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Environment, Natural Resources and Land Use

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During the survey period, both the courts and the legislature moved to resolve basic uncertainties as to the validity of land use, natural resource, and environmental protection laws and regulations. In *Barrett v. Hamby*,[1] the court clarified the relationship between the taking clause and police power regulation and moved to a position closer to the mainstream of American law. The General Assembly sought to resolve any doubts as to the State's ability to legislate in the land use and natural resource protection field by adding language to the proposed editorial revision of the state constitution which specifically bases future land use and natural resource protection laws on the State's police power. The Georgia Supreme Court's validation of three recently passed natural resource protection laws as constitutional eased the concern over the court's past hostility toward planning laws and, in two landmark cases, the court recognized the implications of the energy crisis for public utility rate regulation and defined the limits of public ownership and control of the state's beaches.

I. The Power to Govern

The year's most significant decision was the Georgia Supreme Court's clarification of the interplay between the taking clauses of the United States and Georgia Constitutions[2] and resource legislation and regulation based on the state's inherent police power to protect the health and welfare of its people. While Georgia's leaders have acknowledged the need for additional environmental and resource laws based on a comprehensive regional planning mechanism, initiatives for such laws have faltered because of a persistent strand of hostile decisions of the Georgia Supreme Court[3] which have caused doubt as to the state's authority to act. Although

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1. 235 Ga. 262, 219 S.E.2d 399 (1975).

2. Ga. Const. art. I, § III, para. I; Ga. Code Ann. § 2-301 (1973) states that "[p]rivate property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid. . . ." The Federal Constitution states, "[n]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Taking Clause cases often arise out of alleged excessive governmental regulation which reduces the value of the plaintiff's property. *See* Barrett v. Hamby, *supra*.

3. An analysis of the difficulties facing environmental and land use laws in Georgia is found in W. Futrell, *The Hidden Crisis in Georgia Land Use*, 10 Ga. L. Rev. 53 (1975).

the court had not, until this term, adjudicated the validity of natural resource and land use planning laws as such, its hostility toward one kind of planning law, zoning, has had a chilling affect on legislative proposals in this area.[4] In *Barrett*, the Georgia Supreme Court articulated the standards which it will apply in deciding whether a zoning ordinance violates the constitutional provisions against taking private property without just compensation. The court states,

> as the individual's right to unfettered use of his property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or general welfare. Lacking such justification the zoning may be set aside as arbitrary or unreasonable.[5]

The court defines substantial as being more or less synonymous with reasonable:

> as these critical interests are balanced, if the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, such regulation is confiscatory and void. . . . Moreover we specifically rule that for such unlawful confiscation to occur, requiring that the zoning be voided, it is not necessary that the property be totally useless for the purpose classified. . . . It suffices to void it that the damage to the owner is significant and is not justified by the benefit to the public.[6]

The *Barrett* case arose out of an application to construct a shopping center by the owners of the 26-acre Hamby property which was restricted by the Cobb County zoning ordinance to single family houses on half-acre lots. The County Board of Commissioners denied the application, basing their decision on the existing land use plan which already provided for extensive acreage for commercial development in the area. On appeal, the commissioners argued that the court should rely on the presumption of validity which attaches to zoning ordinances because of their legislative nature. In view of the applicant's detailed testimony as to the financial burden caused by the refusal to rezone the property and the county's failure to introduce countervailing testimony concerning the decision's effect on the public welfare and the benefit achieved, the court held that the alleged community welfare interest was too vague and weighed too lightly in the balance to offset the owner's substantial injury. *Barrett* is a rather conventional American zoning case when compared with cases from other

4. *See, e.g.*, Herrod v. O'Beirne, 210 Ga. 476, 80 S.E.2d 684 (1954); Hunt v. McCollum, 214 Ga. 809, 108 S.E.2d 275 (1959).

5. 235 Ga. at 265, 219 S.E.2d at 402.

6. *Id.* at 266, 219 S.E.2d at 402.

jurisdictions in which courts have taken an active position in judicial review.[7] Nevertheless, it represents a great step forward for Georgia courts, as it is the first explicit endorsement of the balancing analysis found in Georgia Supreme Court decisions and is the first acknowledgement by that court that zoning and land use planning rest upon the police power.

A few months after *Barrett* the Georgia Supreme Court decided *Metropolitan Atlanta Rapid Transit Authority v. Datry*,[8] a suit brought by shop owners on a street which had been closed by subway construction and changed into a pedestrian mall leading to the subway station. The termination of vehicular access to the plaintiff's stores was held to be a taking, calling for the payment of compensation to the shop owners. Justice Gunter, in a short but sharply reasoned dissent, argued that since the city has the authority to regulate the use of street easements under its police power, the termination of vehicular traffic from the street facing the store entrances was not a taking. Indeed, the termination of vehicular access should not have resulted in a compensation award at that point in time because any customers lost because of the street closing will probably be replaced by new customers using the subway stop. The *Datry* opinion is disappointing in its failure to apply the balancing analysis announced by *Barrett*, since the damage to the plaintiffs was so consequential and so speculative at the time of suit that it would appear to have been more appropriate to have relegated their claim to an inverse condemnation proceeding.

Although *Barrett*, with its balancing analysis, points to a new strand of Georgia jurisprudence, other cases of the term suggest that the taking clause is vital in Georgia jurisprudence and it will be a force to be dealt with in any case concerning natural resource, environmental, or land use regulation. If the Georgia courts take into consideration non-economic matters difficult of quantification, such as the public interest in neighborhood stability or the state's interest in protecting environmental diversity necessary for the integrity of ecosystems, then comprehensive environmentally based planning laws should be upheld on judicial review. However, if, in future cases, the courts consider only matters capable of proof in dollars and cents and do not weigh these abstract factors which are difficult of quantification, then the *Barrett* analysis will not be the advance it is presently thought to be.

In view of the General Assembly's concern over the Georgia Supreme Court's hostility to planning laws, a significant development was the court's denial of constitutional challenges to the Georgia Land Sales Act of 1972,[9] the Surface Mining Act of 1968,[10] and the Control of Outdoor

7. *See* F. Schnidman, *The Courts Enter the Zoning Game: Will Local Government Win or Lose?*, 43 GEO. WASH. L. REV. 590 (1975).

8. 235 Ga. 568, 220 S.E.2d 905 (1975).

9. GA. CODE ANN. § 84-61 *et. seq.* (1974).

10. GA. CODE ANN. § 43-14 *et. seq.* (1974).

Advertising Act of 1973.[11]

In *Screamer Mountain Development, Inc. v. Garner*,[12] the court brushed aside constitutional challenges to the Georgia Land Sales Act of 1972 which requires the filing of reports concerning large scale developments involving 150 or more lots being sold out of a common subdivision. The Act, aimed at north Georgia resort developers whose activities in the Blue Ridge Mountain area of the state have been described as the greatest menace yet to the southern mountains,[13] functions as an anti-fraud statute, requiring that any developer desiring to promote such a subdivision file an application for registration with the Secretary of State. The application requires disclosure of detailed information on the financing and development plans of the resort.[14] A public report is also required for prospective purchasers who may rescind the contract if valid disclosure is not made.[15] In its first interpretation of the Act, the Georgia Supreme Court held that a subsequent purchaser is not included in the definition of "purchaser" and thus falls outside the protection of the statute.

In *Georgia Marble Co. v. Walker*,[16] the supreme court in its first opinion on the Surface Mining Act of 1968 held that the Act established only minimum regulations for surface mining and that counties could enact and enforce, through their zoning regulations, different or more restrictive requirements than those called for by the Act or the Department of Natural Resources regulations.

In *City of Doraville v. Turner Communications Corp.*,[17] the Georgia Supreme Court held that the state law concerning outdoor advertising signs had not preempted the police power authority of local governments to regulate outdoor advertising signs and assumed without discussion that the statute was valid. Indeed, the only question was whether the community could enact stricter regulations on the basis of its own local police power authority. The court held that under its police power authority, a municipality can enact and enforce reasonable regulations governing the erection and maintenance of signs within its jurisdiction. The court considered the local ordinance governing the regulation of outdoor advertising signs a regulatory ordinance governing activities and not a zoning ordinance.

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11. GA. CODE ANN. § 95A-9 *et. seq.* (1974).
12. 234 Ga. 590, 216 S.E.2d 801 (1975).
13. *See* O'Neill, *Greatest Menace Yet to Southern Mountains*, SOUTHERN VOICES, May-June 1974, at 73-78.
14. GA. CODE ANN. at 84-6103 (1974).
15. GA. CODE ANN. at 84-6108 (1974).
16. 236 Ga. 545, 224 S.E.2d 394 (1976).
17. 236 Ga. 385, 223 S.E.2d 798 (1976).

II. Two Landmark Cases: The Energy Crisis and Ownership of the Beaches

Another significant judicial development was the Georgia Supreme Court's recognition of the far-reaching implications of the energy crisis. A standard feature of electric utility rate making has been the provision of discounts to large scale users, giving cheaper incremental rates to industrial consumers. Utilities justified such a rate structure on the grounds of economy of scale and the desirability of promoting growth in the system. Following the Arab oil embargo and the beginning of changing attitudes toward unlimited growth, the Georgia Public Service Commission devised a new rate structure shifting the cost of expansion on to those users whose demands were causing the need for additional facilities. In *Allied Chemical Corp. v. Georgia Power Co.*,[18] the Georgia Supreme Court upheld the new rate structure stating:

> The old notions of rate making, which prevailed before the energy crisis, sought to maximize energy sales and encourage even greater energy consumption. Now that a true energy crisis is upon us, we would be surprised to find that this continues to be a goal. With energy now recognized as a scarce natural resource, conditions might no longer exist for necessarily favoring large users with low rates. That of course is not for us to decide. We do decide, however, that nothing in this record shows that it was unreasonable for the commission to conclude that the largest users were primarily responsible for the need for increased facilities.

Thus, the Georgia Public Service Commission and the Georgia Supreme Court join an increasing number of state courts which have revised rate structures to place a higher cost upon those large scale users of energy whose demands for more power fuel the ever mounting strain on resources.[19]

In *State v. Ashmore*,[20] the Georgia Supreme Court settled the legal questions concerning public and private rights in the foreshore (that area between the high watermark and the low watermark along Georgia's coast) in favor of the state. This decision defining the boundary between private and public property as the high watermark is of major significance for coastal zone management and regulation of coastal resources because it confirms the state's free hand in administering the area. The plaintiffs, subdivision lot owners who wanted to develop homes along the dunes and sand beaches of St. Simons Island, claimed title to the beach down to the low watermark because of a 1902 General Assembly Act which stated:

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18. 236 Ga. 548, 224 S.E.2d 396 (1976).

19. A discussion of the regulatory theories on which the new types of rate structures are based is found in R. Cudahy and R. Malko, *Electric Peak Load Pricing: Madison Gas and Beyond*, 1976 Wisc. L. Rev. 47 (1976).

20. 236 Ga. 401, 224 S.E.2d 334 (1976).

> For all purposes, including among others, the exclusive right to the oysters and clams (but not to include other fish) therein or thereon being, the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tide waters, as defined . . . shall extend to low watermark in the bed of the water: Provided, however, that nothing in this and the two preceding sections shall be so construed as to authorize such an exclusive appropriation of any tide water, navigable or nonnavigable, by any person whomsoever, as to prevent the free use of the same by others for purposes of passage and for the transportation of such freight as may be capable of being carried thereover.[21]

The majority, in upholding public ownership and with it the right of the state to regulate the foreshore without running afoul of the taking clause, relied on the debates of the 1943-44 Constitutional Commission, which drafted the current state constitution. In an extensive use of legislative history, the court declared that the 1902 Act, which was ratified in the constitution, gave title only to the oyster and clam beds. In passing on the status of the accreted land (the dry land area) which had been built up in the decades since the area had first been platted, the court recognized the general principle that gradual accretions of land from navigable tide waters accrue to the adjacent land owner. Holding that the accreted land in dispute accrued to the owners of the inshore lots, the court nevertheless held that issues of fact remained to be resolved by the trial court as to whether the said land had been dedicated to public use or had become subject to prescriptive rights on the part of the public by continued use. Two strongly worded dissents argued that the 1902 Act specifically conveyed away all public rights in the tide water area, that no matter what the value of the tidal zone might be in the 1970's the transfer remained firm, and that the effect of the majority opinion was to take private property without the payment of just compensation.

III. MINING

The Georgia Supreme Court cases on mining activity turned primarily on the problem of controlling waste from mines. While Georgia has a surface mining statute, no specific statute provides for disposal of waste from mines and the principles of tort law applicable to injury to land generally apply. In *Morey v. Dixie Lime & Stone Co.*,[22] the court of appeals reversed a lower court award of $2,800 to plaintiffs whose property had been damaged by an overflow of sludge from a neighboring limestone mine. The court found that the award of $2,800 was not inadequate as a matter of law on the evidence presented but that the charge to the jury on measurement of damages was misleading. In 1967, plaintiff's predecessor in

21. GA. CODE ANN. § 85-1309 (1970).
22. 134 Ga. App. 928, 216 S.E.2d 657 (1975).

title had entered into a settlement agreement with the defendant's predecessor for $7,000 for damage done to the land up to that time. After the purchase in 1972, the defendants continued to damage plaintiff's property by dumping sludge and waste from its mining operations. The erroneous charge concerned the jurors consideration of the settlement sum paid for prior damage to the property.

In *Davidson Mineral Properties, Inc. v. Gifford Hill & Co.*,[23] the Georgia Supreme Court ruled that even though earlier cases had denied an injunction against Gifford Hill's operation of a rock quarry and stone crushing plant, the plaintiff could press its claim for damages for the nuisance caused by the defendant's activities. An earlier case, *Davidson Mineral Properties v. Gifford Hill & Co.*,[24] had denied an injunction because no actual or threatened injury to the Davidson property had been shown. In the instant case, the plaintiff sought to present evidence of actual damages from the operation of the rock quarry. Even though injunctive relief had been denied, this was held not to be dispositive of plaintiff's damage claim and summary judgment was held to be inappropriate.

The zoning problems caused by the operations of rock quarry and stone crushing plants have been discussed in a number of Georgia cases. Most recently, in *Martin Marietta Corp. v. Macon-Bibb County Planning & Zoning Commission*,[25] the Georgia Supreme Court upheld the denial of a special use permit for the development of a crushed stone quarry by a regional planning and zoning commission. This denial runs counter to a series of cases which have upheld the right of rock quarries and rock crushing plants to operate in rural areas despite the opposition of local county planning commissions.

IV. Zoning and Land Use

Several important cases on zoning procedure arose during the year. In *Royal Atlanta Development Corp. v. Staffieri*,[26] the Georgia Supreme Court held again that the governing authority of the county is the entity which makes zoning enforcement decisions. In this case, 130 acres in Gwinnett County had been set aside as a planned unit development of homes, condominiums, stores and recreational facilities. After an adverse decision by the planning commission adjacent land owners, claiming to be aggrieved persons, appealed to the zoning board of appeals. The appeal was dismissed for the reason that it had no jurisdiction to entertain appeals from the planning commission. Plaintiff land owners then appealed to the Gwinnett Superior Court, which reversed and remanded the case to the zoning board of appeals. The Georgia Supreme Court held that the zoning

23. 235 Ga. 176, 219 S.E.2d 133 (1975).
24. 232 Ga. 77, 205 S.E.2d 269 (1974).
25. 235 Ga. 689, 221 S.E.2d 401 (1975).
26. 236 Ga. 143, 223 S.E.2d 128 (1976).

board of appeals had been correct since zoning power clearly lies with the governing authority, the county board of commissioners. The planning commission serves as an expert agency whose only function is to advise the governing authority, the county board of commissioners, which must use its own discretion in enforcing the zoning ordinance. The court held that the approval of the planned unit development by the planning commission was not an enforcement decision and therefore was not subject to challenge at that point in time.

In *City of Douglasville v. The Willows, Inc.*,[27] the owner of a mobile home park sought to compel the Board of Commissioners of Douglas County to issue permits to place trailers on the remaining lots in a mobile home park. The city, which had allowed much of the area to be filled with mobile homes, refused to issue the permits despite the fact that the county plan designated the area in question as "R-5 mobile home park residential district." The court held this exercise of authority to be invalid as an abuse of discretion going beyond the limits of the ordinance.

In *Walker v. Duncan*,[28] the Georgia Supreme Court upheld the right of a purchaser of subdivision property to enforce a claim based on reliance on a subdivision plat which designated a lake area and park as open space. The court based its decision on the principle that when a developer sells lots according to a recorded plat, the grantees acquire an easement in any area set apart for their use. The recorded plat showing the open space around the lake was taken as an implied promise of the developer to preserve the area as a park. Furthermore, the court held that the designation of the open space also raised a presumption of intent to dedicate the area to the public.

V. WATER LAW

This term saw several applications of the conventional riparian principle which declares that the owners of the banks of waterways are entitled to have the water in the streams come to their land in its natural and usual flow and that flooding or obstruction caused by an unlawful interference constitutes a trespass. In *Trax, Inc. v. City of College Park*,[29] the city sued Trax for maintaining an obstruction on Sullivan Creek resulting in upstream flooding. The suit sought removal of the obstruction and restoration of the stream banks and bed to their original condition so that the water could follow its natural drainage. At trial, the defendant sought to introduce evidence as to the economic gain gathered from the obstruction and the negligible damage done to the upstream riparians. However, the court refused to balance the equities, and entered judgment for the plaintiff city

27. 236 Ga. 488, 224 S.E.2d 363 (1976).
28. 236 Ga. 331, 223 S.E.2d 675 (1976).
29. 235 Ga. 835, 221 S.E.2d 595 (1976).

holding that the damming was the major, if not the sole, proximate cause of potential upstream flooding. The Supreme Court of Georgia affirmed the trial court's directed verdict for the plaintiff city.

In *Weems v. Freeman*,[30] the plaintiff sued the adjacent owner of riparian property, together with a contractor and engineers doing work thereon, for flooding caused by increased surface runoff resulting from the upstream construction activity. The jury's award of $50,000 damages and $10,000 attorney's fees was modified by the supreme court on the basis of an out of court settlement with two of the joint tortfeasors which had the effect of releasing the third party that had remained in the suit. In the attempt to deal with such overbuilding in flood plains and increase in surface runoff waters, government agencies such as the Corps of Engineers and state governments have moved toward flood plain zoning.[31] However, *Weems v. Freeman* indicates a significant use of the common law courts and traditional remedies by downstream riparians to protect their rights which may well be more effective than the complicated administrative system of sanctions against those who overbuild in the flood plain.

In *City of Rome v. Turk*,[32] the upstream modifier of the waterway was the city of Rome which pleaded sovereign immunity as a defense to the claim for damages to the downstream riparian. The Georgia Supreme Court found that the city's construction of the drainage ditch and modification of the surface water runoff patterns which resulted in water overflowing on plaintiff's property was a continuing nuisance and a willful trespass which entitled the plaintiffs to compensation for the taking or damaging of private property.

VI. TRANSPORTATION

Transportation controversies continued to play a major role in confrontation between environmental plaintiffs, property owners, and state officials. Although most of the controversies centered in federal forums, litigation concerning the development of Atlanta's rapid transit system, the new regional airport, and the state highway system spilled over into the state courts.

The continuing controversy over the location of Atlanta's regional airport reached the Georgia Supreme Court in *Citizens to Save Paulding County v. City of Atlanta*.[33] On June 17, 1975, the trial court denied injunctive relief to the plaintiffs who sought to bar the purchase of property for a new Atlanta regional airport in Paulding County. As no supersedeas bond

30. 234 Ga. 575, 216 S.E.2d 774 (1975).

31. *See* U.S. Army Corps of Engineers, *Will the Flooding Ever Stop?*, METROPOLITAN ATLANTA WATER RESOURCES STUDY GROUP NEWSLETTER, April 1975, p. 1.

32. 235 Ga. 223, 219 S.E.2d 97 (1975).

33. 236 Ga. 125, 223 S.E.2d 101 (1976).

was filed following the filing of judgment, the city consumated the contract, and the supreme court held the case to be moot. The Paulding County controversy has received extensive coverage in the press and in environmental publications, and on-going citizen's groups have been formed to continue litigation on other grounds.[34]

In *Reed v. City of Atlanta*,[35] a condemnation proceeding brought by the City of Atlanta to obtain an avigation easement over Reed's land, the court considered the noise problems of Atlanta's present airport. A special master estimated damages of $3,350 with further consequential damages of $11,000. Both the city and Reed appealed for a de novo hearing in the Fulton County Superior Court, where the jury awarded Reed $5,000 actual damages and no consequential damages. The Georgia Supreme Court affirmed the denial of Reed's motion for a new trial in an opinion which reviews the elements of proof in a noise pollution case. The court refused to permit Reed to show the noise levels in his building as they related to the Occupational Safety Health Standards regulations, but did allow him to show the noise level within and outside the building during the period when aircraft were overhead, together with evidence that such noise levels would disturb sleep, interfere with communication, and cause annoyance, hearing loss, physical injury, and pain.

Challenges to the constitutionality of the Metropolitan Atlanta Rapid Transit Authority (MARTA) were rebuffed again in *Henderson v. Metropolitan Atlanta Rapid Transit Authority*,[36] in which the court held that the amendment establishing MARTA which had received the vote of the substantial majority of voters in Fulton and DeKalb counties did not need submission to the voters of the entire state. In the *Henderson* case, the plaintiffs argued that the state had improperly submitted the question to the voters because an environmental impact statement had not yet been filed. Environmental impact statements are a requirement of federal law and a condition precendent to the beginning of any major federal project which significantly affects the human environment. The Georgia Supreme Court acknowledged that an environmental impact statement would be required in due course, but held that the filing of the statement was not a prerequisite to the holding of the election. The environmental impact statement was seen as being a condition precedent to the taking of federal action concerning MARTA and not to the Georgia voters' approval of the proposal.

Several federal cases concerning the Georgia projects discussed the timing and need for environmental impact statements. In *Atlanta Coalition on the Transportation Crisis v. Atlanta Regional Commission*[37] and

34. *See* J. Dunn, *Takeoff and Landing in Atlanta*, SIERRA CLUB BULLETIN, March 1976, Vol. 61, No. 3, at 16.

35. 136 Ga. App. 193, 220 S.E.2d 492 (1975).

36. 236 Ga. 849, 225 S.E.2d 424 (1976).

37. 8 ERC 1116 (N.D. Ga. 1973).

Citizens for Food and Progress, Inc. v. Musgrove,[38] the U.S. District Court refused relief on the ground that the proposals (the West Georgia Limited Access Highway and the Atlanta Regional Commission's publication of a systems plan identifying future transportation corridors) were state financed and controlled projects which did not require an environmental impact statement. A contrary conclusion was reached in *Hawthorn Environmental Preservation Association v. Coleman*,[39] which held that a statement must be filed on the Newnan bypass even though the Georgia Department of Transportation claimed that no federal funds were involved. The court found that the bypass was only one segment of a larger project which was federal in nature and, for which, compliance with the requirements of the National Environmental Policy Act and the National Historical Preservation Act was necessary.

In *Pye v. Department of Transportation of the State of Georgia*,[40] the United States Court of Appeals for the Fifth Circuit held that a plaintiff whose land had been condemned in state court proceedings had no standing to claim damages or restitution under the National Environmental Policy Act since NEPA has no provision for awarding damages, but is rather a remedy for judicial review of substantive agency decisions on projects which may affect the environment.

VII. LEGISLATION

The most significant action of the 1976 General Assembly was the adoption of an editorial revision of the state constitution which was drafted to resolve the uncertainties in Georgia planning law. It was ratified by the voters in the Fall 1976 General Election. Three judicial doctrines have interacted to create past uncertainty: an unusually broad interpretation of the taking clause which sacrifices the public interest to private rights; a uniquely narrow definition of the state's police power which demands specific constitutional grants for zoning laws; and a confusing reading of the home rule provisions of the Georgia Constitution which suggest that only local governments are empowered to enact planning laws which restrict land use.[41] The use of these three doctrines by the Georgia Supreme Court in years past has resulted in a line of decisions unfriendly toward planning laws. The General Assembly has moved to dispel these doubts by rewording the provisions effecting regional planning in the new constitution. Article III, Section VIII which reaffirms the police power of the state declares:

> GENERAL ASSEMBLY: EXERCISE OF POWERS
> Paragraph III. *Police Power*. The exercise of the police power of the state

38. 397 F. Supp. 397 (N.D. Ga. 1975).
39. Civil Action No. 76-581A (N.D. Ga. Judgment and Order filed April 30, 1976).
40. 513 F.2d 290 (5th Cir. 1975).
41. See discussion in W. Futrell, *supra* note 3, at 85-120.

> shall never be abridged, nor so construed as to permit the conduct of business in such manner as to infringe the equal rights of others, or the general well-being of the State.
>
> Paragraph IIIA. *Restrictions upon Land Use for the Protection of Natural Resources, Environment and Vital Areas.* The General Assembly shall have the authority to provide restrictions upon land use in order to protect and preserve the natural resources, environment and vital areas of this state.[42]

This affirmation would clarify the General Assembly's power to pass a broad based comprehensive environmental protection law such as Florida's Environmental Land and Water Management Act[43] or the American Law Institute's Model Land Development Code.[44]

The concern with the General Assembly's power to pass general laws concerning land use is based upon a confused interpretation of the home rule provisions of the Georgia Constitution enunciated in the 1969 supreme court decision in *Johnston v. Hicks*.[45] In that case the supreme court interpreted the new home rule provisions of the constitution which delegates all zoning activity to local governments. The court held that a local law passed by the General Assembly which conflicted with a county zoning ordinance was invalid. Nowhere in the opinion is it suggested that a general law concerning planning would be invalid. Nevertheless, some commentators have read the *Johnston* case as broadly as possible and have suggested that general resource regulation laws such as the Coastal Marshlands Protection Act[46] would be unconstitutional.[47]

The General Assembly adopted clarifying language to remove any doubt as to the validity of general laws affecting natural resource, land use, and environmental planning. Article IX, Section IV of the proposed constitutional revision, entitled "General Provision Applicable to Local Governments," states:

> Except as otherwise provided in this paragraph as to planning and zoning, nothing contained within this Paragraph shall operate to prohibit the General Assembly from enacting general laws relative to the above subject matters or to prohibit the General Assembly by general law from regulating, restricting or limiting the exercise of the above powers, but, the General Assembly shall not have the authority to withdraw any such powers. The General Assembly shall act upon the above subject matters only by general law. If population is used as a basis for classification for the applicability of any act to any political subdivision or subdivisions of

42. Ga. Laws, 1976, p. 1198, at 1218.
43. FLA. STAT. ANN. § 3801 *et. seq.* (1975).
44. ALI Model Land Development Code (April 1975 draft).
45. 225 Ga. 576, 170 S.E.2d 410 (1969).
46. GA. CODE ANN. § 45-136 *et. seq.* (1974).
47. *See, e.g.*, Abbot, *Some Legal Problems Involved in Saving Georgia's Marshlands*, 7 GA. ST. B. J. 27 (1970).

> this State on the above subject matters, the Act shall apply only to political subdivisions of less than a specified population or shall apply to political subdivisions of more than a specified population. The General Assembly shall not, in any manner regulate, restrict, or limit the power and authority of any county, municipality, or any combination thereof, to plan and zone as herein defined.[48]

The intent of the General Assembly is to remove the judicial cloud over natural resources, land use and environmental planning laws. The proposed constitutional revision makes it clear that local decisions will be in local hands as the zoning function is vested in local authorities; however, the General Assembly's power to pass general laws concerning planning is affirmed.

Most of the press and public coverage of proposed natural resource legislation concerned two bills subordinating wildlife protection to local agricultural interests. One authorized beehive owners to destroy bears under certain conditions,[49] and the other authorized the Department of Natural Resources to issue permits to farmers permitting them to kill deer causing damage to their crops.[50] Both of these bills, which caused intensive lobbying on the part of agricultural forces and wildlife protection spokesmen masked the General Assembly's positive achievements. The Off-Road Vehicle Act of 1975,[51] is a first step toward regulation of what has become a nuisance in many rural and forested areas of the state. Section IV of the Act makes it a misdemeanor punishable by fine to operate an off-road vehicle on any private property without the express written permission of the owner or his agent, or to operate a vehicle without operative brakes, mufflers, or other silencing equipment. The authority of local officials to adopt ordinances and rules consistent with state law or regulations regulating the time periods and zones of use for off-road vehicles is recognized.

Amendments to the Oil and Gas Deep Drilling Act[52] provide for the spacing of wells and better conservation practices by the Georgia Department of Natural Resources. The Hazardous Radiation Control Act[53] designates the Department of Human Resources as the agency in charge of the state's radiation monitoring program and the Department of Natural Resources as the agency in charge of radioactive wastes. Another significant development was the creation of the Georgia Council for Energy Resources composed of 11 members drawn from various state line agencies and the Georgia Office of Energy Resources within the Office of Planning and Budget.[54] The Office is charged with the preparation of data relating

48. Ga. Laws, 1976, p. 1198, at 1312.
49. Ga. Laws, 1976, p. 475.
50. Ga. Laws, 1976, p. 645.
51. Ga. Laws, 1976, p. 330.
52. Ga. Laws, 1976, p. 544.
53. Ga. Laws, 1976, p. 1567.
54. Ga. Laws, 1976, p. 1740.

to the state's energy needs, a standby emergency plan in case of a serious energy shortage, and a program for energy conservation. It is to seek and administer federal funds and programs for energy related research and planning. The General Assembly's other action in the energy field was to provide special tax treatment for equipment used in conversion of solar energy for heating, cooling, or drying.[55]

55. Ga. Laws, 1976, p. 672.