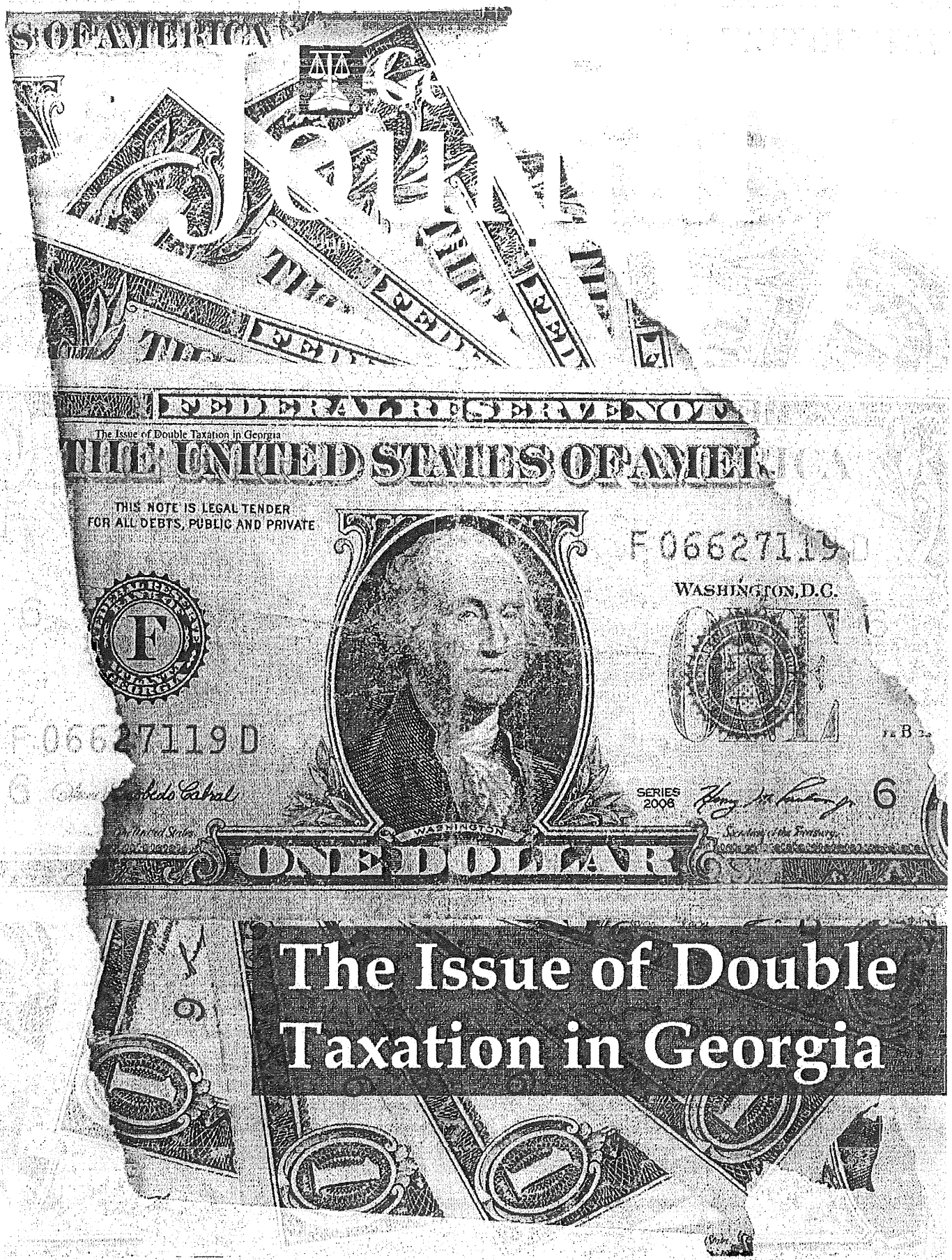

The Issue of Double Taxation in Georgia

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by James V. Burgess Jr. and Michael B. Brown

In most states, there is a legal distinction between the service delivery role of municipal and county governments. Cities exist by charter as creatures of the state legislature for the purpose of providing certain urban type services, such as police and fire protection, water and sewer utilities, street maintenance, etc. By contrast, counties serve as an administrative arm of the state and provide certain state mandated functions such as county courts, health and welfare services, bridge and road maintenance, and agricultural services and programs. This traditional service delivery distinction between cities and counties continued in Georgia until 1972.

This city-county service distinction began to erode as urban populations left cities for unincorporated suburban areas following World War II. As a result, Georgia's most populous counties faced pressure from new citizens desiring the same type of urban or municipal services that they had previously enjoyed as city residents. However, county governments were confronted by a legal dilemma. They possessed no authority under the Georgia Constitution or general laws to provide police, fire, refuse collection or other types of municipal services requested by the new residents in unincorporated areas. As a result, many of Georgia's urban counties sought special constitutional amendments to grant permissive authority for provision of municipal type services. Cities were also powerless to serve new unincorporated suburban residents because of the absence of legal authority to provide municipal services outside their corporate boundaries and, moreover, their powers of annexation were severely limited.

The growing urbanization of unincorporated areas in Georgia's counties continued throughout the 1960s and 1970s. The problems associated with this urban growth were brought to the attention of the State Planning and Community Affairs Committee during the 1971-72 session of the Georgia General Assembly. The Committee was authorized to function as an interim study committee, and to facilitate its work, the Committee established five subcommittees, two of which dealt with community development and urban growth.[1]

The Community Development Subcommittee found,

> In terms of the quality of our environment, we are suffering from the effects of unplanned, uncoordinated, haphazard growth and development. The results are urban sprawl, congestion, pollution and accelerating social ills which have hastened the white flight to the suburbs, leaving the decaying central cities to the poor, the black, and the elderly.[2]

The Subcommittee further predicted: "The problems associated with population growth, migration, and physical development of the 1960's will multiply and intensify during the present decade. The State has an opportunity to formulate comprehensive innovative approaches to these problems."[3]

Equalization of Authority

The Urban Growth Subcommittee found that although structural remedies such as the consolidation of Columbus and Muscogee County or annexation of unincorporated areas in Macon and Albany had been successfully achieved, the use of these approaches might not be politically feasible in other urban areas.[4] The Subcommittee stated,

> Other alternatives, at least for service delivery, should be made available for urban areas, particularly one which precludes the need for local governments to return to the General Assembly for permissive authority. This is also a recognition of the profusion of local legislation which has already indicated the need for an equalization of authority among local governments.[5]

The Urban Growth Subcommittee proposed an amendment to the Georgia Constitution that would equalize service delivery authority among local governments. This amendment was intended as an "effort to provide local governments with the authority by which they may structure their service functions and delivery systems in such a way as local situations and experience may dictate."[6] It included permissive authority to allow the use of special districts for both inter-county and intra-county purposes, given the type of service and degree of urbanization. It was entirely permissive in authority and did not require any action by local governments.

Amendment 19, herein referred to as "the equalization amendment," was approved by the 1972 General Assembly and adopted by Georgia's voters the following November.[7] The equalization amendment enumerated 15 specific urban services that both counties and cities were authorized to perform at their discretion.[8] It granted to counties the power to provide the same urban services that previously only municipalities could provide pursuant to their charter authority.

Service Delivery Role Distinction Eliminated

With the passage of the equalization amendment, the historical distinction between the service delivery role of cities and counties in Georgia was eliminated. This was one of the most significant developments in the history of Georgia local government law. It literally changed the service delivery relationships between cities and counties in the state. As a constitutional grant of legal authority to local governments for the provision of the enumerated services, any changes to or revisions of such authority can only be made by the voters of Georgia.[9] The Subcommittee's intent with the amendment is best explained by the following:

> An important effect of the amendment is to put the state in a position to encourage local governments to provide a level or standard of service delivery .... The local government equalization amendment provides the framework within which the state government may begin to expect local governments to improve their service functions .... [I]t is not an attempt to force local governments to accept a loss of authority which would preclude their responsibility to the local citizens.[10]

The Urban Growth Subcommittee reasoned that expansion of urban services to county unincorporated areas occurred only if alternative service delivery approaches were implemented, such as annexation, city-county consolidation, or functional consolidation, "the last approach being one of the effects of the local government equalization amendment."[11] It concluded, "It will be necessary for the local governments to review the most feasible, politically, and advantageous route" to achieve the desired service expansion.[12]

With the expansion of urban services, county governing bodies determined that levying county-wide property taxes was (and continues to be) the most politically feasible way for counties to fund unincorporated area services. While the equalization amendment prohibited counties from providing services within cities without a county-city contract, the amendment did not prohibit county taxation of properties within cities for unincorporated area urban services. Even though city residents and businesses were already paying for urban services in their city tax bills, city taxpayers began to also pay in their county tax bills for the same type of services provided primarily for the benefit of unincorporated area residents and businesses. Instead of promoting cooperation between cities and counties through functional consolidation, the amendment fostered even further competition in city-county service delivery. While city taxpayers may object to this tax inequity, they have had little recourse except through litigation.

In short, the equalization amendment had the unintended consequence of allowing double taxation and tax inequities for city residents and businesses.

Following approval of the amendment and continuing to the present, counties have significantly expanded unincorporated area services to include law enforcement patrol, fire, roads, water, sewers, sanitation and recreation. In 2013, annual expenditures by Georgia counties (excluding consolidated governments) for these services amounted to $3.18 billion. This was an increase of $2.61 billion from 1985 until 2013.[13]

Remedies for Tax Inequity

A number of legal remedies exist for resolving the issue of double taxation in Georgia. These include the use of special service districts authorized by the equalization amendment, the Service Delivery Act of 1997, the Local Option Sales Tax Act and the 1983 insurance premium statute.

Special Service Districts

The special service district provision of the Georgia Constitution authorizes the creation of special districts for the provision and financing of local government services within such districts.[14] Fees, assessments and taxes may be levied and collected within such districts to pay the cost of providing services therein. This authorization is broad and permissive and may be implemented by general law or by local ordinance or resolution. Counties are not mandated by this authority to create special districts; however, such districts could be directly created by general law or under conditions specified by general law.[15]

Some counties have used this constitutional authority to create special service districts to finance urban services in unincorporated county areas. For example, 23 counties have established fire service districts. Eight counties have multipurpose special service districts for the provision of urban services in unincorporated areas.[16] Of these, several, such as Fulton and Gwinnett counties, implemented special services districts only in the face of litigation or the threat of legislative action. A few counties, including Henry and DeKalb Counties, use differential countywide property tax millage rates to mitigate municipal double taxation.

Service Delivery Act

In 1997 the General Assembly took broader action to address the issue of double taxation through enactment of the Service Delivery Act (SDA).[17] The SDA specifically addresses the funding of services that primarily benefit inhabitants of unincorporated areas. The intent of the law was to establish a county and city service delivery system that minimizes inefficiencies resulting from duplication of services, local government competition and funding inequities.[18] To eliminate double taxation of city taxpayers,

the law requires the preparation and adoption of a comprehensive strategy to identify all local government services, the unit of government providing such services, the geographic areas where the services are provided (including maps), the funding sources for each service, and the identification of mechanisms and steps needed to achieve the intent of the SDA along with the time frame for such steps.[19]

Addressing the specific complaint of cities and incorporated taxpayers, the SDA provides,

> The strategy shall ensure that the cost of any service which a county provides primarily for the benefit of the unincorporated area of the county shall be borne by the unincorporated area residents, individuals, and property owners who receive the service. Further, when the county and one or more municipalities jointly fund a county-wide service, the county share of such funding shall be borne by the unincorporated residents, individuals, and property owners that receive the service.[20]

The SDA also specifies the funding sources for such unincorporated area services:

> Such funding shall be derived from special service districts created by the county in which property taxes, insurance premium taxes, assessments, or user fees are levied or imposed or through such other mechanism agreed upon by the affected parties which complies with the intent of subparagraph (A) of this paragraph[.][21]

The Georgia Department of Community Affairs (DCA) requires counties and cities, adopting their plans, to formally stipulate that double taxation and inequities have been remedied:

> Our service delivery strategy ensures that the cost of any services the county government provides (including those jointly funded by the county and one or more municipalities) primarily for the benefit of the unincorporated area of the county are borne by the unincorporated area residents, individuals, and property owners who receive such service.[22]

Pursuant to the SDA, once a service delivery strategy agreement has been adopted by the county and the requisite cities, it is filed by the county with the DCA.[23] The DCA has 30 days to review the strategy and to verify that it contains the required elements and addresses the mandatory criteria.[24]

Although the DCA must receive and certify service delivery agreements, the law specifically prohibits it from approving or disapproving their components or outcomes.[25] Consequently, the DCA's role as an enforcer of the SDA's requirements is limited. Furthermore, counties and cities face substantial sanctions for noncompliance by failing to jointly submit and agree to a service delivery agreement. These include loss of state funding of essentially all types and inability to obtain state permits.[26]

Recognizing that counties and cities may have difficulty agreeing to the details of a service delivery plan, the SDA provides specific procedures for resolving disputes arising from preparation of the plan; such procedures include alternative dispute resolution, mediation and superior court review of items in dispute (including evidentiary hearings).[27] The court "[i]s authorized to utilize its contempt powers to obtain compliance with its decision relating to the disputed items under review. The judge shall be authorized to impose mediation and court costs against any party upon a finding of bad faith."[28]

Counties and cities have not generally sought court relief to resolve service delivery disputes. The most notable exception is *Gwinnett County v. City of Auburn, et al.*,[29] in which the court conducted a comprehensive review and analysis of numerous county services to determine service delivery tax equity according to the SDA. Judge David E. Barrett issued a series of orders compelling Gwinnett County to establish service and tax districts in order to remedy tax inequities determined by the court. The court prescribed specific funding sources and accounting and budgetary procedures for each service. Judge Barrett's orders were not appealed. The Gwinnett case reveals that cities may achieve substantial relief for county-city tax inequities through litigation. However, cities that assert tax inequities may face an extended and expensive process of fiscal analysis and legal claims.

Another statewide county-city tax inequity arises from the provision of law enforcement patrol services and a legislative exemption from the SDA. Most Georgia cities receive law enforcement patrol services from police departments, funded with city taxes. Most county unincorporated areas receive law enforcement patrol services from their county sheriff's departments which provide little or no patrol services within most cities. Since sheriff patrol services are funded with county-wide taxes, incorporated taxpayers end up paying for both city and county law enforcement patrol services. This practice is contrary to the general intent of the SDA, but the SDA specifically exempts services provided by county sheriffs.[30]

In summary, the SDA provides clearly defined standards for the determination and remediation of tax inequities,[31] and these standards have now been affirmed in the Gwinnett County litigation. However, the procedures and processes for remediation provided in the statute are essentially impracticable. Cities seeking redress for tax inequities face onerous burdens, including state sanctions for failing to have an approved service delivery agreement and, potential-

ly, an extended dispute resolution process and litigation with county governments. While the SDA has established the criteria for developing a service delivery strategy, it has largely been ineffective in alleviating tax inequities in urban service delivery by counties.

Local Option Sales Tax Act

In addition to the SDA, the Local Option Sales Tax Act[32] (LOST) requires that tax subsidies be considered and addressed in determining rational shares of LOST proceeds. LOST provides the following as one of eight allocation criteria:

> The use by any political subdivision of property taxes and other revenues from some taxpayers to subsidize the cost of services provided to other taxpayers of the levying subdivision[.][33]

The Legislature clearly intended to address counties' use of countywide taxes to subsidize the cost of services provided by the county for the benefit of the unincorporated area of the county. Nevertheless, achieving tax equity through the LOST allocation process is problematic and ineffective. The tax equity criterion is only one of eight criteria which have to be considered in a demanding, contentious and time-limited county-city process of negotiation.[34] In most disputed cases between cities and counties, counties simply refute the existence of tax inequities, and cities are hard-pressed to present and receive court acceptance of their equity arguments.

Insurance Premium Statute

A final remedy addressing double taxation is found in insurance premium legislation adopted in 1983.[35] While the SDA refers to insurance premium taxes as a source of county revenue to be used in special service districts, there is no mandate that counties use the funds for specific services. By contrast, the 1983 insurance premium statute mandates that the proceeds of insurance premium taxes be used by counties to fund the following specific services within their unincorporated areas:

> (A) Police protection, except such protection provided by the county sheriff;
> (B) Fire protection;
> (C) Curbside or on-site residential or commercial garbage and solid waste collection;
> (D) Curbs, sidewalks, and street lights; and
> (E) Such other services as may be provided by the county governing authority for the primary benefit of the inhabitants of the unincorporated area of the county.[36]

If the county does not provide any of these enumerated services, the county is required to reduce ad valorem taxes on the inhabitants of the unincorporated area by the amount it receives from the insurance premium tax.[37] The statutory provisions relating to this requirement were litigated in a recent class action lawsuit against Montgomery County, Georgia.[38]

This law further requires county budgets to reflect such financial information along with a record thereof in the minutes of the meeting at which the budget was adopted.[39] Counties are thus required by law to provide budgetary information clearly showing the services that primarily benefit their unincorporated areas. Counties must notify the Department of Revenue (DOR) of their compliance with statutory requirements. DOR records generally show no record of county noncompliance.

Nevertheless, many counties ignore the special requirements of the insurance premium statute. Most counties do not show separately this source of revenues in their budgets, nor do they account for the specific services funded. They fail to enumerate which services are primarily for the benefit of the unincorporated area. Finally, they do not identify insurance premium taxes in their budget adoption resolutions.

Conclusion

Georgia counties and cities have state policy direction as well as multiple opportunities to achieve service delivery efficiency and equity—through the equalization amendment and the service district clauses of the Constitution, the SDA, LOST and the insurance premium statute. A statewide review of county and city service delivery and funding demonstrates that these remedies have not achieved the General Assembly's goal of developing an equitable and responsive local government service delivery system in Georgia.

Of Georgia's 159 counties, 116 counties levy the same or higher county incorporated area (municipal) property tax rates as compared to the unincorporated areas.[40] Most counties have not addressed such tax rate differentials or inequities through functional consolidation, special unincorporated area tax districts, use of LOST allocations, insurance premium taxes or

other remedial measures. While 32 Georgia counties have unincorporated area special service districts, 23 of these districts are only for fire services and not for other urban services. Twenty-eight Georgia counties impose higher property tax rates in their incorporated areas than in the unincorporated area.[41] These counties are effectively asserting that no county service is primarily for the benefit of the unincorporated areas, and therefore the insurance premium tax revenues are available to roll-back property tax millage rates in the unincorporated areas.

In summary, taxpayers within Georgia cities face systemic tax inequities which are the result of county urban service delivery and funding practices within unincorporated areas. In their county tax bills, city taxpayers fund services which primarily benefit unincorporated areas. They also pay for city services which are of county-wide benefit, such as fire services outside city boundaries, city streets and road maintenance, parks and recreation, economic development and tourism promotion. This dual urban service delivery system has accommodated the demand for urban services in unincorporated areas, but it has also caused duplication of local government services among cities and counties and resulted in fiscal inequities in the financing of urban services in many areas of the state.

In the 2014 session of the Georgia General Assembly, legislation for strengthening the enforcement provisions of the SDA was introduced in the House of Representatives.[42] Representatives from the Georgia Municipal Association and the Association County Commissioners of Georgia were unable to agree on the proposed legislation; the House did not vote on the legislation. The proposed legislation would have strengthened the sanctions provided by the SDA by allowing the DOR to retain 10 percent of all sales tax revenues distributed to any local government for noncompliance.

The SDA requires local governments to agree upon on a service delivery strategy to minimize conflicts by specifying which local governments would deliver which services and the method of funding such services. Every local government in Georgia is now required to adopt a "service delivery strategy" that ostensibly eliminates duplication and assures that the costs of services are borne by the residents receiving the service. However, without sufficient enforcement for noncompliance, the SDA has fallen far short of its legislative intent.

In its report to the State Planning and Community Affairs Committee in 1972, the Urban Growth Subcommittee did not anticipate that the equalization of service delivery authority among counties and municipalities would result in double taxation in the provision of urban services. The special district authorization in the Constitution is a remedy for resolving the issue of double taxation in Georgia. However, this authorization is permissive, and the creation of special districts can only be mandated by general law. The Urban Growth Subcommittee could have included such a mandate in its recommendations to the State Planning and Community Affairs Committee in 1972. The mandate would have required that the cost of any service provided primarily for the benefit of the county unincorporated area would be borne solely by the residents who receive the service.

James V. Burgess Jr. served as executive director of the Georgia Municipal Association from 1983 until 1995. Upon retirement he served as mayor of the city of Social Circle from 1997 until 2011. He is a practicing attorney specializing in municipal law and also serves as a public policy mediator and consulting attorney in matters affecting local and state government.

Michael B. Brown is the principal of the Savannah firm of Brown Pelican Consulting LLC which serves numerous cities in Georgia. His local government experience includes city manager of Savannah and city manager of the Columbus Consolidated Government. Brown has a B.A. in government and M.A. in public administration from the University of Virginia.

Endnotes

1. *See* REP. OF THE STATE PLANNING AND CMTY. AFFAIRS COMM., 131ST GEN. ASSEMBLY, REG. SESS. (GA. 1972), *reprinted in* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF GEORGIA, 131ST GEN. ASSEMBLY, REG. SESS., AT 4456 (1972).
2. *Id.* at 4465.
3. *Id.* at 4464.
4. *Id.* at 4459.
5. *Id.*
6. *Id.*
7. *See* 1972 Ga. Laws 1552; GEORGIA OFFICIAL AND STATISTICAL REGISTER 1971-1972, AT 1900.
8. *See* 1972 Ga. Laws at 1552-53; GA. CONST. OF 1976 ART. IX, § 4, ¶ 2 (THE PREDECESSOR TO CURRENT GA. CONST. ART. IX, § 2, ¶ 3(A)). This amendment empowers counties and municipalities to provide the following services: police and fire protection; garbage and solid waste collection and disposal; public health facilities and services, including hospitals, ambulances, emergency rescue and animal control; street and road construction, including curbs, sidewalks, and street lights, and devices to control the flow of traffic on streets and roads constructed by counties and municipalities or any combination thereof; parks, recreational areas, programs and facilities; storm water and sewage collection and disposal systems; development, storage, treatment and purification and distribution of water; public housing; public transportation system; planning and zoning; libraries; terminal and dock facilities and parking facilities; building, housing, plumbing, and

electrical codes; and air pollution control.

9. *See* GA. CONST. ART. X, § 1, ¶ 2.
10. REP. OF THE STATE PLANNING AND CMTY. AFFAIRS COMM., *supra note 1*, at 4460.
11. *Id.*
12. *Id.*
13. These dollar figures are based on unpublished analysis (available upon request from the authors) of data available to the public at the Carl Vinson Institute of Government's Tax and Expenditure Data Center for Georgia Local Governments, https://ted.cviog.uga.edu.
14. *See* GA. CONST. ART. IX, § 2, ¶ 6.
15. *Id.*
16. These counties include Camden, Chatham, Crisp, Coffee, Dougherty, Emanuel, Fulton and Gwinnett. *See* GA. DEP'T OF REVENUE, LOCAL GOV'T SERVS. DIV., 2012 GEORGIA COUNTY AD VALOREM TAX DIGEST MILLAGE RATES, https://dor.georgia.gov/sites/dor.georgia.gov/files/related_files/document/LGS/Property%20Tax%20Digest/LGS_Georgia_County_Ad_Valorem_Tax_Digest_Millage_Rates_2012.pdf.
17. 1997 Ga. Laws 1567, 1571 (codified as amended at O.C.G.A. tit. 36, ch. 70, art. 2 (O.C.G.A. §§ 36-70-20 to -28 (2012)).
18. O.C.G.A. § 36-70-20.
19. *Id.* § 36-70-24.
20. *Id.* § 36-70-24(3)(A).
21. *Id.* § 36-70-24(3)(B).
22. GA. DEP'T CMTY. AFFAIRS, SERVICE DELIVERY STRATEGY FORM 2: CERTIFICATIONS, AT ¶ 4, (citing O.C.G.A. § 36-70-24(3)). This form is available at http://www.dca.state.ga.us development/planningqualitygrowth DOCUMENTS/Forms SDS.Forms SDSForm4.dot.
23. O.C.G.A. § 36-70-26.
24. *Id.*
25. *Id.*
26. *See id.* § 36-70-27(a)(1).
27. *See id.* § 36-70-25.1.
28. *Id.* § 36-70-25.1(d)(2).
29. Gwinnett Cty. v. City of Auburn, *et al.*, Case No. 09-A-01923-9 (Sup. Ct. Gwinnett Cty).
30. *See* O.C.G.A. § 36-70-2(5.2).
31. *See id.* § 36-70-24(3).
32. O.C.G.A. §§ 48-8-80 to -96 (2013 & Supp. 2015).
33. O.C.G.A. § 48-8-89(b)(7) (2013 & Supp. 2015).
34. *See id.* § 48-8-89(b)(1)-(8).
35. 1983 Ga. Laws 1602 (codified as amended at O.C.G.A § 33-8-8.3 (2014 & Supp. 2015)).
36. O.C.G.A. § 33-8-8.3(a)(1). Notably, subparagraph (E) was revised in 1997 to replace the words "solely for" with the words "for the primary benefit." *See* 1997 Ga. Laws 561, 562.
37. *See* O.C.G.A § 33-8-8.3(a)(2).
38. Hamilton v. Montgomery Cty., Case No. 13-CV-159 (Sup. Ct. Montgomery Cty.). This was a class action lawsuit seeking refunds of property taxes paid as a result of the county's use of insurance premium tax proceeds to fund garbage collection centers rather than reducing the millage rate for the inhabitants of the unincorporated areas of the county. The outcome of the case centered on an interpretation of O.C.G.A. § 33-8-8 (a)(1)(C) and (E). The court granted plaintiff's motion for summary judgment, which argued that the county's collection centers do not qualify as "curbside or on-site" residential or commercial garbage and solid waste collection and thus the county must provide an ad valorem tax millage rate reduction for property owners in its unincorporated areas in an amount equal to all insurance premium tax proceeds that it used to fund the centers.
39. *See* O.C.G.A. § 33-8-8.3(b).
40. *See* GA. DEP'T OF REVENUE, LOCAL GOV'T SERVS. DIV., 2013 GEORGIA COUNTY AD VALOREM TAX DIGEST MILLAGE RATES, https://dor.georgia.gov/sites/dor.georgia.gov/files/related_files/document/LGS/Property%20Tax%20Digest/2013%20mill%20rate.pdf.
41. *See id.*
42. H.B. 855, 152nd Gen. Assembly, Reg. Sess. (Ga. 2014).