

Local Government Law

by Kirk Fjelstul*

I. INTRODUCTION

This Article reviews Georgia appellate decisions presenting new or instructive issues related to local government law during the survey period from June 1, 2013 to May 31, 2014.¹

II. IMMUNITY

Overruling *IBM v. Georgia Department of Administrative Services*² and setting new precedent, the Georgia Supreme Court in *Georgia Department of Natural Resources v. Center for a Sustainable Coast, Inc.*³ held that sovereign immunity is a bar to injunctive-relief claims at common law.⁴ The plaintiff, Center for a Sustainable Coast, Inc. (the Center), sought declaratory and injunctive relief, contending that the Shore Protection Act (the Act)⁵ did not authorize the Georgia Department of Natural Resources (DNR) and its officials to issue “Letters of Permission” (LOPs) for land-alteration activities along the coast.⁶ The

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1. For an analysis of Georgia local government law during the prior survey period, see Kirk Fjelstul, *Local Government Law, Annual Survey of Georgia Law*, 65 *MERCER L. REV.* 205 (2013).

2. 265 Ga. 215, 453 S.E.2d 706 (1995).

3. 294 Ga. 593, 755 S.E.2d 184 (2014).

4. *Id.* at 593, 755 S.E.2d at 185-86.

5. O.C.G.A. §§ 12-5-230 to -248 (2012).

6. *Ga. Dep't of Natural Res.*, 294 Ga. at 593, 755 S.E.2d at 186.

supreme court granted certiorari from *Center for a Sustainable Coast, Inc. v. Georgia Department of Natural Resources*⁷ in part to consider whether the Georgia Court of Appeals “erred by finding that sovereign immunity was no bar to injunctive relief at common law.”⁸

The court of appeals had ruled that the trial court improperly relied on sovereign immunity to dismiss the injunctive-relief claims.⁹ The court reasoned that sovereign immunity was not available for injunctive-relief claims based on ultra vires or illegal conduct.¹⁰ The court of appeals relied on *IBM* and concluded that “a governmental entity cannot cloak itself in sovereign immunity while performing illegal acts to the detriment of its citizens.”¹¹

The supreme court in *IBM* recognized a legal fiction by creating an exception to sovereign immunity for injunctive-relief claims concerning acts conducted outside of the scope of lawful authority.¹² Sovereign immunity barred injunctive claims if the asserted acts were legal, but the immunity exception allowed the claims to proceed if the asserted acts were not legal.¹³ Immunity exceptions, as interpreted in *IBM*, are often used by courts to avoid the harsh consequences of immunity that result from acts conducted outside the scope of authority.¹⁴ An exception is different than a waiver in that an immunity waiver is expressly authorized by the Constitution of the State of Georgia,¹⁵ but it can only be applied by the Georgia General Assembly.¹⁶ The court in *IBM* reasoned that it could create common law judicial exceptions that were not considered waivers.¹⁷

The supreme court in *Georgia Department of Natural Resources* reversed the holding of the court of appeals and overruled *IBM*, concluding that the *IBM* analysis was “unsound.”¹⁸ The court reasoned that the 1991 amendment to the constitution¹⁹ was clear and did not leave flexibility for judicial exceptions to immunity.²⁰ The 1991

7. 319 Ga. App. 205, 734 S.E.2d 206 (2012).

8. *Ga. Dep't of Natural Res.*, 294 Ga. at 594, 755 S.E.2d at 186.

9. *Ctr. for a Sustainable Coast, Inc.*, 319 Ga. App. at 209, 734 S.E.2d at 209.

10. *Id.*

11. *Id.*

12. 265 Ga. at 216, 453 S.E.2d at 708.

13. *Id.*

14. *Id.*

15. GA. CONST. art. I, § 2, para. IX.

16. *Ga. Dep't of Natural Res.*, 294 Ga. at 599, 755 S.E.2d at 189.

17. 265 Ga. at 216-17, 453 S.E.2d at 708-09.

18. *Ga. Dep't of Natural Res.*, 294 Ga. at 597, 755 S.E.2d at 188.

19. Ga. H.R. Res. 777, Reg. Sess., 1990 Ga. Laws 2435.

20. *Ga. Dep't of Natural Res.*, 294 Ga. at 598-99, 755 S.E.2d at 189.

amendment extended immunity to the state and its departments and agencies, which "can only be waived by an Act of the General Assembly."²¹ In *IBM*, the court had minimized the 1991 amendment, contending that it was simply intended to change the insurance waiver of immunity.²²

The court in *IBM* also incorrectly contended that there is at least one other example of a similar judicial exception: nuisance claims.²³ The court in *Georgia Department of Natural Resources* concluded that there is no such judicially-created immunity exception.²⁴ Instead, immunity is simply not applicable to nuisance claims because the constitution requires just compensation for takings.²⁵ Finally, the court concluded that the court in *IBM* wrongly used precedent that either predated the constitutional ratification of immunity in 1974 or failed to consider the impact of that ratification.²⁶

Although the court in *Georgia Department of Natural Resources* concluded that sovereign immunity bars injunctive-relief claims against the state and its officers in their official capacities, it noted that relief may be available against the officers in their individual capacities.²⁷ Injunctive relief would also be permitted if there is a specific waiver by act of the General Assembly, which the court concluded did not exist in the present case.²⁸

It should be noted that this case, while initiated against a state agency rather than a local government, does have local government application. Counties are political subdivisions of the state, and as such, the 1991 amendment, which formed the basis of the court's decision, applies to counties as well as the state.²⁹

21. *Id.* at 598, 755 S.E.2d at 189 (emphasis omitted) (quoting GA. CONST. art. I, § 2, para. IX(e)).

22. *Ga. Dep't of Natural Res.*, 294 Ga. at 599, 755 S.E.2d at 190; see *IBM*, 265 Ga. at 217, 453 S.E.2d at 708-09.

23. See *Ga. Dep't of Natural Res.*, 294 Ga. at 600, 755 S.E.2d at 190; *IBM*, 265 Ga. at 217, 453 S.E.2d at 709.

24. *Ga. Dep't of Natural Res.*, 294 Ga. at 600, 755 S.E.2d at 190.

25. *Id.*

26. *Id.* at 601, 755 S.E.2d at 190-91.

27. *Id.* at 603, 755 S.E.2d at 192.

28. *Id.*

29. *Gilbert v. Richardson*, 264 Ga. 744, 746, 452 S.E.2d 476, 478-79 (1994).

III. CHARTERS

The court of appeals in *Kautz v. Powell*³⁰ interpreted the express and supplementary powers contained in the City of Snellville's charter as it addressed the mayor's authority to terminate the city attorney's employment.³¹ Section 3.12 of the charter³² expressly authorized the mayor to appoint the city attorney but was silent about the authority to terminate.³³ The mayor contended in her complaint that the express authority in the charter to hire carried the implicit authority to terminate.³⁴

The court reasoned, however, that the plain and unambiguous language in section 2.16 of the charter³⁵ vested all power with the city council that was not expressly delegated elsewhere.³⁶ Section 2.16 provides, "Except as otherwise provided by law or this [c]harter, the city council shall be vested with all the powers of government of this city."³⁷ It is not allowable, therefore, for the court to construe unambiguous language in favor of additional implicit authority.³⁸ Since there is no express authority for the mayor to terminate the city attorney's employment, the court upheld the trial court's ruling that the mayor did not have authority to terminate the city attorney.³⁹

The dissent argued that the majority ignored the longstanding rule that where an official's tenure is not prescribed by law, the power to terminate is incident to the power to appoint.⁴⁰ The majority responded that it was not construing or interpreting the charter because the charter in *Kautz* was unambiguous.⁴¹ The majority further pointed out that the language in *Bailey v. Dobbs*⁴² relied on by the dissent was mere dicta in that the charter in that case gave the city manager the

30. 326 Ga. App. 816, 755 S.E.2d 330 (2014), *cert. granted*, No. S14C1161, 2014 Ga. LEXIS 690 (2014).

31. *Id.* at 817-18, 755 S.E.2d at 331.

32. SNELLVILLE, GA., CHARTER § 3.12 (2002).

33. *Kautz*, 326 Ga. App. at 816 n.1, 755 S.E.2d at 330 n.1. The charter states, "The mayor shall appoint a city attorney . . ." *Id.* (quoting SNELLVILLE, GA., CHARTER § 3.12).

34. *Id.* at 816, 755 S.E.2d at 330.

35. SNELLVILLE, GA., CHARTER § 2.16 (2002).

36. *Kautz*, 326 Ga. App. at 816-17, 755 S.E.2d at 330-31.

37. *Id.* at 816, 755 S.E.2d at 331 (quoting SNELLVILLE, GA., CHARTER § 2.16).

38. *Id.* at 817, 755 S.E.2d at 331.

39. *Id.* at 817-18, 755 S.E.2d at 331.

40. *Id.* at 819, 755 S.E.2d at 332 (Branch, J., dissenting).

41. *Id.* at 817 n.5, 755 S.E.2d at 331 n.5 (majority opinion).

42. 227 Ga. 838, 183 S.E.2d 461 (1971).

express power to appoint and remove employees, and the court did not use implicit power as an argument in support of its decision.⁴³

IV. MANDAMUS

A. *Bibb County v. Monroe County*

The case of *Bibb County v. Monroe County*⁴⁴ reminds us about the limits of mandamus in matters that are legislative or political in nature. Sections 36-3-20 to -27 of the Official Code of Georgia Annotated (O.C.G.A.)⁴⁵ establish the process for resolving jurisdictional boundary disputes between counties.⁴⁶ By the time the case reached the Georgia Supreme Court, the boundary dispute had been through a nearly ten-year process. It followed the administrative process set out in O.C.G.A. §§ 36-3-20 to -27. A grand jury made a presentment of the dispute, and the governor appointed a surveyor. The surveyor prepared and filed a survey and plat with the secretary of state, recommending final boundary lines. Bibb County filed exceptions to the survey and Monroe County responded with a defense.⁴⁷

The secretary of state referred the dispute to the Office of State Administrative Hearings, and after a three-day hearing, the administrative law judge (ALJ) recommended the acceptance of the survey and plat. The secretary of state heard additional arguments and visited the disputed area. The secretary of state then rejected the survey and left the boundary undetermined.⁴⁸

Monroe County filed an action for judicial review in superior court against the secretary of state, but that action was dismissed as non-reviewable and was not appealed.⁴⁹ Once the action was dismissed, Monroe County filed a mandamus action. The trial court granted the mandamus petition after a hearing and ordered the secretary of state to record the survey filed by the appointed surveyor, thereby recognizing the final boundary as the one prepared by the surveyor.⁵⁰

43. *Kautz*, 326 Ga. App. at 817 n.5, 755 S.E.2d at 331 n.5; see also *Bailey*, 227 Ga. at 839, 183 S.E.2d at 463.

44. 294 Ga. 730, 755 S.E.2d 760 (2014).

45. O.C.G.A. §§ 36-3-20 to -27 (2012).

46. *Id.*

47. *Bibb Cnty.*, 294 Ga. at 730-32, 735, 755 S.E.2d at 763-64, 765.

48. *Id.* at 731, 755 S.E.2d at 764.

49. *Id.* The form of the action and the reason it was not appealed is unclear because it is not part of the record. See *id.* at 735 n.2, 755 S.E.2d at 766 n.2.

50. *Id.* at 731-32, 755 S.E.2d at 764.

It is the secretary of state's duty to ascertain the boundary line: "Upon the hearing, the Secretary of State shall determine from the law and evidence the true boundary line in dispute between the respective counties."⁵¹ Bibb County and the secretary of state contended on appeal that the nature of establishing county boundary lines is purely political and is not reviewable by mandamus.⁵²

Mandamus is a remedy for government failure to perform a clear duty, but a writ of mandamus is only available if two elements are met: (1) no other adequate remedy is available, and (2) there is a clear legal right to the relief.⁵³ The court addressed both elements at length.

(1) *No Adequate Remedy*. If there is another avenue for pursuing relief that is "equally convenient, complete and beneficial," mandamus is not available as a remedy.⁵⁴ The secretary of state contended that, because Monroe County could secure another grand jury presentment, a remedy other than mandamus was available.⁵⁵ The court disagreed and reasoned that starting the process over could not be considered equally convenient, complete, and beneficial.⁵⁶ The process had already taken nearly ten years and cost substantial sums.⁵⁷ The court concluded that mandamus was available because it was the only "practicable" method for obtaining relief.⁵⁸

(2) *Clear Legal Right*. A clear legal right to relief compels performance of a "public duty that an official or agency is required by law to perform."⁵⁹ A clear legal right exists "either where the official or agency fails entirely to act or where, in taking such required action, the official or agency commits a gross abuse of discretion."⁶⁰ Where the law vests the agency or official with discretion to perform an action, mandamus is not available because there is not a clear legal right to performance of the act.⁶¹ Even if mandamus is available to compel some action, it cannot be used to "prescribe how that action is taken or to preordain its result."⁶²

51. O.C.G.A. § 36-3-24 (2012).

52. *Bibb Cnty.*, 294 Ga. at 733, 755 S.E.2d at 765.

53. *Id.* at 734, 755 S.E.2d at 766.

54. *Id.* (quoting *N. Fulton Med. Ctr., Inc. v. Roach*, 265 Ga. 125, 128, 453 S.E.2d 463, 466 (1995)).

55. *Id.* at 735, 755 S.E.2d at 766.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 735, 755 S.E.2d at 767.

62. *Id.* at 736, 755 S.E.2d at 767.

The court concluded that there was a clear legal right under the statute to file a protest challenging the appointed surveyor's plat, a clear legal right to have the secretary of state determine the true boundary, and a clear legal right to have the secretary of state record the survey establishing the boundary line.⁶³ There was no clear legal right to a particular result because the secretary of state had the discretion to make the determination.⁶⁴

B. *Scarborough v. Hunter*

*Scarborough v. Hunter (Scarborough II)*⁶⁵ is another mandamus case decided by the supreme court during the survey period, and it considered the extent of the court's review when mandamus is brought based on allegations of gross abuse of discretion.⁶⁶ The plaintiffs, property owners along Winding Bluff Road, brought actions seeking mandamus and a temporary restraining order (TRO) against the Stephens County Board of Commissioners, which would direct the county to repair the road and prevent a county commission vote to consider abandoning the road.⁶⁷

The trial court in the first *Scarborough v. Hunter (Scarborough I)*⁶⁸ entered a TRO against the county commission directing it not to hold a hearing or take action abandoning the road.⁶⁹ The Georgia Supreme Court in *Scarborough I* reversed the trial court and rescinded the TRO.⁷⁰ The supreme court held that the trial court's duty was to review discretionary acts, not to prevent the exercise of discretion.⁷¹

Thereafter, the county held a public hearing and considered evidence on the issue of road abandonment.⁷² The board of commissioners voted to accept the staff's recommendation to abandon the road in accordance with the O.C.G.A. § 32-7-2(b)(1)⁷³ abandonment standard. The plaintiffs then amended the mandamus complaint, challenging the board of commissioners' decision.⁷⁴

63. *Id.* at 737, 755 S.E.2d at 768.

64. *Id.* at 739, 755 S.E.2d at 769.

65. 293 Ga. 431, 746 S.E.2d 119 (2013).

66. *See id.* at 432-33, 746 S.E.2d at 122.

67. *Id.* at 431-32, 746 S.E.2d at 121.

68. 288 Ga. 687, 706 S.E.2d 650 (2011).

69. *Scarborough II*, 293 Ga. at 432, 746 S.E.2d at 121.

70. *Id.*

71. *Id.*

72. *Id.*

73. O.C.G.A. § 32-7-2(b)(1) (2012).

74. *Scarborough II*, 293 Ga. at 432, 746 S.E.2d at 121.

The trial court held a bench trial and entered an order, concluding that the county's abandonment decision was arbitrary and capricious, an abuse of discretion, and not in the best public interest.⁷⁵ It set aside the abandonment decision and entered a mandamus order directing the board of commissioners to repair and maintain the road in "as good a condition as same was initially accepted."⁷⁶ The supreme court in *Scarborough II* once again reversed the trial court's ruling, this time reversing the mandamus order.⁷⁷

Mandamus is ordinarily available as a remedy for "failure of a public official to perform a clear legal duty."⁷⁸ It is also available, however, to review acts of discretion "where the exercise of that discretion has been so capricious or arbitrary as to amount to a gross abuse."⁷⁹

The county has a duty to maintain roads on its county system, but O.C.G.A. §§ 32-7-1 to -5⁸⁰ provides a statutory process for abandonment.⁸¹ The statutory standard applied by the county from O.C.G.A. § 32-7-2(b)(1) was whether the road has for any reason "ceased to be used by the public to the extent that no substantial public purpose is served by it or that its removal from the county road system is otherwise in the best public interest."⁸²

The court noted that all of the issues associated with road abandonment are matters of discretion for the governing authority.⁸³ The trial court's review of the decision should be whether the board's "judgment on these matters was so arbitrary and capricious that it amounted to a 'gross abuse of . . . discretion.'"⁸⁴ It is "not whether, in *the court's* judgment, the Road had 'ceased to be used by the public to the extent that no substantial public purpose is served by it or that its removal from the county road system is otherwise in the best public interest.'"⁸⁵ The supreme court based its determination on whether there was any evidence to support the county commission's decision, not the trial court's decision.⁸⁶

75. *Id.* at 432-33, 746 S.E.2d at 122.

76. *Id.*

77. *Id.* at 439, 746 S.E.2d at 126.

78. *Id.* at 434-35, 746 S.E.2d at 123.

79. *Id.* at 435, 746 S.E.2d at 123 (quoting Bd. of Comm'rs. of Rds. & Revenues of Walton Cnty. v. Robinson, 160 Ga. 816, 818, 129 S.E. 73, 74 (1925)).

80. O.C.G.A. §§ 32-7-1 to -5 (2012).

81. *Scarborough II*, 293 Ga. at 433-34, 746 S.E.2d at 122-23.

82. *Id.* at 436, 746 S.E.2d at 124 (quoting O.C.G.A. § 32-7-2(b)(1)).

83. *Id.*

84. *Id.* (alteration in original) (quoting O.C.G.A. § 9-6-21(a) (2007)).

85. *Id.* (quoting O.C.G.A. § 32-7-2(b)(1)).

86. *Id.*

The court reviewed the record of the public hearing and held that there was evidence to support the board of commissioners' decision to abandon the road.⁸⁷ The court recognized that there was conflicting evidence.⁸⁸ The board was entitled to conclude, however, that the cause of the road's failure was, in part, the result of defective construction by the private developer who built the road, that it could cost more than \$600,000 to repair the road, and that there was very little public use of the road beyond that of the developer or a few property owners.⁸⁹ As a result, the court held that there was no basis for the trial court to find that the decision to abandon the road was arbitrary or capricious and a gross abuse of discretion.⁹⁰ The trial court's finding that abandonment of the road was not in the best public interest "inappropriately substituted the court's view of the evidence and the public interest for that of the Board."⁹¹

The court also questioned, but did not overrule, the rationale of *Cherokee County v. McBride*,⁹² a case relied on by the plaintiffs.⁹³ The case was cited for the proposition that the county cannot avoid its duty to maintain a county road by letting it fall into disrepair to the point of becoming impassable and then abandoning it based on non-use.⁹⁴ The court distinguished the present case from *McBride* because there was evidence that the road at issue in the present case was failing due to defective design and construction.⁹⁵ The court noted, however, that the statutory standard for abandonment had been amended since *McBride* was published, potentially undermining its rationale.⁹⁶

A 2010 amendment added a new standard for abandonment that is not connected to public use or non-use of the road.⁹⁷ The amendment added the phrase "or that its removal from the county road system is otherwise in the best public interest."⁹⁸ Since the court found the present case was one of defective design and construction rather than neglect, however, it did not decide whether to overrule *McBride*.⁹⁹

87. *Id.* at 436-37, 746 S.E.2d at 124-25.

88. *Id.* at 437, 746 S.E.2d at 125.

89. *Id.*

90. *Id.* at 437-38, 746 S.E.2d at 125.

91. *Id.* at 438, 746 S.E.2d at 125.

92. 262 Ga. 460, 421 S.E.2d 530 (1992).

93. *Scarborough II*, 293 Ga. at 438, 746 S.E.2d at 125.

94. *Id.*

95. *Id.*

96. *Id.* at 438-39, 746 S.E.2d at 126.

97. Ga. S. Bill 354, Reg. Sess. (2010).

98. *Id.* § 1.

99. *Scarborough II*, 293 Ga. at 439, 746 S.E.2d at 126.

C. *Burke County v. Askin*

The supreme court decided a third mandamus case, *Burke County v. Askin (Burke County II)*,¹⁰⁰ during the survey period.¹⁰¹ Five roads in Pineview Subdivision were dedicated to and accepted by Burke County in 1962. Three of the five roads were constructed as unpaved. One of the three, Frances Avenue, was the main road in the subdivision.¹⁰² Although the road was partially constructed, it was left unfinished for “the last few hundred feet.”¹⁰³ The two remaining streets were never constructed.¹⁰⁴

The court in *Burke County II* considered the trial court’s writ of mandamus that required the county to complete the unfinished portion of Frances Avenue.¹⁰⁵ In the first *Burke County v. Askin (Burke County I)*,¹⁰⁶ the supreme court vacated the trial court’s writ of mandamus, which ordered the county to complete and maintain the road, and remanded for rehearing.¹⁰⁷ The court held in *Burke County I* that, although the issue of road maintenance and construction was a matter of discretion, the trial court failed to articulate a standard.¹⁰⁸ On remand, the trial court was directed to use a standard of “arbitrary, capricious, and unreasonable,” or gross abuse of discretion.¹⁰⁹

On remand, the trial court once again issued a writ of mandamus ordering the county to repair, construct, and maintain Frances Avenue, this time applying the proper standard.¹¹⁰ The standard of review on appeal of the county’s duty to maintain a road is “whether the superior court manifestly abused its discretion and erred in granting mandamus relief.”¹¹¹ Grant or denial of mandamus relief is “largely in the discretion of the presiding judge.”¹¹²

100. 294 Ga. 634, 755 S.E.2d 747 (2014).

101. *Id.* at 635, 755 S.E.2d at 748.

102. *Id.* at 635, 755 S.E.2d at 749.

103. *Id.*

104. *Id.*

105. *Id.* at 634, 755 S.E.2d at 748.

106. 291 Ga. 697, 732 S.E.2d 416 (2012). There is also a third case, this time in the Georgia Court of Appeals. The court of appeals case addressed related issues in the same development that were litigated in Columbia County. *See generally* *Burke Cnty. v. Askins*, 327 Ga. App. 116, 755 S.E.2d 602 (2014).

107. *Burke County I*, 291 Ga. at 701, 732 S.E.2d at 419.

108. *Id.*

109. *Id.*

110. *Burke County II*, 294 Ga. at 636, 755 S.E.2d at 749.

111. *Id.* at 637, 755 S.E.2d at 750.

112. *Id.* at 636-37, 755 S.E.2d at 750.

This appellate review standard is different from that applied in *Scarborough II*. That case addressed the statutory authority for road abandonment, which provides a statutory process that is left to the discretion of the governing authority.¹¹³ The present case addressed the duty to maintain roads on the county system.¹¹⁴ The county has a statutory duty to maintain its roads according to specific standards, and the court may enforce that duty through mandamus.¹¹⁵

The court in *Burke County II* upheld the trial court's writ of mandamus, ruling that there was evidence to support the finding that failure to complete the road was arbitrary.¹¹⁶ Although the county contended that it had the discretion to direct road funds in the most efficient and effective manner, the trial court found that there was no evidence in support of that assertion. Instead, it found that decades of neglect were a result of the mistaken belief by the county that the road was private rather than public.¹¹⁷

V. ANTE LITEM NOTICE

In *Greater Atlanta Home Builders Ass'n v. City of McDonough*,¹¹⁸ the Georgia Court of Appeals revisited the issue of whether attorney fees are subject to the requirements of ante litem notice.¹¹⁹ O.C.G.A. § 36-33-5(a)¹²⁰ bars certain claims against municipal corporations without prior written notice: "No person, firm, or corporation having a claim for money damages against any municipal corporation *on account of injuries to person or property* shall bring any action against the municipal corporation for such injuries, without first giving notice as provided in subsection (b) of this Code section."¹²¹ O.C.G.A. § 36-33-5(b)¹²² describes the notice requirements:

Within six months of the happening of the event upon which a claim against a municipal corporation is predicated, the person, firm, or corporation having the claim shall present the claim in writing to the governing authority of the municipal corporation for adjustment,

113. *See id.* at 637 n.4, 755 S.E.2d at 750 n.4.

114. *Id.*

115. *See id.*; *see also* O.C.G.A. § 9-6-21(b) (2007); O.C.G.A. § 32-4-41 (2012).

116. *Burke County II*, 294 Ga. at 638-39, 755 S.E.2d at 751.

117. *Id.* at 637-38, 755 S.E.2d at 750-51.

118. 322 Ga. App. 627, 745 S.E.2d 830 (2013).

119. *Id.* at 627, 745 S.E.2d at 830-31.

120. O.C.G.A. § 36-33-5(a) (2012 & Supp. 2014).

121. O.C.G.A. § 36-33-5(a) (2012) (emphasis added).

122. O.C.G.A. § 36-33-5(b) (2012 & Supp. 2014).

stating the time, place, and extent of the injury, as nearly as practicable, and *the negligence which caused the injury*.¹²³

City of McDonough involved a class action lawsuit brought by the Greater Atlanta Home Builders Association, as a representative of the homebuilders, for the return of impact fees and for attorney fees and costs. Once the class was certified, the plaintiffs filed a motion for summary judgment. The trial court granted the motion, but it denied the request for attorney fees and costs based on the failure to provide ante litem notice.¹²⁴

The plaintiffs appealed the denial of attorney fees and costs, and the court of appeals reversed.¹²⁵ In doing so, the court overruled *Dover v. City of Jackson*,¹²⁶ which held that attorney fees and costs were subject to the ante litem restrictions.¹²⁷ The court reasoned that O.C.G.A. § 36-33-5 is in derogation of common law because common law does not require notice prior to initiating legal action.¹²⁸ As a result, the statute must be strictly construed, and relying on *City of Statesboro v. Dabbs*,¹²⁹ the court recognized that the statute applies only to personal injury and property damage tort claims.¹³⁰ Application of the statute requires a determination of whether there is a claim for injuries to person or property, not just money damages.¹³¹

The damages in this case were for reimbursement of development impact fees and attorney fees and costs.¹³² Since none of the claims were for injury to person or property, the court held that the ante litem restrictions in O.C.G.A. 36-33-5 did not apply.¹³³ The court specifically held that the plaintiffs were not required to give ante litem notice in order to seek attorney fees.¹³⁴

The court then overruled *Dover*,¹³⁵ the authority relied on by the trial court for its holding that attorney fees and costs were barred by the

123. *Id.* (emphasis added).

124. *City of McDonough*, 322 Ga. App. at 627, 745 S.E.2d at 830-31.

125. *Id.* at 627, 745 S.E.2d at 831.

126. 246 Ga. App. 524, 541 S.E.2d 92 (2000).

127. *City of McDonough*, 322 Ga. App. at 629-30, 745 S.E.2d at 832; *see also Dover*, 246 Ga. App. at 526, 541 S.E.2d at 94.

128. *City of McDonough*, 322 Ga. App. at 629, 745 S.E.2d at 831.

129. 289 Ga. 669, 715 S.E.2d 73 (2011).

130. *City of McDonough*, 322 Ga. App. at 629, 745 S.E.2d at 831-32.

131. *Id.* at 629, 745 S.E.2d at 832.

132. *Id.* at 627, 745 S.E.2d at 830.

133. *Id.* at 629, 745 S.E.2d at 832.

134. *Id.*

135. *Id.* at 629-30, 745 S.E.2d at 832.

plaintiffs' failure to serve a proper ante litem notice.¹³⁶ *Dover* incorrectly concluded that a claim for attorney fees and costs, although ancillary to the claims for equitable relief in a zoning case, was a claim for damages.¹³⁷ The court in *City of McDonough* held that conclusion was contrary to both the duty of the court to strictly construe statutes that are in derogation of common law and the language of O.C.G.A. § 36-33-5, which limits applicability of the statute to damage claims arising from injury to person or property.¹³⁸

VI. TAXATION

In *Turner County v. City of Ashburn*,¹³⁹ the Georgia Supreme Court struck down the 2010 amendment¹⁴⁰ to the Local Option Sales Tax (LOST) Act.¹⁴¹ LOST is generally a special district local tax, whose special district boundaries correspond to the 159 counties.¹⁴² It is a joint tax, with the proceeds distributed to the county and qualified municipalities within the county based on terms negotiated in a jointly-executed certificate that is filed with the revenue commissioner.¹⁴³

Prior to the 2010 amendment, the court held that the process in the LOST Act for negotiating the distribution of tax revenue was voluntary, and therefore, not an unlawful delegation of legislative taxing authority to the revenue commissioner.¹⁴⁴ The requirement for filing a joint certificate merely allowed the revenue commissioner to distribute tax proceeds.¹⁴⁵

The difficulty for local governments was that the negotiation process required the municipalities and the county to agree on the distribution of LOST proceeds in order to file the joint certificate and have the tax renewed.¹⁴⁶ Failure to file the certificate would result in revocation of authority to hold the referendum and impose the LOST tax.¹⁴⁷ The

136. *Id.*

137. *Id.*; see also *Dover*, 246 Ga. App. at 526, 541 S.E.2d at 94.

138. *City of McDonough*, 322 Ga. App. at 629-30, 745 S.E.2d at 832.

139. 293 Ga. 739, 749 S.E.2d 685 (2013).

140. Ga. H.R. Bill 991, Reg. Sess. (2010).

141. *Turner Cnty.*, 293 Ga. at 739, 749 S.E.2d at 686; see also O.C.G.A. §§ 48-8-80 to -96 (2013).

142. See *Turner Cnty.*, 293 Ga. at 739, 749 S.E.2d at 686-87.

143. *Id.* at 739-40, 749 S.E.2d at 687.

144. *Id.*; see also Bd. of Comm'rs of Taylor Cnty. v. Cooper, 245 Ga. 251, 257, 264 S.E.2d 193, 198 (1980).

145. *Turner Cnty.*, 293 Ga. at 740, 749 S.E.2d at 687; see also *Cooper*, 245 Ga. at 257, 264 S.E.2d at 198.

146. *Turner Cnty.*, 293 Ga. at 740, 749 S.E.2d at 687.

147. *Id.* at 740, 749 S.E.2d at 688.

LOST Act also required periodic renegotiation of the distribution because the criteria were based, in part, on census data for the jurisdictions.¹⁴⁸ Problems arose because the jurisdictions within a special district could not always agree on the distribution.¹⁴⁹ Prior to the amendment, the jurisdictions participated in non-binding arbitration or some other form of non-binding dispute resolution.¹⁵⁰

The 2010 amendment rewrote O.C.G.A. § 48-8-89(d),¹⁵¹ adding a step to the negotiation process in the event an impasse remained after non-binding dispute-resolution efforts.¹⁵² Any party to the required joint agreement could petition the superior court in the county of the special district to seek resolution of remaining disputed items.¹⁵³ A judge from outside the circuit would be appointed to hear written “best and final offer[s]” from the county in the district on one side, and from the “municipalities representing at least one-half [of] the aggregate municipal population” in the district on the other side.¹⁵⁴ The judge would conduct hearings as he or she deemed necessary and would render a decision by adopting the best and final offer of one of the parties, along with findings of fact.¹⁵⁵ The final order was required to include a new distribution certificate to be transmitted to the revenue commissioner.¹⁵⁶

In *Turner County*, the municipalities filed a petition in superior court once an impasse was reached, as authorized in the 2010 amendment. The county filed a motion to dismiss, challenging the 2010 amendment on constitutional grounds. The trial court denied the motion and upheld the constitutionality of the amendment. It also entered an order adopting the best and final offer of the municipalities and transmitted a new certificate to the revenue commissioner.¹⁵⁷ The supreme court granted a petition for discretionary appeal and reversed the trial court, ruling that the 2010 amendment violated the separation of powers provisions of the Georgia Constitution.¹⁵⁸

148. *Id.*

149. *Id.* at 740-41, 749 S.E.2d at 688.

150. *Id.* at 741, 749 S.E.2d at 688.

151. O.C.G.A. § 48-8-89(d) (2013 & Supp. 2014).

152. *Turner Cnty.*, 293 Ga. at 741, 749 S.E.2d at 688.

153. *Id.*; see also O.C.G.A. § 48-8-89(d)(4), *invalidated by Turner Cnty.*, 293 Ga. 739, 749 S.E.2d 685 (2013).

154. *Turner Cnty.*, 293 Ga. at 741, 749 S.E.2d at 688.

155. *Id.*

156. *Id.*

157. *Id.* at 742, 749 S.E.2d at 688-89.

158. *Id.* at 743, 749 S.E.2d at 689; see also GA. CONST. art. I, § 2, para. III.

The court determined that the amended portion of O.C.G.A. § 48-8-89(d)(4) allowed the municipalities or the county in a district to obtain a court order forcing the other local governments to either levy or renew a LOST “even if the elected representatives of those governing entities have determined the tax should be permitted to expire.”¹⁵⁹ Since the authority to levy a tax is legislative, the decision on whether to renew a tax is legislative as well.¹⁶⁰ It is a decision that should be “left solely to the discretion of the elected legislative body.”¹⁶¹

The same is true for allocation of the tax, once the decision to levy is made. The court followed the reasoning in *Board of Commissioners of Taylor County v. Cooper*,¹⁶² a LOST Act case pre-dating the 2010 amendment that considered the extent of local discretion in allocating LOST proceeds.¹⁶³ The court noted that the LOST Act did not give specific direction on the allocation of funds, but left “the division to be determined within certain guidelines by the municipalities and the county.”¹⁶⁴ The court in *Turner County* also relied on the supporting rationale in *Jackson v. City of College Park*,¹⁶⁵ another pre-2010 amendment case.¹⁶⁶ In *Jackson*, the court of appeals noted that “[v]oluntary agreement, not judicial decree, is the only means of producing the necessary certificate of distribution.”¹⁶⁷

In *Turner County*, the supreme court reasoned that determining the benefit of a tax is a matter of legislative discretion and is not subject to judicial review absent a manifest abuse of discretion.¹⁶⁸ Similarly, determining the allocation of tax revenue is solely a matter of legislative discretion unless there is a manifest abuse of discretion.¹⁶⁹ The court concluded that judicial review “may not be expanded to substitute the court’s decision for that of the parties.”¹⁷⁰

“[T]he basic principle embodied in the separation of powers doctrine [is] that the legislature cannot delegate legislative power to the

159. *Turner Cnty.*, 293 Ga. at 743, 749 S.E.2d at 689.

160. *Id.*

161. *Id.*

162. 245 Ga. 251, 264 S.E.2d 193 (1980).

163. *Turner Cnty.*, 293 Ga. at 743, 749 S.E.2d at 689.

164. *Id.*

165. 230 Ga. App. 487, 496 S.E.2d 777 (1998).

166. *Turner Cnty.*, 293 Ga. at 743-44, 749 S.E.2d at 690.

167. *Jackson*, 230 Ga. App. at 491, 496 S.E.2d at 780 (internal quotation marks omitted).

168. *Turner Cnty.*, 293 Ga. at 744, 749 S.E.2d at 690.

169. *Id.* at 744-45, 749 S.E.2d at 690.

170. *Id.* at 745, 749 S.E.2d at 690.

courts.¹⁷¹ The municipalities argued that the 2010 amendment was a proper delegation because it only authorized the judicial branch to ascertain facts.¹⁷² The court rejected the argument because the judge is required to adopt a best and final offer of one of the parties based on the "intent" of certain sections of the LOST Act, rather than strict criteria.¹⁷³ Even if the judge was required to render a decision based on the criteria, it would still be a

blatant delegation of legislative decision-making to the trial court because it would not call for a factual determination of any fact in dispute but a distribution of tax proceeds based upon what the judge believes to be the appropriate weight to place upon factors that are expressly not limited to the criteria set forth in the statute.¹⁷⁴

The distribution was to be based on, "but not limited to," the listed criteria.¹⁷⁵

In addition, the decision calls for subjective weighing of the criteria and so is not subject to a factual determination.¹⁷⁶ As a result, the allocation decision is political and cannot be delegated to a judicial officer.¹⁷⁷ The general assembly specifically chose not to set rigid standards based strictly on population, but required the local governments to negotiate an allocation based on the needs of the district.¹⁷⁸ As a result, the court held the 2010 amendment unconstitutional.¹⁷⁹

171. *Id.* at 745, 749 S.E.2d at 691 (alteration in original) (quoting *Harrell v. Courson*, 234 Ga. 350, 352, 216 S.E.2d 105, 107 (1975)).

172. *Id.* at 746, 749 S.E.2d at 691.

173. *Id.* at 746-47, 749 S.E.2d at 691-92.

174. *Id.* at 747, 749 S.E.2d at 692.

175. *Id.* (quoting O.C.G.A. § 48-8-89(b)).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 748-49, 749 S.E.2d at 692-93.