purely governmental functions," and "there can be no action for damages against a municipal corporation for its failure to provide medical care to an inmate regardless of the presence of negligence."[114]

In *SJN Properties, LLC v. Fulton County Board of Assessors,*[115] the supreme court took an additional look at sovereign immunity in the post *Georgia Department of Natural Resources v. Center for a Sustainable Coast*[116] era.[117] At issue in *SJN Properties* was the legality of the Development Authority of Fulton County's sale-leaseback transaction wherein the Development Authority would receive title, the private entity entering into a lease for the property, and, for taxation purposes, the leasehold estate's assessment using a "50% ramp-up valuation method."[118] The plaintiff pursued claims seeking declaratory, injunctive, and mandamus relief with respect to the subject transaction.[119]

The supreme court had little difficulty determining that the plaintiff's claim for injunctive relief was barred by sovereign immunity.[120] However, the plaintiff's claim with respect to mandamus and declaratory relief required further exploration.[121] With respect to mandamus, the supreme court held that the action was viable and not precluded by summary judgment.[122] Nonetheless, for a variety of reasons, the court determined the plaintiff's mandamus claim would not survive summary judgment.[123]

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113. *Id.* at 577-78, 769 S.E.2d at 323.

114. *Id.* at 580, 769 S.E.2d at 324, 325. While concluding that sovereign immunity bars such claims against municipal corporations, the court noted that inadequate medical treatment to persons in governmental custody may be actionable under 42 U.S.C. § 1983 (2012). *Mitcham*, 296 Ga. at 580 n.4, 769 S.E.2d at 325 n.4.

115. 296 Ga. 793, 770 S.E.2d 832 (2015).

116. 294 Ga. 593, 755 S.E.2d 184 (2014).

117. *SJN Properties*, 296 Ga. at 798-99, 770 S.E.2d at 837.

118. *Id.* at 797, 770 S.E.2d at 836.

119. *Id.* at 795, 770 S.E.2d at 835.

120. *Id.* at 798, 770 S.E.2d at 837.

121. *Id.* at 799, 770 S.E.2d at 837-38.

122. *Id.* at 799, 770 S.E.2d at 837; *see also* S. LNG, Inc. v. MacGinnitie, 290 Ga. 204, 205, 719 S.E.2d 473, 473 (2011).

123. *SJN Properties,* 296 Ga. at 802, 770 S.E.2d at 839.

Of greater interest with respect to the current state of sovereign immunity, the court spent time reviewing the plaintiff's claim for declaratory relief.[124] As a threshold matter, the court noted it "previously left unresolved the question of whether sovereign immunity generally bars claims against the State for declaratory relief."[125] Although *SJN Properties* did not conclusively resolve whether sovereign immunity bars a declaratory judgment claim, the case did provide tantalizing hints where the supreme court is headed: "Under the rationale of *Sustainable Coast*, it appears that, absent a statutory provision affording claimants an express right to seek declaratory relief against the State, sovereign immunity would bar such claims."[126]

In *Primas v. City of Milledgeville*,[127] the supreme court considered whether the court of appeals adhered to the appropriate standards and legal constructs in determining whether the City of Milledgeville enjoyed sovereign immunity on certain claims.[128] The plaintiff, Primas, was a corrections officer who was allegedly injured when the prison work-detail van he was driving collided with a utility pole after the brakes failed. The City of Milledgeville leased the van to the Georgia Department of Corrections. Pursuant to the lease agreement, the City was responsible for maintaining the vehicle. The plaintiff sued the City, alleging negligence for failure to inspect and maintain the vehicle's brakes. The City moved for summary judgment, asserting that maintenance of the brakes was a "discretionary act" on which it had not waived its sovereign immunity.[129] The trial court denied the City's motion and the court of appeals reversed.[130]

It is well established that "a municipal corporation is immune from suit unless its immunity is waived by the General Assembly"; yet, the waiver of a municipal corporation's sovereign immunity only subjects the municipal corporation to suit for the negligent performance of "ministerial functions," while immunity remains for actions taken in the course of its "governmental functions."[131] This sovereign immunity is a separate and distinct analysis from that of official immunity, which considers

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124. *Id.* at 802-03, 770 S.E.2d at 839-40.

125. *Id.* at 802, 770 S.E.2d at 839.

126. *Id.* (citing Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 755 S.E.2d 184 (2014)).

127. 296 Ga. 584, 769 S.E.2d 326 (2015).

128. *Id.* at 584, 769 S.E.2d at 327.

129. *Id.*

130. *Id.* at 584, 769 S.E.2d at 327-28.

131. *Id.* at 584, 769 S.E.2d at 328 (discussing immunity set out in O.C.G.A. § 36-33-1(b)).

"discretionary" and "ministerial" acts.[132] The court of appeals, though apparently recognizing the principles of official immunity, erred in its application of these principles by incorrectly stating the City waived sovereign immunity for "ministerial acts, but not for discretionary acts."[133] Consequently, the supreme court held the court of appeals "applied inapplicable legal principles, definitions, and precedent," and vacated the judgment and remanded the case for reconsideration under the proper legal analysis.[134]

V. ANTE-LITEM NOTICE

In *Warnell v. Unified Government of Athens-Clarke County,*[135] the plaintiffs made a novel (though ultimately unsuccessful) attempt to circumvent the consequences of the their failure to comply with O.C.G.A. § 36-11-1,[136] which requires the plaintiffs to present timely ante-litem notice to the Unified Government of Athens–Clarke County (County).[137] *Warnell* involved a car accident between the plaintiffs and a County police officer. The County purchased a liability insurance policy on the officer's patrol car with a $1 million limit, but the plaintiffs did not file suit against the County until twenty-two months after the accident. It was undisputed that the plaintiffs failed to provide written notice of their claims to the County within twelve months of their accrual. The County moved for summary judgment, arguing the plaintiffs' claims against the County were barred by their failure to present them to the County within twelve months as required by O.C.G.A. § 36-11-1.[138]

The plaintiffs argued the County was barred from raising the ante-litem defense because the County purchased liability insurance, which thus implicated the O.C.G.A. § 33-24-51[139] statutory waiver of sovereign immunity.[140] The plaintiffs contended that within the context of motor vehicle claims, if a county purchased liability insurance such that sovereign immunity is waived, then the county's only defenses are those of a private party and the county forfeits an ante-litem defense.[141] The

132. *Id.* at 585, 769 S.E.2d at 328; *see also* Heller v. City of Atlanta, 290 Ga. App. 345, 347-50, 659 S.E.2d 617, 620-22 (2008).
133. *Primas*, 296 Ga. at 584-85, 769 S.E.2d at 328.
134. *Id.* at 585, 586, 769 S.E.2d at 328.
135. 328 Ga. App. 903, 763 S.E.2d 284 (2014).
136. O.C.G.A. § 36-11-1 (2012).
137. *Warnell*, 328 Ga. App. at 904, 763 S.E.2d at 286; *see also* O.C.G.A. § 36-11-1.
138. *Warnell*, 328 Ga. App. at 903-04, 763 S.E.2d at 285-86.
139. O.C.G.A. § 33-24-51 (2013).
140. *Warnell*, 328 Ga. App. at 904, 763 S.E.2d at 286.
141. *Id.* at 905, 763 S.E.2d at 287.

court of appeals was unimpressed. The court emphasized the express statutory requirement found in O.C.G.A. § 36-11-1: "*[a]ll claims* against counties *must be presented* within 12 months after they accrue or become payable or the same are barred."[142] The court simply could not get comfortable with the nature of the mandatory notice-of-claim requirement.[143]

In *City of College Park v. Sekisui SPR Americas, LLC*,[144] the court of appeals disapproved its decision in *Jacks v. City of Atlanta*[145] and held that a municipality cannot raise a lack of ante-litem notice as a defense to a subcontractor's claim against the municipality for failure to comply with O.C.G.A. § 36-91-90[146] by obtaining appropriate payment bonds.[147] The City hired the plaintiff to work on a sewer project, and the plaintiff sued the City when the general contractor failed to pay the subcontractor for work performed. The subcontractor maintained that the City was liable for violating O.C.G.A. § 36-91-90 because the City failed to ensure the general contractor had obtained a payment bond. The subcontractor raised additional claims as well. The parties filed cross-motions for summary judgment, and the court granted the plaintiff's motion.[148] On appeal, the City contended, among other things, that the trial court erred in denying its motion to dismiss based upon a lack of ante-litem notice under O.C.G.A. § 36-33-5,[149] relying heavily on the court's decision in *Jacks*.[150] Interestingly in *Sekisui*, the court disapproved of the holding in *Jacks* to the extent it held that claims arising under O.C.G.A. § 36-91-91[151] are subject to the ante-litem notice requirement in O.C.G.A. § 36-33-5.[152] The court reasoned that "the plain text of O.C.G.A. § 36-33-5 . . . applies only to tort claims relating to personal injury and property damage."[153]

142. *Id.* at 904, 763 S.E.2d at 286 (alterations in original) (quoting O.C.G.A. § 36-11-1).
143. *Id.* at 904-05, 763 S.E.2d at 286.
144. 331 Ga. App. 404, 771 S.E.2d 101 (2015), *cert. denied*, 2015 Ga. LEXIS 471 (2015).
145. 284 Ga. App. 200, 644 S.E.2d 150 (2007).
146. O.C.G.A. § 36-91-90 (2012).
147. *Sekisui*, 331 Ga. App. at 407-08, 771 S.E.2d at 104.
148. *Id.* at 404-05, 405, 771 S.E.2d at 102.
149. O.C.G.A. § 36-33-5 (2012 & Supp. 2015).
150. *Sekisui*, 331 Ga. App. at 406, 408, 771 S.E.2d at 103-04, 104.
151. O.C.G.A. § 36-91-91 (2012).
152. *Sekisui*, 331 Ga. App. at 408, 771 S.E.2d at 104.
153. *Id.*

VI. ROADS AND BRIDGES

Despite the "peculiar factual circumstances" at issue in *City of Atlanta v. Kovalcik*,[154] the case is worth noting for its discussion of the interplay between the liability that can arise from a city's negligent breach of its "duty to maintain safe streets" and the immunity a city enjoys in exercising "its discretion in providing lighting on those streets."[155] In *Kovalcik*, the City of Atlanta appealed the denial of its motion for summary judgment in a wrongful death action brought by the parents of a woman who died in a nighttime car accident at a newly reconfigured intersection in the city.[156] While the City acknowledged that a municipal corporation, as a matter of general law, can be liable for the negligent failure to "keep its streets and sidewalks in a reasonably safe condition," the City cited *Roquemore v. City of Forsyth*[157] for the proposition that "the mere absence of an ordinary street light at a given point will not constitute such negligence as to render the city liable if the city otherwise has performed its obligation to keep the streets safe and free from defects."[158] In *Roquemore*, however, the Georgia Supreme Court carefully noted that the city lacked "actual or constructive notice" of the malfunctioning street light at issue,[159] whereas in *Kovalcik* there was evidence that the City "knew or should have known" that lighting was necessary at the roadway in question even though it

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154. 329 Ga. App. 523, 526, 765 S.E.2d 693, 695 (2014), *cert. denied*, 2015 Ga. LEXIS 115 (2015).

155. *Id.* at 525, 765 S.E.2d at 695. O.C.G.A. § 36-33-1 provides, "[I]t is the public policy of the State of Georgia that there is no waiver of the sovereign immunity of municipal corporations of the state and such municipal corporations shall be immune from liability for damages." O.C.G.A. § 36-33-1(a) (2012). However, there is waiver of a municipal corporation's sovereign immunity provided in subsection (b) of O.C.G.A. § 36-33-1 which states "[m]unicipal corporations shall not be liable for failure to perform or for errors in performing their legislative or judicial powers. For neglect to perform or improper or unskillful performance of their ministerial duties, they shall be liable." O.C.G.A. § 36-33-1(b) (2012). This provision has, for more than a century, been interpreted to mean the municipal corporations are immune from liability for acts taken in performance of a governmental function, but may be liable for the negligent performance of their ministerial duties. *See* Koehler v. Massell, 229 Ga. 359, 362-63, 191 S.E.2d 830, 833 (1972). The function of the municipality in maintaining its streets and sidewalks to keep them safe for travel in ordinary modes is a ministerial function. Hammock v. City Council of Augusta, 83 Ga. App. 217, 217-18, 63 S.E.2d 290, 291 (1951).

156. *Kovalcik*, 329 Ga. App. at 523, 765 S.E.2d at 693.

157. 274 Ga. App. 420, 617 S.E.2d 644 (2005).

158. *Kovalcik*, 329 Ga. App. at 525, 765 S.E.2d at 695 (emphasis omitted) (quoting Roquemore v. City of Forsyth, 274 Ga. App. 420, 422, 617 S.E.2d at 644, 646 (2005).

159. *Roquemore*, 274 Ga. App. at 423, 617 S.E.2d at 647.

was not yet operational.[160] Thus, in view of the "unusual circumstances" *Kovalcik* presented, the court held that the absence of lighting "could be considered as evidence on the issue of whether, at the time and place of the crash, the newly constructed intersection was being maintained in a reasonably safe condition."[161]

VII. TAKINGS

A. *Condemnation*

Dillard Land Investments, LLC v. Fulton County[162] involved a county's use of the "special master" method of condemnation to acquire property for public library facilities.[163] The trial court appointed a special master who filed an award that found the market value of the property. However, instead of paying the awarded amount into the registry of the court, the County promptly filed a voluntary dismissal of the action. In response, the property owner moved to vacate the voluntary dismissal, arguing that the County lacked authority to unilaterally dismiss the action once the special master entered the value award. Although the trial court agreed with the property owner, the court of appeals reversed, holding that the special master's award was not final until adopted by the trial judge and therefore the County could unilaterally dismiss the action before entry of a final order.[164] The Supreme Court of Georgia disagreed, resolving the dispute in the property owner's favor.[165]

The supreme court reasoned that a condemning authority cannot unilaterally dismiss a condemnation action once the special master renders an award, even if a court has not yet entered the special master's award via a final order.[166] The supreme court noted that a trial court lacks discretion to alter a special master's award since the

160. *Kovalcik*, 329 Ga. App. at 526-27, 765 S.E.2d at 695-96.

161. *Id.* at 526-27, 765 S.E.2d at 696.

162. 295 Ga. 515, 761 S.E.2d 282 (2014).

163. *Id.* at 515-16, 761 S.E.2d at 284; *see also* O.C.G.A. §§ 22-2-100 to -114 (1982 & Supp. 2015). The special master method constitutes one of three primary statutory methods by which a local government may condemn property using the power of eminent domain. The other methods are the "declaration of taking" method, codified at O.C.G.A. §§ 32-3-1 to -20 (2012 & Supp. 2015), and the lesser-used "assessors" method, codified at O.C.G.A. §§ 22-2-1 to -86 (1982 & Supp. 2015).

164. *Dillard*, 295 Ga. at 521, 761 S.E.2d at 288.

165. *Id.* at 515, 761 S.E.2d at 283-84.

166. *Id.* at 522, 761 S.E.2d at 288.

relevant statute directs that a court "shall" enter an award in the amount provided by the special master.[167]

B. Inverse Condemnation

In the context of inverse condemnation, the court of appeals held in *Pennington v. Gwinnett County*[168] that an option to lease property does not represent a property interest that could be taken and, thus, the County owed no compensation for interfering with the option's value.[169] Over a decade prior in *Five Forks, LLC v. Department of Transportation*,[170] the court of appeals was asked to resolve the question of how (or whether) to value an option to purchase property.[171] However, the court never reached the question because the option expired two years prior to the condemnation and "losses occurring to property before the actual date of taking are not compensable in direct condemnation actions."[172]

The property owners in *Pennington* entered into an option contract with a cellular service provider to lease a portion of their property for a cell tower. After extending the lease option several times, the service provider eventually declined to exercise the option when the County changed its policies to allow cell towers on county-owned property. The property owners sued the County, arguing that the County's change in policy confiscated the value of their option, which thereby constituted a taking by inverse condemnation.[173] According to the appellate court, however, the owners could not recover for the loss of this "contingent, future right."[174] As the owners merely had an expectation of a lease rather than a lease itself, it followed that they had no compensable property right to be taken by the County.[175]

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167. *Id.* at 521, 761 S.E.2d at 288; *see also* O.C.G.A. § 22-2-111 (1982) ("Upon the entry of the award of the special master and the presentation of the award to the judge of the superior court, the judge *shall* enter a proper order and judgment of the court condemning the described property or other interest in rem to the use of the condemnor." (emphasis added)).

168. 329 Ga. App. 255, 764 S.E.2d 860 (2014).

169. *Id.* at 257, 764 S.E.2d at 862.

170. 250 Ga. App. 157, 550 S.E.2d 715 (2001).

171. *Id.* at 157, 550 S.E.2d at 716.

172. *Id.* at 159, 159-60, 550 S.E.2d at 717, 717-18 (quoting Josh Cabaret, Inc. v. Dep't of Transp., 256 Ga. 749, 749, 353 S.E.2d 346, 346 (1987)).

173. *Pennington*, 329 Ga. App. at 255-56, 257, 764 S.E.2d at 861, 862.

174. *Id.* at 257, 764 S.E.2d at 862.

175. *Id.* at 257-58, 764 S.E.2d at 862.

VIII. STORMWATER AND INVERSE CONDEMNATION

A. *Statute of Limitations*

In *Liberty County v. Eller*,[176] the court of appeals considered the appropriate date for commencing the statute of limitations in an inverse condemnation claim.[177] The court first looked to whether the underlying condition allegedly giving rise to the inverse condemnation constituted a continuing, as opposed to permanent, nuisance.[178] Finding no evidence of any lack of required maintenance on the pipe draining water from the county road to the pond, the court determined the underlying nuisance was permanent in nature and, therefore, the pertinent date for the statute of limitations was the date of installation of the pipe.[179] The court also considered whether "some new harm that was not previously observable" had occurred within the four-year statute of limitations window preceding the filing of the lawsuit.[180] Concluding there was no evidence of "any change in the run-off or discharge from the drain pipe after it was installed," the court held that the four-year statue of limitations barred the plaintiffs' claim.[181]

B. *Res Judicata*

In *DeKalb County v. Heath*,[182] the court considered whether the doctrine of res judicata barred the plaintiff's inverse condemnation claim.[183] In a prior action, the plaintiff obtained a jury verdict against the County for diminished property value based on the County's failure to properly maintain a stream bed, which constituted part of the County's sewer and storm water drainage system on the plaintiff's property.[184] While the previous action was pending, the County

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176. 327 Ga. App. 770, 761 S.E.2d 164 (2014), *cert. denied*, 2014 Ga. LEXIS 695 (2014).

177. *Id.* at 770-74, 761 S.E.2d at 166-68. In *Eller*, the County installed a pipe draining water from a county road to an existing private pond in 2001. The plaintiffs purchased the property in 2008 and, three or four months after purchasing the property, noticed that the pipe was filling the pond with storm water when it rained. The plaintiffs filed suit in 2011, claiming damages as a result of the storm water discharged from the pipe. *Id.* at 770, 771, 761 S.E.2d at 166.

178. *Id.* at 772, 761 S.E.2d at 168.

179. *Id.* at 773, 761 S.E.2d at 168.

180. *Id.* at 773-74, 761 S.E.2d at 168 (quoting Oglethorpe Power Corp. v. Forrister, 289 Ga. 331, 336, 711 S.E.2d 641, 645 (2011)).

181. *Id.* at 774, 761 S.E.2d at 168-69.

182. 331 Ga. App. 179, 770 S.E.2d 269 (2015), *cert. denied*, 2015 Ga. LEXIS 424 (2015).

183. *Id.* at 181, 770 S.E.2d at 271.

184. *Id.* at 180, 770 S.E.2d at 271.

installed a retaining wall along the creek bed "for the purpose of preventing erosion to his property in connection with the storm water drainage system" and it failed.[185] The plaintiff filed another action against the County, alleging the County was responsible for the improper construction and maintenance of the wall. After a bench trial, the trial court found in favor of the plaintiff. On appeal, the County argued that the doctrine of res judicata barred this subsequent inverse condemnation claim based on a failing retaining wall in light of the result in the previous case based on the streambed maintenance.[186] The appellate court held that the two inverse condemnation claims were based on continuing (as opposed to permanent) nuisances and that the latter claim "involved a fresh nuisance for which a fresh action would lie."[187]

C. *Ownership and Maintenance*

In *City of Atlanta v. Demita*,[188] the court of appeals addressed a property owner's inverse condemnation claim against the City for storm water damage based on the City's ownership of the road from which water flowed on the plaintiff's property.[189] In *Demita*, the plaintiff contended that "the street itself, which the City owns and maintains, constitutes a sewer or drainage system" and that the City was "liable for maintaining a nuisance to any property owner who . . . owns property adjacent to a low point on a street where water collects and repeatedly overflows the curbing, floods that adjacent property, and causes damage there."[190] Unimpressed with this analysis, the court of appeals found that, "[s]uch an expansive definition of maintaining a sewer or drainage system is not consistent with Georgia jurisprudence," and instead determined the record was devoid of "evidence that the City negligently constructed or maintained a sewer or drainage system under its

185. *Id.*

186. *Id.*

187. *Id.* at 182, 770 S.E.2d at 272.

188. 329 Ga. App. 33, 762 S.E.2d 436 (2014), *reconsideration denied* (Sept. 9, 2014), *cert. denied*, 2014 Ga. LEXIS 971 (2014).

189. *Id.* at 35-36, 762 S.E.2d at 439. The court noted that the City had not installed any drainage facilities on the road and the only aspect of "drainage" constructed by the City was a crown in the center of the road. *Id.* at 36, 762 S.E.2d at 439-40. Years after construction of the road, the developer added a gutter along the road in front of the plaintiff's property when their house was constructed. *Id.*

190. *Id.* at 36, 37, 762 S.E.2d at 440.

control."[191] The court reversed the trial court's denial of a directed verdict in favor of the City.[192]

IX. ORDINANCE INTERPRETATION

The case of *Golden Isles Outdoor, LLC v. Lamar Co., LLC*[193] involved judicial construction of a city's sign ordinance where two outdoor sign companies fought to acquire the last of two available digital billboard permits, and each company proposed a different interpretation of the sign ordinance. One company argued that, in spite of ordinance language restricting digital billboards to "arterial roadways" of four or more lanes, the company was nonetheless entitled to maintain a digital billboard on a smaller, collector street because the arterial roadway restriction could be read to include collector streets in the definition of "arterial roadways." The other company argued that this construction failed to effectuate the legislative intent to restrict digital billboards to larger roadways.[194] The appellate court reviewed the traditional canons of statutory construction and emphasized that these general principles equally apply to zoning ordinances.[195] The court noted the clear distinction between collector streets and arterial roads shown throughout the sign code and correspondingly observed that accepting the first company's definition "would collapse a distinction otherwise carefully drawn throughout the sign ordinances."[196] The court refused to apply a construction leading to such "unreasonable or absurd consequences not contemplated by the legislature," and held in favor of the second company.[197]

Lest one think *Golden Isles Outdoor, LLC* an anomaly, the court of appeals issued *Southern States-Bartow County, Inc. v. Riverwood Farm Property Owners Ass'n*[198] the following day. In *Southern States*, a property owners' association filed suit against a landfill developer and a county to halt the development of a proposed landfill. Among other arguments, the association contended that even if the developer had a vested right to build a landfill, this right lapsed pursuant to the terms

191. *Id.* at 37, 762 S.E.2d at 440.
192. *Id.* at 38, 762 S.E.2d at 441.
193. 331 Ga. App. 494, 771 S.E.2d 173 (2015), *cert. denied*, 2015 Ga. LEXIS 415 (2015).
194. *Id.* at 495-96, 498, 771 S.E.2d at 175-76, 177.
195. *Id.* at 496-99, 771 S.E.2d at 176-78.
196. *Id.* at 497, 498, 771 S.E.2d at 176-77, 177-78.
197. *Id.* at 498, 771 S.E.2d at 178 (quoting Staley v. State, 284 Ga. 873, 873-74, 672 S.E.2d 615, 616 (2009)).
198. 331 Ga. App. 878, 769 S.E.2d 823 (2015), *reconsideration denied* (Apr. 9, 2015).

of the zoning ordinance then in effect.[199] The court of appeals reaffirmed the application of traditional principles of statutory interpretation to a county zoning ordinance.[200] According to the plain meaning of the ordinance in question, the landfill developer's vested right to operate a landfill lapsed where the developer failed to commence the nonconforming use within a year.[201]

X. ZONING

A. *Standing*

Druid Hills Civic Ass'n v. Buckler[202] marked the fourth appearance in the court of appeals of the long-running litigation regarding a proposed subdivision development in the historic Druid Hills area of DeKalb County. At issue was the DeKalb County Planning Commission's approval of the developers' sketch plat. A neighborhood association and two of its individual members (collectively the Association) challenged the plat approval by petitioning for a writ of certiorari. The Association voluntarily dismissed the first petition without prejudice and refiled a second petition six months later. The trial court authorized the second petition as a proper renewal action, but granted the developers' motion to dismiss because the Association lacked standing.[203]

Regarding the propriety of the renewal action, the court of appeals rejected the developers' contention that the Association's alleged lack of standing—a concept implicating the trial court's subject matter jurisdiction—meant the first petition was void and not renewable.[204] The court of appeals concluded the second action was a proper renewal action under O.C.G.A. § 9-2-61(c),[205] holding that "even when a plaintiff's original action suffered from a defect of subject matter jurisdiction, such as a lack of standing, it was renewable as long as the plaintiff voluntarily dismissed the action without prejudice."[206]

The court reversed the dismissal of the petition on the Association's alleged lack of standing, concluding the developers had not properly preserved the issue before the Planning Commission.[207] Relying on its

199. *Id.* at 878, 769 S.E.2d at 824.
200. *Id.* at 884, 769 S.E.2d at 827-28.
201. *Id.* at 884-85, 769 S.E.2d at 828.
202. 328 Ga. App. 485, 760 S.E.2d 194 (2014), *cert. denied*, 2014 Ga. LEXIS 867 (2014).
203. *Id.* at 486, 487, 487-88, 760 S.E.2d at 196, 197-98.
204. *Id.* at 489, 760 S.E.2d at 199.
205. O.C.G.A. § 9-2-61(c) (2007).
206. *Buckler*, 328 Ga. App. at 490, 760 S.E.2d at 199.
207. *Id.* at 491, 760 S.E.2d at 200 (footnote omitted).

prior decision in *RCG Properties v. City of Atlanta Board of Zoning Adjustment*,[208] the court held that "the superior court was bound by the record as developed before the [Planning Commission], and could not consider the issue of the Association's standing when that issue had not been raised before the Planning Commission."[209]

B. *Adoption of Zoning Ordinance and Associated Maps*

Newton County v. East Georgia Land & Development Co., LLC[210] highlights the importance of precision in adopting zoning ordinances and associated maps that apply zoning classifications to specific properties. A developer sought a writ of mandamus against Newton County and several of its officials, claiming the absence of contemporaneously adopted zoning maps invalidated the County's May 21, 1985 zoning ordinance.[211] The Georgia Supreme Court stated, "These [zoning] maps are an integral part of the zoning ordinance. The ordinance identifies the lands to which its various zoning classifications apply only by reference to the maps, and without the maps, the zoning ordinance would be too indefinite and vague to satisfy the requirements of due process."[212]

While the record indicated that Newton County adopted zoning maps on July 2, 1985, these maps were insufficient to save the ordinance.[213] The court held that there was no evidence that the May 21st zoning ordinance was reenacted in conjunction with the July 2nd adoption of the maps or that the County purported to adopt those maps in any existing zoning ordinance.[214] Accordingly, the supreme court affirmed the trial court's grant of summary judgment to the developer.[215]

XI. EMPLOYMENT LAW

A. *Respondeat Superior, Negligent Hiring, and Negligent Retention*

In *Graham v. City of Duluth*,[216] the Georgia Court of Appeals examined whether the City was liable under the theories of respondeat

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208. 260 Ga. App. 355, 579 S.E.2d 782 (2003).
209. *Buckler*, 328 Ga. App. at 495, 760 S.E.2d at 202.
210. 296 Ga. 18, 764 S.E.2d 830 (2014).
211. *Id.* at 18, 764 S.E.2d at 831.
212. *Id.*
213. *Id.* at 18, 764 S.E.2d at 831-32.
214. *Id.* at 20, 764 S.E.2d at 832.
215. *Id.* at 21, 764 S.E.2d at 833.
216. 328 Ga. App. 496, 759 S.E.2d 645 (2014), *reconsideration denied* (July 23, 2014), *cert. denied*, 2015 Ga. LEXIS 32 (2015).

superior, negligent hiring, and negligent retention for injuries caused when an intoxicated off-duty police officer—with a previous history of alcohol abuse, involuntary commitment, and belligerency with a service weapon—attacked a citizen and another officer.[217] The plaintiff alleged that the City was vicariously liable under a theory of negligent hiring.[218]

The City's standard operating procedure in respect to pre-employment investigatory actions was quite detailed, and the evidence reflected that the officer tasked with conducting the investigation did not perform the investigation in a thorough manner by failing to secure critical information regarding this potential employee's background.[219] Based upon evidence indicating a lapse in the background investigation, the court held that a genuine issue of material fact existed regarding whether the City exercised ordinary care in conducting the background investigation.[220] Consequently, the court held that "[a] jury question exists as to whether such information should have raised at least some question as to [the officer in question's] suitability to be a police officer."[221]

B. Borrowed Servant Doctrine

When an employee commits an act of negligence within the scope of his or her employment, the employer is ordinarily liable for such negligence under the doctrine of respondeat superior. In *Garden City v. Herrera*,[222] the Georgia Court of Appeals examined a widely recognized exception to the theory of respondeat superior—the borrowed servant rule.[223] In *Herrera*, a conservator, Ann Herrera, brought a negligence action against Garden City on behalf of an adult ward, Lisa Muse, who was injured in an automobile accident with a Garden City police officer. At the time of the accident, Garden City assigned the Garden City police officer, Judd Robert West, to a multijurisdictional task force run by Chatham County.[224]

Georgia courts have deemed an employee to be a borrowed servant when the party seeking to establish or avoid liability demonstrates the following: (1) the borrowing employer had complete control and direction

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217. *Id.* at 496-97, 759 S.E.2d at 647.
218. *Id.*
219. *Id.* at 503-05, 759 S.E.2d at 651-52.
220. *Id.* at 505, 759 S.E.2d at 652.
221. *Id.* at 504-05, 759 S.E.2d at 652.
222. 329 Ga. App. 756, 766 S.E.2d 150 (2014), *cert. denied*, 2015 Ga. LEXIS 109 (2015).
223. *Id.* at 756-57, 766 S.E.2d at 151-52.
224. *Id.*

over the employee for the occasion; (2) the lending employer had no such control; and (3) the borrowing employer had the exclusive right to discharge the employee.[225] It was undisputed that at the moment of impact, the borrowed servant was driving to the location of a task force operation at the direction of his task force supervisor.[226] The court concluded that while Garden City retained the right to discharge West from employment as a city police officer in general, the County held the exclusive right to discharge the servant from his duties with the task force at the time of the accident and reversed the trial court's denial of the City's motion for summary judgment.[227] This finding provides guidance to local governments participating in joint task force agreements with surrounding cities, counties, and those jurisdictions that share employees with neighboring local governments.

C. Employer-Employee Contracts and Breach of Contract

In *DeKalb County v. Kirkland*,[228] the court of appeals examined whether DeKalb County's Code created a written employment contract that guaranteed compensation for accrued time, waiving the County's sovereign immunity for any action ex contractu.[229] The pertinent DeKalb County Code provided that if the County granted compensatory time, overtime-exempt employees had to use compensatory time within one year and could not receive cash compensation for any unused time.[230] The plaintiffs filed suit for breach of contract based on DeKalb County's refusal to allow them to use their accrued compensatory time or provide compensation for that time in derogation of the DeKalb County Code.[231] Rejecting this theory, the court held that the pertinent DeKalb County Code section did not constitute a written employment contract between the County and the plaintiffs that would defeat the County's sovereign immunity.[232]

Only six days after issuing *Kirkland* the court of appeals reviewed the City of Stockbridge's authority to unilaterally extend a City Administrator's employment contract. In *City of Stockbridge v. Stuart*,[233] the mayor challenged the city council's extension of the city administrator's

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225. *Id.* at 758-59, 766 S.E.2d at 152-53 (citing Six Flags Over Ga., Inc. v. Hill, 247 Ga. 375, 377, 276 S.E.2d 572, 574 (1981)).

226. *Id.* at 760, 766 S.E.2d at 154.

227. *Id.* at 760-61, 763, 766 S.E.2d at 154, 156.

228. 329 Ga. App. 262, 764 S.E.2d 867 (2014).

229. *Id.* at 265, 266, 764 S.E.2d at 870.

230. *Id.* at 263, 764 S.E.2d at 869; *see* DEKALB COUNTY, GA. CODE § 20-161(c) (2015).

231. *Kirkland*, 329 Ga. App. at 265, 266, 764 S.E.2d at 870.

232. *Id.* at 266, 764 S.E.2d at 870, 871.

233. 329 Ga. App. 323, 765 S.E.2d 16 (2014).

employment contract. The mayor argued the city council lacked authority to unilaterally extend the city administrator's employment contract with the City of Stockbridge beyond the previously agreed to term by the mayor and the city council. The mayor argued any extension of the employment contract beyond the existing contract term was ultra vires and void.[234]

Agreeing with the mayor, the court of appeals held that while the City had the power to enter into contracts with private persons under the City's charter, the position of City Administrator only existed by virtue of the mayor's specific delegation of his authority and power to appoint city officers and employees.[235] Therefore, any of the city council's effort to lengthen the city administrator's contract of employment without the mayor's approval constituted an impermissible and unauthorized extension in contravention of the charter.[236]

XII. BOND VALIDATION

In *Greene County Development Authority v. State of Georgia*[237] the Georgia Supreme Court considered a challenge to the validation of the Greene County Development Authority's proposal of certain revenue bonds through an intergovernmental agreement with Greene County regarding the "revenue."[238] Lake Oconee Academy, Inc., a non-profit corporation that operated a public charter school in Greene County, was the ultimate beneficiary of the bonds pursuant to a contract with the Greene County Board of Education.[239] In this case, however, the Greene County Board of Education had little to no involvement in the underlying transaction; rather, the Board of Commissioners and the Development Authority were the primary participants. Several Greene County residents intervened to object to the bond validation, and the trial court declined validation.[240] Specifically, the trial court found that the Development Authority's proposal was not "sound, feasible, and reasonable."[241] In affirming the trial court, the supreme court took pains to emphasize that the trial court's finding was not required, but permitted, based on the record, explaining, "whether a proposal to issue bonds is sound, feasible, and reasonable is a question for the trial court,

234. *Id.* at 325, 327, 765 S.E.2d at 18, 19.
235. *Id.* at 327, 765 S.E.2d at 19.
236. *Id.* at 328, 765 S.E.2d at 19-20.
237. 296 Ga. 725, 770 S.E.2d 595 (2015).
238. *Id.* at 726, 770 S.E.2d at 596.
239. *Id.* at 725-26, 770 S.E.2d at 596.
240. *Id.* at 726, 770 S.E.2d at 596.
241. *Id.*

and its findings about soundness, feasibility, and reasonableness must be sustained on appeal if there is any evidence to support them."[242]

XIII. MANDAMUS

In *Hansen v. DeKalb County Board of Tax Assessors*[243] the Georgia Supreme Court examined two questions in connection with property tax assessments: (1) whether the plaintiffs properly brought their action in trial court seeking mandamus nisi and (2) whether the Georgia Open Records Act[244] applies to information sought pursuant to O.C.G.A. § 48-5-306(d)[245] by a taxpayer.[246]

Pursuant to O.C.G.A. § 48-5-306(d), taxpayers may request information and documents that were reviewed in making a property tax assessment from the county board of tax assessors, and the board shall provide the information within ten business days.[247] The plaintiffs in *Hansen*, a total of thirty-one DeKalb County taxpayers, sought certain information from the DeKalb County Board of Tax Assessors (Board) concerning their 2012 property tax assessments pursuant to O.C.G.A. § 48-5-306(d).[248] The Board provided responses to the plaintiffs' requests on two occasions, but the plaintiffs asserted those responses were "insufficiently specific" because they did not provide the "precise information" sought.[249] The plaintiffs then requested a recorded meeting with the Board's Secretary and Chief Appraiser to discuss the document requests and the Board's responses; however, their request was denied.[250] The plaintiffs filed a petition for mandamus with the trial court, seeking an order directing the Board to "directly, fully, and truthfully" respond to each document request and meet with the plaintiffs to discuss the responses.[251] The plaintiffs also sought penalties, under the Open Records Act based on the Board's responses, and attorney fees.[252] The trial court denied the mandamus nisi and the supreme court agreed.[253]

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242. *Id.*
243. 295 Ga. 385, 761 S.E.2d 35 (2014).
244. O.C.G.A. § 50-18-70 to -77 (2013 & Supp. 2015).
245. O.C.G.A. § 48-5-306(d) (2010 & Supp. 2015).
246. *Hansen*, 295 Ga. at 385, 761 S.E.2d at 36.
247. *Id.* at 386, 761 S.E.2d at 37; *see also* O.C.G.A. § 48-5-301(d)(1).
248. *Hansen*, 295 Ga. at 385-86, 761 S.E.2d at 36.
249. *Id.* at 386, 761 S.E.2d at 36.
250. *Id.*
251. *Id.* at 386, 761 S.E.2d at 36-37.
252. *Id.* at 386, 761 S.E.2d at 37.
253. *Id.* at 386-87, 761 S.E.2d at 37.

The court explained that "[m]andamus is an extraordinary remedy available only where a litigant seeks to compel a public official to perform an act or fulfill a duty that is required by law," and a prerequisite to such remedy is "a 'clear legal right' to the relief being sought."[254] In *Hansen*, there was no dispute the Board provided two responses to the plaintiffs' information requests.[255] According to the court, that was all O.C.G.A. § 48-5-306(d) required, and the plaintiffs' further demands for supplementation and a recorded meeting with the Board were not mandated by the statute.[256] As such, the plaintiffs did not have a clear legal right to the relief sought, and the court held the request for mandamus was "unsupportable as a matter of law."[257]

254. *Id.* at 387, 761 S.E.2d at 37.
255. *Id.*
256. *Id.*
257. *Id.*