

# Administrative Law

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## I. INTRODUCTION

The difficult economic times and resulting budget cuts to many state agencies were evident in the reduced number of high-level administrative law cases brought before the courts during this survey period. It seems in tough times such litigation is often not pursued to the degree it is in a more comfortable economic climate. As the economy begins to recover, we will likely see an increase in the number and complexity of administrative law cases brought before the appellate courts.

This Article is a survey of cases from the Georgia Supreme Court and Georgia Court of Appeals from June 1, 2010 through May 31, 2011.<sup>1</sup> The cases included in this Article were selected based on the concentration of administrative law principles in the opinions. One will be able to find specialized subject matters—some including administrative law principles—in other articles in this volume.

This Article begins with a discussion of judicial review of administrative decisions and exhaustion of administrative remedies. Next, the cases distinguish between discretionary and direct appeals. The Article then addresses statutory construction, procedures regarding administrative rules, and sovereign immunity. The last section provides an

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The Authors gratefully acknowledge the assistance of Troutman Sanders summer associate (and soon to be associate) Nick Phillips in the preparation of this Article.

1. For analysis of Georgia administrative law during the prior survey period, see Martin M. Wilson & Jennifer A. Blackburn, *Administrative Law, Annual Survey of Georgia Law*, 62 MERCER L. REV. 1 (2010).

enumeration of legislation adding, subtracting, and dividing administrative agencies as passed during the 2011 regular session of the Georgia General Assembly.

## II. JUDICIAL REVIEW OF AN AGENCY DECISION

This section addresses the judicial review of an administrative decision and focuses on the well-established “any evidence” rule, which requires the reviewing court to “defer to the agency’s judgment regarding the weight of the evidence and affirm the [agency’s] findings if supported by any evidence.”<sup>2</sup> An exception exists where the agency’s decision is determined to be arbitrary and capricious.<sup>3</sup> However, as the Georgia Court of Appeals recognized in *Professional Standards Commission v. Adams*,<sup>4</sup> this exception has very limited application.<sup>5</sup> The superior court is required to defer to an agency decision where it is supported by any evidence and may “not substitute its [own] judgment for that of the agency as to the weight of the evidence on questions of fact.”<sup>6</sup> Only where the agency determination is arbitrary and capricious may the court revoke or modify that decision.<sup>7</sup> To be arbitrary and capricious the determination must lack a rational basis.<sup>8</sup>

In *Adams*, the superior court affirmed the agency’s determination that a principal violated Standard 10 of the Code of Ethics for Educators<sup>9</sup> but reversed the revocation of her educator’s certificate, finding the agency had arbitrarily and capriciously revoked the principal’s certificate out of retaliation over her appeal.<sup>10</sup> However, the court of appeals held that no evidence in the record supported such a finding.<sup>11</sup> Instead, the record demonstrated that, following the administrative law judge’s hearing, the agency rationally determined the principal’s conduct was far more severe than it had originally believed.<sup>12</sup> The principal’s conduct justified an increased sanction, which is permitted under Georgia law.<sup>13</sup>

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2. *Prof'l Standards Comm'n v. Adams*, 306 Ga. App. 343, 346, 702 S.E.2d 675, 678 (2010) (citing *Bd. of Regents of the Univ. Sys. of Ga. v. Hogan*, 298 Ga. App. 454, 454, 680 S.E.2d 518, 520 (2009)).

3. *Id.*

4. 306 Ga. App. 343, 702 S.E.2d 675 (2010).

5. *See id.* at 346, 702 S.E.2d at 678.

6. *Id.* (internal quotation marks omitted); O.C.G.A. § 50-13-19(h) (2009).

7. *Adams*, 306 Ga. App. at 346, 702 S.E.2d at 678.

8. *Id.*

9. GA. COMP. R. & REGS. 505-6-.01(3)(j) (2009).

10. 306 Ga. App. at 345-46, 702 S.E.2d at 678.

11. *Id.* at 347-48, 702 S.E.2d at 679.

12. *Id.* at 346-47, 702 S.E.2d at 678-79.

13. *Id.*

Because there was evidence in the record to support the agency's determination and a rational basis for the sanction imposed, the superior court exceeded its authority in overturning the agency's decision and the order was reversed.<sup>14</sup>

In *City of Atlanta v. Starship Enterprises of Atlanta, Inc.*,<sup>15</sup> the superior court applied the proper standard of review but erred in its application of that standard.<sup>16</sup> The board of zoning adjustment affirmed the city's revocation of Starship Enterprises' building permit, finding the nonconforming use as an adult business had been interrupted by a permitted use as a used furniture store and therefore could not be resumed. The superior court reversed the board's decision and ordered that the building permit be reinstated.<sup>17</sup>

While the superior court recognized the any evidence standard as the proper standard of review, the court incorrectly applied the standard by determining that the board presented "no evidence at all" in support of its finding of an intervening use.<sup>18</sup> The record contained testimony from residents regarding the removal of old signs, installation of new signs, and "what appeared to be commerce going on at that location" for approximately six months.<sup>19</sup> Such testimony clearly satisfied the any evidence standard, and the court of appeals reversed the superior court's judgment.<sup>20</sup>

Surprisingly, in the next case, the court of appeals was required to clarify the common understanding that the any evidence rule only applies to cases "involv[ing] rules or regulations promulgated by administrative agencies or entities performing non-profit governmental functions . . . ."<sup>21</sup> In *Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co.*,<sup>22</sup> the cemetery group argued that, since evidence was presented at trial to show that a rule the group implemented was reasonable, the superior court was required to uphold such rule prohibiting the use of concrete burial vaults in its cemeteries.<sup>23</sup> However, the cemetery group's reliance on the any evidence rule was

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14. *Id.* at 348, 702 S.E.2d at 679.

15. 308 Ga. App. 700, 708 S.E.2d 538 (2011).

16. *Id.* at 701, 708 S.E.2d at 539.

17. *Id.* at 700-01, 708 S.E.2d at 538.

18. *Id.* at 701, 708 S.E.2d at 539.

19. *Id.* (internal quotation marks omitted).

20. *Id.* at 702, 708 S.E.2d at 539.

21. *Savannah Cemetery Grp., Inc. v. DePue-Wilbert Vault Co.*, 307 Ga. App. 206, 209, 704 S.E.2d 858, 864 (2010).

22. 307 Ga. App. 206, 704 S.E.2d 858 (2010).

23. *Id.* at 209, 704 S.E.2d at 863.

misplaced since it was a private, for-profit business.<sup>24</sup> Accordingly, the court of appeals held that “the cemetery group’s rule was not entitled to the deference afforded a rule promulgated by administrative agencies or governmental entities.”<sup>25</sup>

In the next case, the Georgia Supreme Court determined that, under section 50-13-19(h) of the Official Code of Georgia Annotated (O.C.G.A.),<sup>26</sup> the superior court does not have the power to enjoin an agency from exercising its discretion and is instead limited to reviewing the action after the agency exercises its discretion.<sup>27</sup> In *Scarborough v. Hunter*,<sup>28</sup> the superior court issued a temporary restraining order preventing the board of commissioners from holding a hearing or taking a vote on the abandonment of a public road.<sup>29</sup> Georgia law provides counties with the discretion to abandon former public roads when such abandonment is in the best interest of the public.<sup>30</sup> Because the county did not have the necessary funds to maintain the road, the board determined that abandonment was in the county’s best interest.<sup>31</sup>

O.C.G.A. § 50-13-19(h) provides that “[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings.”<sup>32</sup> The statute clearly does not give the superior court power to enjoin an agency’s discretion.<sup>33</sup> Instead, it indicates that the superior court’s duty is to review the agency’s decision “after [it] exercises its discretion, not prevent the [agency] from using its discretion at all.”<sup>34</sup> Because the superior court “put the cart before the horse” in granting the temporary restraining order, the judgment was reversed.<sup>35</sup>

### III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The next case also analyzes O.C.G.A. § 50-13-19,<sup>36</sup> but with the focus on standing to seek judicial review of an agency decision. In *Fulton*

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24. *Id.* at 209-10, 704 S.E.2d at 864.

25. *Id.* at 210, 704 S.E.2d at 864.

26. O.C.G.A. § 50-13-19(h) (2009).

27. *Scarborough v. Hunter*, 288 Ga. 687, 689, 706 S.E.2d 650, 652 (2011).

28. 288 Ga. 687, 706 S.E.2d 650 (2011).

29. *Id.* at 688, 706 S.E.2d at 651.

30. See O.C.G.A. § 32-7-2(b)(1) (1995 & Supp. 2011).

31. *Scarborough*, 288 Ga. at 688-89, 706 S.E.2d at 651.

32. O.C.G.A. § 50-13-19(h).

33. *Scarborough*, 288 Ga. at 689, 706 S.E.2d at 652.

34. *Id.*

35. *Id.* at 690, 706 S.E.2d at 652.

36. O.C.G.A. § 50-13-19 (2009).

*County Taxpayers Foundation, Inc. v. Georgia Public Service Commission*,<sup>37</sup> the Fulton County Taxpayers Foundation (Foundation) asserted that the superior court improperly determined that the Foundation lacked standing to seek judicial review of a Public Service Commission (PSC) certification order.<sup>38</sup> Under O.C.G.A. § 50-13-19(a), two requirements must be met to seek judicial review of an agency decision: (1) “a person must have exhausted all administrative remedies available within the agency and [(2) the person] [must be] aggrieved by a final decision in a contested case . . . .”<sup>39</sup>

While the Foundation was aggrieved by the PSC’s certification order because their status as Georgia Power customers would be impacted by an increase in the utility rate, the superior court determined they had not exhausted all administrative remedies available to them through the PSC.<sup>40</sup> The Foundation should have applied for “intervention status in the proceedings conducted by the PSC on Georgia Power’s application for certification within 30 days following the first published notice of the proceeding.”<sup>41</sup> Although the Foundation sought to intervene, they did not do so until eight months after notice of the proceeding was published.<sup>42</sup> Because the Foundation failed to “file a timely application to intervene, they [did] not satisfy] the first requirement of [O.C.G.A.] § 50-13-19(a)” and therefore lacked standing to seek judicial review.<sup>43</sup>

Timely filing was also an issue in *Hall County Board of Tax Assessors v. Avalon Hills Partners, LLC*,<sup>44</sup> where the Georgia Court of Appeals held that Avalon Hills Partners, LLC (LLC) did not file a timely appeal with the Board of Equalization, as required under O.C.G.A. § 48-5-311,<sup>45</sup> and thus failed to exhaust its administrative remedies.<sup>46</sup> The LLC attempted to appeal their 2009 tax assessments by submitting letters to the Board requesting reduced assessments prior to receiving actual notice of the 2009 tax assessments. The Board assessment notices clearly stated that the property owner had the right to file an appeal with the Board of Equalization by written notice within thirty

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37. 287 Ga. 876, 700 S.E.2d 554 (2010).

38. *Id.* at 878, 700 S.E.2d at 556.

39. *Fulton Cnty. Taxpayers Found., Inc.*, 287 Ga. at 878, 700 S.E.2d at 556 (second alteration in original) (internal quotations omitted); O.C.G.A. § 50-13-19(a).

40. *Fulton Cnty. Taxpayers Found., Inc.*, 287 Ga. at 878, 700 S.E.2d at 556.

41. *Id.* at 879, 700 S.E.2d at 556 (internal quotation marks omitted); O.C.G.A. § 46-2-59(c) (2004).

42. *Fulton Cnty. Taxpayers Found., Inc.*, 287 Ga. at 879, 700 S.E.2d at 557.

43. *Id.* at 880, 700 S.E.2d at 557.

44. 307 Ga. App. 520, 705 S.E.2d 674 (2010).

45. O.C.G.A. § 48-5-311 (2010).

46. *Avalon Hills*, 307 Ga. App. at 520-21, 705 S.E.2d at 674-75.

days of notice or the right to appeal would be lost. The LLC never provided such written notice.<sup>47</sup> Despite this failure to provide proper notice, the LLC was granted a hearing before the Board of Equalization where it was decided there would be “No Change” to the 2009 valuations.<sup>48</sup> The LLC then appealed to the superior court arguing that the letters submitted before the assessment notices were mailed should nonetheless serve as substitutes for the statutory notice requirement.<sup>49</sup>

On interlocutory appeal, the court of appeals determined that “the failure to file timely a notice of appeal extinguished the taxpayers’ right to appeal, even though the taxpayers had indicated disagreement with valuations before receiving the formal notices of assessment.”<sup>50</sup> Much like the facts of this case, in *Peagler v. Georgetown Associates*,<sup>51</sup> taxpayers submitted a written request to discuss the proposed valuations of their properties prior to the issuance of the formal notices of assessment from the Board of Tax Assessors. The taxpayers then failed to file a timely appeal from such notices of assessment once they were received.<sup>52</sup> The Georgia Supreme Court determined that the taxpayers’ prior communication did not excuse them from complying with the statutory requirements for filing a notice of appeal from the formal notice of assessment issued by the Board of Tax Assessors.<sup>53</sup>

Similarly, in *Avalon Hills*, the letters submitted before the assessment notices were mailed did not excuse the LLC from complying with the statutory requirement that a taxpayer mail or file a notice of appeal within thirty days.<sup>54</sup> As such, the court of appeals held that the LLC failed to exhaust its administrative remedies and that the superior court lacked subject matter jurisdiction to decide the appeal.<sup>55</sup>

#### IV. DISCRETIONARY VERSUS DIRECT APPEALS

This section compares discretionary and direct appeals and determinations of when each is required. The first case, *Worley v. Peachtree City*,<sup>56</sup> involved both a zoning action, which is the review of an agency decision and therefore requires a discretionary appeal, and an annex-

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47. *Id.* at 521, 705 S.E.2d at 675.

48. *Id.*

49. *Id.* at 523, 705 S.E.2d at 676.

50. *Id.* at 524, 705 S.E.2d at 677 (citing *Peagler v. Georgetown Assocs.*, 232 Ga. 848, 848, 209 S.E.2d 186, 186 (1974)).

51. 232 Ga. 848, 209 S.E.2d 186 (1974).

52. *Id.* at 848, 209 S.E.2d at 186.

53. *Id.*

54. 307 Ga. App. at 524, 705 S.E.2d at 677.

55. *Id.* at 520-21, 705 S.E.2d at 675.

56. 305 Ga. App. 118, 699 S.E.2d 94 (2010).

ation challenge, which is routinely heard on direct appeal. In its motion to dismiss, the city argued that the zoning action could only be heard by discretionary appeal.<sup>57</sup>

Where “the underlying subject matter of an appeal involves claims with independent standing, one of which is subject to the discretionary appeal statute and one of which is directly appealable, a party may file a direct appeal and the appellate courts have jurisdiction to address both claims.”<sup>58</sup> Because Worley’s claim involved an annexation claim in addition to the zoning challenge, the annexation claim had independent standing for the direct appeal.<sup>59</sup> Accordingly, jurisdiction was established and the city’s motion to dismiss was denied.<sup>60</sup>

In *Fulton County v. T-Mobile South, LLC*,<sup>61</sup> T-Mobile asserted that the county’s denial of a tax refund request constituted an administrative decision; thus, pursuant to O.C.G.A. § 5-6-35,<sup>62</sup> the court lacked jurisdiction because the county did not file a discretionary appeal.<sup>63</sup> The intent of the statute is to give the appellate courts the discretion as to whether or not to entertain an appeal where the superior court has already reviewed the decision of an administrative agency.<sup>64</sup> Here there was no decision by an administrative agency for the superior court to review. Instead, the county attorney simply denied T-Mobile’s requested refund of the 9-1-1 charges the county collected.<sup>65</sup> Because the county’s action did not constitute an agency decision, the county was not required to file a discretionary appeal and T-Mobile’s motion to dismiss was denied.<sup>66</sup>

The application of O.C.G.A. § 5-6-35 was further clarified in *Danbert v. North Georgia Land Ventures, LLC*.<sup>67</sup> North Georgia Land Ventures argued that the “Danberts’ direct appeal should be dismissed for failure to follow the [statutory] discretionary appeal procedure” because the underlying issue was “the trial court’s review of the [c]ounty’s administrative decision to approve the subdivision application.”<sup>68</sup> However, the

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57. *Id.* at 119-20, 699 S.E.2d at 96.

58. *Id.* at 120, 699 S.E.2d at 96.

59. *Id.*

60. *Id.* at 119-20, 699 S.E.2d at 96.

61. 305 Ga. App. 466, 699 S.E.2d 802 (2010).

62. O.C.G.A. § 5-6-35 (1995 & Supp. 2011).

63. 305 Ga. App. at 468, 699 S.E.2d at 805; *see also* O.C.G.A. § 5-6-35(a)(1), (b).

64. *T-Mobile South*, 305 Ga. App. at 468, 699 S.E.2d at 805 (quoting *Ladzinske v. Allen*, 280 Ga. 264, 626 S.E.2d 83, 85 (2006)).

65. *Id.* at 468-69, 699 S.E.2d at 805-06.

66. *Id.* at 469, 699 S.E.2d at 806.

67. 287 Ga. 495, 697 S.E.2d 204 (2010).

68. *Id.* at 495 n.3, 697 S.E.2d at 205 n.3.

county's subdivision regulations provided a specific review procedure for such applications.<sup>69</sup> The Georgia Supreme Court held that where the underlying local ordinance provides a specific remedy, such remedy supersedes the discretionary appeal procedure set forth in O.C.G.A. § 5-6-35.<sup>70</sup>

#### V. STATUTORY CONSTRUCTION

At times, an agency's construction of the governing statute that the agency is charged with administering becomes the central issue in a case. *ChoicePoint Services, Inc. v. Graham*<sup>71</sup> provided a good example of this situation. Georgia law allows certain companies to obtain refunds for sales tax paid on purchases of computer equipment that are greater than \$15 million.<sup>72</sup> ChoicePoint made computer purchases exceeding the threshold, but part of the purchases included electronically-delivered computer software not subject to sales taxes. Upon ChoicePoint's filing for sales tax refunds, the Department of Revenue denied the claim. The Department of Revenue reasoned that because part of the purchases was not subject to sales tax, and without such part ChoicePoint had not reached the \$15 million threshold, no refund was due. ChoicePoint appealed to the superior court but was unsuccessful.<sup>73</sup> The basis for the superior court's ruling was that "the exemption statute applied only to sales of tangible equipment because only such sales were taxable."<sup>74</sup> ChoicePoint subsequently filed an application for discretionary appeal that was accepted by the Georgia Court of Appeals.<sup>75</sup>

ChoicePoint's primary argument was that the statute was plain on its face and there was no limitation contained in the definition of "computer equipment" that required purchases to be tangible equipment subject to the sales tax.<sup>76</sup> The Department of Revenue presented three unsuccessful arguments in reply. First, it argued that a related statute gave a definition of "sale" that was confined to tangible personal property.<sup>77</sup> The court of appeals was not persuaded, as a more specific definition was present in the contested statute.<sup>78</sup> Second, the Department of

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69. *Id.*

70. *See id.*

71. 305 Ga. App. 254, 699 S.E.2d 452 (2010).

72. *Id.* at 254, 699 S.E.2d at 454; *see also* O.C.G.A. § 48-8-3 (68)(A) (2009 & Supp. 2011).

73. 305 Ga. App. at 254-55, 699 S.E.2d at 453-54.

74. *Id.* at 255, 699 S.E.2d at 454.

75. *Id.*

76. *Id.*

77. *Id.* at 256, 699 S.E.2d at 455.

78. *Id.*



Revenue contended that the statute under review did require that tax be collected before a sale could be used to qualify for the granted exemption.<sup>79</sup> The court found no such requirement anywhere in the statutory language.<sup>80</sup> Finally, the Department of Revenue relied upon its promulgated rules and regulations.<sup>81</sup> The court viewed this merely as bootstrapping because the regulation could not exceed the scope of the statute itself.<sup>82</sup>

In reversing the superior court, the court of appeals relied upon the plain language of the statute.<sup>83</sup> It determined that the language was clear and would not allow deference to the agency determination because to do so would ignore such a primary interpretive rule.<sup>84</sup>

*Judicial Council of Georgia v. Brown & Gallo, LLC*<sup>85</sup> was a somewhat unique case, in that it involved a rule of a judicial branch agency rather than often-litigated decisions of executive branch agencies.<sup>86</sup> *Brown & Gallo* is a court-reporting business that comes under the administrative ambit of the Board of Court Reporting (Board), part of the Judicial Council of Georgia (Council). *Brown & Gallo* sought a declaratory judgment in superior court to overturn a rule that had been promulgated by the Board and reviewed by the Council.<sup>87</sup> Both defendants moved to dismiss the action, citing sovereign immunity enjoyed by the judiciary and also citing a specific exception in the Georgia Administrative Procedure Act (GAPA)<sup>88</sup> for the judiciary under the definition of “agency.”<sup>89</sup> The superior court would not dismiss the action on either ground, separating an agency of the judiciary from the judiciary itself under both arguments.<sup>90</sup> The court of appeals affirmed the denial of the motion to dismiss, and the Georgia Supreme Court granted review through a petition for a writ of certiorari.<sup>91</sup>

The supreme court styled the primary question in the case as whether the Board and the Council—as agencies of the judiciary and not actually judges—were contained within the definition of the judiciary under the

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79. *Id.* at 257, 699 S.E.2d at 455.

80. *Id.*

81. *Id.*

82. *Id.* at 258, 699 S.E.2d at 456.

83. *Id.*

84. *Id.*

85. 288 Ga. 294, 702 S.E.2d 894 (2010).

86. *Id.* at 294-95, 702 S.E.2d at 896.

87. *Id.*

88. O.C.G.A. tit. 50, ch. 13. (2009 & Supp. 2011).

89. *Id.*; see also O.C.G.A. § 50-13-2(1) (defining “agency” as not including the judiciary).

90. *Brown & Gallo*, 288 Ga. at 295-96, 702 S.E.2d at 896.

91. *Id.* at 296, 702 S.E.2d at 896-97.

GAPA.<sup>92</sup> The court recited certain GAPA provisions and stated that the legislative intent that could be discerned did not point to a definitive answer.<sup>93</sup> Instead, the decision relied largely upon separation of powers.<sup>94</sup> In reversing both the superior court and the court of appeals, the following succinctly describes the gist of the opinion:

Because constitutional separation of powers prohibits the legislative branch from encroaching upon the inherent powers of the judicial branch of government, and because the Council and the Board are agencies of the judiciary which are imbued with responsibilities that are important to the administration of justice belonging naturally and logically to the judicial branch concerning the practice of a profession of officers of the courts, we construe "the judiciary" in [O.C.G.A. § 50-13-2(1)] to include the Council and the Board.<sup>95</sup>

The gold star for the most unusual reported case during the survey period has to go to *Grimes v. Catoosa County Sheriff's Office*.<sup>96</sup> Grimes sought the expungement of a criminal record in a case in which he had been indicted, but which was later nolle prossed. The request went to the sheriff's office, where the record was apparently located, and the sheriff sent it to the district attorney. The district attorney objected to the proposed action, and Grimes was so informed. Grimes appealed the sheriff's denial to superior court. The district attorney requested that the appeal be dismissed because of the prior issuance of the indictment, and the superior court granted the motion. An appeal by Grimes ensued.<sup>97</sup>

The court of appeals reversed, holding that the procedures dictated under O.C.G.A. § 35-3-37(d)<sup>98</sup> had not been followed.<sup>99</sup> Even though he had previously been indicted, Grimes was entitled to have the appeal heard by the superior court for a finding as to whether any of the statutory reasons barring expungement were present.<sup>100</sup> Because it did not do so, the case was remanded to the superior court for the prerequisite determination.<sup>101</sup>

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92. *Id.* at 296, 702 S.E.2d at 897.

93. *See id.* at 297, 702 S.E.2d at 897.

94. *See id.* at 297-98, 702 S.E.2d at 897-98.

95. *Id.* at 298, 702 S.E.2d. at 898.

96. 307 Ga. App. 481, 705 S.E.2d 670 (2010).

97. *Id.* at 481-82, 705 S.E.2d at 672-73. Interestingly, the expungement process originates from O.C.G.A. § 35-3-37(d) (2006), although the GAPA is broadly utilized. *See, e.g., Grimes*, 307 Ga. App. at 484, 705 S.E.2d at 673.

98. O.C.G.A. § 35-3-37(d) (2006).

99. *Grimes*, 307 Ga. App. at 482-83, 705 S.E.2d at 672-73.

100. *Id.* at 484, 705 S.E.2d at 673.

101. *Id.*

The last case in this section concludes several years of court actions concerning how hotel occupancy taxes should be handled by online travel companies.<sup>102</sup> *City of Atlanta v. Hotels.com*<sup>103</sup> raised the question of whether a negotiated wholesale rate between an online travel company (OTC) and a hotel should be the basis for payment of a hotel occupancy tax or whether the room rate actually paid by the consumer to the online travel company was the correct amount. The City of Atlanta brought an action against Hotels.com, pleading that the retail room rate was the correct amount for computing the hotel occupancy tax and also seeking back taxes from many OTCs. The trial court found in favor of the City of Atlanta. It enjoined the OTC from acting in a manner inconsistent with the court's order, instructing the OTCs to collect and remit taxes based upon the room rate paid by the consumer. Both sides appealed, with the City of Atlanta being listed as the appellant.<sup>104</sup>

So far as the OTCs were concerned, the court interpreted that the questioned ordinance of the City of Atlanta meant the following:

[T]he amount that is taxable is the retail amount paid for occupancy by someone who will occupy the room. Since the consumer cannot obtain the right to occupy the room without paying the retail room rate charged by the OTC, it is the retail room rate that is the taxable amount or "rent" under the City's ordinance.<sup>105</sup>

In other words, whatever the OTC charged the consumer is the basis for the tax.<sup>106</sup> On that count, the trial court was affirmed.<sup>107</sup> Ancillary issues raised by the OTC were summarily rejected, as was an enumeration of error by the City of Atlanta.<sup>108</sup> Thus, the ordinance and its application were upheld and the judgment of the trial court was affirmed.<sup>109</sup>

## VI. PROCEDURES REGARDING ADMINISTRATIVE RULES

The first case in this part is *Lumsden v. Williams*,<sup>110</sup> and while it was an action based in part upon the Repair Act,<sup>111</sup> the interaction with administrative law was based upon a motion to take judicial notice

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102. See, e.g., Wilson & Blackburn, *supra* note 1, at 7-8.

103. 289 Ga. 323, 710 S.E.2d 766 (2011).

104. *Id.* at 323-25, 710 S.E.2d at 767-69.

105. *Id.* at 326, 710 S.E.2d at 769.

106. See *id.*

107. *Id.*

108. *Id.* at 326-28, 710 S.E.2d at 769-71.

109. *Id.* at 328, 710 S.E.2d at 771.

110. 307 Ga. App. 163, 704 S.E.2d 458 (2010).

111. O.C.G.A. §§ 8-2-35 to -43 (2004 & Supp. 2011).

of a rule.<sup>112</sup> The Lumsdens were purchasers of a home from Williams, who had provided typical warranties and guaranties on the construction. During the year following the sale of the home, certain problems developed that necessitated an eventual court action.<sup>113</sup>

As a part of its duties, the Department of Community Affairs (DCA) provides the state minimum standards for residential buildings like the home that the Lumsdens purchased.<sup>114</sup> The Lumsdens requested that the court give judicial notice to Rule 110-11-1-11<sup>115</sup> as promulgated by the DCA.<sup>116</sup> The rule relates to the minimum building code for residences.<sup>117</sup> The trial court denied the Lumsdens' request, finding that the DCA had adopted a rule outside of the authority granted to the DCA by the General Assembly.<sup>118</sup> The original authority for the promulgation was O.C.G.A. § 8-2-20(a)(A)(i)-(ii),<sup>119</sup> which provided for the adoption of the Council of American Building Officials One-and-Two-Family Dwelling Code (CABO code).<sup>120</sup> That enactment by the General Assembly additionally allowed the DCA to adopt later additions or amendments to the CABO code.<sup>121</sup>

The version of the regulations that applied at the time of the construction on the home purchased by the Lumsdens was promulgated in 2002 by the DCA. The trial court determined that this promulgation was not a later addition of, or an amendment to, the earlier CABO code.<sup>122</sup> Rather, the promulgation substituted the International Residential Code for One-and-Two Family Dwellings (IRC)<sup>123</sup> in place of the CABO code.<sup>124</sup> Accordingly, the trial court found it was outside of the authority granted to the promulgating agency. Using the prior code for guidance, the trial court held in favor of Williams, the seller. The Lumsdens appealed.<sup>125</sup>

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112. 307 Ga. App. at 165, 704 S.E.2d at 461.

113. *Id.* at 163-65, 704 S.E.2d at 460-61.

114. See O.C.G.A. tit. 8, ch. 2. (2004 & Supp. 2011).

115. GA. COMP. R. & REGS. 110-11-1-11 (2002).

116. *Lumsden*, 307 Ga. App. at 165, 704 S.E.2d at 461.

117. See GA. COMP. R. & REGS. 110-11-1-11.

118. *Lumsden*, 307 Ga. App. at 165, 704 S.E.2d at 461.

119. O.C.G.A. § 8-2-20(9)(A)(i)-(ii) (2004).

120. *Lumsden*, 307 Ga. App. at 165-66, 704 S.E.2d at 461-62; see also Council of American Building Officials One-and-Two-Family Dwelling Code (1989) [hereinafter CABO code].

121. See O.C.G.A. § 8-2-20(9)(A)(i)-(ii); O.C.G.A. § 8-2-23 (2004 & Supp. 2011).

122. *Lumsden*, 307 Ga. App. at 166, 704 S.E.2d at 462.

123. INT'L RESIDENTIAL CODE FOR ONE-AND-TWO-FAMILY DWELLINGS (2002) [hereinafter IRC].

124. *Lumsden*, 307 Ga. App. at 166, 704 S.E.2d at 462.

125. *Id.* at 165-66, 704 S.E.2d at 461-62.

The Georgia Court of Appeals framed the issue regarding the regulatory provisions as “whether the IRC can be considered a later edition of [the CABO code] and thus whether it could properly be adopted by the DCA, or whether it represents a completely separate code.”<sup>126</sup> The court determined that there were two things that doomed the questioned promulgation: (1) the IRC document contained in its preface a statement that it was a complete code and only took shape after an IRC task force studied the code that had earlier been developed by the Council of American Building Officials;<sup>127</sup> and (2) the General Assembly adopted the IRC document as a new code in 2004,<sup>128</sup> which it would not have needed to do if the document was just a later version of the earlier promulgation.<sup>129</sup> Accordingly, the court of appeals upheld the trial court’s ruling refusing to give judicial notice to the IRC document.<sup>130</sup> Because of other issues contained in the case, the lower court judgment was affirmed in part and reversed in part.<sup>131</sup>

The other case that raised questions about the validity of an administrative rule was *Georgia Society of Ambulatory Surgical Centers v. Georgia Department of Community Health*.<sup>132</sup> The Department of Community Health (DCH) is empowered to issue a request for data from healthcare providers falling under the certificate of need (CON) requirements and also from those in certain provider categories that are exempt from a CON.<sup>133</sup> The survey DCH issued for completion by ambulatory surgical centers was questioned by the trade association known as the Georgia Society of Ambulatory Surgery Centers (GSASC). The GSASC brought an action in superior court for injunctive relief on the basis that the information sought by the DCH was outside of the statutory scope as enumerated in the enabling statute. The superior court concluded that injunctive relief should be denied and found the law broad enough to permit the request for the contested information.<sup>134</sup>

On appeal, the court of appeals had very little difficulty determining that the trial court’s actions were erroneous. Stated succinctly, the ruling was as follows: “We conclude that the trial court abused its discretion in the present case because its decision to deny interlocutory injunctive relief to GSASC was based on the erroneous legal conclusion

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126. *Id.* at 166-67, 704 S.E.2d at 462.

127. *See* IRC, *supra* note 123, preface.

128. *See* O.C.G.A. § 8-2-20(9)(B)(i) (2004).

129. *Lumsden*, 307 Ga. App. at 167, 704 S.E.2d at 462-63.

130. *Id.* at 167, 704 S.E.2d at 463.

131. *See id.* at 167-72, 704 S.E.2d at 463-66.

132. 309 Ga. App. 31, 710 S.E.2d 183 (2011) [hereinafter GSASC].

133. *Id.* at 32, 710 S.E.2d at 185; *see also* O.C.G.A. §§ 31-6-40(c)(2)(B), -70(a) (2009).

134. GSASC, 309 Ga. App. at 31, 710 S.E.2d at 184-85.

that the Disputed Requests were statutorily authorized."<sup>135</sup> The court went on to review the actual statute from which the survey was taken so that it could discern whether the rule was authorized by the statute and whether it could be found by a trial court to be reasonable.<sup>136</sup> Because the survey contained information in categories that were beyond those in the enabling statute, the court of appeals held that the trial court erred.<sup>137</sup>

Inexplicably, the DCH also sought to use its own administrative rules and regulations as authority for the survey questions and information.<sup>138</sup> Besides precedent, it is just plain common sense that a rule cannot surpass the scope of its enabling statute, and the court of appeals readily set the DCH right on this issue.<sup>139</sup>

A final argument made by the DCH was that the trade association failed to exhaust administrative remedies. The argument was premised on the availability of an administrative hearing if one of the healthcare providers failed to respond to the annual survey.<sup>140</sup> While reinforcing that exhaustion of administrative remedies continues to be the rule, the court of appeals held that exhaustion in this particular case would have been futile.<sup>141</sup> Drawing from *Glynn County Board of Education v. Lane*,<sup>142</sup> the court of appeals held that, in light of the expressed position of the DCH and its commissioner, administrative proceedings would basically have been held before the agency "on the question of its own conduct."<sup>143</sup> Thus, the added expense of another layer of litigation would have been fruitless.<sup>144</sup>

## VII. SOVEREIGN IMMUNITY

Besides *Judicial Council of Georgia v. Brown & Gallo, LLC*,<sup>145</sup> the only other case during the survey period involving the sovereign immunity of agencies was *Upper Oconee Basin Water Authority v. Jackson County*.<sup>146</sup> Several counties in northeast Georgia banded

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135. *Id.* at 33-34, 710 S.E.2d at 186.

136. *See id.* at 34-35, 710 S.E.2d at 186-87.

137. *Id.* at 37, 710 S.E.2d at 188.

138. *Id.*

139. *See id.*

140. *Id.*

141. *Id.*

142. 261 Ga. 544, 407 S.E.2d 754 (1991).

143. *GSASC*, 309 Ga. App. at 38, 710 S.E.2d at 189 (quoting *Glynn Cnty. Bd. of Educ.*, 261 Ga. at 546, 407 S.E.2d at 756) (internal quotation marks omitted).

144. *Id.*

145. 288 Ga. 294, 702 S.E.2d 894 (2010).

146. 305 Ga. App. 409, 699 S.E.2d 605 (2010).

together under a 1994 enactment (Act)<sup>147</sup> to become the membership of the Upper Oconee Basin Water Authority (Authority).<sup>148</sup> The member counties entered into an agreement in 1996 to further the purpose of the Act—increase water supplies to the member counties—and to complete the Bear Creek Reservoir project.<sup>149</sup> According to this agreement, the water was divided among the members according to “Entitlement Shares,” which represented the percentage of the reservoir output that would be piped to each of the counties.<sup>150</sup> The actual amount that could be withdrawn from the reservoir for a particular county was “a quantity equal to the . . . approved Established Yield of the Project multiplied by the Member County’s Entitlement Share of the Project.”<sup>151</sup>

Jackson County requested that the Authority go back and recalculate the Established Yield because of record droughts in the immediate prior years, which the county felt would reduce the numbers. Surprisingly, the Authority said no. Jackson County brought an action in superior court asking for a judgment that the Authority was in breach, an injunction requiring the requested recalculation by prohibiting use of the current Established Yield, and a declaration granting the recalculation originally requested by the county because the current Established Yield was incorrect.<sup>152</sup>

The Authority pleaded sovereign immunity and pointed to the enactment of the General Assembly specifically categorizing the Authority as a political subdivision.<sup>153</sup> However, Jackson County obviously anticipated sovereign immunity as a defense and presented to the trial court that the claim arose under an intergovernmental agreement, which is essentially a contract among the member counties.<sup>154</sup> Thus, sovereign immunity regarding contracts was waived by the Georgia Constitution<sup>155</sup> and by general law.<sup>156</sup> After the trial court denied the Authority’s motion to dismiss, an appeal ensued.<sup>157</sup>

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147. See Ga. H.R. Bill 1514, Reg. Sess., 1994 Ga. Laws 5123.

148. *Id.* § 5(b).

149. *Upper Oconee Basin Water Auth.*, 305 Ga. App. at 410, 699 S.E.2d at 606-07.

150. *Id.*

151. *Id.* at 410-11, 699 S.E.2d at 607 (internal quotation marks omitted).

152. *Id.* at 411, 699 S.E.2d at 607.

153. *Id.* at 411-12, 699 S.E.2d at 607; see also Ga. H.R. Bill 1514 § 3, 1994 Ga. Laws at 5125.

154. *Upper Oconee Basin Water Auth.*, 305 Ga. App. at 412, 699 S.E.2d at 608.

155. GA. CONST. art. I, § 2, para. 9(c).

156. *Upper Oconee Basin Water Auth.*, 305 Ga. App. at 412, 699 S.E.2d at 608; see also O.C.G.A. § 50-21-1(a) (2009).

157. *Upper Oconee Basin Water Auth.*, 305 Ga. App. at 409, 699 S.E.2d at 606.

Using the analysis described in the preceding paragraph, the Georgia Court of Appeals stated that “the essence of the [c]ounty’s claim is for breach of the [a]greement.”<sup>158</sup> In fact, the agreement itself had a provision authorizing a member county to bring an action for enforcement.<sup>159</sup> Accordingly, there was no sovereign immunity.<sup>160</sup> The Authority presented additional reasons that the action should not continue, including failure to state a claim upon which relief could be granted, failure to state properly a claim for declaratory relief, and additional defenses regarding the breach of contract claims.<sup>161</sup> At the preliminary stage of the litigation from which the appeal was taken, the court of appeals ruled that it could not use the record in the case thus far as a reason to absolve the Authority from possible liability that could be proven by Jackson County.<sup>162</sup> Accordingly, the court of appeals affirmed the trial court’s denial of the Authority’s motion to dismiss.<sup>163</sup>

#### VIII. LEGISLATIVE UPDATE

Likely owing to the change in administration from the statewide elections of 2010, there was considerable activity at the 2011 regular session of the General Assembly regarding administrative agencies. While some changes were relatively minor, some were highly significant. The more noteworthy ones include the following:

1. The Council of Superior Court Judges of Georgia will be responsible for reimbursing counties for the expenses of habeas corpus cases instead of the duty falling to the commissioner of administrative services.<sup>164</sup>

2. The Georgia Agricultural Exposition Authority was transferred for purposes of administration from the Department of Natural Resources to the Department of Agriculture.<sup>165</sup> In a real no-brainer, the Commissioner of Agriculture was added as an ex officio member of the authority.<sup>166</sup>

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158. *Id.* at 412, 669 S.E.2d at 608.

159. *Id.* at 413, 669 S.E.2d at 608.

160. *Id.*

161. *Id.* at 413-14, 669 S.E.2d at 608-09.

162. *Id.* at 414, 699 S.E.2d at 609.

163. *Id.* at 415, 699 S.E.2d at 610.

164. Ga. S. Bill 193 § 1, Reg. Sess., 2011 Ga. Laws 477 (codified at O.C.G.A. § 9-14-53 (Supp. 2011)).

165. Ga. H.R. Bill 125 § 2, Reg. Sess., 2011 Ga. Laws 261 (codified at O.C.G.A. § 2-3-3 (Supp. 2011)) (amending O.C.G.A. § 12-3-472 (2006) and redesignating as O.C.G.A. § 2-3-3 (Supp. 2011)).

166. *Id.*



3. The Georgia Public Defender Standards Council has undergone changes to its membership and refinement of the duties of both the council and its director.<sup>167</sup>

4. Members of local boards of education must now have terms that are at least four years long, and those boards in counties with homestead option sales and use taxes must have at least seven district board members unless there has been a contrary local enactment.<sup>168</sup>

5. In somewhat of a new division of territory, the State Board of Education, the Board of Regents of the University System of Georgia, and the Board of Technical and Adult Education will have a framework for coordinating curriculum and standards for certain courses and the credit to be given.<sup>169</sup>

6. There is a new State Education Finance Study Commission to analyze such things as education funding, student transportation, teacher pay, and several other areas.<sup>170</sup>

7. The Georgia Capitol Museum is no longer part of the office of the Secretary of State.<sup>171</sup> It has been transferred to the Board of Regents of the University System of Georgia.<sup>172</sup> Additionally, the Capitol Arts Standards Commission has its membership increased by one to include the Secretary of State.<sup>173</sup>

8. The State Medical Education Board is gone and its functions were transferred to the Georgia Board for Physician Workforce.<sup>174</sup> The

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167. Ga. H.R. Bill 238, Reg. Sess., 2011 Ga. Laws 91 (codified in scattered sections of O.C.G.A. tit. 17, ch. 12 (Supp. 2011)) (amending scattered sections of O.C.G.A. tit. 17, ch. 12 (Supp. 2011)).

168. Ga. S. Bill 79 §§ 1-2, Reg. Sess., 2011 Ga. Laws 26 (codified at O.C.G.A. §§ 20-2-52 to -52.1 (Supp. 2011)) (amending O.C.G.A. § 20-2-52 (2009) and enacting O.C.G.A. § 20-2-52.1 (Supp. 2011)).

169. Ga. H.R. Bill 186 §§ 1-9, Reg. Sess., 2011 Ga. Laws 635 (codified in scattered sections of O.C.G.A. tit. 20, ch. 2 (Supp. 2011)) (amending scattered sections of O.C.G.A. tit. 20, ch. 2 (2009), repealing O.C.G.A. § 20-2-161.1 (2009), and enacting O.C.G.A. §§ 20-2-159.1 to -159.5 (Supp. 2011)).

170. Ga. H.R. Bill 192 § 1, Reg. Sess. (to be codified at O.C.G.A. §§ 20-2-330 to -333.3) (enacting O.C.G.A. §§ 20-2-330 to -333.3).

171. Ga. S. Bill 190 §§ 1-2, Reg. Sess., 2011 Ga. Laws 617 (codified at O.C.G.A. § 20-3-40 (Supp. 2011)) (enacting O.C.G.A. § 20-3-40 (Supp. 2011) and repealing O.C.G.A. §§ 45-13-60 to -62 (1997)).

172. *Id.*

173. *Id.* § 3 (codified at O.C.G.A. § 45-13-70 (Supp. 2011)) (amending O.C.G.A. § 45-13-70 (2006)).

174. Ga. H.R. Bill 509, Reg. Sess., 2011 Ga. Laws 459 (codified in scattered sections of the O.C.G.A.) (amending scattered sections of the O.C.G.A.).

receiving board was also given the power to award loans and scholarships.<sup>175</sup>

9. There is now a State Veterinary Education Board that will grant loans for education of veterinarians whose practice will include food animal specialties.<sup>176</sup> The functions are dependent upon when or if appropriations are made.<sup>177</sup>

10. The State Board of Technical and Adult Education will now be known as the State Board of the Technical College System of Georgia.<sup>178</sup>

11. There is now established an Office of College and Career Transitions as a part of the Technical College System of Georgia.<sup>179</sup>

12. The 2011 Special Council on Criminal Justice Reform for Georgians has been created to study the current criminal justice structure.<sup>180</sup> Additionally, the General Assembly created the Special Joint Committee on Georgia Criminal Justice Reform.<sup>181</sup>

13. The former Division of Public Health has been split from the Department of Community Health and now will be known as the Department of Public Health, complete with a board and a commissioner.<sup>182</sup> In the same enactment, the Hemophilia Advisory Board was created and assigned to the Department of Community Health.<sup>183</sup>

14. There is now a Special Advisory Commission on Mandated Health Insurance Benefits that will attempt to ascertain the costs of mandated health benefits.<sup>184</sup>

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175. *Id.* § 1 (codified at O.C.G.A. § 20-3-512 (Supp. 2011)) (amending O.C.G.A. § 20-3-512 (2009)).

176. Ga. H.R. Bill 60 § 2, Reg. Sess., 2011 Ga. Laws 333 (codified at O.C.G.A. §§ 20-3-518.1 to -518.7 (Supp. 2011)) (enacting O.C.G.A. §§ 20-3-518.1 to -518.7 (Supp. 2011)).

177. *Id.*

178. Ga. H.R. Bill 49, Reg. Sess., 2011 Ga. Laws 632 (codified at O.C.G.A. § 20-4-10 (Supp. 2011)) (amending scattered sections of the O.C.G.A.).

179. Ga. S. Bill 161 § 1, Reg. Sess., 2011 Ga. Laws 421 (codified at O.C.G.A. § 20-4-37 (Supp. 2011)) (enacting O.C.G.A. § 20-4-37 (Supp. 2011)).

180. Ga. H.R. Bill 265 § 1, Reg. Sess., 2011 Ga. Laws 35 (codified at O.C.G.A. § 28-13-2 (Supp. 2011)) (enacting O.C.G.A. § 28-13-2 (Supp. 2011)).

181. *Id.* (codified at O.C.G.A. § 28-13-3 (Supp. 2011)) (enacting O.C.G.A. § 28-13-3 (Supp. 2011)).

182. Ga. H.R. Bill 214 §§ 3-1 to -2, Reg. Sess., 2011 Ga. Laws 705 (codified at O.C.G.A. § 31-2A-1 (Supp. 2011)) (enacting O.C.G.A. § 31-2A-1 and amending scattered sections of the O.C.G.A.).

183. *Id.* § 2-1 (codified at O.C.G.A. § 31-1-12 (Supp. 2011)) (enacting O.C.G.A. § 31-1-12 (Supp. 2011)).

184. Ga. S. Bill 17, Reg. Sess., 2011 Ga. Laws 329 (codified at O.C.G.A. § 33-1-19 (Supp. 2011)) (enacting O.C.G.A. § 33-1-19 (Supp. 2011)).

15. The Department of Public Safety has reacquired its employees that had previously been assigned to the Georgia Aviation Authority, and the department will once more have administrative control over such functions.<sup>185</sup>

16. There is now a Martin Luther King, Jr. Advisory Council which will, among other things, have the power to create a nonprofit corporation in furtherance of its purposes.<sup>186</sup>

17. The powers currently residing in the Office of Planning and Budget relative to the Georgia Council for the Arts are shifted over to the Department of Economic Development.<sup>187</sup>

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185. Ga. H.R. Bill 414 §§ 2, 4, Reg. Sess., 2011 Ga. Laws 409 (codified at O.C.G.A. § 6-5-4 (Supp. 2011) and O.C.G.A. § 35-2-140 (Supp. 2011)) (amending O.C.G.A. § 6-5-4 (2009) and enacting O.C.G.A. § 35-2-140 (Supp. 2011)).

186. Ga. S. Bill 141, Reg. Sess., 2011 Ga. Laws 255 (codified at O.C.G.A. §§ 50-8-240 to -242 (Supp. 2011)) (enacting O.C.G.A. §§ 50-8-240 to -242 (Supp. 2011)).

187. Ga. H.R. Bill 264 § 4, Reg. Sess., 2011 Ga. Laws 514 (codified at O.C.G.A. § 50-12-25 (Supp. 2011)) (amending O.C.G.A. § 50-12-25 (2009)).

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