

STORM WATER UTILITIES:

THE LEGAL ASPECTS

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CREATING THE STORM WATER UTILITY

In 1995, Brant Keller, the City of Griffin's Public Works Director, returned from a conference in Florida, very ecstatic about the concept of creating a storm water utility. He thought that, finally, a reliable source of funding could be created to address the multitude of problems his limited budget had never been allowed to address. Insightful of the future of water management, as well as blindly aggressive, Brant was not undaunted by the fact that Georgia had no established storm water utilities.

My challenge as the City's attorney became one of examining how other States had successfully tackled this issue, with the view toward issuance of a professional legal opinion that a storm water utility could be legally formed and operated under Georgia law. Needless to say, this entailed a tremendous amount of legal research, while at the same time, having to keep Brant from moving ahead too quickly in his zeal to have a utility up and running.

One of my early conclusions was that most cities, like the City of Griffin at that time, owned and operated some form of "storm water management system", which for purposes of this presentation I'll loosely define as a collection or network of drains, pipes, ditches, ponds and facilities whose purpose was to collect and dispose of storm water, generally rain falling upon the municipal street system, often coupled with "drainage systems" installed by developers and later dedicated to the municipal corporation for future operation and maintenance as a consequence of development. In

most cases, these systems were poorly designed and served only to transport water to the nearest river, creek, stream or lake. In the vast majority of cases, the municipal corporation has no specific legal rights to the waterway into which these waters are collected. In most instances, the management system was built or designed to control drainage or flooding, but some of the facilities were designed to retard the sedimentation and erosion created by development, with practically no consideration given to controlling other pollutants that might be carried in storm water.

My second conclusion was that, at that time, no municipality used any financial mechanism, other than appropriation from its General Fund, to finance storm water management, and in virtually all instances, this source of funding was woefully inadequate to address even the most basic needs of the community. Likewise, I found regulatory ordinances and development procedures in these cities to be ineffective to shift this cost onto the development community. Where proper regulations were in place, little effort, largely due to inadequate budgets, was committed to enforcement.

My last major conclusion was that Georgia local governments were not realistically committed to environmental protection, much less the more localized problems a property owner faced with drainage problems. From reading numerous cases in Georgia alone, it was evident that local governments have for years sought to deny their legal liability, while at the same time fostering and encouraging new development that has been the root of the problem.

This led me to conclude that Brant Keller was not a zealot with a wild obsession, but someone with the insight to recognize that within the near future local governments had to be prepared to effectively operate and manage their storm water problems. Brant

was particularly correct in recognizing a shift in emphasis from drainage control (flooding) to environmental water quality (non-point source pollution). Brant was also correct in determining that, to be effective, local governments must have a stable source of dedicated funding and the success of utilities in other states appeared to be the way to achieve this goal.

EDUCATING LOCAL GOVERNMENT: DEFINING THEIR LEGAL LIABILITY

I've been practicing in the local government arena now, representing municipal corporations, for over twenty years. The last fifteen years I've devoted almost exclusively to a municipal law practice, from which I've learned one thing, "if it ain't broke, don't fix it." Any new concept requires an incubation period before gaining acceptance with local elected officials. Particularly, they like to know who else is doing this and what problems they have encountered.

I told Brant, and our city manager at that time, that to create Georgia's first storm water utility, a lot of educating had to be done, starting with the governing authority. The way we went about this was to convince them through a series of discussions on legal liability that a duty exists, the scope of that legal duty, and the inadequate manner it had been addressed in the past.

At common law, the right to drain surface water, as between owners of adjacent land of differing elevations, was governed by the laws of nature. The owner of land which is the lower estate is bound to receive the waters which naturally fall upon the upper estate, *provided the industry of man has not increased the servitude*. **FARKAS v. TOWNS**, 103 Ga. 150.¹ This relationship is adopted by caselaw in Georgia and is not

¹ See **TYLER v. LINCOLN**, __ Ga. App. __ (1999), affirming grant of summary judgment to defendant on plaintiff's riparian rights claim, holding the doctrine was inapplicable since the excess run-off was

altered merely because the upper estate is owned by a local government. **BAKER v. MILLER**, 265 Ga. 486 (1995). Any time surface water is diverted from its natural drainage onto property of another, such conduct may constitute both a nuisance and trespass under Georgia law. **GOBLE v. LOUISVILLE**, 187 Ga. 243 (1954); **CITY OF MACON v. CANNON**, 89 Ga. App. 484 (1954).²

It has further been held in Georgia that the express power to open, grade and pave streets carries with it the implicit power for a municipal corporation to establish a storm drainage system. Such power does not include the right to redirect surface waters onto adjacent private property, to the landowner's detriment, and the owner may sue the government for damages if such a thing is done. **THRASHER v. CITY OF ATLANTA**, 178 Ga. 514 (1934); **CITY OF ROME v. BROWN**, 54 Ga. App. 6 (1936), aff'd 184 Ga. 34 (1937).

The duty on local government has several parameters. Not only must it design and construct its own storm drainage system so as not to divert water onto private property in such quantities as cause damage, it must be certain when accepting dedication of drainage facilities built by private developers that the system was properly designed and constructed; thereafter, the storm drainage system must be operated and maintained by government so that its operation does not constitute a nuisance. **CITY OF ATLANTA v. WILLIAMS**, 218 Ga. 379 (1962); **FULTON COUNTY v. WHEATON**, 252 Ga. 49 (1984); **DeKALB COUNTY v. ORWIG**, 261 Ga. 137 (1991); **PROVOST v.**

caused by the failure of a manmade structure. Right of action for damages affirmed under theories of nuisance, trespass and negligence.

² Due to counties still having governmental immunity in Georgia from commission of torts, including public nuisances, actions against a county are brought for inverse condemnation, which requires a physical invasion of plaintiff's property. See for example, **COLUMBIA COUNTY v. DOOLITTLE**, ___ Ga. ___ (1999).

GWINNETT COUNTY, 199 Ga. App. 713 (1991); **CITY OF LAWRENCEVILLE v. MACKO**, 211 Ga. App. 312 (1993).

The alleged failure of government to properly maintain portions of its public drainage system has led to an interesting series of cases. As I early stated, in many instances during my research, I found local governments had no express legal right to the watercourses within their jurisdictions into which storm waters are intentionally diverted. The **WILLIAMS** case involved a drainage easement in favor of the City across private property. After the City widened and resurfaced its street, the flow of runoff increased and eroded the plaintiff's yard outside the bounds of the established easement.

In **COLUMBUS, GA. v. SMITH**, 170 Ga. App. 276 (1984), the Court noted that a prescriptive easement could be acquired through adverse usage for 20 years of private property, but cautioned that during that time the government is subject to suit for damages, and, as the bounds of prescriptive easements are not ascertainable, the government is at constant risk of suit for flooding adjacent lands each time it rains. The Court teaches another lesson in **HIBBS v. CITY OF RIVERDALE**, 219 Ga. App. 457 (1995), wherein if the city claims a right to use the drainage system across private property, without the express legal right to do so, then it is under a duty to maintain it so that the content and flow of surface waters do not overflow to the damage of adjacent property owners.

It therefore seems that local governments have a duty to operate and maintain the drainage systems into which they intentionally divert storm water, whether from publicly owned streets and roads, the development of other public lands, or from private developments from which the local government, by dedication, has accepted the

responsibility (and liability) for operation and maintenance of the drainage system, regardless of whether the local government holds an express legal right to access, coupled with the right make improvements upon such real property. In this untenable circumstance, most Georgia local governments have elected to take no action unless, and until, someone complains or some major flooding is known to have occurred. How then should local government proceed when faced with a potential lawsuit for damages?

Deciphering the legal procedure found in the reported cases is quite confusing, particularly since the Court's frequently mix tort concepts with those of eminent domain and takings. In **CANNON v. CITY OF MACON**, 81 Ga. App. 310 (1950), the Court was troubled whether the events of flooding of plaintiff's property were sufficiently recurring to constitute a taking, opposed to continual trespass and nuisance. At issue was the proper measure of damages to be applied and the fact that the measure of damages in a condemnation do not take into account the contribution of joint tortfeasors, third-party contributors of stormwater other than the City who the plaintiff did not elect to sue. In this particular case, changing conditions upstream (new development permitted by both the City and Bibb County) increased the quantity of flow during large storms causing the creek flowing through plaintiff's back yard to overflow its banks. The Court resolved its dilemma by concluding the plaintiff's cause of action was in nuisance as the condition was one which the City had been aware of for some time. Thus, proper measure of damages were those actual and consequential damages proved by plaintiff at trial.

Similar facts can be found in **COLUMBUS v. MYSZKA**, 246 Ga. 571 (1980), which favored the theory of inverse condemnation, basing its award of damages on the concept of "just and adequate compensation". A more recent decision by the Georgia

Supreme Court, **COLUMBIA COUNTY v. DOOLITTLE**, ___ Ga. ___ (1999), also favored the Eminent Domain approach, holding plaintiff was entitled to the “same just and adequate compensation” for the taking of his property as if the County had initiated a condemnation action. Interestingly, these latter cases all involve situations of increased upstream development which over time result in increased servitudes on downstream properties.³

SHEALY v. UNIFIED GOV’T OF ATHENS-CLARKE COUNTY, __ Ga. App. ___ (2000) answers another procedural question in this area. If the local government is sued for inverse condemnation, trespass and nuisance, can it render the action moot by filing its own condemnation action? The Court held the original action was not rendered moot by service of the condemnation and that plaintiffs could recover damages as measured by the diminution of the value of their property to the date of condemnation, AND its normal damages in the condemnation. The jury in the condemnation cannot consider the value of the property at any time prior to the date of taking, which for purposes of this case was the date the condemnation was filed. Losses occurring prior to the date of taking are not recoverable in a condemnation proceeding. Even if the previous invasions were deemed as “takings”, damages for these takings are not a consequence of the instant taking.

From this discussion one can conclude local governments have various legal duties owing in relation to storm water management. Combined with the new environmental regulations that were coming forth in the mid-to-late 1990’s, it wasn’t too

³ While it has been held that a local government cannot be held liable for merely approving construction projects which increase surface water runoff, local governments appear to remain liable in nuisance where a pattern can be shown of approving upstream developments without consideration of the consequences downstream. This liability seems to arise from the fact the local government holds creation, power and control over the cause of the nuisance. **FIELDER v. RICE CONST. CO.**, __ Ga. App. ___ (1999).

hard sell on our Board of Commissioners that creating a stormwater utility appeared to offer a promising solution, particularly as regards the issue of dedicated funding, but what other problems would we encounter if we pursue this route?

CONSTITUTIONAL AND STATUTORY AUTHORITY IN GEORGIA

The Georgia Constitution at Article IX, Section II, Paragraph III (a)(6) provides: “In addition to and supplementary of all powers possessed by to conferred on any county, municipality, or any combination thereof, any county, municipality, or any combination thereof may exercise the following powers and provide the following services:...*Storm water* and sewage collection and disposal systems.” According to O.C.G.A. Section 36-82-62 (a)(3), a city or county shall have authority “to prescribe, revise, and collect rates, fees, tolls, or charges for the services, facilities, or commodities furnished or made available by such undertaking; and, in anticipation of the collection of the revenues of the undertaking.” Included in the statutory definition of “undertaking” is “systems, plants, works, instrumentalities, and properties... used or useful in connection with the collection, treatment, and disposal of sewage, waste, and *storm water*.” O.C.G.A. Sec. 36-82-61(4)(C)(ii).

In addition, being a municipal corporation, various powers are specifically granted under the City’s Charter, Georgia Laws 1921, p. 959, et seq. Included among these powers are the power to own and operate public utilities, including *sewers* (without express distinction between sanitary and storm sewers); the power to open, construct and pave streets and roads (which carries the implicit power to operate a drainage system); and the more general power to provide for sanitation, public health and welfare. It was

my conclusion the City of Griffin possessed the authority to own and operate a storm water management system for the benefit of its citizens.

Finding the City had the right to exercise these powers still didn't satisfy our inquiry into whether a system could be legally structured so as to operate as a "utility", rather than through imposition of a charge classified as a "tax". Research into what constitutes a "utility" in Georgia proved generally fruitless as that term doesn't appear to have a legal definition. Instead, it proved more helpful to look to the common characteristics of operations that municipal corporations have historically conducted as a "utility" for guidance.

As a point of reference, Article IX, Section IV, Paragraph I of the 1983 Georgia Constitution clearly states that counties and municipalities "may exercise the power of taxation" only as authorized by the Constitution and general law. At the time the City of Griffin adopted its Ordinance, there was authority to levy both ad valorem taxes and specified special purpose local option sales taxes for storm water management. Of course, there was no statute which specifically authorized creation and operation of a storm water utility in Georgia.

Through my research and working closely with the City's consultants, we developed an ordinance that I believe creates a "utility" and whose revenue mechanism we believe constitutes a "fee", and not a "tax". The secret to our success I credit to Hector Cyre, who meticulously developed the supporting data necessary to justify the fee structure imposed by our ordinance.

Since the City of Griffin adopted and put into motion its storm water utility, the City of Atlanta attempted to create a utility, was challenged legally, and unfortunately

was held in Superior Court to be levying an unauthorized tax, being neither an ad valorem tax or permissible local option sales tax. The City of Atlanta's ordinance imposed a formula which looks to the size of the parcel and the use of the property. Obviously being a case of "first impression" in Georgia, examination of the Court's analysis is in order.

FULTON COUNTY TAXPAYERS ASSOCIATION v. CITY OF ATLANTA, GA.

The Fulton County Taxpayers Association and Joseph L. Kelly, an individual land owner in the City of Atlanta, filed suit in Fulton County Superior Court, Civil File No. 1999cv05897, seeking to enjoin City of Atlanta Ordinance 1998-7 and for declaratory judgment that the charge imposed by this ordinance was an unauthorized tax on city property owners. The case was resolved by Final Order on the Parties' Cross-Motions for Summary Judgment, entered September 22, 1999. The City elected not to appeal this decision and, at last reports, was working to adopt a new ordinance.

Finding the City of Atlanta was authorized by the Constitution, general laws and its Charter to provide storm water management for its citizens, the Court thrust itself directly into the heart of the matter, noting it would not be bound by caselaw from other jurisdictions. The Court, citing **GUNBY v. YATES**, 214 Ga. 17 (1958), defined a "tax" as "an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not a payment for a special privilege or a service rendered." It further found the distinction between a tax and a fee is "that a tax is imposed primarily as a revenue-raising measure, while a regulatory fee, or license, is imposed under the police power and is intended primarily as a means of or an aid in regulating a particular occupation or activity." **HADLEY v. CITY OF**

ATLANTA, 231 Ga. App. 382 (1998). The Court found Atlanta's storm water utility fee to be a tax, more akin to an "assessment" since the formula used street frontage as an element in its calculation. One flaw noted by the Court was the city made no provision in its ordinance for the landowner who had no street frontage to pay the fee or for the landowner who has his or her own manner of disposing of storm water runoff, such as ponds or other systems.

Somewhat troubling language is found in the opinion, as well. The City argued that despite the fact not all landowners subject to payment of the fee received a direct benefit (and others received disproportionate benefits), the mere existence of the storm water utility creates an *inchoate* benefit to all landowners. The Superior Court rejected this position, citing **MONTICELLO, LTD. v. CITY OF ATLANTA**, 231 Ga. App. 382 (1998) and **MAYOR & C OF SAVANNAH v. KNIGHT**, 172 Ga. 371 (1931), holding that a municipality cannot impose a fee for services that have not been provided. If the fee were an "assessment", an assessment levied in excess of the benefit provided arbitrarily deprives a person of his property.

Despite this Superior Court's concern over the fact Atlanta's ordinance had taken "an item which was once paid for by the general fund and recharacterized it as a separate and distinct fee without any corresponding decrease in taxes.", the Court didn't opine that a true storm water utility could not be created consistent with Georgia law. Thus, I now want to discuss the City of Griffin's ordinance, which is provided as an attachment to this presentation.

CITY OF GRIFFIN STORM WATER UTILITY ORDINANCE⁴

Andy Reece and Hector Cyre will address in detail the engineering considerations behind this ordinance, as well as the work the City of Griffin did to detail sufficient support data to justify the need for creation of the utility. The first section, FINDINGS, is very critical since it demonstrates the degree of effort put forth to be sure creation of a utility was done correctly.

Subparagraph (g) recognizes that “Impervious surface is the most important factor influencing storm water service requirements and costs posed by properties throughout the City”, and therefore is used as the factor for calculating both service charges and associated credits.

In the second section, note the establishment of the storm water enterprise fund, as a fund separate and apart from the General Fund, into which all revenues generated by the utility are dedicated. This section also transfer possession and control over City-owned assets comprising the storm water management system to the utility.

Section three consists of definitions particular to this ordinance. A lot of work went into this section of the ordinance. Note under the definition of “Undeveloped Land” we elected to establish a “de minimus” threshold.

The fourth section, scope of responsibility for the public drainage system, attempts to convey the City of Griffin has accepted the obligation of maintain its drainage corridors. We are currently evaluating an extensive streambank mitigation program through the utility, which will not only improve water quality, but will allow the City to preserve open space and greenbelts by obtaining conservation easements on lands

⁴ The original ordinance was adopted in 1997 and has been revised twice. This is the third revision and addresses some concerns raised in the City of Atlanta decision.

adjoining streams, mostly in floodways which cannot be developed today, but over which the local government has no current rights or control. The second paragraph in this section is the legalese which every good local government lawyer should put in ordinances to protect his client.

Under the fifth section, the City establishes its drainage standard of “no net increase of water flow onto adjacent lands, unless the land owner consents to the proposed drainage design. In combination with the City’s separate Soil Erosion and Sedimentation Control Ordinance, all drainage systems must pass through approved sedimentation or detention facilities before discharge into the public drainage system. Also, enforcement of private drainage requirements is founded on this section, using the City’s power to bring nuisance abatement actions in our Municipal Court

The remainder of the Ordinance deals with storm water service charges, classifications of service, and exemptions. Hector and Andy will discuss these issues in their presentations.

CONCLUSION

In conclusion, I feel the City of Griffin has a legally defensible ordinance, which creates a storm water utility consistent with Georgia law. At the same time I make this broad assertion, I hasten to point out that we have not been “court-tested”.

With the second phase of the Clean Water Act amendments now becoming effective, local governments will be dealing with more than just water quantity problems. They must be able to deal with the environmental impacts of storm water runoff and that cannot be done without a reliable and sufficient source of funding.

The use of the utility concept provides a sensible method of meeting our future needs. If properly designed, supported by solid planning based upon quantifiable data, such utilities should become as commonplace in Georgia as in the numerous other states that have already established them.