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WATERS OF THE STATE, PORTS, AND WATER CRAFT General Provisions: Prohibit Certain Structures on Tidewaters Held in Public Trust and Navigable Waters

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WATERS OF THE STATE, PORTS AND WATER CRAFT

General Provisions: Prohibit Certain Structures on Tidewaters Held in Public Trust and Navigable Waters.

CODE SECTIONS:	O.C.G.A. §§ 52-1-1 to -10, -30 to -39 (new)
BILL NUMBER:	HB 1390
ACT NUMBER:	1252
SUMMARY:	The Act provides procedures for the removal of floating structures used for habitation which have been fastened to the banks of, or embedded in, the beds of tidewaters of the state which are held in public trust or are navigable streams or rivers. The Act also directs the Department of Natural Resources to promulgate rules and regulations which establish standards for safety and construction. Structures which meet those standards and which were in place as of February 1, 1992 are eligible for permits on July 1, 1992; such permits extend the time for removal by five years.
EFFECTIVE DATE:	April 20, 1992

History

In the fall of 1991, a small group of State officials toured the Altamaha River. This group included: Michael Bowers, the Attorney General of the State of Georgia; Joe Tanner, Commissioner (the Commissioner) of the Georgia Board of Natural Resources (the Board); and Harold Reheis, Assistant Director of the Environmental Protection Division of the Georgia Department of Natural Resources (DNR).[1]

1. Interview with Rep. Denny Dobbs, House District No. 74 (Apr. 29, 1992) [hereinafter Dobbs Interview]. Mr. Dobbs, a member of the House Natural Resources and Environment Committee, was interviewed in lieu of one of the bill's sponsors because he has been involved with the bill since before its introduction in the House. *Id.* Mr. Dobbs was contacted by a fellow representative from a district affected by the houseboat problems after the 1991 session. *Id.* That representative sent pictures and asked Rep. Dobbs how to take care of the problem. *Id.* Rep. Dobbs advised the representative that it would be best to send the pictures to Joe Tanner, Commissioner of the DNR. *Id.* Rep. Dobbs forwarded the pictures and letter to Joe Tanner and remained actively involved in negotiations between proponents and opponents of the bill because of his record of involvement with environmental concerns. *Id.*

What they saw on the river were floating "unregulated settlements . . . which some liken to the Hong Kong waterfront."[2] There were an estimated 200 or more of these structures or "houseboats" stretching over one four mile section of the river.[3]

Many of the structures lacked toilets and discharged raw sewage into the river.[4] At least one local opponent of the new legislation argued that the sewage problem could be easily regulated without removal of the structures.[5] However, debris from the houseboats also posed a problem to passage on the river because many houseboats were in disrepair.[6] One commentator noted that most houseboats "appear[ed] to be thrown together from scrap lumber, tar paper and metal."[7] A videotape made by the DNR shows "piles of junk" from the houseboats along the river.[8] One local resident reported that "[n]ot a single day goes by that we don't pick up a piece of an old houseboat."[9]

At the time these state officials toured the river there were no laws which regulated the houseboats.[10] Most of the structures were built without building permits so they did not conform to any building, sanitary, or safety codes.[11] As a result, most of the houseboats had no source of fresh water and many had exposed electrical wires running over their decks.[12] In addition, none of the houseboats contained motors, so they did not require boating permits.[13]

In an effort to address the houseboat problems on the river, state officials examined Georgia laws and regulations "to determine what

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2. Charles Seabrook, *DNR Vows to Rid Altamaha River of Floating Shacks*, ATLANTA J. & CONST., Oct. 24, 1991, at B1 [hereinafter Seabrook, *Floating Shacks*].

3. *Id.*

4. *Id.*

5. Tad Skinner Meeks, *Houseboats Should Be Allowed on Altamaha River*, Letter to the Editor, ATLANTA J. & CONST., Feb. 10, 1992, at A6.

6. Charles Seabrook, *The Altamaha River: Troubled Waters 'A Way of Life' That Could Mean Death to Pristine Stream, Unregulated Floating Houses Dump Sewage Right Into River*, ATLANTA J. & CONST., July 14, 1991, at A16 [hereinafter Seabrook, *Troubled Waters*].

7. *Id.*

8. Seabrook, *Floating Shacks, supra* note 2.

9. Charles Seabrook, *Afloat on Troubled Waters Bill Aims to Get Houseboats Off of State Rivers to Halt Pollution*, ATLANTA J. & CONST., Feb. 22, 1992, at B3 (quoting Glynn County resident Chip Croft).

10. Dobbs Interview, *supra* note 1.

11. Seabrook, *Floating Shacks, supra* note 2.

12. *Videotape of Tour of the Altamaha River* (May 21 & 22, 1991) (tape located at the DNR). When a reporter asked how water and electricity are obtained, one resident replied, "I just get it." Seabrook, *Troubled Waters, supra* note 6. Residents had been obtaining water through "jerry-built" systems hooked to park water systems until ordered disconnected by Glynn County health officials. *Id.* No one knows what their present sources of fresh water are. *Id.*

13. Seabrook, *Troubled Waters, supra* note 6.

action [could] be taken against the structures, and if new statutes [were] needed to deal with them."[14] Officials sought "to get the houseboats off the Altamaha."[15] However, they found no laws which could be used to remove the houseboats from the river.[16]

HB 1390

The Governor proposed HB 1390 during the 1992 session as part of an eight bill environmental package.[17] The Act amends title 52 of the Georgia Code by adding a new chapter 1.[18] The Act is broken down into two parts: the Protection of Tidewaters Act[19] and the Right of Passage Act.[20]

The Act provides procedures for the removal of structures used primarily for habitation in state tidewaters[21] and state navigable waters.[22] The Act's procedures are identical whether applied to tidewaters or navigable waters.[23] Therefore, this Article will only address the procedural provisions of the Act.

The Act declares that the state is owner of all tidewaters within its jurisdiction.[24] As sovereign, the state holds those lands in public trust for the use and enjoyment of all its citizens.[25] This is the first codification of the common law doctrine of public trust in Georgia.[26] At common law, the doctrine stated that the "State would have ownership of the lands under tidal waters (other than those conveyed by the crown

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14. Seabrook, *Floating Shacks*, *supra* note 2.

15. *Id.* (quoting Comm'r Joe Tanner).

16. Dobbs Interview, *supra* note 1.

17. Rhonda Cook & Mark Sherman, *From Light-Hearted to Serious, Bills Pile Up in Hopper*, ATLANTA J. & CONST., Feb. 4, 1992, at B3. The Governor's administration announced that the bill would be aimed at removal of the houseboats from the Altamaha River. *Id.* Zell Miller is the Governor of the State of Georgia.

18. O.C.G.A. §§ 52-1-1 to -10, -30 to -39 (Supp. 1992). Title 52, Chapter 1 entitled "General Provisions" had been previously reserved.

19. O.C.G.A. §§ 52-1-1 to -10 (Supp. 1992).

20. *Id.* §§ 52-1-30 to -39 (Supp. 1992).

21. *Id.* §§ 52-1-1 to -10 (Supp. 1992). "Tidewaters" are defined as "all rivers and arms of the sea that are affected by the tide . . . [and] are capable of use for fishing, passage, navigation, commerce, or transportation" located in the State of Georgia. *Id.* § 52-1-3(4) (Supp. 1992).

22. *Id.* §§ 52-1-30 to -39 (Supp. 1992). A "navigable stream or river" is one "which is capable of transporting boats loaded with freight in the regular course of trade either for the whole or part of the year." *Id.* § 52-1-32(3) (Supp. 1992).

23. *See id.* §§ 52-1-3(4), -32(3) (Supp. 1992).

24. *Id.* § 52-1-1 (Supp. 1992).

25. *Id.*

26. Interview with John Walden, Executive Legal Assistant to the Comm'r of the Dep't of Natural Resources, in Atlanta, Ga. (Mar. 23, 1992).

prior to the Revolution) and that the public generally has the right to [use] said waters."[27]

The Act proclaims that citizens of the State have an "inherent right" to use all navigable rivers and streams as "highways."[28] Other parts of the Georgia Code define a "navigable stream" as "a stream which is capable of transporting boats loaded with freight in the regular course of a trade or business either for the whole or part of the year."[29] The Code provides that adjacent landowners' rights extend to the "low-water mark in the bed of the stream."[30] The common law provides that state restrictions on land use by landowners adjacent to navigable streams are a valid exercise of the police power if that use is injurious to public health.[31]

The Act declares that regulation via the use of police power is appropriate in this area because protection of the tidewaters[32] and navigable streams[33] is of "more than local significance" and is a "statewide concern."[34] Thus, the Act announces that anything which meets its definition of a "structure"[35] which is found on tidewaters or navigable streams or rivers is declared unlawful and a public nuisance.[36]

When the bill was sent to the Senate Committee on Natural Resources, the Committee inserted language into the definition of "structure" which excluded commercial establishments from the provisions of the statute.[37] The Committee added the provision at the request of a legislator who was concerned that the scope of the bill was too broad and that it might eliminate commercial establishments rather

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27. West v. Baumgartner, 184 S.E.2d 213, 218 (Ga. Ct. App. 1971).
28. O.C.G.A. § 52-1-30 (Supp. 1992).
29. *Id.* § 44-8-5(a) (1982).
30. *Id.* § 44-8-5(b) (1982).
31. Pope v. City of Atlanta, 249 S.E.2d 16 (Ga. 1978).
32. O.C.G.A. § 52-1-2 (Supp. 1992).
33. *Id.* § 52-1-31 (Supp. 1992).
34. *Id.* §§ 52-1-2, -31 (Supp. 1992).
35. A "structure" is defined as:

> [A]ny structure located upon any tidewaters [or any navigable stream or river] of this state, whether such structure is floating upon such [water] and is made fast by the use of lines, cables, anchors, or pilings, or any combination thereof, or is built upon pilings embedded in the beds of such [waters] when such structure is being or has been used as a place of habitation, dwelling, sojournment, or residence for any length of time; is not being used or is not capable of being used as a means of transportation; and is not owned, occupied, or possessed pursuant to a permit issued by the commissioner.

O.C.G.A. §§ 52-1-3(3), -32(4) (Supp. 1992).
36. *Id.* §§ 52-1-4, -33 (Supp. 1992).
37. HB 1390 (SCS), 1992 Ga. Gen. Assem.

than the places of habitation the bill was designed to regulate.[38] The House Committee on Natural Resources and the Environment attempted to remove the provision by substitute,[39] but the provision was ultimately retained in the Act.[40]

Structures meeting the statutory definition of a structure which are found on tidewaters and navigable streams and rivers must be removed.[41] Procedural remedies for removal are extensive but not exclusive.[42] The Act requires the Commissioner to issue an order to the owner or possessor of a structure if he finds that such structure falls within the definition of "structure" under the Act.[43] The order must describe the structure, indicate its unlawful nature, and order its removal.[44] The order must be initially served by publication at least once a week for two consecutive weeks in a newspaper distributed in the county where the structure is located.[45] The order must then be served on a person in possession of the structure.[46] If no person in possession can be located, the order must be conspicuously posted on the structure.[47] If the address of a person claiming ownership is known, a copy of the order must be sent by certified mail to that person during the period in which it is published in the newspaper.[48] The order then becomes final unless any person in possession of or claiming an interest in the structure appeals pursuant to the Act.[49]

A person wishing to appeal an order must petition a Board administrative law judge within thirty days after the order is served.[50] Filing a petition will entitle such a person to a hearing before an administrative law judge.[51] The hearing is to be conducted pursuant to chapter 13 of title 50 of the Georgia Administrative Procedure Act.[52] The petitioner has the burden of proving possession at the hearing.[53] The hearing and review procedures of the Act constitute the sole means

38. Dobbs Interview, *supra* note 1.
39. HB 1390 (CSFA), 1992 Ga. Gen. Assem.
40. *See* O.C.G.A. § 52-1-3(3), -32(4) (Supp. 1992).
41. *Id.* §§ 52-1-5, -34 (Supp. 1992).
42. *Id.* §§ 52-1-5 to -9, -34 to -38 (Supp. 1992). Sections 52-1-8 and 52-1-37 provide that these remedies do not prevent the state from exercising any other remedies available to it. *Id.* §§ 52-1-8, -37 (Supp. 1992).
43. *Id.* §§ 52-1-5, -34 (Supp. 1992).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* §§ 52-1-6, -35 (Supp. 1992).
51. *Id.*
52. *Id.*
53. *Id.*

by which one can challenge the order, and the decision by the administrative law judge is treated as the final decision of the Board.[54]

Once an order or decision adverse to the owner or possessor becomes final, the structure is deemed contraband.[55] By calling the structure "contraband," the state may remove or "take" the structure without paying for it.[56] In other words, the state avoids constitutional takings challenges by calling the structures "contraband".[57] Once a structure has been designated as contraband, the Commissioner must post a notice on the structure and, if the address of the owner or possessor is known, must send notice to that person by certified mail.[58] The notice must inform the person that the structure is considered contraband and that they have thirty days to remove it.[59] If the structure is not removed within thirty days, it may then be seized and removed by the DNR.[60] The structure must then be sold or disposed of, and funds from the sale must be used to defray the cost of removal, with the balance deposited in the general fund of the state treasury.[61]

A House Committee substitute containing permit provisions was added to the original bill by the House Committee on Natural Resources and Environment[62] as a concession to owners and possessors of the structures so that they could protect their investment.[63] The permit allows the structure to remain for five years in order to give persons time to arrange for removal of the structure rather than allowing the structure to be subject to seizure by the Commissioner.[64]

The Act requires that the Board promulgate rules and regulations which establish minimum standards of safety, sanitation, and construction which must be met in order for a structure to qualify for

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54. *Id.*
55. *Id.* §§ 52-1-7, -36 (Supp. 1992).
56. Dobbs Interview, *supra* note 1.
57. *Id.*
58. O.C.G.A. § 52-1-7 (Supp. 1992).
59. *Id.* The thirty day removal provision may be extended by the Commissioner for a "reasonable period of time" after the end of the thirty day period. *Id.* §§ 52-1-9, -38 (Supp. 1992). However, an extension will only be granted in cases where removal will result in displacement of a person from a structure which is their permanent residence. *Id.*
60. *Id.* § 52-1-7 (Supp. 1992).
61. *Id.*
62. HB 1390 (HCS), 1992 Ga. Gen. Assem.
63. Dobbs Interview, *supra* note 1. The effect of the amendment was to delay the time for removal of certain structures for five years. *Id. See* O.C.G.A. §§ 52-1-10, -39 (Supp. 1992).
64. O.C.G.A. §§ 52-1-10, -39 (Supp. 1992); Dobbs Interview, *supra* note 1.

such a permit.[65] In addition, only structures which were in existence on February 1, 1992, are eligible for a permit.[66] Permits are not renewable, are revocable at any time for failure to meet Board standards, and may not extend beyond June 30, 1997.[67]

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65. O.C.G.A. §§ 52-1-10, -39 (Supp. 1992).
66. *Id.*
67. *Id.*