Local Government Law

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I. INTRODUCTION

What a survey period this time around in the world of local government law. A paradigm-shifting sovereign immunity case with

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respect to equitable relief.[1] A Recreational Property Act ruling that spawned immediate legislative action.[2] An official-immunity ruling that pushed the envelope.[3] These are the headliners for this survey period. These and other cases round out what can best be described as another fairly strong year, liability-wise, for local governments and local government officials. While this area of the law has seen its fair share of historical twists and turns, proponents of "The King Can Do No Wrong" had a solid year.

II. SOVEREIGN IMMUNITY

Although the doctrine of sovereign immunity is by no means new, the Georgia Supreme Court's decision in *Lathrop v. Deal*[4] somewhat rocked the local government bar. In that case, the court clarified that "the doctrine of sovereign immunity extends to claims for injunctive or declaratory relief [even to those] that rest upon constitutional grounds."[5] Previously, the court held that certain claims for injunctive and declaratory relief against governments were barred,[6] but never specifically applied sovereign immunity to claims alleging unconstitutional acts. In this opinion, the court exhaustively traced the history of sovereign immunity in Georgia, pointing out the various contradictions and inconsistencies before authoritatively declaring that sovereign immunity bars all claims against the state, even those seeking to protect "fundamental" constitutional rights, such as due process.[7] Regardless of how "fundamental" or important a constitutional right is, even those guaranteed in the Bill of Rights,[8] suits against the state are barred by sovereign immunity, unless sovereign immunity is specifically

1. Lathrop v. Deal, 301 Ga. 408, 801 S.E.2d 867 (2017). For an analysis of last year's local government law during the prior survey period, see Ken E. Jarrard, *Local Government Law*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 205 (2017).

2. Mayor v. Harris, 302 Ga. 853, 809 S.E.2d 806 (2018).

3. Barnett v. Caldwell, 302 Ga. 845, 809 S.E.2d 813 (2018).

4. 301 Ga. 408, 801 S.E.2d 867 (2017).

5. *Id.* at 408–09, 801 S.E.2d at 869.

6. *See* Olvera v. Univ. Sys. of Ga. Bd. of Regents, 298 Ga. 425, 428 n.4, 782 S.E.2d 436, 438 n.4 (2016); State v. Int'l Keystone Knights of the Ku Klux Klan, 299 Ga. 392, 394–95 n.11, 788 S.E.2d 455, 459 n.11 (2016); Ga. Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, 294 Ga. 593, 602, 755 S.E.2d 184, 191 (2014).

7. *Lathrop*, 301 Ga. at 444, 801 S.E.2d at 892.

8. U.S. CONST. amends. I–X.

and explicitly waived.[9] As such, the court affirmed the dismissal of the plaintiffs' claims against state officials in their official capacity.[10]

Lathrop did leave a few openings for claims against the government to survive. One such area in which suits alleging constitutional violations are not barred is takings claims.[11] Thus, sovereign immunity does not bar actions against the government for the taking of private property, because the Takings Clause[12] itself "specifically prescribes just and adequate compensation as the remedy for an uncompensated taking."[13] Likewise, claims seeking writs of mandamus based upon "the failure of a public official to perform a clear legal duty" where "(1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief" are allowed.[14]

The State Tort Claims Act[15] is "the most prominent" avenue by "which an aggrieved citizen may pursue claims directly against state departments, agencies, and officers in their official capacities for relief from official acts alleged to be unconstitutional or otherwise unlawful, notwithstanding the broad sweep of sovereign immunity."[16] Lastly, the court appeared to reaffirm the inapplicability of sovereign immunity to claims against government officials "in their individual capacities [where they] were alleged to have acted without legal authority, even if they acted under color of their offices."[17] The court was unpersuaded that "the constitutional doctrine of official immunity would bar a suit against a state officer in his individual capacity for injunctive or declaratory relief from the threat of official acts that would allegedly violate the Constitution."[18] In other words, litigants may still seek "prospective declaratory or injunctive relief from the enforcement of allegedly unconstitutional laws—so long as the litigants [seek] relief against state

9. *Lathrop*, 301 Ga. at 427, 801 S.E.2d at 881 (holding that implied rights of action do not waive sovereign immunity).

10. *Id.*

11. *Id.*

12. U.S. CONST. amend. V.

13. *Lathrop*, 301 Ga. at 426, 801 S.E.2d at 881.

14. Ga. Ass'n Prof. Process Servers v. Jackson, 302 Ga. 309, 312, 806 S.E.2d 550, 554 (2017).

15. O.C.G.A. §§ 50-21-20 to -37 (2018).

16. *Lathrop*, 301 Ga. at 433, 801 S.E.2d at 885.

17. *Id.* at 414, 801 S.E.2d at 873.

18. *Id.* at 439–40, 801 S.E.2d at 889.

officers and employees in their *individual* capacities and not in their *official* capacities."[19]

The Georgia Supreme Court's decision in *Lathrop*, specifically, but also its prior holdings in *Georgia Department of Natural Resources v. Center for a Sustainable Coast*[20] and *Olvera v. University System of Georgia Board of Regents*,[21] created, or at least perpetuated, "uncertainties . . . about the availability of other types of suits in the wake of that decision."[22] The State of Georgia Court Reform Council addressed this uncertainty over the application of sovereign immunity in its 2017 Final Report.[23] That Council recommended legislation to clarify some of the confusion surrounding sovereign immunity, and the General Assembly took up a partial "fix" during this year's session that only addressed the doctrine as applied to the State, but that bill stalled in the Senate.[24] As a result, sovereign immunity as set forth in *Lathrop* is still the law of the state.

While *Lathrop* raises many questions regarding the application of sovereign immunity, one of the most pressing issues for local governments is whether zoning challenges remain viable. The cases addressing zoning challenges or appeals contain an inconsistent hodgepodge of causes of action for a property owner to employ against

19. STATE OF GA. COURT REFORM COUNCIL, FINAL REPORT 30–31 (2017), https://law.georgia.gov/sites/law.georgia.gov/files/related_files/site_page/FINAL%20REPORT_Court%20Reform%20Council.pdf.

20. 294 Ga. 593, 755 S.E.2d 184 (2014).

21. 298 Ga. 425, 782 S.E.2d 436 (2016).

22. FINAL REPORT, *supra* note 19, at 36.

23. *Id.* at 25–38.

24. Ga. H.R. Bill 791, Reg. Sess. (2018) (unenacted).

cities and counties, including: declaratory judgment,[25] mandamus,[26] appeal by petition for certiorari,[27] "a suit in equity to declare a zoning ordinance unconstitutional,"[28] injunctive relief,[29] and due process violations.[30] In light of *Lathrop*, it would appear, at first blush, that none of these causes of action would survive sovereign immunity, because

25. *See, e.g.*, Burton v. Glynn Cty., 297 Ga. 544, 544, 776 S.E.2d 179, 181 (2015) ("[T]he trial court properly found that [property] owners were violating the [zoning] ordinance and . . . properly issued a declaratory judgment to that effect."); BBC Land & Dev., Inc. v. Butts Cty., 281 Ga. 472, 472, 640 S.E.2d 33, 34 (2007) (involving property owner's claims against county for injunctive relief, mandamus, declaratory judgment, damages, allegations regarding vested rights to develop property in accordance with prior zoning decision); Cooper v. Unified Gov't of Athens Clarke Cty., 275 Ga. 433, 433, 569 S.E.2d 855, 856 (2002) (remanding the trial court's dismissal of a complaint appealing denial of rezoning, seeking declaratory judgment and mandamus); City of Fayetteville v. Taylor, 256 Ga. 697, 697, 353 S.E.2d 28, 28 (1987) (affirming declaratory judgment that use of property was allowed under zoning ordinance); Int'l Funeral Servs., Inc. v. DeKalb Cty., 244 Ga. 707, 708–09, 261 S.E.2d 625, 627 (1979) (overruled on other grounds by Jackson v. Spalding Cty., 265 Ga. 792, 462 S.E.2d 361 (1995) ("The relief sought by plaintiffs [—declaratory judgment and mandamus regarding constitutionality of zoning ordinance as applied to property—] was proper."); Dawkins & Smith Homes, LLC v. Lowndes Cty., 306 Ga. App. 79, 81, 701 S.E.2d 544, 546 (2010) ("declaratory judgment action concerning a zoning issue"—whether a use "was grandfathered" under a zoning ordinance); U.S.A. Gas, Inc. v. Whitfield Cty., 298 Ga. App. 851, 854, 681 S.E.2d 658, 661 (2009) (holding that declaratory judgment action was proper where property owner questioned applicability of zoning ordinance to alleged "vested rights."); Flippen All. for Cmty. Empowerment, Inc. v. Brannan, 267 Ga. App. 134, 134, 601 S.E.2d 106, 108 (2004) (holding issues of material fact precluded summary judgment for county in "declaratory judgment action" to determine whether property "was grandfathered as a nonconforming use under the applicable . . . Zoning Ordinance."); Rock v. Head, 254 Ga. App. 382, 382, 562 S.E.2d 768, 769 (2002) ("[P]laintiffs had standing to bring the declaratory judgment action" seeking determination "concerning the effect of a vote" to rezone property.).

26. *See, e.g.*, *BBC Land & Dev., Inc.*, 281 Ga. at 472, 640 S.E.2d at 33; *Cooper*, 275 Ga. at 433, 569 S.E.2d at 856; *Int'l Funeral Servs., Inc.*, 244 Ga. at 708–09, 261 S.E.2d at 627; City of Atlanta v. Wansley Moving & Storage Co., 245 Ga. 794, 796, 267 S.E.2d 234, 236 (1980) (holding zoning appeal seeking mandamus and declaratory judgment was proper).

27. *See, e.g.*, Village Ctrs., Inc. v. DeKalb Cty., 248 Ga. 177, 179, 281 S.E.2d 522, 523–24 (1981) ("Although, as we have noted, a suit in equity to declare a zoning ordinance unconstitutional as applied to certain property is not an appeal either in form or in substance . . . it is nonetheless appropriate to treat it as an appeal or petition for certiorari.").

28. *Id.*

29. *See* Merritt v. City of Warner Robins, 243 Ga. App. 693, 694, 534 S.E.2d 149, 150 (2000) ("Because plaintiff joined his action for injunctive relief with an appeal from a zoning decision, we conclude that the trial court's order comes within the purview of O.C.G.A. § 5-6-35(a)(1), requiring the grant of an application for discretionary appeal.").

30. *See* Diversified Holdings, LLP v. City of Suwanee, 302 Ga. 597, 611, 807 S.E.2d 876, 888 (2017) ("[B]ecause Diversified requested relief in the form of rezoning without seeking damages for a taking, its claim is properly understood as sounding in due process.").

sovereign immunity bars claims seeking injunctive relief and declaratory judgment against cities and counties, even claims meant to protect "fundamental" constitutional rights, such as due process.[31] However, zoning appeals and challenges derive from violations of the Takings Clause.[32] Again, *Lathrop* specifically recognized takings claims as constitutional exceptions to sovereign immunity.[33] Therefore, *Lathrop* may not signal the death of zoning litigation after all.[34]

III. OFFICIAL IMMUNITY

Application of the Georgia constitutional provision on official immunity[35] continues to evolve with many significant decisions rendered during this survey period. Although the main holding in *Lathrop v. Deal*[36] involved the application of sovereign immunity to claims seeking injunctive and declaratory relief against state officers in their official capacities, the Georgia Supreme Court also provided an in-depth historical analysis of the state's official immunity doctrine. The court noted "worrisome trends with respect to official immunity in the tort

31. *Lathrop*, 301 Ga. at 444, 801 S.E.2d at 892.

32. *See* Tuggle v. Manning, 224 Ga. 29, 33, 159 S.E.2d 703, 705 (1968) ("Zoning laws and regulations must meet the demands of the constitutional prohibition against the taking of private property for public use without just compensation, and restrictions which are arbitrary or unreasonable or lacking in any substantial relation to the public health, safety, morals, or general welfare come within the constitutional inhibition, as where a regulation permanently so restricts the use of property that it cannot be used for any reasonable purpose."); Jervey v. City of Marietta, 274 Ga. 754, 754, 559 S.E.2d 457, 458 (2002) (citing Guhl v. Holcomb Bridge Rd. Corp., 238 Ga. 322, 232 S.E.2d 830 (1977) ("The actual standard for determining the existence of an unconstitutional taking is whether the current . . . zoning classification causes the property owner a significant detriment having no substantial relation to the public health, safety, morality, and welfare."); Town of Tyrone v. Tyrone, LLC, 275 Ga. 383, 384, 565 S.E.2d 806, 808 (2002) ("A court's role in zoning disputes is to determine whether the current zoning amounts to an unconstitutional taking, not which zoning classification should apply to a particular parcel of property.").

33. *Lathrop*, 301 Ga. at 426, 801 S.E.2d at 881.

34. *See* Kammerer Real Estate Holdings, LLC v. Forsyth Cty. Bd. of Comm'rs, 302 Ga. 284, 285 n.2, 806 S.E.2d 561, 562 n.2 (2017) (setting aside dismissal of a declaratory judgment action in a zoning challenge on other grounds, but holding that "the trial court can take up the question of sovereign immunity on remand").

35. The Georgia Constitution provides that:

> [A local government officer] may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, [his] ministerial functions and may be liable for injuries and damages if [he] act[s] with actual malice or with actual intent to cause injury in the performance of [his] official functions.

GA. CONST. art. I, § 2, para. 9(d).

36. 301 Ga. 408, 801 S.E.2d 867 (2017).

decisions that followed the adoption of the Constitution of 1983."[37] The apparent confusion on the distinction between ministerial and discretionary functions served as a backdrop to the General Assembly's proposal to recognize constitutionally the concept of official immunity.[38] This proposal resulted in the immunity being "[e]nacted as part of the 1991 amendment [to] the Constitution of 1983, Article I, Section II, Paragraph IX (d)."[39]

The constitutional official-immunity provision does not expressly refer to any preexisting doctrine.[40] Thus, the court declined to hold that the text of the provision unambiguously signals an incorporation of the whole of the decisional law concerning official immunity that predated the 1991 amendment.[41] The court, however, also noted that the provision "does not unambiguously sweep [the preexisting] law into the dustbin of historical curiosities."[42] Thus, "[e]ven if the Constitution of 1983 as amended does not provide for the wholesale incorporation of preexisting decisional law on official immunity, that decisional law nevertheless provides important context for a proper understanding of Article I, Section II, Paragraph IX (d)."[43]

With this understanding recognized, the Georgia Supreme Court analyzed both the pre-1991 decisional law and the text of the constitutional official-immunity provision. The Georgia Supreme Court found that the decisional law "does not suggest that official immunity ever has been understood to apply to claims of prospective relief."[44] Similarly, the current text of the constitutional official-immunity provision suggests that the provision is only about suits for retrospective relief and monetary damages.[45] The Georgia Supreme Court therefore held that official immunity does not apply to claims for prospective relief.[46] This holding provides an avenue for declaratory and injunctive relief against state and local officials in their individual capacities where such claims are otherwise barred by sovereign immunity against the state as well as state and local officials in their official capacities.

37. *Id.* at 438, 801 S.E.2d at 888.
38. *Id.*
39. *Id.*
40. *Id.* at 439, 801 S.E.2d at 888.
41. *Id.*
42. *Id.* at 440, 801 S.E.2d at 889.
43. *Id.* at 441, 801 S.E.2d at 889.
44. *Id.* at 441, 801 S.E.2d at 890.
45. *Id.* at 441–42, 801 S.E.2d at 890.
46. *Id.* at 444, 801 S.E.2d at 892.

In *Barnett v. Caldwell*,[47] the Georgia Supreme Court further dissected the determination of whether an action is discretionary or ministerial in the context of student supervision. The Fulton County State Court granted the subject teacher's motion for summary judgment, finding that a teacher's duty to supervise students in her classroom is a discretionary function, and the Georgia Court of Appeals affirmed.[48] The teacher's classroom was in a cluster system that shared a common entrance with the classroom of another teacher, and a bifold wall divided the two classrooms. The teacher left her classroom, asking the other teacher to "listen out" for her class.[49] While the teacher was gone, two students engaged in horseplay that caused one student to land on top of the other student, knocking him to the ground. The teacher later returned to find the student lying unconscious. The teacher called 9-1-1 and medical technicians responded, but the student was later pronounced dead at the hospital.[50]

The school's faculty handbook provided that "[t]he classroom teacher is solely responsible for the supervision of any student in his or her classroom. Students are **never** to be left in the classroom unsupervised by an APS certified employee."[51] The Georgia Supreme Court, however, found that nowhere does the faculty handbook define "supervise" or "unsupervised."[52] Thus, "[o]ffering no specificity in the general duty of student supervision, the written policy cannot be read to require an absolute or definite duty of teachers to be physically present in the classroom, having their students within eyesight at all times."[53] The school policy, instead, "calls for a teacher to exercise personal deliberation and judgment in determining whether to leave a classroom, and if so, how to go about providing for supervision of the class during the absence."[54] The Georgia Supreme Court therefore found that the act of student supervision in this particular case was discretionary; and absent evidence of actual malice or intent to injure in the record, the teacher was entitled to official immunity.[55]

While affirming the Georgia Court of Appeals, the Georgia Supreme Court took the opportunity to caution lower courts from always

47. 302 Ga. 845, 809 S.E.2d 813 (2018).
48. *Id.* at 845, 809 S.E.2d at 814.
49. *Id.* at 846, 809 S.E.2d at 815.
50. *Id.*
51. *Id.*
52. *Id.* at 846–47, 809 S.E.2d at 815.
53. *Id.* at 849, 809 S.E.2d at 817.
54. *Id.*
55. *Id.* at 852, 809 S.E.2d at 819.

classifying student supervision as a discretionary function. The supreme court noted that there may be times where a policy on student supervision is "so definite as to render a school employee's acts ministerial."[56] The supreme court held, "[T]o the extent that language used in prior Court of [Appeals] decisions may suggest that school employees' supervision of students is always and inalterably discretionary, that conclusion would be overbroad."[57] This decision confirms the point that "the determination of whether the action at issue is discretionary or ministerial is made on a case-by-case basis, and the dispositive issue is the character of the specific actions complained of, not the general nature of the job."[58]

In *Odum v. Harn*,[59] the Georgia Court of Appeals considered the issue of whether a county school district bus driver is entitled to official immunity when a student is fatally struck by a motorist who ignores the bus's stop arm and flashing lights. The State Court of Bryan County granted summary judgment for the bus driver based on official immunity, and the court of appeals affirmed.[60] The bus driver stated that she followed safety procedures for dropping the student off, including "activat[ing] the [bus's] flashing lights, stop sign, and crossing guard bar." Once off the bus, the student passenger is supposed to wait for the bus driver to check for oncoming traffic and to signal to the student that he may proceed to cross the road. In this case, the bus driver claimed that the student darted across the road towards his mother before the bus driver signaled to him to proceed across the road. The bus driver saw oncoming traffic and "sounded the bus's horn in an attempt to stop the [student], but the warning was too late, and the oncoming vehicle struck the child."[61]

Not yet heeding the supreme court's warning in *Barnett*, which was decided only ten days before, the court of appeals did not analyze whether any policy on student supervision was so definite as to render any of the bus driver's acts ministerial. Instead, the court of appeals summarily stated its long-standing holding that "a school official's task of monitoring, supervising, and controlling students is a discretionary act."[62] Thus, the court of appeals ruled that the bus driver's "actions of stopping the school bus, activating the stop sign and warning lights, and

56. *Id.* at 851, 809 S.E.2d at 818.
57. *Id.*
58. *Id.* at 848, 809 S.E.2d at 816.
59. 344 Ga. App. 488, 811 S.E.2d 19 (2018).
60. *Id.* at 488–89, 811 S.E.2d at 20.
61. *Id.* at 488, 811 S.E.2d at 20.
62. *Id.* at 489, 811 S.E.2d at 20.

supervising of the student's exit from the bus clearly involved supervision of student safety and constituted a discretionary function."[63] Absent any allegation of actual malice or actual intent to cause injury, the bus driver was entitled to official immunity.[64] The decision in *Odum* highlights the historical approach taken by the court of appeals in classifying student supervision, including any ancillary functions, as discretionary. Yet, as previously discussed above, the supreme court in *Barnett* "conclude[d] that student supervision is not unalterably discretionary in all respects."[65] Thus, the court of appeals' analysis will likely evolve to align with the *Barnett* ruling in the years to come.

In *Roberts v. Mulkey*,[66] the plaintiff brought suit against a county water authority and the crew chief of the county water authority for injuries sustained when the van she was driving collided with a pile of dirt and then an excavator at a work site. The Carroll County State Court granted the crew chief summary judgment, finding that the plaintiff's claims were barred by official immunity.On appeal, the plaintiff argued that the crew chief was not shielded by official immunity because he failed to perform a ministerial act by not "placing advance warning signs to alert motorists at any . . . work site." The record showed that, at the time of the collision, the county water authority did not have a written traffic control policy. However, when viewed in a light most favorable to the plaintiff, the evidence did show that a field superintendent instructed the crew chief to deploy warning signs at work sites.[67] Recognizing that a ministerial duty may be established by an unwritten policy or a supervisor's directive,[68] the court of appeals held that the particular instruction to deploy warning signs "was clear, definite, and certain, and required the execution of a relatively simple, specific duty, such that the deployment of warning signs was a ministerial act."[69] Accordingly, the court of appeals concluded that the trial court erred in granting summary judgment to the crew chief on the basis of official immunity.[70]

In *Schroder v. DeKalb County*,[71] the court of appeals analyzed the application of official immunity at the motion for judgment on the

63. *Id.*

64. *Id.*

65. *Barnett*, 302 Ga. at 845, 809 S.E.2d at 814.

66. 343 Ga. App. 685, 808 S.E.2d 32 (2017).

67. *Id.* at 687–89, 808 S.E.2d at 35–36.

68. *Id.* at 688, 808 S.E.2d at 35.

69. *Id.* at 689, 808 S.E.2d at 36.

70. *Id.*

71. 341 Ga. App. 748, 802 S.E.2d 277 (2017), *cert. granted sub nom.*, No. S17C1875, 2018 Ga. LEXIS 6 (Jan. 16, 2018).

pleadings stage. The plaintiff brought claims under state law and 42 U.S.C. § 1983,[72] alleging that the DeKalb County Recorder's Court falsely reported to the Georgia Department of Driver Services (DDS) that his driver's license had been suspended because he failed to pay a traffic ticket and failed to appear in court. As a result of this report, the plaintiff allegedly was arrested and jailed.[73] He contended that the individual defendants failed to perform their ministerial duties with due care, leading to the arrest.[74]

The court of appeals reversed the trial court's grant of official immunity to the individual defendants.[75] The court of appeals noted that it was "premature" for the trial court to make this determination on a motion for judgment on the pleadings because "there conceivably could be evidence of some explicit detailed laundry list of discrete tasks [a defendant] was required to perform" and that as long as the plaintiff's complaint "satisfies the minimal requirements of notice pleading as set forth in [Georgia's] case law," the case could survive a motion for judgment on the pleadings and proceed to discovery.[76] In other words, the pleadings did not show that the individual defendants were clearly entitled to judgment on the ground of official immunity, and allegations otherwise satisfied the minimal requirements of notice pleading; thus, the trial court erred in dismissing the claims.[77] The Georgia Supreme Court has granted certiorari.[78]

Conversely, *Gates v. Khokhar*[79] highlights the different result that oftentimes occurs when official immunity is analyzed under the federal pleading standard. The United States Court of Appeals for the Eleventh Circuit reversed the United States District Court for the Northern District of Georgia and held that police officers were entitled to qualified immunity against the plaintiff's federal law claims and official immunity against the plaintiff's state law claims at the motion to dismiss stage.[80] As to the state law claims, the plaintiff alleged that the officers violated his privacy rights, committed an assault and battery against him, and unlawfully detained and maliciously prosecuted him following the plaintiff's participation in a protest march in downtown Atlanta. The

72. 42 U.S.C. § 1983.
73. *Schroder*, 341 Ga. App. at 748, 802 S.E.2d at 280.
74. *Id.* at 750, 802 S.E.2d at 282.
75. *Id.*
76. *Id.* at 752, 802 S.E.2d at 283.
77. *Id.*
78. *Withers*, 2018 Ga. LEXIS 6, at *1.
79. 884 F.3d 1290 (11th Cir. 2018).
80. *Id.* at 1294.

parties agreed that the officers were performing a discretionary act when they arrested the plaintiff; thus, the issue for the Eleventh Circuit was whether the plaintiff properly alleged that the officer acted with "actual malice" or "actual intent to cause injury" as required to overcome official immunity.[81]

The Eleventh Circuit held that the plaintiff's factual allegations did not reach this necessary threshold.[82] The plaintiff alleged that the officers "approached [him] in 'full riot gear' and arrested him without probable cause; they 'pushed' or 'pulled' [him] while making the arrest; they handcuffed [him], transported him to [jail] . . . and they made [him] wait approximately twelve hours without food, water, or a place to sleep."[83] "Construing these allegations as liberally as possible, together with [the Court's] conclusion that arguable probable cause existed [for purposes of qualified immunity], the most that can be made of them is that [the plaintiff] was arrested and subjected to the routine inconveniences that attend any arrest."[84] Accordingly, "[t]hese facts are obviously insufficient to show actual malice or intent to injure."[85]

IV. LEGISLATION

One of the biggest questions going into the 2018 legislative session was whether the Georgia General Assembly would adopt any legislation in response to the supreme court's findings on sovereign immunity in *Lathrop*. As noted further below, no such measure passed. The General Assembly, however, did respond in the wake of the supreme court's ruling in *Mayor & Aldermen of Garden City v. Harris*,[86] which involved analysis and application of the Georgia Recreational Property Act (RPA).[87] In *Harris*, the plaintiffs, along with their six-year-old daughter, attended a youth football game at a stadium owned and maintained by the City of Garden City. As adults, the plaintiffs each paid the required $2 admission fee for spectators over the age of six; however, their daughter was admitted free of charge. During the event, the daughter slipped while walking across the bleachers, and she suffered serious injuries after falling nearly thirty feet to the ground.[88]

81. *Id.* at 1294–95, 1304.
82. *Id.* at 1305.
83. *Id.*
84. *Id.*
85. *Id.*
86. 302 Ga. 853, 809 S.E.2d 806 (2018).
87. O.C.G.A. §§ 51-3-20 to -26 (2018).
88. *Harris*, 302 Ga. at 853–54, 809 S.E.2d at 807–08.

Reversing both the State Court of Chatham County and the Georgia Court of Appeals, the Georgia Supreme Court accepted the most "natural reading of the plain language of O.C.G.A. § 51-3-23[89] [which indicates that] a landowner remains free from potential liability to any individual person who is injured on the landowner's property who has been allowed to use the property for recreational purposes free of charge."[90] Thus, although the plaintiffs were charged a fee, because their child was not, "the City was shielded from liability for [the child's] injuries."[91]

Apparently dissatisfied with the outcome in *Harris*, the General Assembly passed House Bill 904,[92] which removes the immunity otherwise provided to public and private owners of recreational property that is made available to the public if such owners charge anyone for admission on the date of the injury.[93] The bill was signed by the governor and went into effect on July 1, 2018.[94]

The General Assembly continues to push decisions related to alcohol sales down to counties and municipalities with the passage of Senate Bill 17.[95] Colloquially known as the "Brunch Bill" or the "Mimosa Mandate," this bill authorizes counties and municipalities, in which the sale of alcoholic beverages for consumption on premises is already lawful on Sunday from 12:30 p.m. to 12:00 midnight, to allow said sale from 11:00 a.m. to 12:00 midnight if the local government adopts an ordinance or resolution and the voters so approve by referendum.[96] The bill was signed by the governor and went into effect on May 8, 2018.[97]

In an effort to address the lack of broadband connectivity in rural areas of the state, the General Assembly passed Senate Bill 402.[98] The bill directs the Georgia Department of Community Affairs (DCA) to map out rural parts of the state that do not have broadband internet access, establishes a voluntary "Broadband Ready Community" program for local governments, and creates a statewide broadband deployment

89. O.C.G.A. § 51-3-23 (2018).

90. *Harris*, 302 Ga. at 855, 809 S.E.2d at 808.

91. *Id.* at 857, 809 S.E.2d at 810.

92. Ga. H.R. Bill 904, Reg. Sess., 2018 Ga. Laws 554 (codified at O.C.G.A. § 51-3-25 (2018)).

93. *Id.*

94. *Id.*

95. Ga. S. Bill 17, Reg. Sess., 2018 Ga. Laws 461 (codified at O.C.G.A. § 3-3-7 (2018)).

96. *Id.*

97. *Id.*

98. Ga. S. Bill 402, Reg. Sess., 2018 Ga. Laws 423 (codified at O.C.G.A. §§ 50-40-1 to -84 (2018)). This Act shall be known as the Achieving Connectivity Everywhere (ACE) Act. *Id.*

plan.[99] Local governments that include a broadband promotion element in their comprehensive plans may apply to DCA to be designated a "Broadband Ready Community."[100] Said communities will receive priority for certain grant funding.[101] The bill was signed by the governor and went into effect on May 7, 2018.[102]

Finally, one of the most notable measures that failed to pass during the 2018 legislative session was House Bill 791,[103] which provided for a limited waiver of sovereign immunity for declaratory and injunctive relief in response to the *Lathrop* ruling. The bill was tabled in the state senate.[104] Accordingly, the seminal *Lathrop* decision will remain the controlling law on sovereign immunity for at least one more year.

V. TAXATION

This year saw three cases dealing with taxability of leasehold interests, including another remand in the now decade-old case involving the Columbus Medical Center, and another two dealing with refund actions under O.C.G.A. § 48-5-380.[105] Another case clarified the harsh consequences for a board of assessors that failed to comply with a 2015 addition to the law regarding appeals, and yet another found against a municipality on an occupation tax issue. Of the seven cases discussed herein, the Authors saw four clear wins for the taxpayer and only one for local government, with the other two being a remand and a somewhat pyrrhic victory on limitation of relief.

Bond validation orders typically pose an insurmountable obstacle, but such was not the case in *Columbus Board of Tax Assessors v. Medical Center Hospital Authority*.[106] At issue was the tax-exempt status of a hospital authority's leasehold interest. The authority, a public entity, leased real property from Columbus Regional Healthcare System, a private, non-profit entity, and issued revenue bonds to finance the construction of facilities to be operated by the authority, with the lease providing that ownership of the facilities would revert to the non-profit lessor at the conclusion of the lease. The bonds were validated in 2004 (as were refinancing bonds issued in 2007). The board of tax assessors

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Ga. H.R. Bill 791, Reg. Sess. (2018) (unenacted).

104. 2017-2018 Reg. Sess., H.B. 791, GA. GEN. ASSEM., www.legis.ga.gov/Legislation/en-US/display/20172018/HB/791 (last visited Oct. 21, 2018).

105. O.C.G.A. § 48-5-380 (2018).

106. 302 Ga. 358, 806 S.E.2d 525 (2017).

sent the authority a tax bill for the value of its leasehold interest, and the authority sought a declaratory judgment that its leasehold interest was exempt from ad valorem taxation, pointing to the bond validation order that conclusively found the authority was the owner of said facilities and that the project "served a public purpose as contemplated by the Hospital Authorities Law."[107]

The Georgia Supreme Court rejected that argument, holding that the authority's leasehold interest was exempt only if it constituted "public property," which is a different question than whether the project serves a "public purpose" under the Hospital Authorities Law.[108] The court remanded the case for further findings by the trial court, stating, "It may be that in many cases—perhaps even most cases—facts establishing that bonds have a public purpose also will tend to show that property associated with those bonds is public property, but it is not inevitably so."[109]

Two decisions dealt with the taxability of leasehold interests at Hartsfield–Jackson Atlanta International Airport. In *Clayton County Board of Tax Assessors v. Aldeasa Atlanta Joint Venture*,[110] the Georgia Supreme Court affirmed the Clayton County Superior Court's finding that the taxpayer's agreement for concession space at the airport created only a nontaxable usufruct, not a taxable estate in real property.[111] Although the agreement granted a five-year term of possession, which gives rise to a rebuttable presumption of a taxable estate for years, other factors rebutted the presumption.[112] In addition to an express statement that it was intended to create only a usufruct, the agreement contained substantial restrictions on the taxpayer's use of the property, which the court found to be "fundamentally inconsistent with the concept of an estate for years."[113] The court also rejected a number of alternative arguments made by the board of assessors, including an argument that the agreement created a taxable franchise.[114]

The same issue was decided in the same manner in *City of College Park v. Paradies-Atlanta, LLC*.[115] The agreements at issue here were for a term of seven years, but again, the Georgia Court of Appeals found the

107. *Id.* at 359–60, 806 S.E.2d at 527.
108. *Id.* at 363, 806 S.E.2d at 529.
109. *Id.*
110. 304 Ga. 15, 815 S.E.2d 870 (2018).
111. *Id.* at 20, 815 S.E.2d at 875.
112. *Id.* at 16–17, 815 S.E.2d at 872–73.
113. *Id.* at 17, 815 S.E.2d at 873.
114. *Id.* at 20, 815 S.E.2d at 875.
115. 346 Ga. App. 63, 815 S.E.2d 246 (2018).

presumption of an estate for years was rebutted by an expression of intent to create only a usufruct combined with substantial restrictions on the taxpayer's use of the property.[116]

Another two decisions dealt with refunds of taxes under O.C.G.A. § 48-5-380. In *Coleman v. Glynn County*,[117] three class actions sought refunds for incorrect application of a local homestead exemption.[118] Affirming summary judgment for the county, the court found that refunds were limited to payments made during the three-year window immediately preceding the filing of a written claim for refund.[119] The named plaintiffs had made a written demand on November 10, 2011, but the class members made no written claim prior to the filing of suit on November 20, 2012.[120] Thus, the named plaintiffs were entitled to refunds for payments made after November 10, 2008, but the class members were entitled to refunds only for payments made after November 20, 2009.[121]

In *City of Dublin School District v. MMT Holdings, LLC*,[122] a taxpayer sued the school district for a refund of school taxes it alleged had been collected to pay obligations not approved by the voters.[123] Reversing the Laurens County Superior Court, the Georgia Court of Appeals found that a refund action can be filed only against a county or city, not a school district, and that the school district's motion for summary judgment should have been granted.[124]

In *Hall County Board of Tax Assessors v. Westrec Properties, Inc.*,[125] the Georgia Supreme Court gave sharp teeth to a new procedural requirement for property tax appeals to superior court. The 2015 session of the Georgia General Assembly added language to section (g)(2) of O.C.G.A. § 48-5-311[126] requiring boards of assessors to schedule a settlement conference subsequent to receiving a taxpayer's notice of appeal to superior court and prior to certifying the appeal.[127] This new

116. *Id.* at 67, 815 S.E.2d at 250.

117. 344 Ga. App. 545, 809 S.E.2d 383 (2018).

118. *Id.* at 545, 809 S.E.2d at 385.

119. *Id.* at 550, 809 S.E.2d at 388.

120. *Id.* at 546, 809 S.E.2d at 385–86.

121. *Id.* at 550–51, 809 S.E.2d at 388.

122. 346 Ga. App. 546, 816 S.E.2d 494 (2018).

123. *Id.* at 546, 816 S.E.2d at 494.

124. *Id.* at 547–48, 816 S.E.2d at 495.

125. 303 Ga. 69, 809 S.E.2d 780 (2018).

126. O.C.G.A. § 48-5-311 (2018).

127. Ga. H.R. Bill 202, Reg. Sess., 2015 Ga. Laws 1219 (codified as amended at O.C.G.A. § 48-5-311(g)(2) (2018)).

requirement became effective on January 1, 2016.[128] The taxpayer in *Westrec Properties* filed its notice of appeal on January 8, 2016 (the board of equalization having denied its appeal in December of 2015). The board of assessors failed to send a notice of settlement conference within forty-five days thereafter, and the taxpayer mailed letters to the board of assessors demanding that its alleged value be entered as the value of record. Thereafter, the board of assessors sent a notice of settlement conference, which the taxpayer attended under protest, and no agreement being reached, the matter proceeded to the Hall County Superior Court where the taxpayer moved for summary judgment.[129]

Affirming the trial court's decision, the Georgia Supreme Court held the board of assessors' failure to send a notice of settlement conference within forty-five days, as mandated by the statute, to be an "election" by the board not to participate in such a conference, which in turn required that the taxpayer's stated value be accepted.[130] The court rejected the board's argument that the taxpayer's remedy should be mandamus to hold the conference, finding the law already provides a remedy—namely, mandated acceptance of the taxpayer's value.[131] It is interesting, however, as the court noted, "The Board does not contend that it neglected to send notice through oversight or mistake; it follows that it made a choice not to do so."[132] Perhaps a board's opportunity to avoid the harsh result of this case remains open in cases of "oversight or mistake," or perhaps it does not—no further hints are given.

Turning to occupation taxes, the court of appeals ruled against a taxing municipality in *Cotton Pickin' Fairs, Inc. v. Town of Gay*.[133] The relevant statute only permits occupation taxes against entities having a "location or office" in the jurisdiction, which term does "*not include a temporary or construction work site which serves a single customer or project*."[134] The taxed entities here were exhibitors at a two-day fair, and construing the law "most strongly" against the municipality, the Georgia Court of Appeals reversed Meriwether County Superior Court's grant of summary judgment to the Town and found that the exhibitors were exempt from taxation under the "temporary work site" exception.[135]

128. *Id.*

129. *Westrec Props. Inc.*, 303 Ga. at 69–70, 809 S.E.2d at 782–83.

130. *Id.* at 75, 809 S.E.2d at 786.

131. *Id.*

132. *Id.* at 77, 809 S.E.2d at 787.

133. 346 Ga. App. 327, 816 S.E.2d 160 (2018).

134. *Id.* at 330, 816 S.E.2d at 163 (quoting O.C.G.A. § 48-13-5(3) (2018)).

135. *Id.* at 332, 816 S.E.2d at 164.

VI. OPEN RECORDS / OPEN MEETINGS

A. Open Records

The Georgia Court of Appeals was 0-2 this year on the topic of Open Records as the Georgia Supreme Court saw fit to overrule the two main cases considered, one addressing mandatory versus discretionary disclosure of records and the other, whether documents created by an organization on behalf of a government agency are subject to the Georgia Open Records Act.[136] A Rule 21 decision concerning request for court records and a footnote in a decision regarding appraisals were also mentioned to round out the topic.

In *Campaign for Accountability v. Consumer Credit Research Foundation*,[137] the Consumer Credit Research Foundation (CCR) entered into an agreement with the Kennesaw State University Research and Service Foundation (KSU) and, in accordance, a KSU professor conducted statistical research and published a paper relating to "payday" loans. The Campaign for Accountability (CFA) sent a request to KSU under the Georgia Open Records Act for copies of certain correspondence relating to the research. KSU did not oppose the release and notified CCR that it planned to release the redacted correspondence. CCR objected and filed an action for declaratory and injunctive relief to prevent the release.[138]

The Fulton County Superior Court ruled that the two research exceptions in the Open Records Act, O.C.G.A. §§ 50-18-72(a)(35)[139] and (36),[140] authorized a state agency to withhold research materials covered by the exceptions from public disclosure, but that the Act did not mandate nondisclosure. Based on that conclusion, the trial court ruled that KSU had the discretion to release the research correspondence in response to the request by CFA.[141] However, the court of appeals reversed, holding that the trial court's ruling was inconsistent with the reasoning of the Georgia Supreme Court in *Bowers v. Shelton*.[142] The court of appeals read *Bowers* as holding that a state agency's compliance with the specific exceptions to disclosure contained in the Open Records Act was mandatory rather than discretionary, and that private parties

136. O.C.G.A. § 50-18-70 to -77 (2018).

137. 303 Ga. 828, 815 S.E.2d 841 (2018).

138. *Id.* at 829, 815 S.E.2d at 843.

139. O.C.G.A. § 50-18-72(a)(35).

140. O.C.G.A. § 50-18-72(a)(36).

141. Consumer Credit Res. Found. v. Bd. of Regents of the Univ. of Ga., 341 Ga. App. 323, 800 S.E.2d 24 (2017), *rev'd sub nom.*, 303 Ga. at 829, 815 S.E.2d at 843.

142. 265 Ga. 247, 453 S.E.2d 743 (1995).

may sue to enjoin an agency from releasing records that fall within one of those exceptions.[143]

The supreme court disapproved the court of appeals and adopted a narrower reading of *Bowers*, concluding that the holding in that case referred only to records within certain specific exemptions from the Act's general disclosure requirement.[144] The court noted, however, that it did not disapprove the holding in *Bowers* that parties with an interest in nondisclosure may pursue a lawsuit to seek compliance with the Act.[145] Further, the supreme court stated that nothing prevented agencies from promising by contract not to disclose information that the Act does not require them to disclose.[146]

In this case, CCR had no confidentiality agreement binding on KSU.[147] Accordingly, the supreme court held that the court of appeals erred in ruling that all records that are exempted from the Open Records Act's general disclosure requirement are prohibited from disclosure to the public.[148] And because the records CCR sought to keep confidential were not subject to any prohibition against disclosure, the supreme court reversed.[149]

In *Smith v. Northside Hospital, Inc.*,[150] the Georgia Supreme Court analyzed whether documents created by an organization on behalf of a government agency were subject to the Open Records Act. The Fulton County Hospital Authority (Authority) was created in 1966 and it opened Northside Hospital, which it owned and operated for approximately twenty-five years. Looking to improve the hospital's operations, the Authority restructured in the 1990s through a long-term lease of the hospital and related assets for operation by a private, charitable, nonprofit corporation.[151]

Attorney E. Kendrick Smith brought this action to compel the corporation Northside Hospital, Inc. and its parent company Northside Health Services, Inc. (collectively, Northside) to provide certain documents related to the acquisitions of four privately owned physician groups. Northside responded to the request asserting that it was a private, nonprofit hospital that was not subject to the Open Records Act

143. *Consumer Credit Res. Found.*, 341 Ga. App. at 324, 800 S.E.2d at 25.
144. *Campaign for Accountability*, 303 Ga. at 834, 815 S.E.2d at 846–47.
145. *Id.* at 836, 815 S.E.2d at 848.
146. *Id.*
147. *Id.* at 828, 815 S.E.2d at 843.
148. *Id.* at 838–39, 815 S.E.2d at 849.
149. *Id.* at 839, 815 S.E.2d at 849–50.
150. 302 Ga. 517, 807 S.E.2d 909 (2017).
151. *Id.* at 517, 807 S.E.2d at 912.

and, even assuming it was subject to the Act, the requested documents were exempt from production under a variety of exemptions. The Fulton County Superior Court dismissed Smith's action after a bench trial, and a divided court of appeals affirmed.[152] The supreme court granted certiorari to consider whether the documents in question were "public records" within the meaning of the Act. "The parties agree[d] that the Authority [was] an 'agency' [as defined by the Act] and Northside [was] not; the only question posed by this appeal [was] whether the documents sought . . . were 'prepared and maintained or received by' Northside 'in the performance of a service or function for or on behalf of' the Authority."[153]

The supreme court reversed the opinion of the court of appeals with Justice Nels Peterson writing: "The corporation's operation of the hospital and other leased facilities is a service it performs on behalf of the [county's] agency, and so records related to that operation are public records."[154] The case was remanded and the trial court was directed to apply the correct standard and determine how closely related the acquisitions were to the operation of the hospital's facilities.[155] Justice Melton concurred to emphasize that he felt "it defies credulity that Northside could be completely separate from and do nothing 'on behalf of' the Authority when it was the Authority itself that '*created*' Northside for the purpose of carrying out virtually all of its public duties."[156]

Although not a technical Open Records Act decision, a related case concerning a request for court records, *Undisclosed LLC v. State*,[157] should be mentioned as a history lesson peppered with quotations by Alexander Hamilton and James Madison meets modern-day podcasts. Joseph Watkins was convicted of felony murder and other crimes following a jury trial, and his conviction was affirmed on appeal.[158] Thereafter, "Undisclosed LLC, a producer of a legal documentary podcast, began investigating Watkins's case and, as part of that investigation, sought access to audio recordings of several hearings and the trial."[159] Undisclosed LLC (Undisclosed) filed a motion under

152. *Id.* at 517–20, 807 S.E.2d at 912–13.
153. *Id.* at 521, 807 S.E.2d at 914.
154. *Id.* at 517, 807 S.E.2d at 912.
155. *Id.* at 531, 807 S.E.2d at 921.
156. *Id.* at 532, 807 S.E.2d at 921 (Melton, J., concurring).
157. 302 Ga. 418, 807 S.E.2d 393 (2017).
158. *Id.* at 418–19, 807 S.E.2d at 395.
159. *Id.* at 419, 807 S.E.2d at 395.

Uniform Superior Court Rule 21 to obtain copies of the audio recordings.[160]

> The State did not oppose the motion; the trial court denied it to the extent Undisclosed wanted to make copies of the audio recordings, holding Rule 21 did not confer the right to copy. [The court] granted Undisclosed's application for discretionary appeal. Interpreting Rule 21 in the light of the common law right that it preserved, [the court on appeal] conclude[d] that the trial court erred . . . Rule 21 does include a right to copy court records. [The court] nevertheless affirm[ed] the trial court's order because *Green*'s[161] limited holding [did] not apply here, and a review of the common law show[ed] that "court records" within the historic right include only those materials filed with the court, which the recording in question was not.[162]

In *City of Marietta v. Summerour*,[163] the Georgia Supreme Court issued an opinion regarding the City of Marietta's condemnation of property. The city failed to comply with the statutory requirement that it provide the appraisal summary to the landowner prior to the initiation of condemnation negotiations.[164] Although the majority of the case is inapplicable to this section, the court does offer insight into the Open Records Act in footnote seven. The city argued that the statutory requirement of providing an appraisal summary was inconsistent with the Open Records Act, which exempted real estate appraisals from public disclosure until condemnation proceedings had been completed.[165] The court dismissed this argument, holding that the Open Records Act governs disclosure of records to members of the public seeking such records; it does not govern the flow of information between parties to a transaction.[166] Therefore, requiring the city to disclose information to the seller as part of a transaction is not inconsistent with the Open Records Act that allows the city to prevent disclosure of information pursuant to an Open Records request.[167]

160. *Id.*

161. Green v. Drinnon, 262 Ga. 264, 417 S.E.2d 11 (1992).

162. *Undisclosed LLC*, 302 Ga. at 419, 807 S.E.2d at 395.

163. 302 Ga. 645, 807 S.E.2d 324 (2017).

164. *Id.* at 645, 807 S.E.2d at 326.

165. *Id.* at 659 n.7, 807 S.E.2d at 334 n.7; s*ee* O.C.G.A. § 50-18-72(a)(9).

166. *Summerour*, 302 Ga. at 659 n.7, 807 S.E.2d at 334 n.7.

167. *Id.*

B. Open Meetings

The Georgia Court of Appeals published three different opinions regarding the Open Meetings Act, all centering around the ninety-day time limitation requirement set out in O.C.G.A. § 50-14-1(b)(2).[168] Under that subsection,

> Any action contesting a resolution, rule, regulation, ordinance, or other formal action of an agency based on an alleged violation of this provision shall be commenced within 90 days of the date such contested action was taken or, if the meeting was held in a manner not permitted by law, within ninety days from the date the party alleging the violation knew or should have known about the alleged violation so long as such date is not more than six months after the date the contested action was taken.[169]

In *Martin v. City of College Park*,[170] a city firefighter, Chawanda Martin, was terminated by the interim fire chief and subsequently appealed to the interim city manager, who affirmed the decision. Instead of appealing the decision to the mayor or city council, Martin filed an open records request with the city, upon which she discovered that the interim appointments of the fire chief, city manager, and human resources director were not done pursuant to a vote by the city council in an open meeting. Martin sued the city, fire chief, city manager, and city council, alleging that the interim appointments violated the Open Meetings Act,[171] and therefore, the interim officials lacked authority to take employment action against her.[172]

The Georgia Court of Appeals held that all of Martin's claims were time-barred, except as to the interim city manager.[173] The Open Meetings Act clearly states that voting on hiring decisions must be done in a public meeting and any official action taken at a meeting that is not open to the public shall not be binding.[174] However, because the interim fire chief and human resources director were appointed more than ninety days prior to the commencement of the lawsuit, the complaint was untimely.[175] Although Martin argued that "she [was] entitled to 90 days from the date she knew or should have known of the unlawful appointments . . . the

168. O.C.G.A. § 50-14-1(b)(2) (2018).

169. *Id.*

170. 342 Ga. App. 289, 802 S.E.2d 292 (2017).

171. O.C.G.A. §§ 50-14-1 to -6 (2018).

172. *Martin,* 342 Ga. App. at 290–91, 802 S.E.2d at 293–94.

173. *Id.* at 291, 802 S.E.2d at 294.

174. O.C.G.A. §§ 50-14-1(b)(2), 50-14-3(b)(2) (2018).

175. *Martin*, 302 Ga. App. at 292, 802 S.E.2d at 295.

'knew or should have known' phrase only applies '[when] the *meeting* was held in a manner not permitted by law.'"[176] Because the executive session meeting at issue was lawful (only the appointment without a vote in public was improper), "Martin was required to file suit within 90 days of the contested interim appointments themselves."[177] Martin's claim against the city manager was not time-barred, as the city manager was appointed fewer than ninety days prior to the filing of the complaint.[178]

The Georgia Court of Appeals issued a similar opinion six days later in *Heiskell v. Roberts*.[179] In *Heiskell*, a former judge, Bruce Roberts, filed suit against Walker County, alleging that the county paid him a smaller supplement than his predecessor and thus underpaid him for fifteen months. The county filed various counterclaims, alleging that it overpaid Roberts and should be reimbursed for the overpayments. The county argued, among other things, that the salary supplement was not properly approved and documented and that the supplement was not authorized.[180] Although the court of appeals assumed, without holding, that the decision to pay Roberts a supplement was made in violation of the Open Meetings Act, it still held that the county was not entitled to reimbursement.[181] Because the "shall-not-be-binding language [in O.C.G.A. § 50-14-1(b)(2)] is limited by the [ninety-day] limitation period in the following sentence,"[182] the county's answer and counterclaim were not timely when filed well after the ninety days had expired.[183] Therefore, the court held that the Open Meetings Act was not controlling on the issue of the county recouping Roberts's salary supplement.[184] In making this holding, the court pointed out that although acts done with a want of power are generally null and void in Georgia, a mere procedural irregularity in the exercise of lawful authority does not make the action void.[185]

Lastly, the Georgia Court of Appeals decided *Avery v. Paulding County Airport Authority*,[186] which involved a different aspect of the ninety-day limitations period. In *Avery*, taxpayers filed a declaratory judgment

176. *Id.* (quoting O.C.G.A. § 50-14-3(b)(2)).
177. *Id.*
178. *Id.* at 293, 802 S.E.2d at 295.
179. 342 Ga. App. 109, 802 S.E.2d 385 (2017).
180. *Id.* at 110, 802 S.E.2d at 387–88.
181. *Id.* at 114, 802 S.E.2d at 390.
182. O.C.G.A. § 50-14-1(b)(2).
183. *Heiskell*, 342 Ga. App. at 115, 802 S.E.2d at 391.
184. *Id.*
185. *Id.*
186. 343 Ga. App. 832, 808 S.E.2d 15 (2017).

action, claiming that the airport authority violated the Open Meetings Act when it planned and prepared to submit a Federal Aviation Administration application. In 2012 and 2013, the airport authority held a series of meetings that were in violation of the Open Meetings Act.[187] The taxpayers demanded a declaration that the airport authority violated the Open Meetings Act, an injunction prohibiting future violations of the Open Meetings Act, and civil penalties for each of the defendant's violations. However, they did not seek to invalidate any actions taken at the aforementioned meetings.[188]

Even though the taxpayers did not file their lawsuit within ninety days of the meetings, the court held that the claims were not time-barred because the limitation period only pertains to "[a]ny action *contesting* a resolution, rule, regulation, ordinance, or other formal action of an agency based on an alleged violation [of the Open Meetings Act]."[189] Based on a plain reading of the statute, the court held that the declaratory judgment action was not subject to the ninety-day limitation period, because the taxpayers specifically pled that they did not seek to invalidate any official action.[190] Nonetheless, the court of appeals affirmed the denial of the taxpayers' motion for summary judgment, because declaratory relief is not appropriate when the party is not in a position of uncertainty as to an alleged right.[191] Furthermore, the trial court "may" impose civil penalties under O.C.G.A. § 50-14-6.[192] Where the defendants argued that penalties were not appropriate, the court of appeals found no basis to reverse the denial of summary judgment.[193]

VII. ZONING AND LAND USE

In the past year, the Georgia Supreme Court took up a number of matters examining both the conditions plaintiffs must meet in order to bring an action challenging a zoning decision, as well as the conditions local authorities must satisfy if their zoning decisions are to withstand such a challenge. Of particular note is the court's ruling in *Hoechstetter v. Pickens County*,[194] wherein the court provided some guidance—minimal though it was—on when the information considered by a local entity in a zoning decision is too sparse to meet minimum standards for

187. *Id.* at 834, 808 S.E.2d at 18-19.

188. *Id.* at 834, 808 S.E.2d at 20.

189. *Id.* at 839–40, 808 S.E.2d at 22 (quoting O.C.G.A. § 50-14-1(b)(2)).

190. *Id.*

191. *Id.* at 842–43, 808 S.E.2d at 23–24.

192. *Id.* at 843, 808 S.E.2d at 24; O.C.G.A. § 50-14-6 (2018).

193. *Avery*, 343 Ga. App. at 843, 808 S.E.2d at 24.

194. 303 Ga. 786, 815 S.E.2d 50 (2018).

affording a "meaningful opportunity" for citizens to be heard, which Georgia's Zoning Procedures Law (ZPL)[195] required.[196]

In *Stuttering Foundation, Inc. v. Glynn County*,[197] the Georgia Supreme Court held that a short-term tenant lacks standing to challenge a rezoning decision made at the request of the fee simple owner of the property under the "substantial interest-aggrieved citizen" test.[198] The tenant, holder of a five-year lease, petitioned for judicial review following the County's approval of the landlord's request to rezone the property for construction of an addition to the building where the tenant leased its office. The trial court dismissed the suit for the tenant's want of standing.[199] On grant of the tenant's application for discretionary appeal, the supreme court held that, because the tenant's interest in the property was only a usufruct, it was not an interest in real property.[200] In the absence of a real property interest, there was therefore no "substantial interest" sufficient to grant standing to the tenant to challenge the zoning decision.[201] The supreme court also reaffirmed the "clear error" standard for review of a trial court's determination on the issue of standing in a zoning matter.[202]

In *Schumacher v. City of Roswell*,[203] the Georgia Supreme Court held that a challenge to the adoption of a general zoning code does not constitute a "zoning case,"[204] and therefore, does not fall under the definition of a "decision" by an administrative agency requiring application for discretionary appeal under O.C.G.A. § 5-6-35(a)(1).[205] In *Schumacher*, property owners challenged the process by which the Roswell City Council adopted a unified development code to govern land use issues. The Superior Court of Fulton County ruled against them, and

195. O.C.G.A. §§ 36-66-1 to -6 (2018).

196. *Hoechstetter*, 303 Ga. at 787–88, 815 S.E.2d at 52.

197. 301 Ga. 492, 801 S.E.2d 793 (2017).

198. *Id.* at 503, 801 S.E.2d at 803. Under the "substantial interest-aggrieved citizen" test, the person seeking standing to challenge a zoning decision must show (1) that he has a "substantial interest in the zoning decision" and (2) that his interest is "in danger of suffering some special damage or injury not common to all property owners similarly situated." Dekalb Cty. v. Wapensky, 253 Ga. 47, 48, 315 S.E.2d 873, 875 (1984).

199. *Stuttering Found.*, 301 Ga. at 492, 801 S.E.2d at 796.

200. *Id.* at 496, 801 S.E.2d at 798. The supreme court also noted that Georgia cases in which the first prong of the test was satisfied "have all involved holders of vested or inchoate title to real property," by virtue of which the challenger of the zoning decision has a "substantial interest." *Id.*

201. *Id.* at 496–97, 801 S.E.2d at 798–99.

202. *Id.* at 503, 801 S.E.2d at 803.

203. 301 Ga. 635, 803 S.E.2d 66 (2017).

204. *Id.* at 639, 803 S.E.2d at 70.

205. *Id.* at 638, 803 S.E.2d at 69; O.C.G.A. § 5-6-35(a)(1) (2018).

they filed a direct appeal, whereupon the Georgia Court of Appeals dismissed the matter for failure to file an application for discretionary appeal.[206] The Georgia Supreme Court reversed, holding that because the adoption of a zoning code is a legislative act, it is not a "decision" within the meaning of the statute, which requires the act be of an "adjudicative nature."[207] The implication of "zoning" notwithstanding, the adoption of a generally applicable code is not a "zoning case," because it does not involve an individualized decision regarding any particular parcel of land[208] which constitutes a "zoning case" as Georgia law uses the term.[209]

On remand in *Schumacher v. City of Roswell*,[210] the Georgia Court of Appeals reaffirmed that, in the context of adoption of a general zoning code, due process under both the Federal[211] and State[212] Constitutions is satisfied by notice by publication, and personal notice to property owners is not required.[213]

In *Shelley v. Town of Tyrone*,[214] the Georgia Supreme Court addressed again the contours of requirement that a property owner must exhaust all administrative remedies prior to bringing an action for declaratory judgment on an as-applied claim.[215] In *Shelley*, the plaintiff purchased two properties, each with commercial, warehouse-type buildings where tenants operated businesses such as automobile repair and furniture upholstery.[216] The City subsequently adopted a new zoning ordinance, which prospectively prohibited these types of businesses in plaintiff's zone, allowed for the continuance of nonconforming uses, but provided that such uses could not be resumed if they ceased for more than six months. The plaintiff filed suit, claiming that this constituted a taking because it would require him to spend one to two million dollars to change the buildings so they could be put to a conforming use.[217] The plaintiff never formally asked the City Council to add the uses of his property to the applicable zone or to rezone his property; and he never applied for

206. *Schumacher,* 301 Ga. at 635, 803 S.E.2d at 67.

207. *Id.* at 637, 803 S.E.2d at 69.

208. *Id.* at 639, 803 S.E.2d at 70.

209. *Id.* (discussing O.S. Advert. Co. v. Rubin, 267 Ga. 723, 482 S.E.2d 195 (1997); Trend Dev. Corp. v. Douglas Cty., 259 Ga. 425, 383 S.E.2d 123 (1989)).

210. 344 Ga. App. 135, 809 S.E.2d 262 (2017).

211. U.S. CONST. amend. XIV.

212. GA. CONST. art. I, § 1, para. 1.

213. *Schumacher*, 344 Ga. App. at 138–39, 809 S.E.2d at 265.

214. 302 Ga. 297, 806 S.E.2d 535 (2017).

215. *Id.* at 304, 806 S.E.2d at 540.

216. *Id.* at 298, 806 S.E.2d at 536.

217. *Id.* at 300, 806 S.E.2d at 538.

any zoning relief, such as a conditional-use permit or variance.[218] Since he had not done so, his claim failed.[219]

The Georgia Supreme Court revisited the statutory requirement for zoning cases to be appealed via application for discretionary appeal in *Diversified Holdings, LLP v. City of Suwannee*,[220] wherein it also clarified that the "substantially advances" standard derived from constitutional due process has no place in an eminent domain or condemnation proceeding.[221] In this matter, the city denied the owner's request to rezone property from commercial to multi-family use, and the owner filed suit in the Gwinnett County Superior Court, claiming that the decision amounted to an unconstitutional taking. The fair market value of the property, if rezoned, would have increased fivefold. The trial court found that, although the owner met its burden to show by clear and convincing evidence that it had suffered a significant detriment, it failed to show that the current zoning was not substantially related to public health, safety, and welfare, because the City had a valid concern that residents would face a potential for increased nighttime crime due to the property's location adjacent to a liquor store, two motels, and a Walmart; consequently, the City's decision "was not arbitrary, capricious, or without rational basis." The owner filed both a direct appeal and an application for discretionary appeal from the trial court's order.[222] The Georgia Supreme Court held that, since the City's decision was based on a fact-specific inquiry involving the application of the ordinance to a particular piece of land, it was adjudicative in nature, and therefore, the application for discretionary appeal was the proper channel for the owner to use.[223] Because the owner's complaint alleged both an inverse condemnation and a due process violation, the court, in a lengthy discussion,[224] provided clarification that, where the relief sought is to invalidate the zoning decision or the ordinance itself—as opposed to seeking financial damages to compensate for the loss of property—the claim sounds in due process, rather than in the United States Constitution's Takings Clause[225] or the Georgia Constitution's Eminent

218. *Id.* at 305, 806 S.E.2d at 541.
219. *Id.* at 303, 806 S.E.2d at 540.
220. 302 Ga. 597, 807 S.E.2d 876 (2017).
221. *Id.* at 597, 807 S.E.2d at 879.
222. *Id.* at 598–99, 807 S.E.2d at 880–81.
223. *Id.* at 604–05, 807 S.E.2d at 884.
224. *Id.* at 605–12, 807 S.E.2d at 884–89.
225. U.S. CONST. amend. V.

Domain Provision,[226] where inverse condemnation actions sound.[227] The court affirmed the trial court's appropriate use of the "substantially related to the public health, safety, and welfare" standard for upholding the City's decision in this context.[228] The court also reiterated that whether a municipality's zoning decision substantially benefits the public health, safety, and welfare depends in part on whether the current zoning is consistent with the planning goals in place for the area, and that this factor is particularly relevant when the zoning ordinance in question was adopted "after extensive study and public debate."[229]

In *Hoechstetter v. Pickens County*,[230] the Georgia Supreme Court concluded that a one-page memorandum from the County's Planning Commission to the Pickens Board of Commissioners, summarizing a conditional-use, permit-application hearing before the Planning Commission, was insufficient to satisfy the requirement that the public be given notice and a "meaningful opportunity to be heard" under Georgia's Zoning Procedures Law (ZPL).[231] Following publication of a notice for a hearing before the Planning Commission, the hearing was held, wherein neighbors of the applicants objected to the conditional-use permit request. The Planning Commission issued a memorandum to the Board of Commissioners that disclosed only that the Planning Commission had heard "testimony from the applicant and considerable objections from the surrounding neighborhood" and recommended the permit be granted. The Board adopted the Planning Commission's recommendation and granted the application without noticing or holding any further hearing. The neighbors filed suit, claiming that the ZPL required an additional notice and hearing before the Board's final decision. The neighbors filed for summary judgment, which the trial court denied, and the court of appeals affirmed the denial, holding that the initial notice of the Planning Commission hearing was sufficient to satisfy the ZPL's notice requirements.[232] Instead of addressing the question of whether additional notice was required, the Georgia Supreme Court determined that, since there was no evidence that the Board considered anything other than the Planning Commission's brief and

226. GA. CONST. art. I, § 3, para. 1.

227. *Diversified Holdings*, 307 Ga. at 611, 807 S.E.2d at 888.

228. *Id.* at 613, 807 S.E.2d at 889.

229. *Id.*

230. 303 Ga. 786, 815 S.E.2d 50 (2018).

231. O.C.G.A. §§ 36-66-1 to -6; *Hoechstetter*, 303 Ga. at 787, 815 S.E.2d at 51.

232. *Hoechstetter*, 303 Ga. at 787–88, 815 S.E.2d at 51–52; *see also* Hoechstetter v. Pickens Cty., 341 Ga. App. 213, 216, 799 S.E.2d 352, 354 (2017), *cert. granted* (Sept. 13, 2017), *rev'd*, 303 Ga. 786, 815 S.E.2d 50.

generalized memorandum, the public had not been afforded a meaningful opportunity to participate and be heard in the process because the Board had not been meaningfully informed of what happened at the Planning Commission hearing, noting that the memorandum failed to disclose even the "general nature" of the objections at the hearing.[233] The court provided no further guidance on what minimum information is required for such a report to satisfy the ZPL's notice and hearing requirements, holding simply that the memorandum in this case was, without further evidence of what formed the basis of the Board's ultimate decision, insufficient.[234]

VIII. SERVICE DELIVERY STRATEGIES

Sovereign immunity and separation of powers were front and center in *City of Union Point v. Greene County*,[235] where, among other things, Greene County's having discontinued the agreed and contracted upon provision of fire dispatch and communications services to the City's police and fire departments pursuant to the Service Delivery Strategy Act (SDSA),[236] was questioned.[237] The City subsequently sued, asking for relief not only pursuant to the SDSA but also on independent grounds outside of that offered under the SDSA, to include breach of contract, mandamus, specific performance, attorney's fees, and the like.[238]

After a failed mediation, a hearing was held, and the trial court ruled that O.C.G.A. § 36-70-25.1,[239] the SDSA's mechanism to resolve disputes, was unconstitutional on the grounds that it violated the separation of powers clause[240] of the Georgia Constitution.[241] It said the SDSA's provision that a trial court rendering a decision regarding the "items remaining in dispute" amounts to the judiciary unconstitutionally taking on a legislative function reserved to local governments.[242] The trial court also ruled that sovereign immunity barred all claims and remedies except those provided for in the SDSA itself.[243]

233. *Hoechstetter*, 303 Ga. at 788, 815 S.E.2d at 52.
234. *Id.*
235. 303 Ga. 449, 812 S.E.2d 278 (2018).
236. O.C.G.A. § 36-70-20 (2018).
237. *City of Union Point*, 303 Ga. at 450–52, 812 S.E.2d at 281–82.
238. *Id.* at 451–52, 812 S.E.2d at 281–82.
239. O.C.G.A. § 36-70-25.1 (2018).
240. GA. CONST. art I, § 2, para. 3.
241. *City of Union Point*, 303 Ga. at 452, 812 S.E.2d at 282.
242. *Id.* at 459, 812 S.E.2d at 286–87.
243. *Id.* at 449, 812 S.E.2d at 280.

Of import, the Georgia Supreme Court's 6–3 decision upheld the trial court's sovereign immunity ruling, but rejected the separation of powers holding, ruling the SDSA does not improperly delegate purely legislative issues to the trial court for judicial resolution.[244] As to sovereign immunity, the court held that in actions brought under the SDSA, any remedy not provided for in the Act is barred by sovereign immunity.[245] That is, unless the claim is for breach of contract for an Intergovernmental Agreement signed off on as a result of operation of the SDSA.[246] Breach of written agreements are subject to a constitutional waiver of sovereign immunity.[247] Justices Benham, Hunstein, and Melton dissented on the separation of powers question.[248]

IX. WHISTLEBLOWERS

This survey period saw more reported appellate activity in the area of whistleblower cases than any other substantive category of local government cases, including issues concerning official immunity. This trend appears to be growing out of the wide variety of scenarios in which employees are claiming whistleblower protections. Notably, many of the reported cases came out of Georgia's federal district courts, where plaintiffs now frequently attach supplemental whistleblower claims to their Title VII[249] and Federal Equal Protection actions.[250] The most impactful cases involved questions of whether an undertaken activity qualifies as being entitled to protection under the Georgia Public Whistleblower Act;[251] whether an employer provided enough evidence on summary judgment to overcome a plaintiff's claim of pre-textual termination;[252] and, whether after-termination retaliation qualifies for protection under the Act.[253] All told, this survey period was by no means plaintiff-friendly.

244. *Id.* at 458–61, 812 S.E.2d at 287–88.

245. *Id.* at 454, 812 S.E.2d at 283.

246. *Id.*

247. *Id.* at 454, 812 S.E.2d at 283–84.

248. *Id.* at 463, 812 S.E.2d at 289–90 (Benham, J., dissenting).

249. 42 U.S.C. § 2000e-3 (2018).

250. *See* Coward v. MCG Health, Inc., 342 Ga. App. 316, 802 S.E.2d 396 (2017).

251. O.C.G.A. § 45-1-4 (2018); Harris v. City of Atlanta, 345 Ga. App. 375, 813 S.E.2d 420 (2018).

252. *See* Murray-Obertein v. Ga. Gov't Transparency & Campaign Fin. Comm'n, 344 Ga. App. 677, 812 S.E.2d 28 (2018).

253. *See* Coward v. MCG Health, Inc., 342 Ga. App. 316, 802 S.E.2d 396 (2017).

Returning to an area that has already seen appellate action, in *Coward v. MCG Health, Inc.*,[254] the Georgia Court of Appeals examined whether two employees engaged in protected speech when they apprised supervisors that a lack of staffing caused a jail suicide and that the staffing issue was having an enormous impact on the quality of inmate healthcare.[255] Absent protected speech, liability under the Act is not triggered.[256] Continuing its reluctance to expand the Act's protections beyond a strict construction of the statute, the court reiterated that the statute disallows retaliation for only disclosure of a very discreet, narrow list of wrongs.[257] Safety concerns and staffing concerns, as a root cause of poor healthcare, are not the type of miscues contemplated by the statute as being deemed worthy of its protections.[258]

Shifting gears, since the earliest days of appellate review of the Georgia Whistleblower Act, our courts have latched on to application of the *McDonnell Douglas*[259] burden-shifting analysis as a basic framework for resolving whistleblower claims.[260] In applying this framework during the reporting period, the court of appeals grappled with the issue of pretext in *Harris v. City of Atlanta*.[261] Christopher Harris was promoted to Watershed Manager for the City of Atlanta's 200-employee Department of Watershed Management (DMW) at a time of workplace turmoil including theft, productivity issues, and failure to timely respond to service repair requests. Harris ultimately relayed numerous instances of fraud, theft, sleeping on the job, and the over-reporting of hours worked. Turns out, Harris was not such a nice guy either. Instances of theft, favoritism, demeaning and otherwise inappropriate treatment of employees, and lying to human resources during an investigation led to his ultimate termination according to the City.[262] Accepting the City to have met its exceedingly light burden of production to show legitimate, non-discriminatory reasons for the termination, the court turned to Harris's argument that those reasons were pretextual.[263] Harris claimed pretext because, instead of pointing to the litany of ills, the City simply

254. 342 Ga. App. 316, 802 S.E.2d 396 (2017).

255. *Id.* at 320, 802 S.E.2d at 400.

256. *Id.*

257. *Id.*

258. *Id.* at 321, 802 S.E.2d at 400.

259. McDonnell Douglas Corp. v. Green, 411 U.S. 992 (1973).

260. Forrester v. Ga. Dep't of Human Servs., 308 Ga. App. 716, 721–22, 708 S.E.2d 660, 665–66 (2011).

261. 345 Ga. App. 375, 813 S.E.2d 421 (2018).

262. *Id.* at 375–78, 813 S.E.2d at 422–24.

263. *Id.* at 378, 813 S.E.2d at 423–24.

said that his "services were no longer needed."[264] The court was not buying his theory, holding that fact did not "'present a basis for the disbelief of the City's overall justification,' nor [did] it constitute 'a direct showing that a discriminatory reason more likely motivated the City.'"[265]

The final whistleblower case warranting attention is *Murray-Obertein v. Georgia Government Transparency & Campaign Finance Commission*,[266] where the court of appeals held that post-termination retaliation is not protected by the Act.[267] The plaintiff had earlier successfully sued and settled with the Commission for wrongs alleged under the Whistleblower Act. The plaintiff claimed that after she was fired, the Commission retaliated against her by virtue of derogatory comments made by the Commission's Executive Secretary to the media.[268] The court of appeals succinctly held that the Act only prohibits retaliation against one "who is employed," thus denying the plaintiff relief thereunder.[269]

264. *Id.* at 379, 813 S.E.2d at 424.

265. *Id.* (quoting Tuohy v. City of Atlanta, 331 Ga. App. 846, 852, 771 S.E.2d 501, 506 2015)).

266. 344 Ga. App. 677, 812 S.E.2d 28 (2018).

267. *Id.* at 677, 812 S.E.2d at 29.

268. *Id.* at 678, 812 S.E.2d at 29.

269. *Id.* at 679–80, 812 S.E.2d at 30.