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Constitutional Barriers to Statewide Land Use Regulation in Georgia: Do They Still Exist?

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CONSTITUTIONAL BARRIERS TO STATEWIDE LAND USE REGULATION IN GEORGIA: DO THEY STILL EXIST?

INTRODUCTION

Statewide or regional growth management and land use planning currently do not exist in Georgia. However, this subject is receiving an increased amount of publicity.[1] State politicians and administrators have expressed support for a growth management or land use regulation plan that operates on a statewide basis, instead of the current system which leaves land use regulation almost entirely to local governments.[2] This publicity and increased support for

1. *See, e.g.*, O'Shea, *Rapid Development, Court Decisions Highlight Need for Statewide Planning*, Atlanta Const., Oct. 14, 1986, at 2E, col. 4; Wells, *Harris to Swear in 36 on Commission to Map "Quality Growth" Plan for State*, Atlanta Const., June 16, 1987, at 46A, col. 1.

2. *See* O'Shea, *supra* note 1, quoting Governor Joe Frank Harris and Harry West, executive director of the Atlanta Regional Commission. *See also* the resolution passed by the Board of Directors of the Coastal Area Planning and Development Commission, April 10, 1985, supporting planning based on a state, regional, and local partnership. (copy on file at the *Georgia State University Law Review* office). The resolution reads in part:

> WHEREAS, no coordinated local or statewide planning and management of . . . valuable and vulnerable resources currently exist and their continued protection and conservation is essential to preserving the quality of life of these citizens of this state and region; and
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> WHEREAS, the individual planning and management efforts of the cities and counties cannot yield a comprehensive approach to inter-related development issues which affect many local governments throughout the state; and
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> WHEREAS, existing state development control programs focus predominantly on natural environmental issues and do not address the economic and social effects of development and growth on the human environment; and
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> WHEREAS, Area Planning and Development Commissions throughout the State of Georgia have been established to assist state and local governments in planning for the wise use of resources and these organizations are ideally suited to provide invaluable services to state and local governments in planning for future growth; and
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> NOW THEREFORE BE IT RESOLVED, that the Coastal Area Planning and Development Commission recommends to the General Assembly and the Governor that a state, regional and local partnership be formed to address the planning needs of coastal Georgia which will achieve a balance between growth and development, natural resource conservation and pro-

statewide growth management are the direct result of pressures caused by high growth rates in some areas of the state, principally metropolitan Atlanta and the coastal areas of Georgia.[3] With these high growth rates expected to continue, pressure on the state legislature to address the accompanying problems is likely to increase.

The purpose of this Note is to analyze the extent of the General Assembly's power under the current Georgia Constitution to enact legislation which addresses growth and planning on a state level. Presently, local governments have constitutional authority to zone. It is uncertain, however, whether the local government's authority to zone bars the General Assembly from acting concurrently with local governments in regulating land use.

The general perception exists among many leaders in Georgia that any attempt to regulate land use on a statewide basis, without a constitutional amendment to support it, would be futile, as it would not withstand a constitutional challenge.[4] This Note takes the position that this perception is unnecessarily pessimistic. While the General Assembly may be foreclosed from "zoning," it does not appear to be constitutionally barred from enacting broad state level land use controls. The arguments supporting this premise will be presented using Article 7 of the Model Land Development Code (Model Code),[5] developed by the American Law Institute, as a background. Article 7 provides an appropriate model for analysis of Georgia's position in regard to land use regulation. This

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tection, and public investment conservation and protection; and

BE IT FURTHER RESOLVED, that the Coastal Area Planning and Development Commission also recommends that a comprehensive and coordinated statewide planning system be established in Georgia to guide future development decisions and promote the wise and prudent use of the state's valuable resources . . . .

3. A recent report by the Georgia:2000 project highlighted some of these population trends. GEORGIA:2000 PROJECT, GEORGIA:2000 FUTURE GROWTH AND HUMAN AND NATURAL RESOURCES, (Jan. 8, 1986). For example, 70% of the growth in Georgia in the last 10 years has been within a 100 mile radius of the Atlanta airport. *Id.* at 6. Georgia will continue to attract newcomers at the rate of about 60,000 to 75,000 new residents per year. The population of Georgia is projected to continue growing rapidly, reaching a population total of approximately seven million by the year 2000. *Id.* at 9. *See also* COASTAL AREA PLANNING AND DEVELOPMENT COMMISSION, POSITION PAPER ADVOCATING A STATE, REGIONAL, AND LOCAL PARTNERSHIP FOR PLANNING AND GROWTH MANAGEMENT (1985) (copy on file at the *Georgia State University Law Review* office). "Perhaps nowhere in the state outside of metropolitan Atlanta are these growth pressures taking such formidable dimensions as they are in coastal Georgia." *Id.* at 3.

4. Telephone interview with James Kundell, Ph.D., senior associate, Carl Vinson Institute of Government, University of Georgia, and Science and Technology Advisor to the Georgia General Assembly (Jan. 2, 1987) [hereinafter Kundell Interview].

5. MODEL LAND DEV. CODE (1975).

section of the Model Code is divided into two complementary parts which address different land use concerns: (1) areas of critical state concern[6] and (2) development of regional impact.[7] The Model Code's approach to land use regulation will be compared to the General Assembly's power to regulate land use under the present constitution and as interpreted by the Georgia Supreme Court, and an argument will be presented that Georgia could constitutionally enact a statute like the Model Code. The 1983 constitution, coupled with the broad reading by the supreme court of the state's power to regulate land use, can be interpreted to support state level power to regulate land use and manage growth, using a plan such as the one envisioned by the Model Code.

I. THE MODEL CODE APPROACH

Since the decision in *Village of Euclid v. Ambler Realty Co.*,[8] establishing the constitutionality of zoning, the entity traditionally chosen to exercise this power has been local government.[9] States typically have used the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act, prepared by the U.S. Department of Commerce in 1922 and 1928, as models to delegate their police power to local governments.[10]

Recently, some state governments have acted to regain some of the power that they previously have delegated to local governments. As a result, a number of states have enacted various types of regional and statewide plans to regulate land use. Approaches taken by these states include control of zoning on a statewide level, the use of standards for major developments and areas of statewide importance, and the enactment of regulations designed to protect sensitive areas, such as wetlands and coastal areas.[11]

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6. *Id.* at §§ 7-201 to -207.
7. *Id.* at §§ 7-301 to -305.
8. 272 U.S. 365 (1926).
9. MODEL CODE art. 7 commentary at 248.
10. MODEL CODE art. 1 commentary at 1. A concept which must be kept in mind is one dealing with the relationship of state and local government. Professor Sentell characterizes it as follows:

> The relationship between a state and its local governments is of basic . . . significance. A bedrock characterization of that relationship, the 'creature concept,' holds the local government to be but a creation of the state, primarily existing for the state's convenience, and totally dependent upon the state for the exercise of power.

Sentell, *The United States Supreme Court as Home Rule Wrecker*, 34 MERCER L. REV. 363, 365 (1982). *See infra* note 45 and accompanying text.
11. 2 R. ANDERSON, AMERICAN LAW OF ZONING 3d § 2.01, at 29 (1986). *See also*

Article 7 of the Model Code provides a method for integrating state and regional involvement in land use regulation with the traditional local power. The goal of this Article, however, is to involve the state or regional authority only if a land use decision has an impact beyond local proportions.[12] The Model Code reporters, in their commentary on Article 7, stated:

> [I]t is important to recognize that most land use decisions currently being made by local governments have no major effect on the state or national interest and can be made intelligently only by people familiar with the local social, environmental and economic conditions. . . . The Code, therefore, balances the need for expanded state participation in the control of land use against a policy that this participation be directed toward only those decisions involving important state or regional interests. This policy retains local control over the great majority of matters which are only of local concern.[13]

The implementation of a plan such as the one which the Model Code advocates, presents the problem of "defining in advance those matters that will be of state or regional interest."[14] The Model Code defines these matters as "areas of critical state concern" and "development of regional impact."[15]

A. Areas of Critical State Concern

Article 7, section 2 of the Model Code seeks to define "critical areas," and to specify procedures for identification and regulation of such areas. Of particular importance in assessing the possible lack of state power under the Georgia Constitution, is section 7-201(3)(b) of the Model Code, which defines an area of critical state concern as "an area containing or having a significant impact upon historical, natural or environmental resources of regional or statewide importance."[16] The rationale behind this designation is that

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MODEL CODE art. 7 commentary at 249-52. *See* J. DEGROVE, LAND GROWTH AND POLITICS (1984), for a comprehensive analysis of the political context in which seven states (Hawaii, Vermont, Florida, California, Oregon, Colorado, and North Carolina) adopted land use regulation laws.

12. MODEL CODE art. 7 commentary at 252.

13. *Id.* at 252-53.

14. *Id.* at 253.

15. MODEL CODE art. 7.

16. Section 7-201(3) of the Model Code defines other areas of critical state concern as:

> (a) an area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public

development in such areas, which might result in adverse impacts on these important resources, affects more than the local community. Therefore, because the impact is of regional or statewide importance, the local government must share control of these areas with the state or a regional authority. For example, the protection of the water quality of a major river, which supplies the water for a large portion of the state's population, would fall within the definition of "critical areas." Because pollution at one site could easily affect the quality of the water supply in other areas, it is appropriate for the state to be involved in regulating this resource.[17] This approach has been followed in Florida, which has a state land use regulation plan based on the Model Code. Florida has designated several natural areas as "critical areas," including the Big Cypress Swamp, the Green Swamp, and the Florida Keys.[18]

B. Development of Regional Impact

In section 3 of Article 7, the Model Code establishes that the state shall "define categories of Development of Regional Impact that, because of the nature or magnitude of the development or the nature or magnitude of its effect on the surrounding environment, are likely . . . to present issues of state or regional significance."[19] The Model Code lists a number of factors which should be consid-

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investment;

. . . .

(c) a proposed site of a new community designated in a State Land Development Plan, together with a reasonable amount of surrounding land; or

(d) any land within the jurisdiction of a local government that, at any time more than [3 years] after the effective date of this Code, has no development ordinance in effect.

MODEL CODE § 7-201(3)(a), (c), (d) (brackets in original). These definitions will not be dealt with in this Note as they pose different types of questions and are beyond the scope of this article.

17. MODEL CODE § 7-201 note at 261.

18. FLA. STAT. §§ 380.05—380.10 (Supp. 1987) (Legislative designation of the Big Cypress Swamp is found at FLA. STAT. § 380.055. The Green Swamp and the Florida Keys were designated critical areas under the official administrative designation as authorized under the statute.). *See* Pelham, *Regulating Areas of Critical State Concern: Florida and the Model Code*, 18 URB. L. ANN. 3, 41-51 (1980). This article presents a comprehensive analysis of Florida's approach to "critical areas" regulation under legislation based on the Model Code. *See also* Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789 (1977); Frith, *Florida's Development of Regional Impact: Process, Practice and Procedure*, 1 J. OF LAND USE & ENVTL. L. 71 (1985).

19. MODEL CODE § 7-301(1).

ered in developing these categories.[20] When the state level agency attempts to design rules in this area, it must be recognized that "these lines will be hard to draw and require the exercise of a sound judgment."[21] Additionally, the state administrators making these decisions must concentrate on developments that actually are of regional or statewide concern. As the Reporters of the Model Code acknowledge:

> In drafting the rules it is important to keep in mind both the need to protect state interests and the need to avoid forcing small developers to engage in unnecessary red tape. A procedure of state review such as outlined in this Code is likely to be successful only if it concentrates on the truly important decisions.[22]

II. GEORGIA'S LAND USE REGULATION POWER UNDER THE CONSTITUTION

A series of Georgia Supreme Court decisions, construing the source of the power to zone and the power of the state in relation to local governments' power under home rule, have resulted in a perception that the General Assembly has little power to regulate land use.[23] While the delegation of the power to zone and the doctrine of home rule are distinct, the history of these two areas is closely interwoven; therefore, it is necessary to understand both in order to fully appreciate the reluctance of the General Assembly to

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20. Section 7-301(2) lists the following factors:

> (a) the extent to which the development would create or alleviate environmental problems such as air or water pollution or noise;
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> (b) the amount of pedestrian or vehicular traffic likely to be generated;
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> (c) the number of persons likely to be residents, employees, or otherwise present;
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> (d) the size of the site to be occupied;
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> (e) the likelihood that additional or subsidiary development will be generated; and
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> (f) the unique qualities of particular areas of the state.

MODEL CODE § 7-301(2).

21. MODEL CODE § 7-301 note at 271.

22. *Id.* at 271-72. The Florida Environmental Land and Water Management Act (codified at FLA. STAT. §§ 380.012—380.10 (Supp. 1987)) contains a modified version on the development of regional impact process. *See supra* note 18.

23. *See, e.g.*, Futrell, *Environment, Natural Resources and Land Use*, 28 MERCER L. REV. 109 (1976). The author notes that the Georgia Supreme Court's hostility to one type of land use regulation, zoning, "has had a chilling affect [sic] on legislative proposals in this area." *Id.* at 110. There is no indication that the General Assembly's approach has changed since 1976. *See supra* text accompanying note 4.

become involved in land use regulation.

A. *The Source of the Power to Zone*

The United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*,[24] held that local zoning ordinances were a valid exercise of the state's police power. Prior to *Euclid*, however, the Georgia Supreme Court, dealing with this same issue, came to a conclusion contrary to the *Euclid* rationale. In *Smith v. City of Atlanta*,[25] the Georgia court found the exercise of zoning power to be unconstitutional. In reaching this conclusion, the court relied on the lower federal court's holding in *Ambler Realty Co. v. Euclid*,[26] which had held that the village's zoning ordinance violated due process.[27] After the Supreme Court's decision in *Euclid*, the Georgia Supreme Court was asked to reconsider its holding in *Smith*.[28] The court stated that it was "satisfied with the correctness of the decision of this case when it was formerly here, and the request to review and overrule the same is therefore refused."[29]

In response to this decision, the General Assembly proposed, and the people approved, a constitutional amendment authorizing zoning by a number of specifically named cities.[30] This amendment was subsequently challenged in court. In *Howden v. Mayor of Savannah*,[31] the court held that the 1927 amendment superseded the earlier decisions of the court that had held zoning unconstitutional.[32]

Several years later, in *Commissioners of Glynn County v. Cate*,[33] the Georgia Supreme Court issued a brief opinion, which is the basis of a unique doctrine in Georgia. The court held that the power to zone is based not on the inherent police power of the state, a theme that had been stated in *Howden*,[34] but rather the power to zone derives only from an express constitutional grant.[35]

The General Assembly reacted to this decision, as it had to the

24. 272 U.S. 365 (1926).
25. 161 Ga. 769, 132 S.E. 66 (1926).
26. 297 F. 307 (N.D. Ohio 1924).
27. 161 Ga. at 776, 132 S.E. at 69.
28. City of Atlanta v. Smith, 165 Ga. 146, 140 S.E. 369 (1927).
29. *Id.* at 146, 140 S.E. at 371.
30. GA. CONST. of 1877, art. III, § 7, ¶ 25 (1927).
31. 172 Ga. 833, 159 S.E. 401 (1931).
32. Howden v. Mayor of Savannah, 172 Ga. at 843-44, 159 S.E. at 406.
33. 183 Ga. 111, 187 S.E. 636 (1936).
34. *Howden*, 172 Ga. at 846, 159 S.E. at 407.
35. Commissioners of Glynn County v. Cate, 183 Ga. at 113, 187 S.E. at 637.

Smith decision, by passing another constitutional amendment. This amendment granted the power to zone to any city or county "having a population of 1000 or more."[36] In 1945, the revision of the state constitution eliminated the specific listing of local governments by name and granted cities and counties general authority to zone.[37]

The holding in *Commissioners of Glynn County v. Cate*, that an express constitutional grant was needed in order to exercise zoning power, was reinforced in several later Georgia Supreme Court cases. In *Herrod v. O'Beirne*,[38] the court narrowly construed the language of the 1945 constitution, holding that:

> [a] mere reading of this provision will disclose that the only authority therein granted to the legislature is the authority to delegate to counties and municipalities the right to zone. Neither under this provision of our Constitution, nor under any other provision of our Constitution or laws, has the legislature the right to zone property.[39]

Similarly, in *Hunt v. McCollum*,[40] the court held that "[w]ithout constitutional sanction no one could exercise such power. . . . [O]nly the authorities empowered by the Constitution to zone can zone . . . ."[41] These decisions strongly reaffirmed the court's earlier holding and indicated that it would continue to find the power to zone only in an express constitutional grant.

An unofficial opinion of the Attorney General in 1974 summarized the supreme court's position by saying:

> Historically speaking, the Supreme Court of Georgia took a hostile view quite early to the intrusion of the state's police power upon the right of a property owner to use his property any way he saw fit. . . . While the Supreme Court of the United States rejected this view insofar as the "due process" clause of the United States Constitution is concerned . . . , the Supreme Court of Georgia wasted little time in announcing that it would not follow the Supreme Court's lead in connection with its own prerogatives concerning interpretation of "due process" under the State Constitution. The rule in Georgia remained that the police powers of the state could not be

36. 1937 Ga. Laws 1135, amending GA. CONST. of 1877, art. III, § 7, ¶ 26.
37. GA. CONST. of 1945, art. III, § 7, ¶ 23.
38. 210 Ga. 476, 80 S.E.2d 684 (1954).
39. Herrod v. O'Beirne, 210 Ga. at 478, 80 S.E.2d at 685.
40. 214 Ga. 809, 108 S.E.2d 275 (1959).
41. Hunt v. McCollum, 214 Ga. at 810, 108 S.E.2d at 276.

> used to enact zoning legislation . . . . The legal consequence was, and so far as I am aware still is, that in the State of Georgia no general zoning power can exist in any governmental body beyond that which is expressly provided for by the various constitutional amendments ratified by the people of Georgia subsequent to the State Supreme Court's 1927 decision in *City of Atlanta v. Smith*.[42]

This series of cases construing the basis and extent of the power to zone forms the foundation of Georgia's unique position regarding the state's power to zone. Rather than basing the power to zone on the inherent police power of the state, the court has required that it be based on a specific constitutional grant.[43] This result,

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42. 1974 Op. Att'y Gen. No. U74-9, at 349-50 (footnotes omitted).

43. Another line of cases interpreting zoning ordinances appears to rest its analysis on the state's "police power." *See, e.g.*, Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399 (1975). *Barrett* is the source of the "balancing test," which the court presently uses when it considers challenges to zoning decisions. The court stated, "As the individual's right to the 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." *Id.* at 265, 219 S.E.2d at 402 (footnote omitted, emphasis added).

It should be noted that, even though the court spoke of "police power," it did so in the context of an entity that is constitutionally authorized to zone—Cobb County. When confronted by a "zoning" effort by the state in State Highway Dept. v. Branch, 222 Ga. 770, 152 S.E.2d 372 (1966), the court reached a different result. The court found the state legislature's attempt to comply with the Federal Highway Beautification Act to be an unconstitutional taking without compensation. The General Assembly reacted with a constitutional amendment. In National Advertising Co. v. State Highway Dept., 230 Ga. 119, 195 S.E.2d 895 (1973), the court upheld the state's action of zoning beside highways, basing it on the specific power granted in the constitution, not on any inherent police power.

See also McCoy v. Sanders, 113 Ga. App. 565, 148 S.E.2d 902 (1966), for an example of a broad reading of the state's inherent police power. This case was decided in the context of an allegation of taking without just compensation, the same argument that has been used to defeat zoning actions. McCoy sued the state seeking to recover damages resulting from the Georgia Bureau of Investigation agents' investigation of a murder on his property. During the investigation, Mr. McCoy's pond was drained, and his flowers and shrubbery were trampled. The court, in finding that no uncompensated taking had occurred, made some very sweeping statements about the inherent police power of the state. The court said:

> "Police powers have their origin in the law of necessity," and "are inherent in every sovereignty." The power extends to "the protection of the lives, health and property of the citizen, and to the preservation of good order and public morals," is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interest.

Id. at 567, 148 S.E.2d at 903-04 (citations omitted).

The court also said:

coupled with the unusual reading of the home rule amendments,[44] has been interpreted to mean that the General Assembly is barred from enacting any general land use regulations.

B. Home Rule in Georgia

When considering the state's constitutional power to regulate land use, another important area to consider is the extent to which the state has delegated its general regulatory power in this area to local governments. This analysis requires a consideration of the home rule doctrine and its interpretation by the courts. Home rule, like the power to zone, has been the subject of some unique interpretations by the Georgia Supreme Court.

Traditionally, local governments only possess powers which the state legislature has delegated to them. Local governments possess no "inherent right of self-government."[45] Legislatures, while traditionally reluctant to grant too much autonomy to local governing bodies, have allowed them to possess some independence. Without this autonomy, the state legislature would remain too involved in the daily administrative functions of the local governments. The Georgia Supreme Court's reactions to early attempts by the state legislature to grant local autonomy have paralleled its decisions in the zoning cases. Any constitutional grant was strictly construed, and the power delegated was held to be within narrowly defined

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> In a general way the police power extends to all the great public needs. . . .
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> . . . .
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> "All property is held subject to the police power of the State. . . . The police power has never been surrendered by the State . . . [and] to the exercise of police power all rights of natural persons and corporations are subject."

Id. at 568-69, 148 S.E.2d at 904-05 (quoting Atlantic Coast Line R.R. v. State, 135 Ga. 545, 557, 69 S.E. 725, 731 (1910) (ellipsis and brackets in *McCoy v. Sanders*).

See also Altman, Bolster, & Bross, *Judicial Review of Georgia Zoning: Cyclones and Doldrums in the Windmills of the Mind*, 2 GA. ST. U.L. REV. 97 (1986), for an analysis of the various problems presented in Georgia case law regarding zoning. The authors describe the *Barrett* case as the case which moved Georgia "into what Norman Williams has described as the 'second period' (of judicial attitudes toward zoning) when 'privately owned land could be made subject to broad restrictions on its use.' " *Id.* at 104.

44. Initially, the Georgia Supreme Court narrowly construed, against local governments, any grant of home rule power. Later, the supreme court interpreted the grant of power to local governments as completely foreclosing any concurrent action by the General Assembly. These decisions are discussed in the next section of the article.

45. Howard, *Home Rule in Georgia: An Analysis of State and Local Power*, 9 GA. L. REV. 757, 759 (1975).

limits.[46]

The first significant attempt to grant home rule powers came in the revision of the constitution in 1945. The new provision dealing with local governments read:

> The General Assembly shall provide for uniform systems of county and municipal government, and provide for optional plans of both, and shall provide for systems of initiative, referendum and recall in some of the plans for both county and municipal governments. The General Assembly shall provide a method by which a county or municipality may select one of the optional uniform systems or plans or reject any or all proposed systems or plans.[47]

Under this authority, the General Assembly passed the Municipal Home Rule Act of 1951.[48] Included in the powers granted to municipal governments was the authority to adopt charters, incorporate adjacent areas, and exercise powers necessary for the administration of government.[49] The delegation of these powers was challenged in *Phillips v. City of Atlanta*.[50] Strictly construing the constitutional provision, the supreme court found the home rule law invalid. The court said that "the Constitution clearly prohibited the exercise of legislative powers by other than the General Assembly."[51] The court rejected the city's argument that its power was based on a valid delegation of legislative power provided under the home rule provision of the new constitution. The court also stated that the new constitutional provision did not authorize the subsequent Municipal Home Rule Act and only provided for a system of uniform governments. The General Assembly was authorized to enact "general, standard, model enactments,"[52] which the municipalities could adopt. The general legislative power could not be delegated, however, because it still rested in the General Assembly.[53]

The General Assembly reacted to the court's decision in *Phillips* by proposing a new constitutional amendment, dealing with mu-

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46. *Id.* at 760.
47. GA. CONST. of 1945, art. XV, § 1, ¶ 1.
48. 1951 Ga. Laws 116.
49. *Id.* at 119-23.
50. 210 Ga. 72, 77 S.E.2d 723 (1953).
51. Phillips v. City of Atlanta, 210 Ga. at 75, 77 S.E.2d at 726.
52. *Id.* at 76, 77 S.E.2d at 726.
53. *Id.* at 76, 77 S.E.2d at 725.

nicipal home rule, which was subsequently ratified by the people.[54] A constitutional amendment dealing with home rule for counties was passed in 1966.[55]

This series of constitutional changes resulted in a striking decision in 1969 in *Johnston v. Hicks*,[56] a case which dealt with zoning as well as home rule. While the earlier supreme court cases[57] held that an express grant of power was needed to exercise zoning power, and only local governments had been given this express grant, no case held that the General Assembly lacked the power to regulate the dimensions of the zoning power or establish the procedures that local governments must follow while exercising this power. In *Johnston*, however, the supreme court held that the 1966 County Home Rule Amendment had stripped the General Assembly of its power to regulate in the area of zoning and planning.[58] According to the court, the power was constitutionally vested in the county governments, and any attempt by the General Assembly to pass the provision in question, dealing with local zoning and planning, was "wholly beyond its power and without legal effect."[59]

Building upon the autonomy that *Johnston* had given local governments, the General Assembly in 1972 passed a provision known as Amendment 19.[60] This constitutional amendment authorized local governments to exercise powers and provide services in fifteen specifically named areas.[61] Several supreme court cases, construing home rule powers, were decided between the time of the passage of

54. 1953 Ga. Laws 504, Nov. Sess., amending GA. CONST. of 1945, art. XV, § 1, ¶ 1.

55. 1965 Ga. Laws 752, amending GA. CONST. of 1945, art. XV, § 2A, ¶ 1 (1966). This sequence of events led to a unique situation in Georgia local government law relating to all areas of home rule power except planning and zoning. The grant of power in the constitution to municipalities is permissive, and, therefore, it requires enabling legislation by the General Assembly. The grant to counties in the constitution is self-executing and requires no enabling legislation by the General Assembly. *See generally* Sentell, *Home Rule Benefits or Homemade Problems for Georgia Local Government?*, 4 GA. ST. B.J. 317 (1968); Howard, *supra* note 45.

56. 225 Ga. 576, 170 S.E.2d 410 (1969).

57. *See supra* § IIA.

58. Johnston v. Hicks, 225 Ga. at 580, 170 S.E.2d at 413. The court specifically addressed the conflict between article III, § 7, ¶ 23 of the constitution of 1945, which provided: "The General Assembly of the State shall have the authority to grant the governing authorities of the municipalities and counties authority to pass zoning and planning laws," and paragraph 3 of the Home Rule Amendment which embodied a self-executing grant of the power to zone and plan. *Id.* at 578-79, 170 S.E.2d at 412-13.

59. *Id.* at 581, 170 S.E.2d at 413.

60. 1972 Ga. Laws 1552. *See* Sentell, *Local Government "Home Rule": A Place to Stop?*, 12 GA. L. REV. 805, 807 (1978).

61. GA. CONST. of 1945, art. IX, § 3, ¶ 1 (1972).

this amendment and the passage of the new constitution in 1976. These cases raised serious doubts about the power of the General Assembly to regulate local government activities.[62]

In *Richmond County v. Pierce*,[63] the court extended its holding in *Johnston* and determined that the 1966 Home Rule Amendment had "vested sole authority over compensation [and] retirement . . . in the county governing authorities" and had "divested the General Assembly of authority to enact a retirement Act."[64] Then, in *Thompson v. Hornsby*,[65] a case decided under the enumerated powers of Amendment 19, the court held that because the amendment expressly included "police and fire protection," the state legislature could not enact a general statute which contradicted county action in those areas.[66] *Pierce* and *Thompson* appeared to indicate that the court was willing to give substantial autonomy to local governments and severely limit the state's power to act concurrently in areas delegated to local governments.

In 1976, Georgia adopted a new constitution. In this constitution, Amendment 19 was "editorially revised," with some significant language added.[67] This language declared that the General Assembly, except in the area of zoning and planning, could enact general statutes "regulating, restricting or limiting the exercise" of the powers conferred to local governments but could not "withdraw any such powers."[68] Additionally, the zoning language from article III of the 1945 constitution was incorporated into Amendment 19, thus further changing this section.[69]

In a case that the supreme court decided under the old Amendment 19 language, the court appeared to anticipate the language of the newly revised constitution clarifying the General Assembly's regulatory powers.[70] In 1976, the city of Atlanta passed an ordi-

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62. Richmond County v. Pierce, 234 Ga. 274, 215 S.E.2d 665 (1975); Thompson v. Hornsby, 235 Ga. 561, 221 S.E.2d 192 (1975).

63. 234 Ga. 274, 215 S.E.2d 665 (1975).

64. Richmond v. Pierce, 234 Ga. at 280-81, 215 S.E.2d at 670.

65. 235 Ga. 561, 221 S.E.2d 192 (1975).

66. Thompson v. Hornsby, 235 Ga. at 562, 221 S.E.2d at 195.

67. *See* Sentell, *supra* note 60.

68. GA. CONST. of 1976, art. IX, § 4, ¶ 2.

69. GA. CONST. of 1976, art. IX, § 4, ¶ 2 editorial note.

70. City of Atlanta v. Meyers, 240 Ga. 261, 240 S.E.2d 60 (1977). The 1976 constitution was proposed by the General Assembly during the 1976 legislative session. 1976 Ga. Laws 1198. It was ratified during the general election on November 2, 1976 and became effective on January 1, 1977. *See* editorial note preceding GA. CONST. OF 1976 (Harrison Code, Book 1A at 3 (1977)). Since *Meyers* was decided on November 8, 1977, after the 1976 constitution was effective, it seems that the 1976 constitution should

nance requiring police and fire department employees to reside in the city.[71] When the city's ordinance was challenged in *City of Atlanta v. Meyers*,[72] the city relied on its enumerated powers under Amendment 19, which included the power to provide police and fire protection services.[73] This ordinance, however, conflicted with a general statute that the state legislature passed in 1975, barring any municipality or county from requiring its employees to live within the particular local government's boundaries.[74] The court, in what appears to be a significant retreat from its earlier position, distinguished *Johnston v. Hicks*[75] and *Thompson v. Hornsby*[76] and held:

> There is no indication in the 1972 amendment [Amendment 19] . . . that the grant of power to counties and municipalities to provide certain services, and to enact ordinances to effectuate the powers given, was intended to preclude the General Assembly from enacting general laws affecting the manner in which the powers would be exercised.[77]

This decision seemed to indicate that the court would not continue to construe any grant of home rule power to local governments as a bar to the General Assembly's power to act concurrently with local governments in that area.

The "editorial changes" in the 1976 constitution clarified the power of the General Assembly to act concurrently with local governments in all areas, except zoning and planning.[78] Consequently, the court has had little problem finding that the General Assembly

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have been interpreted in *Meyers*.

The court in *Meyers*, however, held that the Atlanta city ordinance was "unconstitutional and void under the Constitution of 1945." *Meyers*, 240 Ga. at 264, 240 S.E.2d at 63. The court did not explain why it was construing the language of the 1945 constitution instead of the 1976 constitution. The court acknowledged that "[t]he 1972 amendment to the 1945 constitution [Amendment 19] . . . was in existence at the time the challenged city ordinance was adopted," *Meyers*, 240 Ga. at 263, 240 S.E.2d at 62; but it failed to explain why the 1945 constitution was interpreted in the case after the 1976 constitution was in effect. When the court stated that the ordinance was void under the 1945 constitution, it made a parenthetical reference without explaining the significance of this reference to the 1976 constitution. *Meyers*, 240 Ga. at 264, 240 S.E.2d at 63.

71. ATLANTA, GA., CODE § 11-1005 (1976).
72. 240 Ga. 261, 240 S.E.2d 60 (1977).
73. GA. CONST. of 1945, art. IX, § 3, ¶ 1(1) (1972).
74. City of Atlanta v. Meyers, 240 Ga. at 263-64, 240 S.E.2d at 62-63.
75. 225 Ga. 576, 170 S.E.2d 410 (1969).
76. 235 Ga. 561, 221 S.E.2d 192 (1975).
77. *Meyers*, 240 Ga. at 264, 240 S.E.2d at 63.
78. GA. CONST. of 1976, art. IX, § 4, ¶ 2.

is not precluded from enacting general laws dealing with the enumerated powers which the constitution grants local governments. For example, in *City of Mountain View v. Clayton County*,[79] the court held that "[t]here is no merit in [the] . . . argument that the 'Supplementary Home Rule' provision of the Georgia Constitution vests municipalities with almost autonomy and the General Assembly is powerless to withdraw the powers granted by the Constitution."[80]

This position was affirmed in *Clayton County v. Otis Pruitt Homes*,[81] in which the court stated that "[t]he General Assembly may by general law preempt a local law and may by general law restrict the manner in which a county regulates. . . . It is not unconstitutional nor a withdrawal of power by the General Assembly [to enact] state-wide regulations . . . which are binding upon local governments."[82] Another case, *State v. Golia*,[83] based on the municipal home rule provision of the constitution, reached the same result as that reached in *Otis v. Pruitt Homes*. In *Golia*, the court held that "[t]he mere fact that the General Assembly may have delegated to municipalities certain authority . . . does not raise a constitutional bar . . . prohibiting the General Assembly from legislating directly in that same area at a later date."[84] These cases established the rule that, even though the General Assembly has granted home rule powers to local governments, it may act concurrently through general legislation to regulate the exercise of that power.

The power of the General Assembly to act concurrently with local governments appears clear in all areas except one: planning and zoning. The revised Amendment 19 powers specifically prohibited the General Assembly from regulating in the area of "planning and zoning."[85] In 1977, in regard to this section of the constitution, and in light of Georgia's confusing history in home rule, the Attorney General concluded:

> The final stage in the evolution of localized planning and zoning is represented by Article IX, Section IV, Paragraph II

79. 242 Ga. 163, 249 S.E.2d 541 (1978).
80. City of Mountain View v. Clayton County, 242 Ga. at 167, 249 S.E.2d at 544.
81. 250 Ga. 505, 299 S.E.2d 721 (1983).
82. Clayton County v. Otis Pruitt Homes, 250 Ga. at 506, 299 S.E.2d at 722 (citation omitted).
83. 235 Ga. 791, 222 S.E.2d 27 (1976).
84. State v. Golia, 235 Ga. at 799, 222 S.E.2d at 33.
85. GA. CONST. of 1976, art. IX, § 4, ¶ 2(15).

> of the 1976 Constitution. This paragraph reiterates the grant of supplementary planning and zoning powers to cities and counties and provides further that "[t]he 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. . ." This prohibition is clarified and strengthened by other language in the paragraph[.]
>
> [Next, the opinion quotes the constitutional language which has been interpreted as allowing the General Assembly to enact general laws except in the area of planning and zoning.]
>
> Thus, this new provision of the new Constitution prohibits the legislature's enactment of any further legislation concerning planning and zoning.[86]

This long and complicated history of zoning and home rule in Georgia resulted in the conclusion that the General Assembly was barred from any activity in the area of zoning and planning. However, constitutional revisions in 1976 and in 1983 created significant changes and, from these changes, it can be concluded that the bar to the General Assembly's power in land use regulation no longer exists.

C. *Other Constitutional Changes Affecting Land Use Regulation*

In addition to the constitutional changes which resulted from the struggle to establish the legislature's power to zone and to grant local governments home rule powers, several other changes in the Georgia Constitution should be considered in a discussion of the state's power to regulate land use. In 1976, when the constitution was revised, a section was added to the article III powers of the General Assembly. This provision stated that 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."[87]

When this provision was enacted, one commentator believed that it was broad enough, by itself, to support a general land use law, such as the one which the Model Code envisions.[88] The com-

86. 1977 Op. Att'y Gen. No. 77-5, at 9. This opinion apparently caused the revisors of the Code to drop Chapters 69-8 and 69-12 from the Code when it was revised. These code sections dealt with municipal planning and zoning legislation and municipal planning commissions. *See* Adams, *"Out of the Midst of the Fire": Vignettes from the Code of 1981*, 19 GA. ST. B.J. 130, 133 (1983).

87. GA. CONST. of 1976, art. III, § 8, ¶ 3A.

88. Futrell, *supra* note 23.

mentator said, "This [provision] 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 or the American Law Institute's Model Land Development Code."[89]

This "vital areas" language, first inserted in the constitution in 1976, has been judicially scrutinized only twice. The court first examined this provision within the context of a challenge to the Metropolitan River Protection Act (MRPA).[90] This Act provides for the regulation of development along the "major streams in certain metropolitan areas."[91] In the Georgia Supreme Court's first consideration of MRPA in *Pope v. City of Atlanta* (*Pope I*),[92] the plaintiff, who desired to build a tennis court in her backyard next to the Chattahoochee River, challenged MRPA on the basis that the Act constituted "zoning." She argued that the state was precluded from acting in this area.[93] The court disagreed and held:

> The trial court erred in holding that the River Act constituted an attempt by the state to exercise zoning powers delegated by the Georgia Constitution to the local governing authorities. . . .[94] The state contends it validly enacted the River

89. *Id.* at 120 (footnotes omitted).

90. O.C.G.A. §§ 12-5-440 to -457 (Supp. 1987).

91. O.C.G.A. § 12-5-442(a) (Supp. 1987). It is interesting to note that MRPA was first passed in 1973 (1973 Ga. Laws 128), before the "vital areas" language was part of the constitution. In 1983, the following language was added to the statute:

> The General Assembly finds that the stream corridors of major streams in certain metropolitan areas as set forth in this part are vital areas within the meaning of Article III, Section VIII, Paragraph IIIA of the Constitution of the State of Georgia of 1976 and Article III, Section VI, Paragraph II of the Constitution of the State of Georgia of 1983.

1983 Ga. Laws 1059, 1063 (codified at O.C.G.A. § 12-5-442(b) (Supp. 1987)).

The supreme court considered the constitutionality of MRPA before the "vital areas" language was added to the Code, but after it was added to the constitution. *See infra* notes 92-98 and accompanying text.

92. 240 Ga. 177, 240 S.E.2d 241 (1977). This was actually the second time that Pope was before a court with her challenge. The first time she challenged MRPA was in federal court, Pope v. City of Atlanta, 418 F. Supp. 665 (N.D. Ga. 1976), on federal constitutional grounds. After losing there, she moved her challenge to state court. Besides the two cases discussed in the text, she was in court a fourth time, Pope v. City of Atlanta, 243 Ga. 577, 255 S.E.2d 63 (1979), at which time she won the right to build a tennis court within the flood plain based on the city's failure to rebut her evidence regarding the tennis court's impact.

93. *Pope I*, 240 Ga. at 178, 240 S.E.2d at 242.

94. At this point, the court cited the constitution as "Art. *XI*, § 4, ¶ II, Code Ann. § 2-6102(15)," as authority for this proposition. This appears to be an error as art. *IX*, § 4, ¶ 2 can be found in GA. CODE ANN. § 2-6102 (Harrison 1976); this section contains the language that the court subsequently quotes.

> Act under its police power.
>
> . . . .
>
> We conclude that the River Act does not constitute zoning within the definition set out in the Georgia Constitution . . . , but instead falls within the reserved powers of the state to act, along with the local governing authorities. . . .[95]

Pope I did not rely on the vital areas language of the constitution, but instead relied on the state's inherent police powers. When Pope returned to court, *Pope v. City of Atlanta* (*Pope II*),[96] this constitutional language was considered. First, the court made a broad statement about the state's inherent police powers:

> The inherent police power of the state extends to the protection of the lives, health and property of the citizen, and to the preservation of good order and public morals and is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of public interest.[97]

Next, the court quoted the vital areas language for support of the legislature's authority to regulate the land in question: "Further, in the area of environmental legislation, the state Constitution specifically authorizes the General Assembly 'to provide restrictions upon land use in order to protect and preserve the natural resources, environment and vital areas of this State.' "[98]

The "vital areas" language also was used to uphold the constitutionality of the Shore Assistance Act.[99] In *Rolleston v. State*,[100] the court said, "the Act is a valid land use regulation well within the ambit of legislative authority."[101] The vital areas language remains essentially the same in the 1983 constitution.[102]

In both the 1976 and 1983 constitutions, several significant changes were made in the local government provisions. In 1976, references to zoning and planning were eliminated from the County Home Rule Amendment of 1966[103] and added to the con-

95. 240 Ga. at 180-82, 240 S.E.2d at 244 (citations omitted).
96. 242 Ga. 331, 249 S.E.2d 16 (1978).
97. *Pope II*, 242 Ga. at 333, 249 S.E.2d at 18.
98. *Id.* at 333-34, 249 S.E.2d at 18-19.
99. O.C.G.A. §§ 12-5-230 to -246 (1982).
100. 245 Ga. 576, 266 S.E.2d 189 (1980).
101. Rolleston v. State, 245 Ga. at 579-80, 266 S.E.2d at 192.
102. GA. CONST. art. III, § 6, ¶ 2(a) states: "[T]he General Assembly shall have the power to provide by law for . . . [r]estrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas of this state."
103. GA. CONST. of 1976, art. IX, § 2, ¶ 1.

stitutional section dealing with supplementary powers.[104] The zoning and planning language was incorporated into what had been the list of powers originally found in Amendment 19.

This constitutional language addressing planning and zoning appears to reflect the holding in *Johnston v. Hicks*,[105] in that it explicitly prohibits the General Assembly from passing general planning and zoning laws. The constitutional provision, however, clarified the General Assembly's power to pass general laws in other areas. This provision stated:

> 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 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.[106]

The conclusion that this constitutional language reflects the holding in *Johnston* is further supported by the fact that the article III language regarding zoning and planning, which was the subject of the holding in *Johnston*, is incorporated into this section.[107] What had been in *Johnston* a conflict between two apparently irreconcilable sections of the 1945 constitution became, in the 1976 constitution, an express prohibition to the General Assembly's power.

In 1983, the constitution was revised again. The section granting home rule to counties (Home Rule Amendment of 1966) was extensively debated. An attempt was made to eliminate the lengthy grant of power to the counties and to substitute more concise language, similar to that used to grant home rule to the municipali-

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104. GA. CONST. of 1976, art. IX, § 4, ¶ 2. *See also* the editorial note following art. IX, § 2, ¶ 2 (1976), which says that changes were made to the Home Rule Amendment, deleting the language on planning and zoning.

105. 225 Ga. 576, 170 S.E.2d 410 (1969). *See supra* notes 56-68 and accompanying text.

106. GA. CONST. of 1976, art. IX, § 4, ¶ 2(15).

107. *See* Johnston v. Hicks, 225 Ga. at 578, 170 S.E.2d at 412 and editorial note following art. IX, § 4, ¶ 2 of the 1976 constitution, which says, "The Article III (Const. 1945, § 2-1923) language was added to define the power to plan and zone as used in this Paragraph."

ties.[108] However, this section of the 1983 constitution was not changed, and the home rule grant to counties continues to be the same as it was in the 1976 document,[109] as is the home rule grant to municipalities.[110]

Significant changes were made, though, in the Amendment 19 supplementary powers, which had embodied the earlier prohibitory language regarding planning and zoning.[111] All planning and zoning language was eliminated from the supplementary powers section.[112] Significantly, the only section of the constitution currently addressing zoning is a short paragraph which states, "The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power."[113] These substantial constitutional changes provide the basis for a strong argument that the General Assembly is no longer prevented from enacting general land use regulation statutes.

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108. *See* Busbee, *An Overview of the New Georgia Constitution*, 35 MERCER L. REV. 1, 13 (1983). Former Governor George Busbee was the chairman of the Constitutional Revision Committee. In reporting on the constitutional changes, he said:

> Home rule for counties continues to be provided for directly in the constitution, and home rule for municipalities continues to be provided for by statutory law.
>
> This brings to mind one of the most interesting conflicts that arose during the process of developing the new document. In the Committee on Article IX on Counties and Municipal Corporations, both the Select Committee and the Legislative Overview Committee thought that the County Home Rule paragraph in the constitution should be the same as that provided for municipalities. That paragraph, incidentally, is contained in forty-four words of text. This was not acceptable to the counties, whose consistent demand was that the only acceptable home rule provision would be an *exact* duplicate of the one contained in the 1976 document. The counties won the battle (a pyrrhic victory in the eyes of many), and the three and one-half page paragraph was substituted for the one containing forty-four words. There is one significant feature to this that will likely be overlooked by history. In the drafting of the new constitution, care was taken to eliminate every pronoun that might be considered "sexist" in nature. Since the counties would only accept exactly what they had, the words "he" and "his" each appear twice in article IX, section II, paragraph I. Unless an error was made that has not yet been found, words of that nature are used nowhere else in our modern document.

Id. at 13-14 (footnotes omitted).

109. GA. CONST. art. IX, § 2, ¶ 1.

110. GA. CONST. art. IX, § 2, ¶ 2.

111. *See supra* notes 103-07 and accompanying text.

112. GA. CONST. art. IX, § 2, ¶ 3.

113. GA. CONST. art. IX, § 2, ¶ 4.

III. Could Georgia Enact the Model Code?

This long, complicated history of the power to regulate land use raises serious doubts about the state's power to regulate land use because the enactment of legislation, such as that suggested by the Model Code, would affect zoning decisions by local governments. The ability of the state to regulate land use, therefore, involves the consideration of two basic issues:

(1) Whether the doctrine, recognized in Georgia, that an express grant of power is necessary in order for a governmental entity to zone precludes any activity by the state in general land use regulation.

(2) Even if the state possesses general land use regulation power, whether the supreme court's holding in *Johnston v. Hicks* precludes the state from acting concurrently with local governments in a way that would significantly affect zoning decisions.

A. An Express Grant to Zone

In considering the first issue, it is significant that the Georgia Supreme Court's decision in *Smith v. City of Atlanta*,[114] that the power to zone must come from an express constitutional grant, has never been reversed. The court, however, has occasionally referred to the "police power" when considering zoning and thus implied that the state's police power may provide some support for the state's power to zone.[115] If the supreme court were faced with a challenge to state legislation authorizing the state to zone, *Smith* and the other cases dealing with the source of the power to zone could be construed as a continuing bar to the constitutionality of possible state zoning legislation.[116]

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114. 161 Ga. 769, 132 S.E. 66 (1926). *See supra* notes 25-28 and accompanying text.

115. *See supra* note 43. *See also* Horne v. City of Cordele, 140 Ga. App. 127, 230 S.E.2d 333 (1976), in which the court considered the constitutionality of a municipal ordinance which allowed for destruction of dilapidated buildings. The court's language in regard to police power, relating to the governing authority's power over private property, was broadly worded. The court held that the destruction of a house as allowed under the statute without compensation would be valid if it were an exercise of the police power which is "government's inherent and plenary power over persons and property, having its origins in the law of necessity, which extends to all great public needs, sanctions the destruction of property for such purposes without recompense, and, as to the owner, constitutes damnum absque injuria." *Id.* at 129, 230 S.E.2d at 334.

116. *See, e.g.*, Hunt v. McCollum, 214 Ga. 809, 108 S.E.2d 275 (1959); Herrod v. O'Beirne, 210 Ga. 476, 80 S.E.2d 684 (1954); Commissioners of Glynn County v. Cate, 183 Ga. 111, 187 S.E. 636 (1936); Smith v. City of Atlanta, 161 Ga. 769, 132 S.E. 66

An important distinction exists, however, which supports state activity in land use regulation: "land use regulation" and "zoning" are not synonymous terms.[117] The Attorney General noted this distinction in 1974.[118] After addressing the question of whether the General Assembly could exercise zoning powers, he said:

> It has come to my attention that some question may exist as to the intended scope of the unofficial opinion on county and municipal zoning which we rendered you on January 25, 1974. In specificity it has been asked whether the opinion was intended to extend to the authority of the state itself to engage in planning or control over "land use."
>
> To resolve any possible doubt on this point, I would like to make it quite clear that the opinion was intended to deal solely with the questions asked. . . . [The opinion was] *not* intended to cover or extend to the question of whether the term "land use" differs from or is broader than the term "zoning"; and . . . *not* intended to deal with the extent to which the state may engage in land use planning and control to the extent that the terms may differ. The opinion of January 25 is not to be taken as an expression of views one way or the other as to these perhaps quite different and certainly equally complex issues.[119]

The conclusion that land use regulation and zoning differ is reflected in the Georgia Supreme Court's holding in *Pope I*,[120] in which the court concluded that the Metropolitan River Protection Act did not constitute zoning even though it affected land use.[121] The language in *Pope II*[122] also supports the view that land use regulation by the state is different from zoning. The court noted, "The type of land use restriction involved in this case is unlike zoning; therefore, the factors suggested in *Guhl v. Holcomb Bridge Road Corp.*, . . . for testing the reasonableness of zoning ordinances are inapplicable here."[123] The court also noted, "Our case

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(1926). *See supra* notes 25-44 and accompanying text.

117. *See, e.g.*, Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) (plan has been described as a general plan to control and direct the use and development; purpose of zoning ordinance is implementation of plan); Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975) (basic instrument for land use planning is comprehensive plan; zoning is the means by which the plan is effectuated).

118. 1974 Op. Att'y Gen. No. U74-9.

119. *Id.*, addendum of Feb. 4, 1974.

120. 240 Ga. 177, 240 S.E.2d 241 (1977).

121. *Pope I*, 240 Ga. at 182, 240 S.E.2d at 244.

122. 242 Ga. 331, 249 S.E.2d 16 (1978).

123. *Pope II*, 242 Ga. at 334-35 n.2, 249 S.E.2d at 19 n.2 (citation omitted). *See also*

. . . does not involve zoning but land use restrictions necessary for the public health and safety . . . ."[124] Therefore, because Georgia courts recognize that "land use regulation" is different from "zoning," it is possible to conclude that the state could regulate land use without an express grant of zoning power in the constitution.

Next, it is necessary to consider sources of the state's power to regulate land use. This power is derived from two sources. The first is the inherent police power of the state. Because the General Assembly's actions in the area of land use have been very limited, the court has had little opportunity to confront the question of the extent of the state's police power supporting land use regulation.

The court's only thorough treatment of this subject was in *Pope II*.[125] In that case, the court made a broad statement regarding the state's police power and its application to land use regulation. The court reasoned that "[t]he inherent police power of the state extends to the protection of the lives, health and property of the citizen, and to the preservation of good order and public morals and is . . . coextensive with the necessities of the case and the safeguard of public interest."[126]

Based on *Pope II*, it appears that the state does not lack the inherent police power necessary to regulate land use. However, one could argue that the court was willing to allow regulation of the river corridor in *Pope II* because little of economic value was at stake—only a tennis court. However, it should be noted that in its analysis, the court relied on several cases from other jurisdictions in which the courts balanced the state's power to regulate land use against claims of taking resulting from regulation that greatly di-

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the letter from Frank Edwards, Legislative Council, to members of the Georgia General Assembly, August 23, 1976, which accompanied the proposed 1976 Georgia Constitution in which changes were made in article ix and in the conflicting provisions of the 1945 constitution addressing planning and zoning. Mr. Edwards noted that "the General Assembly clearly distinguished the power to plan and zone from the power to enact land use legislation" in making these changes.

124. *Id.* at 337, 249 S.E.2d at 20. *See also* Futrell, *The Hidden Crisis in Georgia Land Use*, 10 GA. L. REV. 53 (1975). The author notes:

> The debate over the future of land use planning is complicated by the confusion in many quarters between land use planning and zoning. The two concepts are related, but are not synonymous. Land use planning is the broader concept, zoning being merely one of the several regulatory techniques available to land use planners and community officials. Planning is both broader in scope and continuous in nature.

Id. at 71 (footnotes omitted).

125. *Pope II*, 242 Ga. 331, 249 S.E.2d 16 (1978).

126. *Id.* at 333, 249 S.E.2d at 18.

minished property value.[127]

In *Pope II*, the Georgia court cited with approval *Just v. Marinette County*,[128] a leading case upholding regulation of wetlands against a taking challenge. In *Just*, the Wisconsin Supreme Court upheld the state's shoreland zoning act and concluded that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[129]

For support of its analysis in *Pope II*, the Georgia court also cited *Maple Leaf Investors v. Department of Ecology*,[130] in which the Washington Supreme Court ruled that the department's denial of a building permit in a flood plain was a valid exercise of the police power and was not a taking. In *Turnpike Realty Co. v. Town of Dedham*,[131] also cited in *Pope II*, the Supreme Judicial Court of Massachusetts held that land in a flood plain had not been unconstitutionally taken when its use was restricted to woodland, wetland, grassland, or recreational use.[132] In citing these cases, the Georgia court, therefore, acknowledged the legitimacy of the balancing of interests that the courts reviewing these challenges recognized.

A second source of the power to regulate land use is the express language of the vital areas provision in the Georgia Constitution.[133] This language grants the General Assembly power to regulate land

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127. *Id.* at 336-37, 249 S.E.2d at 20.

128. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

129. Just v. Marinette County, 56 Wis. 2d at 17, 201 N.W.2d at 768. *Just* was relied on in Graham v. Estuary Properties, 399 So.2d 1374 (Fla. 1981), to uphold a ban on a developer's plan to build a waterway. The court held that the waterway would have created serious environmental damage and ruled that to prohibit it was not an unconstitutional taking even though the developer claimed he could not survive economically without it.

130. 88 Wash. 2d 726, 565 P.2d 1162 (1977).

131. 362 Mass. 221, 284 N.E.2d 891 (1972).

132. While there has been no judicial interpretation of Georgia's power to regulate land use in a setting in which it extensively affects land use, the state has acted to affect land use on a broad basis. This has been done through the imposition of sewer connection moratoriums in rapidly developing counties around the city of Atlanta. *See, e.g.*, Laccetti, *State Tells Gwinnett to Impose Sewer Hookup Moratoriums*, Atlanta Const., Feb. 18, 1987, at 7A, col. 2. "State officials slapped Gwinnett County with a sewer moratorium — which effectively stops development in an area for a period of time . . . . Then last month the DNR [Department of Natural Resources] warned Gwinnett commissioners it would impose another ban if it did not bring down the number of gallons of sewage being treated . . . ." *Id.* at col. 3-4.

133. GA. CONST. art. III, § 6, ¶ 2(a)(1).

use "to protect and preserve the natural resources, environment, and vital areas of this state."[134] In *Pope II*, the court used this language, along with the state's police power, to support the constitutionality of the Metropolitan River Protection Act.[135] If a court were to broadly construe the vital areas language, this provision, by itself, could support broad land use regulation.[136]

Several arguments exist which would allow a court to find support in the vital areas language of the Georgia Constitution for an act similar to the one envisioned by the Model Code. First, an argument can be made based on construction of the words "vital areas." Although a Georgia court has yet to define this phrase, it could be used to support a wide variety of land use regulation. Any areas that could be considered "vital" to the state, for any number of reasons, could fall within the definition of vital areas.[137] In fact, it is possible to conclude that the phrase "vital areas" is synonymous with "critical areas" and, therefore, use this language to support the type of land use regulation which the Model Code envisions.[138]

A broad interpretation of the vital areas language in the Georgia Constitution also could support state regulation of development of regional impact, as this type of development is defined in the Model Code.[139] When major developments occur, there are always "spillover" effects which have an impact on the environment of the surrounding area, including many things that affect the quality of life for the citizens living in the particular geographic region. If the state were to regulate the "environment" around a major development, such regulation could include control of the quality of the air and water, as well as regulation of the resulting traffic congestion and noise.[140]

A number of courts in other jurisdictions have defined "environment" and have concluded that this term encompasses more than just the natural environment. Generally, these courts have interpreted the word "environment" as it is used in the National Environmental Policy Act (NEPA)[141] or a similar state law.[142] For ex-

134. *Id.*
135. 242 Ga. 331, 333-34, 249 S.E.2d 16, 18-19.
136. *See supra* notes 88-89 and accompanying text.
137. Kundell Interview, *supra* note 4.
138. MODEL CODE §§ 7-201 to -207 (1975).
139. MODEL CODE §§ 7-301 to -305.
140. Kundell Interview, *supra* note 4.
141. 42 U.S.C. §§ 4321—4370 (1982).
142. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (Consol. 1984).

ample, in *Jones v. United States Dept. of HUD*,[143] the court said, " 'Environment' means more than rocks, trees, and streams, or the amount of air pollution. It encompasses all the factors that affect the quality of life: crowding, squalor, and crime are obviously adverse environmental factors."[144] The court, in *Hanly v. Mitchell*,[145] reached a similar conclusion and explained:

> The National Environmental Policy Act contains no exhaustive list of so-called "environmental considerations," but without question its aims extend beyond sewage and garbage and even beyond water and air pollution. The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban "environment". . . .[146]

An expansive interpretation was also given to "environment" in *Goose Hollow Foothills League v. Romney*,[147] in which the court held that the effects on the environment included such things as changes in the character of the neighborhood and an increase in traffic.[148]

If the word "environment" in the Georgia Constitution were given a similar broad construction, the vital areas provision could be used to support state regulation of large developments. This intervention would be justified because large developments affect the quality of life of nearby residents by altering the surrounding environment.[149]

Even if such a broad interpretation were given to the word "environment," however, it would not justify state intervention into all planning and zoning matters. State intervention would only be justified when a development affects more than the local area. The

143. 390 F. Supp. 579 (E.D. La. 1974).
144. *Jones*, 390 F. Supp. at 591 (citations omitted).
145. 460 F.2d 640 (2d Cir. 1972).
146. *Hanly*, 460 F.2d at 647 (citations omitted).
147. 334 F. Supp. 877 (D. Or. 1971).
148. *See also* Township of Springfield v. Lewis, 702 F.2d 426, 449 (3d Cir. 1983) ("For NEPA to fulfill the vision of its drafters, the statute must encompass a broad spectrum of environmental and socioeconomic changes that would affect the quality of life."); City of Rochester v. United States Postal Serv., 541 F.2d 967 (2d Cir. 1976) (substantial environmental degradation could occur from increased commuter traffic to suburbs and by loss of jobs in inner city; therefore, these factors should be considered). For an example of a state court construing a state statute modeled after NEPA, see Tuxedo Conservation and Taxpayers Assoc. v. Town Bd. of Town of Tuxedo, 96 Misc. 2d 1, 408 N.Y.S.2d 668 (1978).
149. *See supra* text accompanying note 140.

legal standard which some state courts use, when determining whether state intervention is appropriate in a particular situation, is whether the activity is one of "statewide concern." Land use planning and zoning can be characterized as areas in which some matters are of statewide concern and other matters are predominantly of local interest.[150] If this standard were used in Georgia, the problems created by the constitutional grant of zoning power to local governments could be avoided. By recognizing a division of power between state and local governments based on the standard of "statewide concern," a court could hold that even though a local government has the power to zone, the state can become involved in land use regulation in a particular situation if the development implicates matters of statewide concern, whether these are critical natural areas or developments of regional impact.

The Model Code[151] also embodies a division of power between local and state governments, which would be appropriate under the constitutional doctrines established in Georgia.[152] The Model Code does not reflect a view that the state is to exercise "zoning" power. The reporters' comments support local and state governments sharing land use regulation power:

> Although this Article [Article 7] is titled "State Land Development Regulation," it is the local government's Land Development Agency that remains the primary regulatory body. . . .
>
> Although the Institute desires to see increased state participation in land use regulation, it does not seek to replace local regulation as the basic mechanism for controlling the use of land. The great majority of land use decisions do not involve matters of state or regional importance . . . . Local people will be familiar with the land and the specific conditions of the local community and may discern problems in a development proposal that would be too subtle for people not familiar with local conditions.[153]

The Model Code is designed to provide a mechanism enabling state and local governments to each perform the function for which they are best suited.[154] While both state and local government

150. Allison v. Washington County, 24 Or. App. 571, 548 P.2d 188 (1976). For other examples of courts applying the test of statewide concern, see Buchanan v. Wood, 79 Or. App. 722, 720 P.2d 1285 (1986) and Yost v. Thomas, 36 Cal. 3d 561, 685 P.2d 1152, 205 Cal. Rptr. 801 (1984).

151. *See supra* notes 5-23 and accompanying text.

152. *See supra* notes 24-43 and accompanying text.

153. MODEL CODE § 7-101 note at 255.

154. MODEL CODE art. 7.

functions involve land use regulation, only the local government function involves zoning.[155]

Enough evidence exists, therefore, both in the express language of the Georgia Constitution and in the cases construing the extent of the state's police power, to support a finding that the state possesses the power necessary to regulate land use.[156]

B. Home Rule and the Restriction of State Power

Assuming that zoning and land use regulation sufficiently differ to support the state's ability to regulate land use without an express constitutional grant to zone, it then becomes necessary to reconsider the court's holding in *Johnston v. Hicks*.[157] That decision has been interpreted to mean that an express grant of zoning power to one governmental entity forecloses any other entity from operating in that area.[158] Applying this reasoning, any land use regulation that affects the substantive aspects of a local government's zoning decisions would violate this principle.[159]

However, the language in the 1983 constitution and some recent supreme court decisions[160] support a conclusion that a Georgia court, faced with deciding the constitutionality of a statewide land use plan that would affect the local governments' zoning power, would find that statewide land use plan to be a valid exercise of the state's power. Significantly, if one considers the actual ruling in *Johnston*, it is evident that the court was faced with two conflicting provisions of the 1945 constitution. One provision gave the General Assembly power to grant zoning authority to the counties and the other gave the power directly to the counties.[161] The court, finding that these provisions conflicted, held that the later provision, granting direct authority to the counties, was an implied repeal of the earlier provision, which had allowed the General Assembly to exercise some regulatory control over zoning decisions.[162]

155. MODEL CODE § 1-101(1) note at 8.
156. *See supra* text accompanying notes 67-84.
157. 225 Ga. 576, 170 S.E.2d 410 (1969).
158. *See supra* notes 58-59 and accompanying text.
159. The General Assembly now has the express right to regulate the procedural aspects of zoning in the new constitution, art. IX, § 2, ¶ 4, which reads: "This authorization [of planning and zoning to local governments] shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power." *Id.*
160. *See, e.g., Pope II*, 242 Ga. 331, 249 S.E.2d 16 (1978).
161. 225 Ga. at 578-79, 170 S.E.2d at 412.
162. *Id.* at 581, 170 S.E.2d at 413.

Therefore, the court concluded that the General Assembly lacked the authority to pass the *local zoning* act questioned in that case. Applying the *Johnston* reasoning would not preclude a finding by the court that a *general planning* law was a constitutional exercise of state power.

Several other factors support the conclusion that *Johnston* no longer prohibits state level land use controls. One important factor is the text of the 1983 constitution. The passages that were the subject of the ruling in *Johnston* were revised in the 1976 constitution and became an express prohibition against state regulation of zoning activities.[163] The conflicting language was eliminated, and the power to plan and zone was given to local governments with express language prohibiting state action in zoning activities.[164] However, when the constitution was revised in 1983, the prohibitory language was eliminated. The only reference to zoning and planning is made in one short paragraph granting this power to local governments with no statement prohibiting state zoning action.[165] Therefore, if the court were to hold that the prohibitory language of article IX, § 4, ¶ 2(15) in the 1976 constitution embodied the principle established in *Johnston*, it could conclude that its absence from the 1983 constitution removes the barrier to state regulation of zoning. Because this prohibition was specifically removed from the Georgia Constitution, this conclusion appears to be a much sounder interpretation of the 1983 constitution than relying on a decision construing two conflicting provisions of the 1945 constitution, neither of which exist in the present document.[166]

In addition, several express constitutional provisions give the General Assembly power to regulate land use. These provisions include the vital areas language[167] and the language granting the General Assembly power to regulate local zoning procedures.[168] The language in these provisions could be construed broadly to

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163. GA. CONST. of 1976, art. IX, § 4, ¶ 2(15). *See supra* notes 103-06 and accompanying text.

164. GA. CONST. of 1976, art. IX, § 4, ¶ 2(15).

165. GA. CONST. art. IX, § 2, ¶ 4.

166. *See* Salem v. Tattnell County, 250 Ga. 881, 302 S.E.2d 99 (1983), in which the court held, "The General Assembly of this State is absolutely unrestricted in its power of legislation so long as it does not undertake to enact measures prohibited by the State or Federal Constitution." *Id.* at 882, 302 S.E.2d at 100 (quoting Tripp v. Martin, 210 Ga. 284, 288, 79 S.E.2d 521, 523 (1954)).

167. GA. CONST. art. III, § 6, ¶ 2(a).

168. GA. CONST. art. IX, § 2, ¶ 4.

support the constitutionality of the state's exercise of land use regulation power. The vital areas language by itself, as discussed earlier, could support a plan as envisioned by the Model Code.[169] In addition, the language of the new constitution allowing the General Assembly to regulate "procedures" could be used to support state activity in land use regulation.[170] This language has not yet been defined by a Georgia court, but its insertion in the constitution has resulted in the enactment of several statutes by the General Assembly. One act requires local governments to follow certain procedures regarding notification and publication of hearings about zoning and rezoning actions.[171] Another law requires certain large counties and municipalities to follow specified criteria when making zoning recommendations.[172] Neither of these laws contains any strong language regarding the state's power to regulate land use.[173]

In addition to the text of the constitution, support for state land use regulation is derived from the broad language in *Pope II*[174] describing the state's power in the area of land use regulation. The court did not rest the constitutionality of the river protection act only on the vital areas language of the constitution, but also made a broad statement regarding inherent police power to regulate the use of land.[175] While some commentators have noted the general hostility of the Georgia courts to the exercise of local governments' zoning powers,[176] this hostility is not evident in the few cases in which the court has had the opportunity to construe state level regulation of land use.[177] These factors, taken together, lend sup-

169. MODEL CODE art. 7. *See supra* text accompanying notes 87-89.

170. GA. CONST. art. IX, § 2, ¶ 4.

171. 1985 Ga. Laws 1139 (codified at O.C.G.A. §§ 36-66-1 to -5 (Supp. 1987) (the Zoning Procedures Law)).

172. 1985 Ga. Laws 1178 (codified at O.C.G.A. §§ 36-67-1 to -6 (1987)).

173. *See, e.g.*, O.C.G.A. § 36-66-2(a) (1987), which states that it "recogniz[es] and confirm[s] the authority of local governments to exercise zoning power within their respective territorial boundaries,"; O.C.G.A. § 36-67-3 (1987), which only requires a local government "which has established a planning department or . . . similar agency" to follow the criteria outlined in this law.

174. 242 Ga. 331, 249 S.E.2d 16 (1978).

175. *Id.* at 333, 249 S.E.2d at 18.

176. *See* Altman, Bolster, & Bross, *supra* note 43.

177. The only cases dealing directly with state land use regulations are *Pope I*, 240 Ga. 177, 240 S.E.2d 241 (1977), *Pope II*, 242 Ga. 331, 249 S.E.2d 16 (1978) (*see supra* notes 92-97 and accompanying text), and *Rolleston*, 245 Ga. 576, 266 S.E.2d 189 (1980) (*see supra* notes 98-100 and accompanying text). The only thorough analysis of the subject appears in *Pope I* and *Pope II*, and it contains broad language. *See* Futrell, *supra* note 124, at 97, in which the author suggests that a closer reading of the Georgia zoning cases will reveal a hostility to the "taking" of property and not an absence of

port to the view that the court would look differently at a state level plan to regulate land use, even if it continued the same line of reasoning that it has used in zoning decisions and its view that the state is precluded from zoning.

CONCLUSION

The general perception that the state has no power to regulate land use results from the supreme court's interpretation of planning and zoning power and the extent of autonomy associated with home rule. Initially, the court refused to find an inherent power to zone and continued to require that any zoning actions be based on a constitutional grant of power. In addition, after first refusing to grant any home rule autonomy to local governments, the court established the unique doctrine that a grant of the power to zone to local governments precluded any state action in this area.

These doctrines became embodied in the language of article IX of the 1976 constitution and embedded in the minds of Georgia legislators who generally enter into the area of planning and zoning with great reluctance and little feeling of authority.[178] However, as addressed in this Note, the general perception that the state legislature cannot act is no longer supported by the text of the constitution or by the state's public policy as articulated by the supreme court.

If such a law as the one envisioned by the Model Code were to be enacted by the General Assembly, and if its constitutionality were to be challenged, a strong argument could be made that it would withstand that challenge. In considering the constitutionality of such a law, it is likely that the court would rely on the few decisions it has rendered dealing with the state's involvement in land use regulation. These cases articulate a strong public policy argument, revealing that the court is fully aware of the pressing needs that such laws are designed to address in times of high growth rates and the accompanying problems. A reliance on this type of reasoning provides a much sounder basis upon which to evaluate this type of law than reliance on cases which construed language no longer included in the constitution and policies that were developed in a time when the public needs were different.

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state police power in this area. This hostility has not been exhibited in the few cases dealing with state level land use laws. In fact, one can read *Pope I* and *Pope II* and *Rolleston* as taking an entirely opposite position.

178. *See supra* notes 171-73 and accompanying text.

Importantly, the power to zone and the power to regulate land use are distinct. Therefore, even without a grant of zoning authority to the state, the supreme court's doctrines do not preclude a court from finding that the state may regulate land use through general law. In fact, the supreme court has articulated a strong public policy argument supporting state action in land use regulation. This argument is supported by the court's broad statements about the state's inherent police powers and by the court's interpretation of the vital areas language of the constitution.

In addition, the holding of *Johnston v. Hicks* no longer appears to preclude a finding of sufficient state power to act concurrently with local governments. While the language of the vital areas provision by itself probably supports a general land use law, this language, when coupled with the removal of the prohibitory language of the 1976 constitution that had embodied the holding of *Johnston v. Hicks*, makes such a finding by the court even more likely.

The language in the 1983 constitution granting local governments the power to zone supports only the conclusion that local governments have constitutional power to zone. Nowhere in the constitution is there a prohibition of the state's power to enact general land use laws. Similarly, the court, in modern cases, has not articulated any public policy arguments to support such a conclusion. Therefore, the perception that the state is powerless to act to regulate land use in Georgia lacks adequate support and appears to be a perception that no longer is valid.

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