LEGAL IMPLICATIONS OF CREATING A STORMWATER MANAGEMENT UTILITY

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Municipal corporations have long been subject to suit for their inarticulate handling of stormwater runoff. In many cities, our road and street infrastructure is aging and no longer sufficient in design or capacity to handle the demand of frequent storms shedding water upon densely developed urban areas. The City of Griffin is no exception to the problem of not enough money to solve a growing list of burdens.

Three years ago, our Public Works Director returned from a conference in Florida very excited about the concept of creating a stormwater management utility for the City of Griffin. He had learned that over 20 states now have such utilities in place and that this list is growing. My challenge was to determine how other Georgia local governments were addressing this problem and to opine whether, under Georgia law, a municipality could start a stormwater management utility.

Stormwater management systems address the issues of drainage management (flooding) and environmental quality (pollution, erosion and sedimentation) of receiving rivers, streams, creeks, lakes, ponds and reservoirs through improvements, maintenance, regulation and funding of plants, works, instrumentalities, and properties used or useful
in the collection, retention, detention and treatment of stormwater or surface water drainage. Traditionally, municipalities have used general funds, revenues raised by the levy of ad valorem taxes, to address stormwater problems as they occur. Just as traditionally, many governments try to deny the existence of such problems, and certainly have denied any liability for their creation and maintenance.

The concept of a utility logically lends itself to providing a stable source of funding, with all revenues received dedicated to being expended on long-range solutions. In practice, a stormwater management utility operates similarly to those established for water, sewerage, electricity or natural gas.

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WHY WOULD ANY SANE CITY DO THIS?

At common law, the right to drain surface water, as between owners of adjacent lands 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 fill upon the upper estate, provided the industry of man has not increased the servitude. FARKAS v. TOWNS, 103 Ga. 150. This relationship was adopted in the caselaw of Georgia, BAKER v. MILLER, 265 Ga. 486 (1995), and is not altered merely because the upper estate is owned by a local government. CANNON v. CITY OF MACON, 81 Ga. App. 310 (1950), ANDERSON v. COLUMBUS, 152 Ga. App. 772(1979). Where surface water is diverted from its natural drainage onto the property of another, such conduct may constitute a nuisance, GOBLE v. LOUISVILLE, 187 Ga. 243 (1954), and is actionable even without the presence of an element of danger to the public health, CITY OF MACON v. CANNON, 89 Ga. App. 484 (1954).

Most local governments own a system of streets, roads and bridges, which are constructed, owned and operated for the public's benefit. The express power to grade and open streets implicitly carries with it the power of local governments to establish a storm drainage system. This power does not include the right to redirect surface waters onto adjacent private properties, 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).

Therefore, the duty on the local government is two-fold. It must adequately design and construct its drainage system so as not to divert water onto private property in quantities above that of its natural flow so as to cause damage, and thereafter it must maintain the drainage system so that its operation does not constitute a nuisance.

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In looking specifically to the issue of design and construction, local governments have traditionally sought to use those natural drainage components, such as creeks and streams, as opposed to acquiring easements. In several cases I noticed a trend where the local government diverted water from its property, such as a new street, into a catchbasin that emptied at the edge of the right-of-way onto private property. See, for example, CITY OF ATLANTA v. WILLIAMS, 218 Ga. 379(1962). From that point, water generally flowed to a low-point, such as a dry wash or small creek. The problem in this type case is the government hasn't acquired an express drainage easement through which to drain the water, i.e. there are no ascertainable bounds of the area to be flooded. While prescriptive easements may be acquired through adverse usage for 20 years, continuing invasions of surface water amount to a continuing trespass, which is the equivalent of a continuing nuisance. HIBBS v CITY OF RIVERDALE, 219 Ga. App. 457(1995).

'Under the facts of this case, the City enlarged Campbellton Road. A new catchbasin carried surface water off the street and emptied about 6' behind the curb. Water ran down across Williams' yard to a small creek behind his house. After each rain, Williams complained of erosion of his yard, water ponding in small pools, and deposits of trash and filth. Over time, this condition caused the uprooting of large trees near the creek bank. If the city claims a right to use the drainage system across private property, through which it holds no 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. COLUMBUS, GA. v. SMITH, 170 Ga. App. 276 (1984). As the bounds of prescriptive drainage easements are not ascertainable, the local government is at constant risk of suit in nuisance for flooding adjacent lands each time it rains. Keep in mind that through erosion, water tends to forge its own course and is continually shifting.

As cities grew and developed, impervious surfaces, other than public streets and roads, were created compounding the local government's liability exposure. Private developers (owners) built houses, stores and factories, often diverting the surface waters from their lots into the streets. Some diverted their waters directly into the municipal drainage system; while others constructed their own systems then publicly dedicated the drainage system to the local government. Upon acceptance of dedication of the drainage system, the local government becomes responsible for the maintenance and repair of the system. CITY OF LAWRENCEVILLE V. MACKO, 211 Ga. App. 312 (1993). This responsibility includes rebuilding those systems, which were not adequately designed or properly constructed before dedication was accepted.
Another frequently reoccurring situation found in these cases involves the local government's failure to make downstream improvements to its drainage system due to the approval of upstream development. The **CANNON case**, cited earlier, and **CITY OF COLUMBUS v. MYSZKA**, 246 Ga. 571(1980), which cites 8 similar cases, offer good examples.

CANNON turned on the "takings" clause, now found at Article I, Section III, Paragraph I of the 1983 Constitution of Georgia, that private property shall not be taken or damaged for public purposes without just and adequate compensation first being paid.

A city does not assume responsibility for a property dedicated to the public use unless it has **accepted** that dedication, and such acceptance may be direct or implied. The mere filing of a plat by a developer showing drainage easements and a retention pond with an easement as dedicated 'to the use of the public

The City of Macon tried valiantly to defend its conduct under the doctrine of sovereign immunity, but the Supreme Court rejected this notion by concluding a municipality may be liable for damages arising from a nuisance it creates, despite its immunity from negligent performance of its governmental powers.

At the time the City first began diverting water from its streets into this creek, the creek had well-defined and actual banks capable of carrying the flow. Development of a shopping center upstream created more impervious surface within the drainage basin, while some downstream piping created an obstruction. Changing conditions rendered the drainage system inadequate and this was a condition known to, or which had existed for a sufficient time that it should have become known to the City.

Keep in mind that the Cannons sued only the City of Macon for failing to maintain its drainage system. The facts do not state that the City held an easement or other property rights to the creek, nor do they recite that the Cannons ever sued their neighbor, who piped the creek through his property. And what about the shopping center developer, whose construction changed conditions at this location? I point this out because the liability normally should be shared by the joint tortfeasors, yet the policy of the law places the sole burden on local government to maintain and improve, as necessary, its drainage system.

forever" is a mere offer until accepted. **HIBBS v. CITY OF RIVERDALE**, ___Ga. App. - (Case No. A95A1274, decided 7/15/97).

The facts recite that Mrs. Cannon notified the City each time the creek began to flood. On one or more occasions, the City sent a crew to remove obstructions from the creek,
which seems to "satisfy" the Cannons. It was only after heavier rains that caused flooding to reach the house, that the suit was filed.

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The rationale rests in the fact that Georgia law governs damages in these actions by the rules in a condemnation action. *Wilmoth v. Henry County*, 251 Ga. 643 (1983); *Fulton County v. Wheaton*, 252 Ga. 49 (1984). Once a local government is called upon to pay damages for, in essence, the taking of private property, it should at least receive from the court an order granting it some permanent right to flood the area without further monetary liability. Yet, in a number of these cases, I found that the property owner sought injunctive relief against the reoccurring condition and compensatory damages for the surface water invasion as though it would never reoccur.

The cases cited above all involve municipal liability for water quantity. Today, many local governments are facing newly emerging duties, and attendant liability, for water quality. The U.S. Environmental Protection Agency recently announced new pollution limits for Georgia’s 14 river basins. With new regulations imposed to settle claims in the case of *Sierra Club, et al. v. Hankinson*, 939 F. Supp. 865 (N.D. Ga. 1996), the State will soon begin intensive monitoring of waterways throughout Georgia.

Georgia EPD's Water Quality Director Alan Hallum, commenting upon the settlement in the August 8, 1997 edition of The Atlanta Constitution, stated "In the past, communities have only worried about providing services, wastewater or drinking water. Very little thought was given to how we are using the land and its impact on receiving streams."

5 The imposition of "development impact fees" may be used to finance facilities for storm water collection and flood control. Since impact fees are an exaction imposed as a condition for development approval, separate consideration should be given to whether a developer who pays an impact fee can also be required to pay a monthly fee under a storm water management utility.

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The State must now set limits on each river basin, or segments thereof, by various deadlines set forth in the settlement agreement. These range from June 30, 1999 for the Savannah River to June 30, 2003 for the Tallapoosa. Local governments will be required to begin "non-point source pollution" monitoring as these limits are established. Within 18 months after the limits are set, the State must begin cleanup and enforcement action. Most likely, local governments will have to obtain a permit from the State for its municipal drainage system and be subject to penalties if permit limitations are exceeded. In the end, these environmental standards will force local governments to rethink their
land-use policies, restricting growth and shifting more cost onto those businesses and industries that have the greatest impact.

CONSTITUTIONAL AND STATUTORY AUTHORITY

Attached to my paper are two ordinances adopted by the Board of Commissioners of the City of Griffin. Collectively, these ordinances constitute the legislation creating Georgia's first stormwater management utility. Space does not allow me to include several studies prepared by the City's consulting engineers, Ogden Environmental and Energy Services, and Water Resource Associates, Inc. These two companies have combined to successfully develop stormwater management utilities in over a dozen states. In the Southeast, Ogden has worked in Florida, North and South Carolina, Tennessee, Kentucky and Virginia. Water Resource Associates created some of the first stormwater management utilities in the Pacific Northwest.

6 Pollutants and waste traced to more than one particular source. It can include storm water runoff from streets and parking lots, animal waste, or materials carried through erosion and sedimentation due to development.

7 At the outset, I was afraid to venture too far without assurance of express authority in Georgia to create and operate a stormwater management utility. Consideration was given to seeking new legislation, as was the case in North Carolina, but discussion with several key legislators convinced me to forge ahead based upon the law as now exists.

Article IX, Section II, Paragraph III of the 1983 Constitution of Georgia grants certain enumerated powers to all counties and municipal corporations in Georgia. Among this laundry list of powers are "Storm water and sewage collection and disposal" systems; provided, however, subparagraph (b) of Paragraph III limits the provision of services, under the authority of this Paragraph, to the entity's territorial boundaries, unless otherwise provided by law.

Such a law may be found at O.C.G.A. Section 36-82-61, The Revenue Bond Law of Georgia, where an "undertaking" is defined to include "Systems, plants, works, instrumentalities, and properties... used or useful in connection with the collection, treatment, storage and disposal of sewage, waste, and storm water". Any governmental body (counties, municipalities, and certain public authorities) shall have the power under The Revenue Bond Law "to operate and maintain any undertaking for its own use, for the use of public and private consumers, and for users within and outside the territorial boundaries of the governmental body"; and "to prescribe, revise, and collect rates, fees, tolls, or charges for the services, facilities, or commodities furnished or made available by such undertaking". O.C.G.A. Sec. 36-83-62. It has been said that The Revenue Bond
Law modified the Charter of every municipal corporation as to its grant of powers. 


A third source of statutory authority for municipal corporations may be found at O.C.G.A. Sec. 36-35-3, the "Municipal Home Rule Act of 1965", which provides: "The governing authority of each municipal corporation shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which are not inconsistent with the Constitution or any charter provision applicable thereto."

Thus, there appears to be express legal authority for a Georgia municipal corporation to construct, own and operate the facilities and structures necessary to collect, treat and dispose of stormwater, and to impose charges for the services rendered. But my research revealed no reported cases under any of the above-stated provisions discussing the exercise of such powers as relates to stormwater. Such broadly worded authority, frankly, leaves many questions unresolved. While the vagueness associated with these broadly worded powers doesn't impose a limitation on local government, the lack of objective criteria within the Constitutional provision and statutes may open the ordinance to future legal challenge.

**TAX OR UTILITY FEE**

The City of Griffin held five public hearings before adopting its ordinances. These served a public education function as the first two were designed to focus public attention on the problems of flooding and water quality. The third hearing came just after release of the engineering report on the need for the utility and elicited comment on that report. The fourth preceded the adoption of the first ordinance and the fifth focused upon the rate ordinance.

Each hearing invoked more attention and public participation. The concept now has its supporters and opponents, but has generally received the endorsement of our local news media. This Fall, the City will start a public relations campaign through civic club speeches, insertions in its monthly utility bills, and in the local press.

The most compelling argument against the utility that I have heard thus far is what the City contends is a "utility fee" is in reality a tax. This has also been an issue in most states where the concept of stormwater utilities have been litigated. Unfortunately, Georgia law is not abundantly helpful on this point.
Georgia law does distinguish between the provision of sewer and sanitary services generally viewed as a governmental service, and electricity, gas, or water service, generally held to be proprietary functions. For the latter, the business affairs of a municipality are committed to its corporate authorities and the courts will not interfere except in a clear case of mismanagement or fraud. *Glendale Estates v. Mayor & Council of Americus*, 222 Ga. 610(1966). Electricity, gas, or water furnished by a municipality are "goods" within the provisions of the Uniform Commercial Code, Article 2 on Sales. Parties are free to make whatever contracts they please so long as there is no fraud or illegality. In the absence of a contract, there is a continuing offer by the city to sell its commodity, and an acceptance by the consumer who draws the commodity through its meter. *Zepp v. Mayor & Council of Athens*, 180 Ga. App. 72(1986).

On the other hand, municipal corporations must have express authority to levy a tax. The tax becomes a lien upon the property benefited and its owner is chargeable. In case of a failure to pay the tax, execution shall issue *in rem* against the property benefited by the service and *in personam* against the owner thereof. 10

*North Springs Shopping Center v. Tustian*, 229 Ga. 699(1972); *Pease v. City of College Park*, 155 Ga. App. 122 (1980). Providing the infrastructure for sewer collection and treatment is generally recognized as a governmental service, for which municipal corporations are authorized to levy a tax or assessment on those properties benefited. With this function normally comes an attendant obligation to make the service available within the service district. *Denby v. Brown*, 230 Ga. 813(1973). See also. *Humming v. City of Woodbine*, 253 Ga. 255 (1984) where a monthly "base fee" imposed on properties accessible to public sewer, but not connected to the system, was held to be a tax or assessment.

On the surface, these cases are cause for concern, especially since the ordinances creating the utility are based on the premise that all properties within the City having impervious surfaces will benefit from the utility's management program and facilities. On the other hand, Georgia law is quite similar to that of Florida, which has consistently held stormwater utility fees were "non-ad valorem revenue sources", imposed by ordinance under the municipal home rule provisions of the Florida Constitution and not a tax. *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So.2d 180 Fla. 1995). 8

7Our caselaw tends to use the terms "tax or assessment" very loosely. Cases from outside of Georgia often make a distinction between the two, i.e. there is no requirement that taxes provide any specific benefit to the property and &e levied throughout the taxing unit for the general benefit of residents and property. On the other hand, assessments must confer a special benefit upon the land burdened by the assessment.

8This case also upheld the County's use of imperious surface as the basis for its utility fee and concluded that churches and other non-profit organizations were not exempt from payment of the fee on their property.
WHERE DO WE GO FROM HERE?

On July 1, 1998, the City of Griffin anticipates it will begin billing stormwater utility customers. I have approached the establishment of the utility with the expectation the City may be tested both judicially and legislatively. Some citizens have already vowed they will not pay the fee and will challenge it in court as a tax. A member of our local legislative delegation requested an opinion from the Attorney General and indicates he may seek legislation on this subject in the 1998 Session. The local board of education passed a resolution accusing the City of imposing an "unfunded mandate".

On the other hand, the environmental mandate is now clear. Local governments can no longer continue with "business as usual". The funding of a stormwater management program that addresses water quality using the utility concept makes good sense. It assesses the cost of the program to its beneficiaries based on their relative contribution to its need.

In closing, let me say I hope to come before you at a future meeting and tell you the City of Griffin's venture into this area was a resounding success. Hopefully, our efforts will serve as a model for other local governments in Georgia.