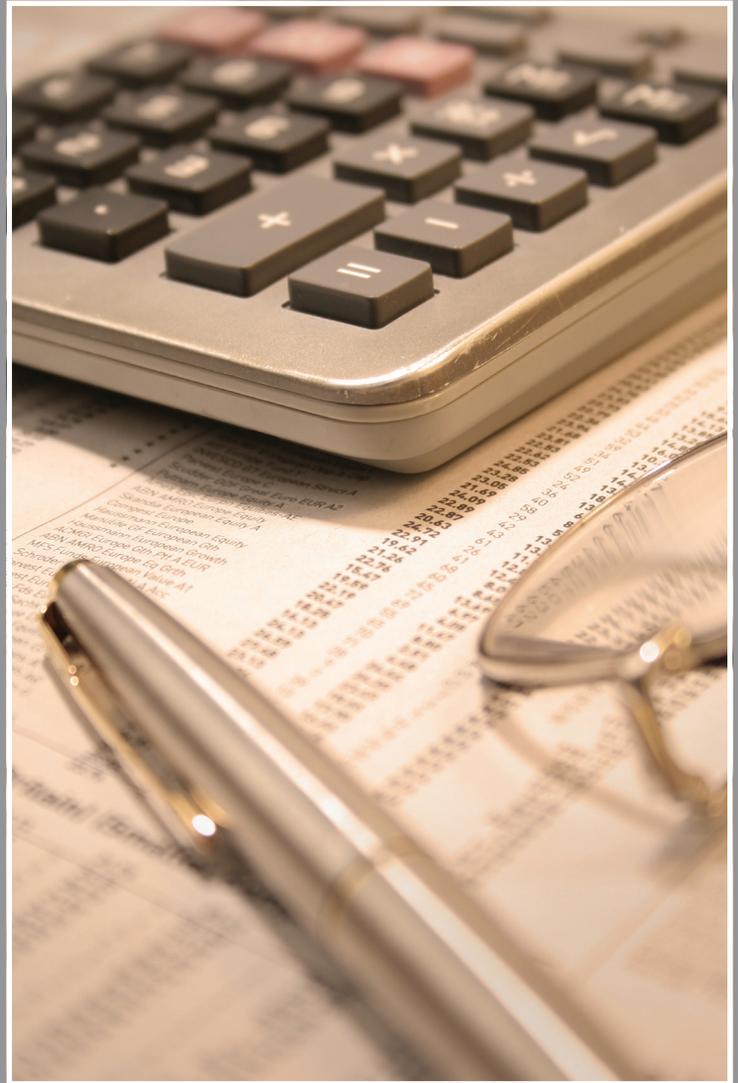


Constitutional Officers: Budgeting, Contracting and Other Critical Issues

A Guidebook for County Commissioners
(3rd Edition)
2013

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TABLE OF CONTENTS

Introduction	1
Basic County Government Structure	2
County Commissioners	2
County Commissioners as Legislators and Regulators	2
County Commissioners as Providers of Services That Protect the Health, Safety and Welfare of the Citizens	2
County Commissioners as Fiscal Authority and Service Provider	3
Constitutional Officers	3
Sheriff	3
Tax Commissioner	3
Superior Court Clerk	4
Probate Judge	4
The Budget	5
Setting the Budget	5
How Much Is Enough?	5
How Funds Appropriated Through the Budget Are Spent	6
Setting the Legal Level of Control	6
Effect of Setting a More Detailed Level of Control	6
Overspending the Budget	7
Budget Amendments	8
Closing the Courthouse as a Cost Saving Measure	8
Compensation of County Officials	9
County Officer Salaries	9
County Officers Still Paid on the Fee System	9
The Effect of Furloughs or Reduction in County Officer Salaries	10
Personnel Policies and Civil Service Systems	11
Employment Decisions	11
Civil Service or Merit Systems	11
What is Included in a Civil Service System	11
How to Include County Officers' Employees in a Civil Service System	12
Salaries of Employees of County Officers	12
Employment Benefits for County Officers and Their Employees	13
Fair Labor Standards Act	13
Basic FLSA Requirements	13
Special Rules for Sheriff's Offices	13
FLSA Issues for Commissioners and County Officers	13
Employment Discrimination	14

The Power to Contract	15
Contracts That Require Mutual Consent of County Officers and Commissioners.....	15
Contracts to House Federal Prisoners.....	15
Contracts with Cities to Provide Additional Law Enforcement Services.....	15
Prepare Tax Digest and Collect Taxes for Cities.....	15
Transfer of Tax Executions in Lot Blocks.....	15
Collection of City Taxes.....	16
Contracts with Private Probation Companies.....	16
Municipal Court Services.....	16
Contracts That County Officers May Enter Without the Commissioners.....	16
Superior Court Data and Filings.....	16
Maintenance of Copies of Legal Organ.....	16
Inherent Power to Contract.....	16
Contracts for Fiscal Services.....	17
Lawsuits and Attorneys’ Fees	18
Liability Insurance.....	18
Bonds.....	18
Attorneys’ Fees.....	18
Attorneys’ Fees Paid at the Option of the Board of Commissioners.....	18
Attorneys’ Fees Paid Because of a Georgia Supreme Court Ruling.....	19
Attorneys’ Fees Paid Because Superior Court Determines That County Attorney has Conflict of Interest.....	19
Purchasing	20
The Problem.....	20
Implementation of Purchasing Procedures.....	21
Fees	22
Fees Paid into County Treasury.....	22
Fees Generated from Use of County Property.....	22
Fees that May be Kept by the County Officer.....	22
Accounting of Fees.....	23
Forfeitures and “Drug Money”	24
Forfeiture Under State Law.....	24
Funding for Sheriffs.....	24
Funding for District Attorneys.....	24
Other Uses.....	24
Forfeitures Under Federal Law.....	25
Cooperation and Assistance	26

INTRODUCTION

In Georgia, local government at the county level is structured so that power is distributed to several independent officials. One of the most challenging aspects of being a county commissioner is harmoniously and efficiently working with the other elected county officials. Sometimes these relationships falter because of the personalities of one or more individuals involved. More often, the problems arise from the basic tension established in the Georgia Constitution and statutes between the fiscal duties of county commissioners and the independent authority of the other elected county officials. This tension is compounded by a lack of understanding among commissioners and elected county officials of each other's duties and responsibilities under the law.

As county officers and county commissioners are elected officers, there is a great deal of coordination and cooperation required to balance the board of commissioners' fiduciary and fiscal duties to the county taxpayers with county officers' functions established by law. While there are some state statutes and cases to help guide county officials, it is not clear where the board of commissioners' fiscal authority ends and the county officers' statutory duties begin (and vice versa). There used to be more "gray areas" in the laws that separate the powers of county commissioners and county officers in Georgia. However, in recent years, the appellate courts have clarified several of these areas — mostly by taking fiscal authority away from commissioners and giving it to the county officers. Generally, county commissioners and other elected officials are able to maintain a more positive relationship when all parties understand and respect the boundaries of their authority.

This guidebook is designed to help commissioners understand the current status of the law so that they can better identify the limits of their authority. The guidebook begins with a basic explanation of the structure of county government — the umbrella that includes commissioners, sheriffs, superior court clerks, probate judges and tax commissioners. While there are many other county elected and appointed officials that also fall under the county umbrella, this guidebook focuses on the "constitutional officers." Budgets, contracts, purchasing, salaries, employees, lawsuits, fees and drug and forfeiture money will be discussed.

BASIC COUNTY GOVERNMENT STRUCTURE

The Georgia Constitution addresses the issue of county governance by allocating power between a county governing authority¹ (i.e., a board of commissioners, a sole commissioner, or the governing body of a consolidated government) and county-level constitutional officers (i.e., “county officers”). The Georgia Constitution creates the positions of the county officers but leaves their duties to be determined by general law.² The board of commissioners, on the other hand, is given its authority both through the Constitution and through statute.

County Commissioners

County commissioners are the governing body of the county. They determine the budget, as well as establish a millage rate to raise the revenues necessary to provide services required or permitted by law and desired by citizens. With the fiscal and fiduciary authority given to commissioners comes great fiscal responsibility.

Commissioners must conduct the county’s business in the open and maintain records (i.e., minutes, resolutions, ordinances, etc.) so that citizens may examine for themselves how their tax dollars are used. Commissioners are required to abide by laws establishing how contracts are approved and recorded, how budgets are adopted and amended, how funds are audited, how to lawfully obligate the county, how projects are to be publicly bid, how county funds are to be invested, how to protect taxpayer dollars from lawsuits and claims, how to provide benefits for employees, how to provide payroll services and how to responsibly bind the county.

County Commissioners as Legislators and Regulators

County commissioners are legislators at the county level. They are constitutionally vested with legislative power to “adopt clearly reasonable ordinances, resolutions or regulations” about their property, affairs and for county government generally, so long as there is not a general state law on the same subject and so long as the ordinances, resolutions and regulations are not inconsistent with the Georgia Constitution.³ Some specific examples where county commissioners are authorized by the Constitution or statute to enact ordinances include: zoning, historic preservation, building codes, signs, adult bookstores, adult movie houses, dangerous dogs, rabies control, animal licensing, shore protection, drainage basins, soil erosion and sedimentation control, solid waste handling and disposal, repairing, closing and demolishing unfit buildings, litter, removal of junk vehicles, cable television, alcoholic beverages, fortune telling, auctioneering, billiard rooms, precious metal and gem dealers, used vehicle and used vehicle parts sales, traffic regulation, off-road vehicles, public indecency, loitering, disorderly conduct, public drunkenness, smoking in public places, sale of model glue to minors, street gangs and inspection of meats, poultry, and dairy products.

County Commissioners as Providers of Services That Protect the Health, Safety and Welfare of the Citizens

In addition to the grant of legislative power, the Georgia Constitution also gives supplementary powers to county commissioners. These powers allow the governing authority to provide services that include police protection, fire protection, solid waste collection and disposal, public health facilities and services, and road construction and maintenance.⁴ The governing authority is also vested with the ability to create special tax districts to provide for local government services within their counties.⁵

County Commissioners as Fiscal Authority and Service Provider

In addition to the constitutionally granted powers, the General Assembly has given county commissioners “original and exclusive” jurisdiction to direct and control county property, to levy a general tax for county purposes, to levy special taxes for particular county purposes, to establish, alter or abolish roads and bridges, to fill all vacancies in county offices (unless another body is empowered to do so), to examine and settle claims against the county, to examine and audit the accounts of all officers having the care, management, keeping, collection or disbursement of money belonging to the county (or appropriated for its use and benefit), to adopt rules and regulations for the support of the poor, to provide county police and patrol, and to promote health, to quarantine and to regulate peddling.⁶

Constitutional Officers

There are four county positions that draw their authority from the state constitution and do not fall under the control of the county governing authority. The term “constitutional officers” or “county officers” typically refers to the sheriff, superior court clerk, tax commissioner and probate judge. Although magistrate courts are created in the Constitution, and coroners, state court judges, solicitors and surveyors are also independently elected county officials, they are not generally referred to as “constitutional officers” or “county officers.”⁷ The powers and duties of the sheriff, superior court clerk, probate judge and tax commissioner are determined by general law and not on a county-by-county basis.⁸ The duties and minimum salaries of the county officers are set by the General Assembly and are not within the authority of the commissioners to control, except that discretionary supplements may be approved by the commissioners.⁹

Sheriff

The sheriff has the right and duty to enforce the laws enacted for the protection of the lives, property, health and morals of the people.¹⁰ The office of the sheriff must be kept at the county seat and at the courthouse. However, the sheriff may also operate administrative facilities in areas of the county located outside the county seat.¹¹ The sheriff is required to serve papers related to the courts, to attend all sessions of the superior court and the probate court when required, to attend the place or places holding an election at the county site while the polls are open, to publish sales and other proceedings as required by law, to keep records of the publications, to keep an execution docket, to keep a book listing all sales by process of the courts, to receive and process all unexecuted writs from the previous sheriff, to perform such other duties as are or may be imposed by law or which necessarily pertain to his or her office, to exercise the same duties, powers and arrest authority within municipalities as he or she exercises within the unincorporated areas, to prepare and implement a courthouse security plan,¹² to appoint one or more deputies,¹³ to set the salaries of deputies, to be the jailer, to appoint other jailers,¹⁴ to take custody of the jail and inmates from the previous sheriff, to furnish inmates with food, shelter and health care,¹⁵ and to take arrestees to a jail in another county if his or her jail is in an unsafe condition.¹⁶

Tax Commissioner

The tax commissioner is required to diligently collect county taxes, to pay such funds promptly to the county general fund, to have an insolvent list, to post and maintain a notice of the days that the office is open for collecting taxes (as well as regular office hours), to issue executions for all unpaid taxes due the state or county, to keep a permanent qualification or voters’

book, to make up the registration lists as provided by the elections code, and to perform all duties pertaining to the office of tax collector.¹⁷ Funds collected by the tax commissioner must be transferred to the county general fund at least once per week or once every two weeks depending upon the size of the county.¹⁸ The tax commissioner is required to keep a cashbook to record all cash collected for taxes, as well as disbursements of such funds to the proper state and local authorities. Generally, this book must be balanced and filed by April 20 of each year with the county commissioners, who have the power to audit it.¹⁹ Each year, the tax commissioner is required to render an account of official actions and to exhibit books, vouchers, and accounts to the county commissioners. If the tax commissioner fails or refuses to do so after being notified by the board of commissioners, then the commissioners must suspend the tax commissioner from office pending a decision from the courts about whether the tax commissioner should be removed from office.²⁰

Superior Court Clerk

The powers and duties of the superior court clerk are mostly ministerial regarding the maintenance of court records, the registration of property transactions, the oversight of the board of equalization and the recording of subdivision plats. The superior court clerk is required to record all proceedings in civil and criminal court cases, to record the final record of every part of the pleading in every case, including garnishments, affidavits, bonds, and attachments in any judicial proceeding, to reference the location of any subsequent paper in the original record of the case, to keep the clerk's office at the county site and at the courthouse or other location authorized by law, to attend to the needs of the court, to issue and sign every summons, writ, execution, order, or other paper under authority of the court, to keep an automated civil case management system, to keep an automated criminal case management system, to keep a docket for recording all deeds, liens, and other documents regarding title to real or personal property, to keep all publications of the laws of the United States furnished by the state and to keep all other law books furnished to him or her for the public's convenience.²¹ To help perform duties of the office, the clerk may appoint deputy clerks.²²

Probate Judge

The duties of the probate judge are judicial, ministerial and clerical. Probate judges are required to probate wills, to grant and repeal letters of testamentary and of administration of an estate, to settle controversies in relation to the right of executorship or administration of an estate, to sell and distribute property of deceased persons' estates, to appoint and remove guardians for minors and persons who are mentally incompetent, to resolve controversies regarding the right of guardianship, to audit and pass returns of all executors, administrators and guardians, to discharge former sureties, to require new sureties from administrators and guardians, to handle all other matters relating to the estates of deceased persons and persons who are mentally incompetent,²³ to perform county governmental administration duties under specific circumstances, to serve as election superintendent (when there is no local legislation creating an elections board), to fill vacancies in public offices, to administer oaths to public officers, to accept, file, approve, and record bonds of public officers, to register and permit certain enterprises, to issue marriage licenses, to hear traffic cases (when there is no state court), to receive pleas of guilty and impose sentences for fish and game violations, to hold criminal commitment hearings,²⁴ to hear cases involving the removal of road obstructions, to conduct trials for certain misdemeanors (e.g., violations of state rules and regulations regarding parks, historic sites, and recreational areas, violations of the "Georgia Boat Safety Act," possession of less than an ounce of marijuana, the purchase or possession of alcohol by a minor and cases involving litter on public and private property).²⁵

THE BUDGET

The county commissioners are responsible for approving the annual budget for all operations of the county, including the county officers.²⁶ The budget must be balanced and must account for each unit of the county.²⁷ While that sounds simple enough, it quickly becomes very complicated by the fact that independent elected county officials are also funded through the budget.

A county officer may insist that he or she needs additional funds to buy equipment, hire additional staff or pay overtime to their employees to do their job properly. On one level, this is no different than the same claims made by a department head. They are simply looking for additional funds to do their jobs. On another level, however, there is a significant difference. The county officers are independent elected officials. As such, they are not employees of the commissioners and are not subject to supervision by the commissioners. County officers are charged by law to perform their duties and depend upon the county commissioners to adequately fund them. While not obligated to give county officers whatever they claim to need, county commissioners are charged by law to properly fund the county officers.

Setting the Budget

The preparation and administration of the budget is the responsibility of the county “budget officer.”²⁸ The “budget officer” is either the board of commissioners or someone appointed by the board of commissioners (e.g., the county manager, county administrator or finance director).²⁹ The process of passing a budget begins with the submission of proposed budgets by the various departments and by the county officers. County officers must include the amount of anticipated revenues by source and the amount budgeted for expenditures (i.e., at the department level, unless a more detailed legal level of control is adopted) in the proposed budgets that they submit.³⁰ At this point, the commissioners are free to make reasonable adjustments to the proposed budget, including cutting funding. The commissioners are vested with the final decision as to where to allocate county property and funds. Whether the commissioners have fulfilled their duty to make reasonable and adequate provision to enable a county officer to perform his or her duty is judged by an abuse of discretion standard.³¹ The commissioners must be able to provide a reasonable explanation as to why county property or funds were allocated a certain way.³² The Supreme Court has stated that it will only reverse the commissioners’ budget decision if “it is clear and manifest” that commissioners abused their discretion in establishing a budget.³³ Once balanced, the budget is implemented by passage of a local ordinance or resolution.³⁴

How Much Is Enough?

Any budget approved by the commissioners must be reasonable and must provide reasonably sufficient funds to allow the county officer to discharge his or her legal duties.³⁵

There is a fine line between providing what the commissioners believe is a reasonable budget and dictating to a county officer how to perform his or her statutory duties. On one hand, in order for the commissioners to make an educated decision about what is a reasonable budget, the commissioners should know about the types of services that the county officer provides, the impact of state or federal mandates, the work load of the county officer and budgets of other county officials in similarly situated counties. On the other hand, that knowledge naturally

may result in commissioners having opinions about how the county officer could perform their duties more efficiently and more effectively with less staff or different equipment. However, trying to make the county officers accept these opinions could run afoul of the prohibition against dictating to an officer how to perform his or her duties.

In one case, the commissioners removed 47 percent of the sheriff's proposed budget to avoid duplication of effort and expense when the responsibility for patrols and drug enforcement shifted from the sheriff's office to the new county police department. Avoiding duplication of effort and expense was seen by the Georgia Supreme Court as a reasonable decision by the board and the transfer of such duties did not divest the sheriff's office of all law enforcement responsibilities.³⁶ However, a percentage across the board reduction in all county department budgets, including the county officer budgets, was deemed not acceptable by a trial court in another case. The Chatham County Superior Court held that the county commissioners failed to properly exercise their discretion by neglecting to consider the varying needs of the county officers relative to other county needs.³⁷

How Funds Appropriated Through the Budget Are Spent

While county commissioners clearly are responsible for preparing and maintaining the budget for all county functions, the courts have made it clear that the commissioners must defer to the county officers' judgment when it comes to spending within the budget approved for them.³⁸ Despite the commissioners' fiscal control, they have no say in how the county officers run their department or carry out their duties established by law.³⁹ Once the funds are appropriated in the budget, it is within the discretion of each county officer to spend those funds as he or she sees fit, keeping in mind that money may not be moved except within the established legal level of control without board approval.

Setting the Legal Level of Control

"Legal level of control" is the lowest level of budgetary detail where the county's budget officer or manager cannot reassign appropriated funds without approval of the county commissioners.⁴⁰ The law states that, at a minimum, the legal level of control must be at the department level.⁴¹ This means that the budget officer, a department head or a county officer may be able to transfer money to different budget categories within their own department without having the board of commissioners adopt a budget amendment in a commission meeting. However, it also means that funds cannot be transferred from one department to another department unless the commissioners adopt a budget amendment in a commission meeting.

The commissioners are free to establish a more detailed budgetary document and level of control.⁴² This may require the commissioners to establish more sophisticated budget procedures. Like an adjustment to the budget, changing the legal level of control must be adopted through a resolution or ordinance passed by the governing authority.⁴³

Effect of Setting a More Detailed Level of Control

If the legal level of control is at the department level (which is the default set in state law), then the county officers may move money around within their department without going before the board. However, if the commissioners set the legal level of control at a more detailed level, the county officers cannot move around money from one budget category to another without the

approval of the commissioners as specified in the resolution establishing the more detailed level of control.

The more detailed the level of control established by the commissioners, the more the commissioners become involved with the spending decisions of the various departments in the government, including the constitutional officers. While a more detailed level of control may generally be appropriate, there is a risk that too detailed a level of control would encroach on the authority given to the county officers to carry out their duties without the approval of the county commissioners.

In several cases, the courts have held that the commissioners cannot strip the county officers of their duties either directly through legislation or indirectly through the micromanagement of funds.⁴⁴ The Georgia Supreme Court has cautioned that the governing authority cannot “attempt to do indirectly, by exercise of their fiscal authority and their control of county property, that which they could not do directly.”⁴⁵ Thus it cannot establish a system where any spending decision by the county officer requires governing authority approval, because that will essentially be dictating to the county officer how to do his or her job. For instance, a legal level of control that required board approval for a change in allocation between the sheriff’s narcotics and traffic divisions could be more problematic and possibly seen as the use of fiscal authority to exercise a form of direct control over the county officer.

On the other hand, it may be appropriate for the level of control to be established lower than the department level. For example, it may be possible to establish a legal level of control at a level that requires the county officer to seek governing authority approval should the officer wish to transfer funds allocated for maintenance of his or her facilities to capital expenditures. Requiring approval of the commissioners could be justified by the fact that the officer’s facilities are in fact county property and that the commissioners, in their discretion, believe that the maintenance amount was necessary for the upkeep of the officer’s facility. A legal level of control that would require commissioner approval for transfers from capital expenditures to salaries may be appropriate in that capital expenditures are often a one-time expense. However, increases in salaries or positions create an ongoing expense into future budget years.

Overspending the Budget

While the commissioners have the authority to determine the budget, they cannot determine how the budget will be spent in the exercise of the county officer’s duties as long as the amounts are within the allotted budget.⁴⁶ Problems arise when county officers fail to remain within their budget. Unfortunately, the commissioners’ options in such a case are limited. Commissioners can:

1. Talk with the county officer to try to find a way to help him or her come into compliance.
2. Be open to legitimate needs of a county officer that may justify an amendment to increase funding for the county officer.
3. Do nothing until the county officer’s budget is exhausted prior to the end of the fiscal year. However, even if the county officer unlawfully overspends his or her budget, the county is still obligated by the Fair Labor Standards Act (FLSA) to pay the wages and overtime of the employees of the department.

4. Engage in a battle in the press about which elected official is a better steward of county property tax dollars.
5. Educate the public through reports and audits regarding the use and misuse of their tax dollars.
6. File a petition for mandamus in superior court asking the judge to order the county officer to stay within budget.⁴⁷

Obviously, some options are preferable to others. Although personalities often get in the way, commissioners need to remember that they are trustees with a fiduciary relationship to the citizens in selecting which course of action to take in resolving budget disputes.⁴⁸

Budget Amendments

Even though the budget is set at the beginning of the fiscal year, the commissioners have the ability to amend the budget to adapt to changing governmental needs.⁴⁹ County commissioners have the authority to amend or change estimates or required expenditures of a county officer anytime during the fiscal year.⁵⁰

If the amendment involves the reallocation of funds at the legal level of control, the amendment is subject to approval by the county commissioners through adoption of a local ordinance or resolution.⁵¹

Closing the Courthouse as a Cost Saving Measure

During tough economic times, many county commissioners have considered unpaid holidays or furlough days for their employees. While commissioners can clearly require their employees to take furlough days, they cannot impose furlough days on the employees of the county officers unless the employees are under the county's civil service system. While commissioners may not be able to require furlough days, they do have the ability to close the courthouse by formally declaring a public holiday, which can reduce the cost of maintenance, utilities and salaries of employees of the commissioners.⁵² In closing the courthouse, commissioners must be mindful that some of the county officers located in the courthouse have office hours dictated by law.⁵³ However, by formally declaring a public holiday on the days that the courthouse will be closed, these county officers may vary the office hours dictated by law. It is in the discretion of the county officers to rearrange their employees' schedules around the closing or not. Commissioners are strongly encouraged to discuss the option of furlough days or closing the courthouse and the impact on the public with the county officers prior to taking such actions.

In the case of a clerk of superior court with at least one employee, the office must be open Monday through Friday from 9:00 a.m. until 5:00 p.m., unless the office is open on Saturdays. The clerk may close the office for inclement weather if other county offices are closed. In counties with a population of less than 10,000, the clerk may close the office for lunch if all other county offices are closed for lunch. The clerk is not required to open the office on any public and legal holiday or day of rest recognized and designated as such by the county commissioners. Finally, the clerk may close the office for training every six months under certain conditions.⁵⁴ The probate judge is authorized by statute to establish his or her office hours with the requirement that the office must be closed on Sundays and may be closed one other additional day.⁵⁵

COMPENSATION OF COUNTY OFFICIALS

In the early years of the State of Georgia, county officers were allowed to keep the fees that they collected as their salary. However, in modern times, the General Assembly established minimum salaries for all of the county officers in lieu of fees. With few exceptions, county officers have moved from the fee system of compensation to a salary.

County Officer Salaries

County officers are either paid according to the state minimum salary⁵⁶ based upon the county's population or by an act of the General Assembly (i.e., local legislation), whichever is greater. The population-based salaries are devised from the U.S. census. The population totals from the 2010 census became effective on July 1, 2011, unless it would result in a reduction of a county official's salary.⁵⁷ In any year that the Department of Community Affairs publishes a census estimate before July 1, the population in the census estimate is used. A base salary is established by statute, which is increased by state-mandated supplements for additional duties that may be performed by the county official, by longevity and by cost of living adjustments determined by the state.

The board of commissioners is authorized, but not required, to supplement a county officer's salary.⁵⁸ However, once a supplement is given by the board of commissioners, it may not be reduced or eliminated during the officer's term. If the commissioners want to reduce or eliminate a supplement, board action must be taken sometime prior to January 1 of the constitutional officer's new term.

The board of commissioners is also authorized, but not required, to provide a monthly expense allowance to county officers based upon population.⁵⁹

When a county officer is paid according to a minimum salary state statute, he or she must be paid in equal monthly installments.⁶⁰

For more information on computing county officer and other state minimum salaries, please see the *ACCG Guide for Computing County Official Salaries*. It is published each year after the cost of living adjustments are announced by the Governor's Office of Planning and Budget and made available through the ACCG website at www.accg.org.

County Officers Still Paid on the Fee System

While the fee system has been mostly abolished in Georgia for county officers, there are still some instances where county officers receive compensation based upon the fees that they collect.

For instance, superior court clerks who were on the fee system in 1973 may continue on the fee system.⁶¹ Additionally, any superior court clerks who receive passport applications on behalf of the U.S. State Department are authorized to keep a passport fee as part of their compensation.⁶² This passport fee compensation applies regardless of whether the superior court clerk is paid a salary or is on the fee system.

Similarly, some tax commissioners are still paid a commission based upon the tax digest in lieu of salary.⁶³ Tax commissioners may also negotiate personal compensation for collecting city taxes.⁶⁴

The probate judge may keep up to \$7,500 per year of vital records fees (for example, birth and death certificates) as personal compensation in addition to his or her state minimum salary.⁶⁵

The Effect of Furloughs or Reduction in County Officer Salaries

In tight budget times, some county officers may request that they be subject to furloughs or reductions in salary along with county employees. However, the commissioners are restricted by the Georgia Constitution from taking any action that impacts county officer salaries.⁶⁶ Because of this prohibition, the commissioners may not vary from the salaries established by law, even at the county officer's request. When reduced salaries are requested, the recommended action is to pay the county officer his or her state mandated compensation. The county officer can then make a donation to the county for the amount of the requested reduction.

PERSONNEL POLICIES AND CIVIL SERVICE SYSTEMS

The Constitution not only limits commissioners' authority over the county officers but also limits their authority over the employees of the county officer.⁶⁷ Personnel supervised by county officers are seen as employees of the county officer and not of the county commissioners.⁶⁸ The commissioners cannot take any action affecting the personnel of county officers.⁶⁹ The Georgia Supreme Court has interpreted this to mean that unless the employees of the county officer are placed by the county officer in a county civil service system, the commissioners cannot affect the conditions of their employment.⁷⁰

Employment Decisions

The county officers are responsible for making employment decisions about their employees, including hiring and firing decisions and setting the salaries. This is, however, all subject to the budget.⁷¹

Commissioners may not terminate or direct a county officer to terminate an employee, because it would be a direct encroachment on the county officer's constitutional power to make his or her own staff determinations.⁷²

The commissioners can, however, reasonably reduce the amount budgeted for the county officer and allow the county officer to decide how the reduction will occur in his or her budget. Such action is not seen as an abuse of discretion, even if it may require the county officer to adjust the total number of his or her employees or their pay.⁷³

Civil Service or Merit Systems

Personnel policies enacted by a board of commissioners only cover employees who are under the control of the commissioners. Such policies do not apply to the employees of the county officers, unless they are covered under a county civil service system. Employees of a county officer can only be placed in a county civil service system if the county officer petitions the commissioners to include his or her employees in the system.⁷⁴

What is Included in a Civil Service System

State law is silent on the definition of a civil service system or what must be included in the system. Generally, a civil service system is put in place to promote public service and offer employees the inducement of promotion for merit and not political allegiance.⁷⁵ Essentially, it is meant to insulate the government work force from shifting political winds to allow for effective and efficient government service.⁷⁶

Several county civil service systems have been enacted across the state and, while they vary in the specifics, the broad outline of what is established is relatively consistent. Typically, the purpose of a county civil service system is to establish a personnel administration system that uses merit principles to govern the appointment, promotion, transfer, layoff, removal, discipline and well-being of the employees governed by the system.⁷⁷

Many civil service systems create a classification system that identifies what type of employees are covered by the system (e.g., full time, permanent employees) and what type of employees are not covered by the system (e.g., part-time employees, temporary employees, department

heads, contract employees, etc.). In addition, the classification system sets the duties, powers and responsibilities of each position covered by the service. Appointments are based on merit. The fitness of an employee is generally tested through competitive examination.

The system may have position control, which provides that there are a specified number of positions. New employees may not be hired unless one of the positions is vacant. New positions may not be created without going through the commissioners.

A board may be established to create the system's regulations and to see that they are enforced. Many systems provide that an employee cannot be dismissed or disciplined except for good cause and in accordance with the regulations established in the system. Some systems provide for progressive discipline.

The courts do not seem concerned with the exact label given to the system, whether it is called a "civil service system" or a "personnel system."⁷⁸ It appears that what is important is the legislative action taken by the county to officially adopt the system, not the name they choose to give it.

How to Include County Officers' Employees in a Civil Service System

There are several steps to bringing the employees of a county officer under a county's personnel system. First, the county must create a civil service system. A civil service system must be adopted by ordinance or resolution and needs to provide for the rules and administration of the system.⁷⁹ Second, the county officer has to request in writing that his or her employees be covered under the county civil service system. After receiving the request, the commissioners are allowed to include the employees of the requesting county officer in the civil service system by ordinance or resolution. Inclusion in the civil service system is not automatic and cannot be done unilaterally by the commissioners. Without the written request by the county officer, the commissioners cannot include employees of the county officers in the county civil service system.⁸⁰

Once the employees are covered under the system, subsequent county officers cannot remove them from coverage.⁸¹ This potentially can create a problem because county officers will no longer have the free reign over their hiring and firing practices that they had before entry into the system. The appellate courts have held that county officers whose employees are under the county personnel system are limited in their ability to hire and fire "to vacancies created by the removal of employees in the manner provided under the applicable personnel or civil service system or vacancies created when employees resign or retire."⁸² County officers must abide by the hiring and firing regulations set out by the system's board.⁸³ Inclusion under the system does not, however, make the employees of the county officers employees of the county.

Salaries of Employees of County Officers

A board of commissioners is not authorized to set the salaries of the employees of a county officer. Those decisions are within the discretion of the county officers. The commissioners' authority is generally restricted to approving the budget of the county officers and the county officers must make their personnel and salary decisions based on the budget approved for them by the commissioners.⁸⁴

Employment Benefits for County Officers and Their Employees

The board of commissioners may create and maintain retirement or pension systems for any elected county officers or employees paid (in whole or in part) from county funds.⁸⁵ Additionally, a board of commissioners is authorized, but not required, to provide group health, life, disability, liability, social security, and employment security coverage for the county officers, their employees and their families.⁸⁶

Fair Labor Standards Act

Although the employees of the county officers are not employees of the board of commissioners, the county may still be held liable if an employee is not treated in accordance with the Fair Labor Standards Act (FLSA).

Basic FLSA Requirements

In general, the FLSA establishes the minimum wage and requires employees (other than those exempt as executives or administrators) to be paid overtime at 1.5 times their regular rate for each hour worked over 40 hours within a work week or receive compensatory time off at the rate of 1.5 times the number of hours worked over 40 within a work week.⁸⁷

The maximum amount of compensatory time that may be accrued by a covered employee is 240 hours. After that maximum is reached, a covered employee must be paid overtime if he or she worked more than 40 hours in a workweek. However, an employer may require employees to use compensatory time.⁸⁸ Employees must be permitted to use their compensatory time within a “reasonable period” of a request unless it would be “unduly disruptive.”⁸⁹ Employees must be paid any unused compensatory time upon separation from employment with the county.

Special Rules for Sheriff's Offices

Because law enforcement agencies, including sheriffs, operate 24 hours per day, seven days per week, the FLSA provides a partial exemption for law enforcement employees.⁹⁰ Rather than using a 40-hour workweek, a sheriff's department may have work periods of 7 to 28 days. For example, if the work period is seven days, then these employees are entitled to overtime or compensatory time for every hour worked over forty-three.⁹¹ If the work period is 28 days, then law enforcement employees are entitled to overtime or compensatory time for every hour worked over 171. Employees performing public safety activities may accumulate up to 480 hours of compensatory time.

Additionally, FLSA provides a complete exemption from overtime for law enforcement employees in departments that regularly employ fewer than five employees during the work week.⁹²

FLSA Issues for Commissioners and County Officers

FLSA problems can occur between the commissioners and the county officers – most often with the sheriff's office. Because of the nature of sheriffs' offices as around the clock operations, a sheriff may ask for additional funding to meet what he or she believes are staffing requirements. If the commissioners do not provide additional funds to meet those requirements, the sheriff may schedule existing employees for overtime. Under the FLSA, the commissioners are responsible for paying minimum wage and overtime to the sheriff's

employees when they work overtime, even if there is no money set aside in the sheriff's budget for overtime. While similar problems may occur with the other county officers, the problem is less likely to arise.

Employment Discrimination

Even though a board of commissioners does not manage employees of county officers, the county may still be held liable for violations of the Americans with Disabilities Act, Age Discrimination in Employment Act and Title VII of the Civil Rights Act (i.e., discrimination based upon sex, race, religion or national origin). County personnel systems often provide procedures that are designed to prevent discrimination, or, if it occurs that it is handled appropriately. As such, it is advantageous to have the employees of the county officers covered by the county's personnel system. However, where county officers' employees are not covered, they should be encouraged to develop and adhere to policies on hiring, interviewing, investigating complaints and disciplining employees designed to avoid liability.

It can also be helpful if the county officers' personnel policies were similar to the policies adopted for the commissioners' employees. The county attorney should play a key role in working with all county officials to ensure that proper policies and procedures are put in place and to ensure consistency between the policies of the several county offices to the extent feasible.

THE POWER TO CONTRACT

Generally, commissioners have “the exclusive power to incur indebtedness and to authorize contracts and purchases.”⁹³

State law requires all contracts entered into by the county commissioners on behalf of the county to be approved in a commission meeting and included on the minutes.⁹⁴ This creates a single place where any member of the public can research or access any contracts to which the county commissioners are a party.

Contracts That Require Mutual Consent of County Officers and Commissioners

State law authorizes constitutional officers to approve certain contracts with the consent of the commissioners. Similarly, in some instances, the commissioners are authorized to approve a contract with the consent of the constitutional officer.

Contracts to House Federal Prisoners

The board of commissioners has exclusive jurisdiction over the “directing and controlling of all property of the county.”⁹⁵ While the jail is “placed in the keeping of the sheriff” for purposes of protection, this power is “subject to the order of the board of commissioners.”⁹⁶ State law allows the sheriff to receive federal prisoners with the written consent of the county commissioners.⁹⁷ This law is silent regarding how the funds generated from the housing of federal prisoners are to be handled. Because the commissioners are included in the approval of the contract and because housing such prisoners would increase the amount of funds and resources necessary for the jail, it is assumed that the money generated by the housing of federal prisoners is included in the county’s budget process.

Contracts with Cities to Provide Additional Law Enforcement Services

The sheriff has the ability to contract with the cities within the county to provide law enforcement services.⁹⁸ As with the ability to house federal prisoners, the ability to contract with the city requires prior written approval of the county commissioners.⁹⁹ Without the commissioners’ approval, the sheriff has no authority to enter into such contracts with cities. Unlike the statute allowing the federal government contracts, the state law regarding city contracts is not silent with respect to the sheriff’s control of the funds.¹⁰⁰ Any funds collected as payment for services provided to the municipality must be turned over to the commissioners and deposited in the general fund. Without an express grant changing the entity responsible for the funds generated by any city contract, the fiscal power and control still lies with the county commissioners. Therefore, any funds generated by a contract with a municipality must be turned over to the governing authority.

Prepare Tax Digest and Collect Taxes for Cities

The county may contract with any city located within the county to prepare the tax digest, assess and collect taxes for the city.¹⁰¹ However, the tax commissioner must also approve the contract if the county has fewer than 50,000 tax parcels.

Transfer of Tax Executions in Lot Blocks

Agreements between tax commissioners and individuals seeking to transfer tax executions in lot blocks for \$10,000 or more must also be approved by the board of commissioners.¹⁰²

Collection of City Taxes

Tax commissioners can contract with cities within the county to collect city taxes.¹⁰³ In counties where the tax commissioner receives tax payments for both the county and city or receives mailed tax payments for the county, the tax commissioner may enter into a contract for a lock box system with a bank to receive, process and deposit mailed tax returns and payments.¹⁰⁴

Contracts with Private Probation Companies

A probate judge (or magistrate judge) may enter into a contract with a private probation company to provide probation supervision for their respective courts, so long as the contract is approved by the board of commissioners.¹⁰⁵ Similarly, the termination of such contracts entered into after July 1, 2000 must be initiated by the probate judge or magistrate judge, with the approval of the board of commissioners.

Municipal Court Services

The board of commissioners and city council of a city located within the county may enter into an agreement for the magistrate court to provide municipal court services to the city.¹⁰⁶ However, the contract is not effective unless it is also approved by the chief magistrate judge.

Contracts That County Officers May Enter Without the Commissioners

It is within the power of the General Assembly to vest the county officers with specific abilities to contract and it has chosen to do so in specific instances.¹⁰⁷

Superior Court Data and Filings

Superior court clerks can enter into agreements for the filing and transmission of civil case filings.¹⁰⁸ Superior court clerks may enter into a contract to distribute, sell or market records or computer-generated data from the office.¹⁰⁹ Any profit made is payable to the clerk. A monthly report of any such contracts, as well as the revenues received must be submitted to the board of commissioners. Superior court clerks may contract with the Georgia Superior Court Clerks' Cooperative Authority to develop and implement a statewide uniform automated information system for real and personal property.¹¹⁰ Any such contracts unless the funds obligated are included in the clerk's operations budget at the time that the contract is executed.¹¹¹

Maintenance of Copies of Legal Organ

Since the probate court clerk is required to maintain all newspapers in which the probate courts advertisements appear, the probate judge may enter into a contract with the sheriff and/or superior court clerk to bind, retain, microfilm or photocopy newspapers, so that only one set is retained in the courthouse.¹¹² The agreement must specify which officer is responsible for maintaining and preserving the newspapers, microfilm or photographs.

Inherent Power to Contract

In addition to the specific contractual authority listed above, the Georgia Supreme Court has now given county officers the "inherent" authority to enter into contracts that relate to their official duties even when there is not a specific law that authorizes the contract.¹¹³ For example, while there was no state law authorizing the sheriff to enter into a contract for inmate health services, the sheriff has a duty to provide medical care to prisoners placed in his custody.¹¹⁴ Consequently, he or she has the inherent authority to enter into contracts with medical care providers.¹¹⁵ In the case of superior court clerk, contracts to purchase services, supplies, or

equipment authorized by O.C.G.A. §§ 15-6-50 through 15-6-99 that require expenditure of county funds may not be entered into unless the funds are included in the clerk's operations budget when the contract is executed. Presumably, contracts of other county officers must also be within the budgetary limitations of the county officer contracting to expend county dollars.

Contracts entered into by county officers are not required to be included in the minutes of the board of commissioners.¹¹⁶ So, there is no central repository for all county contracts. Members of the public researching the county's contractual obligations must go to each of the county officers to find this information.

Irrespective of the inherent power of county officers to contract, consent will still be required from county commissioners on contracts when specifically provided in the statute. Also, all of the requirements for commissioners to enter into contracts (i.e., that contracts must be approved in a meeting and included on the minutes) still apply to contracts approved by the commissioners.

Contracts for Fiscal Services

While there is no specific statutory authorization to do so, commissioners may consider formally recognizing the county officers as separate legal entities. The county officers would have the ability to maintain their own bank accounts, employer identification numbers and account with the Department of Labor. An agreement then could be crafted between the commissioners and the county officers regarding procedures for budget amendments, processing of purchase orders and accounts payable, establishing that the county officers' employees are not employees of the county (and not subject to the benefits provided by the commissioners unless so provided by the contract) and establishing payroll procedures (if payroll services are still provided by the county). While the county would be required to provide the lump sum funding to the county officers, the county officers would be in complete control as to how to spend it, so long as they meet all of the auditing, transparency and record-keeping standards set by state and federal law.

LAWSUITS AND ATTORNEYS' FEES

Protecting the taxpayers from lawsuits against the county is the responsibility of the board of commissioners. The county officers' role is limited to properly performing their duties and managing their offices.

Liability Insurance

The board of commissioners is authorized, but not required, to purchase liability insurance for the elected officers of the county.¹¹⁷ The amount of the coverage is also in the discretion of the board of commissioners.

Bonds

State law requires that county officers be bonded.¹¹⁸ These bonds protect the county in case the officer fails to faithfully perform his or her duties or embezzles county funds. In general, the amount of the bond is set by state statute. The premium of the bonds must be paid by the board of commissioners out of county funds. Rather than purchase several individual bonds, the county may purchase one "blanket bond" to cover all officials that must be bonded.¹¹⁹

Attorneys' Fees

There are three circumstances under which a county officer is entitled to the payment of his or her attorney's fees by the county under Georgia law.

Attorneys' Fees Paid at the Option of the Board of Commissioners

Georgia law allows the county commissioners to adopt a plan to indemnify any local government employees, including county officers, who are facing criminal, civil or quasi-criminal charges in their official capacity in lieu of obtaining insurance or indemnity.¹²⁰ If the local government official is charged with a crime of theft or embezzlement of property or assets in which the county has an interest, then the county can refuse to pay for the official's lawyer. The specifics of the policy are determined by the board of commissioners, as are the specific criteria of when the local government official will no longer qualify for representation under the policy.¹²¹ The commissioners are not obligated to adopt a policy and can instead choose to buy insurance to indemnify the local government officials.¹²² This law only addresses providing a defense for the local government officials; a local government official who sues the county would not be able to recoup attorney fees under these sections if he or she was a plaintiff in the action.¹²³

The commissioners have complete discretion to determine what actions will disqualify a local government official from coverage under the plan. When making an actual decision about whether to exclude a county officer from the plan, a Georgia Supreme Court case suggests that the disqualification must be related to litigation at hand and not be based on the general or past behavior of the official.¹²⁴ In that case, a county official was involved in a relationship with a woman in his office. When the commissioners found out about the relationship, they warned him that the relationship was against county personnel policy and that his willful violation of the policy disqualified him from coverage under the county plan for any claim of retaliation or discrimination or allegation of unfair employment practices by any other employee in his office. The county refused to cover the official on a subsequent lawsuit brought by an employee based on their determination that he no longer qualified for the plan due to his continuing

inter-office relationship. The Georgia Supreme Court held that the official must be covered under the plan because he was disqualified for actions not relating to the case at hand.¹²⁵ The implication of this ruling is that any disqualification of a local government official must be specifically related to the action being brought against him or her and that the commissioners cannot issue a blanket removal from the plan.

Attorneys' Fees Paid Because of a Georgia Supreme Court Ruling

The second way that a county officer can have the county pay his or her attorney fees is through a remedy created by the Georgia Supreme Court. The Court requires that county commissioners pay reasonable attorney fees when a county official, acting in his or her official capacity, hires outside counsel to assert a legal position that the county attorney cannot (because of a conflict of interest in representing the county) or will not assert, and the county official is successful in their claim.¹²⁶ There are only two requirements to being granted attorney fees under the judicial rule: (1) that there is a conflict of interest for the government attorney; and (2) that the official is successful in his or her action. According to the Court, payment of the fees is simply an expense of government operation.¹²⁷

Attorneys' Fees Paid Because Superior Court Determines that County Attorney has Conflict of Interest

The final circumstance under which the county is required to pay for an outside attorney is when a county officer is either a plaintiff (i.e., the one filing the lawsuit) or defendant (i.e., the one who is being sued) in a civil case (i.e., not a criminal case). This is triggered when the chief judge of the superior court determines that the county attorney has an ethical conflict that prohibits him or her from representing the county, the board of commissioners (or other county official or employee) and the county officer.¹²⁸ Once the court determines that there is a conflict, there is no requirement that the county officer be successful in his or her action.¹²⁹ All that is required is: (1) that the commissioners deny the county officer's written request for representation; and (2) that the superior court judge determine that a conflict of interest exists.¹³⁰ It is important to note that the county officer is not required to proceed *pro se* (i.e., without an attorney) until the trial judge determines a conflict. Nonetheless, a judicial determination is still necessary to qualify under the statute.¹³¹ The amount of attorneys' fees must be based on a rate that is no more than the rate paid to the county attorney for similar representation or in accordance with a schedule of rates for outside attorneys, if one has been adopted by the commissioners.¹³²

PURCHASING

“Procurement” or purchasing has several facets from the determination of the specifications for an item or service to be purchased, the choice and evaluation of vendors, as well as the time and manner of payment and acceptance of the items or service. Many commissioners and county officers acknowledge that having centralized purchasing for the county saves taxpayer money by standardization, elimination of duplication of effort, and lower prices as a result of volume purchasing.

Centralized purchasing allows a county to hire an individual professionally trained in purchasing. This allows vendors and the public to go to one professional staff person for information and assurance that the county’s purchases are being properly and economically handled.

Many counties have purchasing policies or ordinances requiring some form of competitive bidding. Such policies help to ensure that taxpayer money is spent wisely, that contracts are not awarded for less-than-legitimate reasons, and that all businesses are provided with a fair opportunity to make their case for the contract in question. Formal procurement rules also prevent both favoritism and appearance of favoritism.

The Problem

Purchasing (or procurement) of supplies, equipment and services is where conflict between county officers and commissioners may be acutely felt. County officers have the power to make purchases from third parties in the pursuit of their duties.¹³³ Unfortunately, although the courts have given the county officers this power, they have put no restrictions on the county officers to be fiscally responsible. Once the governing authority has approved a budget for a county officer, the commissioners cannot dictate to the county officer how to spend the allocated funds, so long as such expenses do not exceed the approved budget. This means that commissioners are not authorized to interfere when a county officer chooses the high bidder, does not get the best product for the best price or shows favoritism to a particular vendor. Unless there is something criminal in the county officer’s actions, these are issues between the county officer and the voters. Essentially, the county officers each have the power to make use of the resources that have been allocated to their departments by the commissioners without interference as long as it is in the reasonable performance of their duties.¹³⁴ While some county officers feel that centralized purchasing and competitive bidding of products and services is an appropriate county service supporting the county officer’s operations, others view it as an attempt by the commissioners to control how the county officer performs his or her duties.

In one case, a superior court clerk bought bottled water for her department with available funds in the budget. The commissioners refused to approve the purchase – and lost.¹³⁵

In another case, a sheriff wanted to terminate the services of a medical provider for the jail and hire a different company. The commissioners refused to approve the change – and lost.¹³⁶ The Court held that the commissioners could not control the sheriff’s choice.

In still another case, the sheriff purchased painting and remarking services for the sheriff’s vehicles, rather than using the county’s vehicle maintenance department. The commissioners objected – and lost.¹³⁷ The Court of Appeals held that the commissioners’ authority over county

property was limited in the context of motor vehicles and equipment owned by the county but assigned to the sheriff for his exclusive use by local legislation. In contrast, in the same case, the Court agreed with the county that the sheriff did not have the authority to paint his offices in the courthouse without approval from the commissioners.¹³⁸

In all of these cases, from a fiscal standpoint, the commissioners were being good stewards of taxpayer funds. They were also acting as a responsible fiscal authority. Unfortunately, even with the best intentions and justifications, the Georgia appellate courts have sacrificed wise use of taxpayer dollars in favor of giving county officers fiscal power without fiscal responsibility.

Implementation of Purchasing Procedures

The commissioners have the legislative power to “adopt clearly reasonable ordinances, resolutions or regulation relating to its property, affairs and local government for which no provision has been made by general law and which is not inconsistent with the [Georgia] Constitution.”¹³⁹ However, the appellate courts have drawn a distinction between property that belongs to the county and property that is assigned to the exclusive use of a county officer.¹⁴⁰ The former is still in control of the commissioners and the latter in the control of the county officer.

Presumably, commissioners still have the authority to establish certain procurement rules and forms for all government branches. In this context, “procurement rules” refers to procedural rules about how purchases are processed and paid. For instance, the amount of the purchase and budget line item number is necessary to determine whether there are funds available in the budget. Before paying for a product or service, the county needs to know whether the county officer has actually received the product or service and whether there are any reasons to withhold payment. Use of such procurement rules are designed to unify county government purchase requests, monitor the budget, and account for expenditure of county funds.

Some county officers object to being forced to abide by such rules, claiming that forced compliance amounts to a usurpation of the county officer’s authority to run their offices separate from the governing authority. However, commissioners should ensure that procurement rules and forms should not be used to divest the county officer of any of their statutorily enumerated duties or to deny the county officer the ability to purchase for his or her department within their discretion.

Implementation of these provisions should be accomplished by adoption of a proper procurement ordinance. Merely enacting a procurement procedure “policy” not officially adopted through the county’s legislative process is unlikely sufficient legal basis for the governing authority to require a county officer to abide by a policy. An ordinance on the other hand is an authoritative law or decree and serves as law within the boundaries of the county.¹⁴¹ County officers are bound by the law of the jurisdiction like any other official and would be required to follow the purchasing ordinance so long as the ordinance was not drafted in a way that amounted to an attempt to control where the county officer spent the money in his or her budget. To avoid unnecessary conflict with the county officers regarding the exercise of their authority, commissioners should ensure that the procurement procedures in the ordinance would apply to all branches of the county government. Moreover, nothing in such an ordinance should give an employee of the commissioners’ authority to question the wisdom of a particular purchase.

FEES

County officers are authorized by statute to collect a variety of fees associated with their individual departments. Disputes as to who controls these fees (i.e., the county officer or the county commissioners) arise from time to time. These disputes have been generated in part because of a change in the nature of these fees over time. Initially, county officers were allowed to keep the fees that they collected as part of their compensation for carrying out their duties. As discussed previously, the General Assembly has established minimum salaries in lieu of fees for all of the county officers. Situations where certain county officers are paid fees are described in the section of this guidebook on the compensation of county officials.¹⁴²

Fees Paid into County Treasury

County officers are responsible for collecting fees for their services, but all the statutes are quite clear that virtually all funds are eventually deposited in the county treasury.

For example, Georgia sheriffs are no longer paid according to the fee system. The law states that “no sheriff shall receive as any portion of his compensation for his services as such any fees, fines, forfeitures, costs, commissions, emoluments, or perquisites of any nature whatsoever.”¹⁴³ Although a sheriff is authorized by the General Assembly to collect fees for transporting prisoners, summoning witnesses, attending court, etc., “all such fees shall be turned over to the county treasurer or fiscal officer of the county.”¹⁴⁴

The fact that the fee revenues are under the control of the county commissioners is in keeping with the well-established fact that the governing authority is the county fiscal and budget authority and in charge of the county property and assets.¹⁴⁵

Fees Generated from Use of County Property

Until recently, many sheriffs received commissions, fees or other revenue generated by the inmate’s use of the telephone or telephone cards. The Georgia Court of Appeals has held that a sheriff may not use county property, facilities, or other resources to earn revenue independent from the county budgeting process or keep that revenue in separate accounts exclusively for use of the sheriff’s department.¹⁴⁶ The Court reasoned that the revenue earned depended upon the existence of the jail facilities, which is county property and therefore subject to county commissioners’ budget authority.¹⁴⁷ To allow the sheriff to use county property or facilities to earn and keep revenue independent from the county’s budgeting process would, in the extreme, undermine the county’s broad discretion to exercise control of its property.¹⁴⁸

Fees that May be Kept by the County Officer

In most cases, when county officers collect fees, the money is county property that must be turned over to the county. However, the law specifically provides certain instances where the fees are not turned over to the county. For instance, the probate judge may keep vital records fees (e.g., fees for birth and death certificates) that he or she collects as personal compensation. However, the commissioners, by enacting a resolution or ordinance, may cap any vital records fees collected at \$7,500 per year. Any excess must go to the general fund.¹⁴⁹ Tax commissioners may receive additional compensation for collecting city taxes.¹⁵⁰ Additionally, superior court clerks who receive passport applications on behalf of the U.S. State Department are authorized to keep a passport fee as part of their compensation.¹⁵¹

Accounting of Fees

Not only does the money collected by county officers need to be turned over to the county treasury, but the officers are required to make an accounting of all funds received. All county officials must make a return, under oath, in front of the grand juries of their respective counties on the first day of each term of the superior court.¹⁵² The return must contain a true statement of the amount and source of money belonging to the county that they received since the last return, along with their expenditures and the most recent financial statement or annual audit of the financial affairs of their office. In addition, tax commissioners and sheriffs turn over all taxes collected by them on a weekly basis in counties over 30,000 population and every two weeks in smaller counties.¹⁵³ Tax commissioners must also render an accounting to the governing authority annually and make their books and accounts available for inspection.¹⁵⁴

FORFEITURES AND “DRUG MONEY”

When assets or property (i.e., currency, vehicles, real estate, firearms, etc.) linked to drug-related crimes and certain other crimes are seized by law enforcement, a forfeiture action may be commenced and the court may order that the property be sold. The money resulting from this property is often referred to as “drug fund” money. Some commissioners encourage sheriffs to use drug fund money to pay for many things to keep budgets down. However, there are several state and federal laws that limit the sheriff’s use of the drug fund monies. To complicate matters, how drug funds are handled depends on whether the assets were forfeited under state law or federal law. Regardless of whether it is forfeited under state or federal forfeiture law, there are two principles that apply: (1) the use of the money distributed to the sheriff may be used at the discretion of the sheriff; and (2) the sheriff’s budget may not be reduced to offset the amount of drug and forfeiture money received.

Forfeiture Under State Law

Under Georgia law, property, money, or other things of value that are either directly or indirectly linked to a violation of the Georgia Controlled Substances Act¹⁵⁵ are subject to forfeiture. Property and money is submitted to the district attorney for court approval. Assets are distributed to the state and local governments pro rata according to the role their law enforcement agencies play in the seizure. However, the state is limited to receiving 25% of the amount distributed.

Funding for Sheriffs

The sheriff’s office may receive up to one-third of its regular budget in drug funds. At the sheriff’s discretion, drug funds may be used for any official law enforcement purpose except to pay salaries or rewards to law enforcement officers.¹⁵⁶ In other words, it is up to the sheriff to determine how drug funds he or she receives are spent – not the commissioners.

Drug and forfeiture fund money may not be used to “supplant” any other funds appropriated to the sheriff’s office for staff or operations.¹⁵⁷ This means that commissioners may not reduce the amount of funding that is budgeted for the sheriff’s office to offset the amount of drug and forfeiture funds received. The sheriff is required to submit an annual report to the commissioners with his or her budget request that itemizes the forfeiture and drug money that was received in the fiscal year and the way that it was used.¹⁵⁸

Funding for District Attorneys

Up to ten percent of the seized drug and forfeiture money may also be used to fund expenses of the district attorney’s office with the consent of the county commissioners.¹⁵⁹ Unlike the restriction for salaries in the sheriff’s office, the district attorney may use the money for salaries, so long as it does not go for salaries of employees who are acting in a law enforcement capacity (i.e., an assistant district attorney overseeing a multi-agency narcotics squad).¹⁶⁰

Other Uses

Drug money may also be used to fund victim witness assistance programs or a state law enforcement museum.¹⁶¹ If the sheriff receives more than one-third of his budget in drug money, then any additional drug money coming to the county may be spent by the commissioners for any law enforcement purposes, indigent defense, drug treatment,

rehabilitation or education and/or victim witness programs.¹⁶² If real property is forfeited, the commissioners may transfer the property to a land bank authority.

Forfeitures Under Federal Law

The sheriff's office may also receive drug and forfeiture money pursuant to federal law.¹⁶³ Federally forfeited property is generally left to the discretion of the U.S. Attorney General or the Secretary of the Treasury, depending upon the nature of the forfeiture.¹⁶⁴ These officials transfer forfeited property to the sheriff if his or her law enforcement agency participated directly in any of the acts leading to the seizure or forfeiture of the property.¹⁶⁵

Many of the federal government's rules for handling federal drug money are spelled out in a federal equitable sharing agreement¹⁶⁶ with the Department of Justice and the Department of Treasury. These agreements require the county to agree to abide by federal statutes and guidelines¹⁶⁷ in the use of the funds.

For instance, according to the guidelines, the money may be used for law enforcement purposes including training, activities that enhance future investigations, law enforcement facilities, equipment and operations, detention facilities, awards and memorials and drug education and awareness, etc. The guidelines from the U.S. Attorney General and the Department of Treasury state that the forfeited funds may only be used to supplement the sheriff's budget. As with state drug forfeitures, federal drug fund money cannot be used to replace moneys otherwise provided by the county. *The Guide to Equitable Sharing for Foreign Countries and Federal, State, and Local Law Enforcement Agencies* states:

“Shared funds must be used to increase or supplement the resources of the receiving state or local law enforcement agency. Shared resources shall not be used to replace or supplant the resources of the state or local law enforcement agency. In determining whether the sharing increased or supplemented the receiving agency, the total law enforcement budget will be considered as opposed to any particular item or items within the budget. In other words, the receiving law enforcement agency's aggregate budget must benefit directly from the sharing.

Example: A police department receives \$100,000 in equitable sharing, only to have its budget cut \$100,000 by the city council; thus, the police department has received no benefit from the sharing. Rather, the city as a whole has received the benefit of the equitable sharing.”

Although the example refers to police departments and city councils, the same logic applies to county commissioners and sheriff's offices.

One major difference between federal drug money and state drug money is that the sheriffs' federal drug money is not subject to the county's budget process. The Georgia appellate courts have held that, since the sheriff is the only authorized user of the federal drug funds, these funds are not required to go through the board of commissioners' budgeting process.

COOPERATION AND ASSISTANCE

Georgia's appellate courts have rendered decisions in recent years that have effectively limited commissioners' authority over the fiscal affairs of the county. Unfortunately for Georgia's taxpayers, the diminished authority of the commissioners over the county budget has not been matched by any measures that would protect the public from favoritism and wasteful use of tax dollars by county officers. In effect, although the Constitution demands that commissioners bear fiduciary responsibility for the use of public funds, the courts have short-circuited the commissioners' ability to function in that capacity.

Because of the potential for liability, it is imperative that county commissioners and the various other county officials cooperate in regard to the matters addressed in this guidebook. While commissioners must allow county officers to manage their departments, they should offer assistance in developing sound policies and practices with the intent of protecting both the county officers and the taxpayers. Where thoughtful county officers are elected, the prospects are good that the system can work, as flawed as the system may be.

Endnotes

- ¹ O.C.G.A. § 1-3-3(7).
- ² The clerk of the superior court, judge of the probate court, sheriff, tax receiver, tax collector, and tax commissioner, where such office has replaced the tax receiver and tax collector, shall be elected by qualified voters of their respective counties for terms of four years and shall have qualifications, powers and duties as provided by general law. GA. CONST. art. IX, § 1, para. 3 (a).
- ³ GA. CONST. art. IX, § 2, para. 1(a).
- ⁴ For the complete list see GA. CONST. art. IX, § 2, para. 3.
- ⁵ GA. CONST. art. IX, § 2, para. 6.
- ⁶ O.C.G.A. § 36-5-22.1.
- ⁷ Although this guide is written specifically about constitutional officers, many of the same principles about the separation of authority would likely apply to the other elected county officials.
- ⁸ See GA. CONST. art. IX, § 1, para.3.
- ⁹ O.C.G.A. § 15-16-20 (sheriff); O.C.G.A. § 48-5-180 (tax commissioner); O.C.G.A. § 15-6-88 (superior court clerk); O.C.G.A. § 15-9-63 (probate judge).
- ¹⁰ *Elder v. Camp*, 193 Ga. 320 (1942); *Veit v. State*, 182 Ga. App. 753 (1987).
- ¹¹ O.C.G.A. §§ 15-16-9, 15-6-61(a)(1), 15-6-86; *Brewster v. Houston County*, 235 Ga. 68 (1975).
- ¹² O.C.G.A. § 15-16-10.
- ¹³ O.C.G.A. § 15-16-23.
- ¹⁴ O.C.G.A. § 42-4-1.
- ¹⁵ O.C.G.A. § 42-4-32.
- ¹⁶ O.C.G.A. § 42-4-4.
- ¹⁷ O.C.G.A. § 48-5-127; see *Boswell v. Bramlett*, 274 Ga. 50, 50 (2001).
- ¹⁸ O.C.G.A. § 48-5-141. Tax commissioners in counties with a population of 30,000 or more must transfer the collected tax money each week. Tax commissioners in counties with a population under 30,000 must transfer the collected tax money every two weeks.
- ¹⁹ O.C.G.A. §§ 48-5-138, 48-5-139, 48-5-154.
- ²⁰ O.C.G.A. § 48-5-140.
- ²¹ O.C.G.A. §§ 15-6-61, 15-6-62.
- ²² O.C.G.A. § 15-6-59.
- ²³ O.C.G.A. § 15-9-30(a).
- ²⁴ O.C.G.A. § 15-9-30(b).
- ²⁵ O.C.G.A. §§ 15-9-30.1 through 15-9-30.7.
- ²⁶ O.C.G.A. §§ 36-81-3(a), 36-81-3(b)(1).
- ²⁷ A budget is balanced when the sum of estimated revenues and appropriated fund balances is equal to appropriations. O.C.G.A. § 36-81-3(b)(3).
- ²⁸ O.C.G.A. § 36-81-2(2).
- ²⁹ O.C.G.A. § 36-81-4.
- ³⁰ O.C.G.A. § 36-81-5(b).
- ³¹ *E.g.*, *Chaffin v. Calhoun*, 262 Ga. 202 (1992); *Griffies v. Coweta County*, 272 Ga. 506 (2000); *Board of Commissioners of Randolph County v. Wilson*, 260 Ga. 482 (1990); *Lovett v. Bussell*, 242 Ga. 405 (1978).
- ³² Paul Vignos, *Georgia Local Government Law: Court Resolution of County Government Disagreement*, 46 Mercer L. Rev. 599, 623 (1994).
- ³³ *Lovett v. Bussell*, 242 Ga. 405 (1978).

- ³⁴ O.C.G.A. § 36-81-3(b)(1).
- ³⁵ Chaffin, 262 Ga. at 203-04.
- ³⁶ Id.
- ³⁷ St. Lawrence, Beam and Prouse v. The Board of Commissioners of Chatham County, Georgia, CV01-1479 Superior Court of Chatham County (December 7, 2001).
- ³⁸ Griffies, 272 Ga. at 508-09.
- ³⁹ Griffies, 272 Ga. at 508.
- ⁴⁰ O.C.G.A. § 36-81-2(14).
- ⁴¹ O.C.G.A. § 36-81-5(b).
- ⁴² Id.
- ⁴³ O.C.G.A. § 36-81-3(d)(1).
- ⁴⁴ Chaffin, 262 Ga. at 203; see generally, Wolfe v. Huff, 232 Ga. 44 (1974); Wolfe v. Huff, 233 Ga. 162 (1974) (hereinafter “Wolfe II”); Bd. of Comm’rs of Dougherty County v. Saba, 278 Ga. 176, 180 (2004).
- ⁴⁵ Wolfe II, 233 Ga. at 164.
- ⁴⁶ Id.
- ⁴⁷ Id.; see, e.g., Haralson County v. Kimball, 243 Ga. App. 559 (2000).
- ⁴⁸ GA. CONST., art. 1, § 2, para. 1; Malcolm v. Webb, 211 Ga. 449, 459 (1955).
- ⁴⁹ O.C.G.A. § 36-81-3(d).
- ⁵⁰ O.C.G.A. § 36-5-22.1; Board of Commissioners of Randolph County v. Wilson, 260 Ga. 482 (1990).
- ⁵¹ O.C.G.A. § 36-81-3(d).
- ⁵² O.C.G.A. § 36-1-12; Mobley v. Polk County, 242 Ga. 798 (1979).
- ⁵³ See O.C.G.A. §§ 15-6-93 and 15-9-83.
- ⁵⁴ O.C.G.A. § 15-6-93.
- ⁵⁵ O.C.G.A. § 15-9-83 specifically provides that the probate judge establishes his or her office hours. However, the statute provides that the office must be closed on Sundays and may be closed one other additional day.
- ⁵⁶ O.C.G.A. §§ 15-6-88, 15-9-63, 15-16-20, 48-5-183.
- ⁵⁷ O.C.G.A. § 1-3-1(d)(2)(A).
- ⁵⁸ O.C.G.A. §§ 15-6-88(d), 15-9-63(a)(3), 15-16-20(a)(3), 48-5-183(b)(3).
- ⁵⁹ O.C.G.A. §§ 15-6-88.2, 15-9-64.1, 15-10-105.2, 15-16-20.2, 48-5-183.1.
- ⁶⁰ O.C.G.A. §§ 15-6-88(a), 15-9-63(a)(1), 15-16-20(a)(1), 48-5-137, 48-5-183(b)(1).
- ⁶¹ O.C.G.A. §§ 15-6-77(c), 15-6-92 and 48-6-5(b)(1).
- ⁶² O.C.G.A. § 15-6-77(c), 22 CFR § 51051(b).
- ⁶³ O.C.G.A. §§ 48-5-180, -183 (a).
- ⁶⁴ See. O.C.G.A. § 48-5-359.1.
- ⁶⁵ O.C.G.A. § 5-9-68.
- ⁶⁶ GA. CONST. art. IX, § 2, para. 1 (c)(1).
- ⁶⁷ GA. CONST. art. IX, § 2, para. 1 (c)(1).
- ⁶⁸ Boswell, 274 Ga. at 51; see, Marting v. Peach County, Georgia et al, 2011 U.S. Dist. LEXIS 117655 (2011) and Robbins v. Chatham County et al., 863 F. Supp. 2d 1367 (2012).
- ⁶⁹ GA. CONST. art. IX, § 2, para. 1 (c)(1).
- ⁷⁰ Yates, 265 Ga. at 507-08.
- ⁷¹ Boswell, 274 Ga. at 50.
- ⁷² Bd. Comm’rs of Randolph County, 260 Ga. at 483-84.
- ⁷³ Id.
- ⁷⁴ GA. CONST. art. IX, § 1, para. 4; O.C.G.A. § 36-1-21.

⁷⁵ 15A Am. Jur. 2d Civil Service § 1.
⁷⁶ Id.
⁷⁷ 1982 Ga. Laws 4896.
⁷⁸ See generally, *Wayne County v. Herrin*, 210 Ga. App. 747 (1993).
⁷⁹ O.C.G.A. § 36-1-21(a).
⁸⁰ *Yates*, 265 Ga. at 508.
⁸¹ O.C.G.A. § 36-1-21(b).
⁸² *Herrin*, 210 Ga. App. At 753 (1993).
⁸³ Id.
⁸⁴ *Boswell*, 274 Ga. 50.
⁸⁵ GA. CONST. art. IX, § 2, para. 3(a)(14); O.C.G.A. § 36-1-11.1(a).
⁸⁶ O.C.G.A. § 36-1-11.1(a).
⁸⁷ 29 U.S.C. § 207(a),(o).
⁸⁸ See generally *Christensen v. Harris County*, 529 U.S. 576 (2000).
⁸⁹ 29 U.S.C. § 207(o)(5).
⁹⁰ 29 U.S.C. § 207(k).
⁹¹ 29 C.F.R. § 553.230.
⁹² 29 U.S.C. § 213(b)(20); 29 C.F.R. § 553.200.
⁹³ *Stephenson v. Bd. Comm'rs of Cobb County*, 261 Ga. 399, 401 (1991); see also O.C.G.A. § 36-5-22.1.
⁹⁴ O.C.G.A. §§ 36-10-1, 50-14-1(b).
⁹⁵ O.C.G.A. § 36-5-22.1(a)(1).
⁹⁶ O.C.G.A. § 36-9-8.
⁹⁷ O.C.G.A. § 42-4-9.
⁹⁸ O.C.G.A. § 15-16-13.
⁹⁹ Id.
¹⁰⁰ O.C.G.A. § 15-16-13(b).
¹⁰¹ O.C.G.A. § 48-5-359.1(a).
¹⁰² O.C.G.A. § 48-3-19(b)(2).
¹⁰³ O.C.G.A. § 48-5-359.1.
¹⁰⁴ O.C.G.A. § 48-5-147.
¹⁰⁵ O.C.G.A. § 42-8-100.
¹⁰⁶ O.C.G.A. §§ 15-10-150, -151.
¹⁰⁷ GA. CONST. art. IX, § 1, para. 3.
¹⁰⁸ O.C.G.A. § 15-6-61(a)(18).
¹⁰⁹ O.C.G.A. § 15-6-96.
¹¹⁰ O.C.G.A. § 15-6-97(a).
¹¹¹ O.C.G.A. § 15-6-100.
¹¹² O.C.G.A. §§ 15-9-37(a)(9), -43(b).
¹¹³ *Bd. Comm'rs of Spalding County v. Stewart*, 248 Ga. 573 (2008).
¹¹⁴ O.C.G.A. § 42-4-4(a)(2); *Kendrick v. Adamson*, 51 Ga. App. 402 (1935).
¹¹⁵ *Hill v. Clayton Bd. of Comm'rs*, 283 Ga. App. 15, 19 (2006); *Bd. Comm'rs of Spalding County v. Stewart*, 248 Ga. 573 (2008).
¹¹⁶ *Bd. Comm'rs of Spalding County v. Stewart*, 248 Ga. 573 (2008); see *Wilson v. Strange*, 235 Ga. 156, 161 (1975).
¹¹⁷ O.C.G.A. § 45-9-20.
¹¹⁸ O.C.G.A. §§ 15-6-59(a), 15-10-20, 15-9-7, 15-16-5, 48-5-122(b).

- ¹¹⁹ O.C.G.A. § 45-4-11.
- ¹²⁰ O.C.G.A. § 45-9-21(a), (b), (d).
- ¹²¹ *Baker v. Gwinnett County*, 248 Ga. App. 839 (2004).
- ¹²² O.C.G.A. § 45-9-20.
- ¹²³ *Bd. Comm’rs of Dougherty County v. Saba*, 278 Ga. 176, 180 (2004).
- ¹²⁴ *Gwinnett County v. Blaney*, 275 Ga. 696, 702 (2002).
- ¹²⁵ *Id.*
- ¹²⁶ *Gwinnett County v. Yates*, 265 Ga. 504, 508 (1995).
- ¹²⁷ *Id.*
- ¹²⁸ O.C.G.A. § 45-9-21(e).
- ¹²⁹ *Saba*, 278 Ga. at 180.
- ¹³⁰ O.C.G.A. § 45-9-21(e); *Haralson County v. Kimball*, 243 Ga. App. 559, 560 (2000).
- ¹³¹ *Id.*
- ¹³² O.C.G.A. § 45-9-21(e)(2).
- ¹³³ *Hill v. Clayton Bd. Of Comm’rs*, 283 Ga. App. 15 (2006).
- ¹³⁴ *Griffies v. Coweta County*, 272 Ga. 506, 508-09 (2000).
- ¹³⁵ *Id.*
- ¹³⁶ *Bd. Comm’rs of Spalding County v. Stewart*, 248 Ga. 573 (2008).
- ¹³⁷ *Hill v. Clayton County Bd. of Comm’rs*, 283 Ga. App. 15 (2006).
- ¹³⁸ *Id.*; see also *Keener v. Kimble*, 170 Ga. App. 674, 675 (1984) (the act requiring county to provide supplies and equipment to the sheriff’s department did not give the county commissioners control over the use of the equipment); *Clayton v. Taylor*, 223 Ga. 346, 348-349 (1967).
- ¹³⁹ GA. CONST. art. IX, § 2, para. 1(a).
- ¹⁴⁰ *Hill v. Clayton County Bd. Comm’rs*, 283 Ga. App. 15 (2006).
- ¹⁴¹ *Black’s Law Dictionary* 1132 (9th ed. 2004).
- ¹⁴² O.C.G.A. § 15-16-20 (sheriff); O.C.G.A. § 48-5-183 (tax commissioner); O.C.G.A. § 15-6-88 (superior court clerk); O.C.G.A. § 15-9-63 (probate judge).
- ¹⁴³ O.C.G.A. § 15-16-19(a).
- ¹⁴⁴ O.C.G.A. § 15-16-21 (a); *Lawson v. Lincoln County*, 292 Ga. App. 527 (2008).
- ¹⁴⁵ O.C.G.A. § 36-5-22.1; *Stephenson*, 261 Ga. at 401.
- ¹⁴⁶ *Lawson v. Lincoln County*, 292 Ga. App. 527 (2008).
- ¹⁴⁷ *Id.*; O.C.G.A. § 36-5-22.1.
- ¹⁴⁸ *Lawson v. Lincoln County*, 292 Ga. App. 527 (2008).
- ¹⁴⁹ O.C.G.A. § 15-9-68.
- ¹⁵⁰ O.C.G.A. § 48-5-359.1.
- ¹⁵¹ O.C.G.A. § 15-6-77(c); 22 CFR § 51.51 (b).
- ¹⁵² O.C.G.A. § 36-1-7.
- ¹⁵³ O.C.G.A. § 48-5-141.
- ¹⁵⁴ O.C.G.A. § 48-5-140.
- ¹⁵⁵ O.C.G.A. §§ 16-13-20 to 49.
- ¹⁵⁶ O.C.G.A. § 16-13-49(u)(4)(D)(i).
- ¹⁵⁷ *Id.*
- ¹⁵⁸ O.C.G.A. § 16-13-49(u)(4)(D)(iii).
- ¹⁵⁹ O.C.G.A. § 16-13-49(u)(4)(B).
- ¹⁶⁰ 1992 Ga. Att’y Gen. Op. No. U92-22.
- ¹⁶¹ O.C.G.A. § 16-13-49(u)(4)(D)(i).

¹⁶² O.C.G.A. § 16-13-49(u)(4)(D)(ii).

¹⁶³ 18 U.S.C. § 981; 19 U.S.C. § § 1613b(a)(1)(F), 1616a(c)(1)(B)(ii); 21 U.S.C. § 881.

¹⁶⁴ 18 U.S.C. § 981(e).

¹⁶⁵ 18 U.S.C. § 981(e)(2).

¹⁶⁶ A sample agreement may be found at: <http://www.justice.gov/criminal/afmls/pdf/aca-current-form.pdf>.

¹⁶⁷ Hill v. Clayton County Bd. of Comm'rs, 283 Ga. App. 15 (2006); see O.C.G.A. § 16-13-48.1.

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Advancing Georgia's Counties.

50 Hurt Plaza • Suite 1000 • Atlanta, Georgia 30303
p. 404.522.5022 | www.accg.org