FIVE FEET HIGH AND RISING:
USING NUISANCE LAW TO ADDRESS FLOODING FROM DEVELOPMENT AND MISMANAGED STORMWATER

Kasey Sturm
WEISSMAN PC
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, Georgia 30326
kaseys@weissman.law

Whether we are fighting over too much water or too little water, rapid growth and development in Georgia continues to be one of, if not the driving factor in the debate. With development again booming across the state, almost everyone is familiar with the pressures and impacts brought on by residential and commercial development.

Most of the rain that falls on undeveloped land is absorbed into the ground. But when land is developed, and the property is covered with impervious surfaces such as buildings, rooftops, parking lots, driveways, sidewalks, and roads, rainfall cannot be absorbed and flows onto adjacent land in higher volumes and at higher velocities than if the land had remained in an undeveloped state. This additional runoff damages properties in various ways. Additional runoff increases the risk of flooding for nearby properties and also contributes to water pollution because the stormwater collects dirt, debris, oils, chemicals, and other materials on the pavement and other impervious surfaces as it travels towards natural waterways. Stormwater runoff from impervious surfaces also damages property and impairs water quality through erosion and sedimentation. In some cases, portions of streams or lakes become silted in leaving a property owner with dry land where he or she once enjoyed a flowing stream or where he or she was once able to fish, swim or boat. More often than not, sedimentation of

streams and lakes also decreases the capacity of such streams and lakes, and increases flooding of nearby properties.

While responsible developers understand the impact their developments may have on neighboring properties, and undertake their projects with minimal impact to their neighbors, a subset of developers continue to shirk their responsibilities and obligations under the law, often inflicting high costs and damages on their neighbors and the environment. Too often, developers cut financial corners when implementing erosion and sediment controls or when building storm water systems, by constructing systems that are severely undersized and incapable of handling the actual volume and velocity of storm leaving the site.

With local jurisdictions often in a position to benefit financially from increased development, some jurisdictions are better than others in ensuring responsible development practices are followed through permitting requirements and enforcement measures. With increasing development, counties and municipalities can find themselves in trouble as well, struggling to install and maintain appropriate sewage and storm water systems. Too often, private property owners are left to bear the brunt of increased storm water flows from development and antiquated and/or improperly managed storm water systems.

Surface Flow Diversion in General

As a general proposition, a property owner is obliged to use his or her property in a manner that will not harm others in the use of their property. With regard to water, if one takes no steps to alter the natural flow of water from his or her property, he or she is not liable for damage that results to an adjoining owner's property from such flow. In

surface water run-off disputes, the owner of a lower tract of property owes a servitude to the owner of an adjoining higher tract and is required to receive surface waters which normally flow from the higher lot." *West v. CSX Transportation, Inc.*, 230 Ga. App. 872, 874 (1988); *Rinzler v. Folsom,* 209 Ga. 549, 552(1), 74 S.E.2d 661 (1953). However, the owner of the higher tract has no right to concentrate and collect water and thus cause it to discharge upon the land of a lower property "in greater quantities at a particular locality or in a manner different from that in which the water would be received by the lower property if it simply ran down upon it from the upper property by the law of gravitation. " *Sumitomo Corp. of America v. Deal*, 256 Ga. App. 703, 704 (2002). Although property must accept the natural runoff of water from neighboring lands, an artificial increase or concentration of water discharge may give rise to a cause of action *Green v. Eastland Homes, Inc.* 284 Ga. App. 643 (2007).

Using Nuisance Law to Combat Flooding and Other Stormwater Impacts

The diversion of surface water or storm water, including from real estate development, often harms adjoining and downstream properties and the environment, giving rise to a variety of claims. The most common: continuing nuisance and continuing trespass claims. However, additional claims are also available. Local, state, and federal environmental laws provide a basis for negligence and negligence per se claims. Where a developer dams or fills in streams, a riparian rights claim might also arise. An impacted property owner can also seek equitable relief in the form of a temporary or permanent injunction. Against a local governing authority, an impacted property owner may pursue an inverse condemnation claim, in some instances referred to as nuisance taking claim. This paper will discuss nuisance claims arising from storm

water and surface water flows generally, with a focus on claims against counties stemming from storm water /surface water diversion and mismanagement.

Nuisance Defined

A nuisance is any act or condition that causes hurt, inconvenience, or damage to another even when the act or condition may otherwise be lawful. O.C.G.A. § 41-1-1. OCGA § 41–1–1 provides, "[a] nuisance is anything that causes hurt, inconvenience, or damage to another and *the fact that the act done may otherwise be lawful shall not keep it from being a nuisance*. The inconvenience complained of shall not be fanciful, or such as would affect an ordinary, reasonable man." (Emphasis supplied.) Lawful acts become nuisances when they are conducted in a manner causing hurt, inconvenience , or damage to another. See *Sumitomo Corp.*, supra, 256 Ga.App. at 707–708(3), 569 S.E.2d 608(construction of detention pond in lawful manner did not prevent pond from becoming a nuisance when increased water flow caused hurt and inconvenience to neighboring landowners). It should be noted that Georgia nuisance law recognizes injuries to the person as well as the property. *See Arvida/ JMB Partners, L.P. II v. Hadaway, I227 Ga. App. 335, 340 (1997).*

Permanent v. Abatable Nuisance

Georgia law recognizes two categories of nuisances: (1) permanent and (2) continuing or abatable. The distinction between the two turns, in part, on the ability of the entity creating, controlling or maintaining the nuisance, to abate it. With respect to permanent nuisances, Georgia law provides:

> "[a] nuisance, permanent and continuing in its character, the destruction or damage being at once complete upon the completion of the act by which the nuisance is created, gives but one right of action, which accrues immediately

> upon the creation of the nuisance and against which the statute of limitations begins, from that time to run."

Savage v. E.R. Snell Contractor, Inc., 295 Ga. App. 319, 324 (2008); *See also* City of Atlanta v. Kleber, 285 Ga. 413, 416, 677 S.E.2d 134 (2009).

As to a continuing or abatable nuisance, Georgia law provides,

> "[w]here a nuisance is not permanent in its character, but is one which can and should be abated by the person erecting or **maintaining it**, ***every continuance of the nuisance is a fresh nuisance for which a fresh action will lie***.... Where one creates a nuisance and permits it to remain, it is treated as a continuing wrong and giving rise, over and over again, to causes of action.... **Where the structure, though permanent in its character, is not necessarily and of itself a permanent and continuing nuisance, but only becomes such in consequence of some supervening cause which produces special injury at different periods, a separate action lies for each injury thus occasioned**."

Id. (emphasis added). The distinction – whether permanent or continuing/abatable – is also important because it affects the statute of limitations.

Statute of Limitations

Generally, Georgia law provides a four-year statute of limitations for nuisance claims. *See* O.C.G.A. § 9-9-30. The statute of limitations is more flexible where a continuing abatable nuisance exists. "[E]very continuance of a nuisance which is not permanent, and which could and should be abated, is a fresh nuisance for which a new action will lie. Consequently suit may be maintained for damages growing out of a nuisance of the character indicated, where the damages were inflicted within four years before the time of filing suit, though the act which originally caused the nuisance was not done within the period of limitation of the action." (citations, punctuation, and emphasis omitted.) *Hoffman v. Atlanta Gas Light Co.,* 206 Ga. App. 727, 731(2), 426 S.E.2d 387 (1992). *See also, Goble v. Louisville, etc., R. Co.,* 187 Ga. 243, 249(3), 200

S.E. 259 (1938). *West v. CSX Transp., Inc.,* 230 Ga. App. 872 (1998). Because each new continuance of the nuisance gives rise to a new claim, the statute of limitations only precludes recovery of damages occurring more than four years from the date of suit. *See Tri-County Investment Group, LTD v. Southern States, Inc.,* 231 Ga. App. 632, 635 (1998) (citing *City Council of Augusta v. Lombard*, 101 Ga. 724, 727 (1897).

Determining Whether a Nuisance Exists

Georgia courts have considered several factors in determining whether a nuisance exists. For example,

> (1) the defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence (A single isolated act of negligence is not sufficient to show such a negligent trespass as would constitute a nuisance).
>
> (2) The act must be of some duration … and the maintenance of the act or defect must be continuous or regularly repetitious.
>
> (3) Failure of [defendant] to act within a reasonable time after knowledge of the defect or dangerous condition.

Earnheart v. Scott, 213 Ga. App. 188, 189 (1994). These factors are interpreted consistent with a policy that "[p]rivate property cannot be physically harmed or its value impaired in any way, however socially desirable the conduct without payment being made for the harm done, if the interference that is the consequence of the activity is substantial and considered to be unreasonable. *Fielder v. Rice Construction Company, Inc.* 239 Ga. App. 362, 365-66 (1999); *Sumitomo Corp of America,* 256 Ga. App. at 708. Whether an act or condition constitutes a nuisance is almost always a question for the jury. *See City of Vidalia v. Brown,* 237 Ga. App. 831, 836 (1999).

Repeated Surface Water / Storm Water Diversion as a Continuing Nuisance

Nuisances have often been found in cases where an upstream property owner's actions have caused flooding or increased silt deposits on a downstream landowner's property. In surface water invasion cases, the continuing diversion of surface water / storm water onto another's property amounts to a continuing trespass which is the equivalent of a continuing nuisance. *City of Columbus v. Myszka,* 246 Ga 571, 573 (1980); *Leverich v. Roddenberry Farms, Inc.,* 257 Ga. 731 (1988); *Cox v. Cambridge Square Town Homes,* 239 Ga. 127 (1977). Georgia courts have held that one landowner "has no right to concentrate and collect water and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality or in a manner different from that in which the water would be received by the lower property if it simply rand down upon it from the upper property by the law of gravitation." *Sumitomo Corp. of Amercia*, 256 Ga. App at 705. Any artificial alteration of the land's topography that results in an increase of the volume and/or velocity of surface water leaving the property constitutes a nuisance. *See generally, Raymar, Inc. v. Peachtree Golf Club,* 161 Ga. App. 336 (1982), *Kiel v. Johnson,* 179 Ga. App. 43 (1986), *Bauman v. Snider,* 243 Ga. App. 526 (2000).

For flooding caused by an upstream drainage ditch, "[t]he owner of a drainage ditch is under a duty to maintain it so that the surface waters do not overflow to the damage of adjacent property owners. Similarly, the owner of a creekbed containing a creek flowing through culverts constructed by such owner or his predecessor in title is under a duty to maintain them so that the waters do not overflow to the damage of adjacent property owners." *West v. CSX Transp., Inc.,* 230 Ga. App. 872, 874 (1998),

aff'd 240 Ga. App. 209 (1999) (quoting *Equitable Life Assur. Soc. Of U.S. v. Tinsley Mill Village,* 249 Ga. 769 (1982).

Standing to Sue and Notice to Abate Requirements (O.C.G.A. §41-1-5(b))

In order to maintain a continuing trespass/nuisance action, a person must either own or possess the injured property. *See D.F. Stanley v. City of Macon*, 95 Ga. App. 108, 112 (1957). In addition, the ownership or possession must have occurred within the four years prior to filing suit. *See Briggs & Stratton Corp. v. Concrete Sales & Services,* 29 F. Supp 2d 1372, 1377 (1998) (citing *Cox v. DeJarnette*, 104 Ga. App. 664 (1961). Unlike the common law, well-established Georgia allows the tenant of a property to sue for a continuing nuisance as well. *See D.F. Stanley*, 95 Ga. App. At 112-13; *Towaliga Falls Power Co.,* 65 S.E. at 846; *Bonner v Welborn*, 7 Ga. 296, 1849 WL 1680 *1, *12 (1849).

It is *not* necessary to provide notice to a defendant who created or increased the nuisance. When an owner or occupier of injured property sues the creator of a nuisance, the owner/occupier has no obligation to first provide a notice to abate the nuisance prior to filing suit. *See Macko,* 231 Ga. App. at 676. Similarly, when a person purchases property injured by a continuing nuisance, he or she may sue the creator of the nuisance without first providing a notice to abate event when he or she had full knowledge of the nuisance at the time of purchase. *See Bonner,* 1849 WL 1680, at *10. While this may seem unfair, Georgia law allows the person who knowingly purchases a property affected by a nuisance to "presume that the nuisance, being illegal, will be abated," and if the nuisance is not abated, he may sue for any resulting damages. *Ingram v. City of Ackworth,* 90 Ga. App. 719, 723 (1954).

However, when a party purchases a property injured by a nuisance and wants to sue a party who purchased a property containing a nuisance, the notice to abate provisions of O.C.G.A. § 41-1-5(b) apply. In situations governed by O.C.G.A. § 41-1-5(b), the notice to abate should be in writing, should specifically identify the source(s) of the nuisance, the injuries cause by the nuisance, and should specifically request abatement of the injurious actions.

Liability is Not Dependent Upon Ownership, but Control

It is not necessary to directly own the land on which the nuisance is located to have liability for a nuisance. Instead, control over the land is the more important factor. To recover for a nuisance, the plaintiff must demonstrate that the defendant was "either the cause or a concurrent cause of the creation, continuance, or maintenance of the nuisance." *Sumitomo Corp. of America v. Deal*, 256 Ga. App. at 707.

Because multiple parties may have control over a nuisance, multiple defendants may have liability for the nuisance. The obvious defendant is the party creating the nuisance. One who creates a nuisance is liable for it even if he has sold the property containing the nuisance. *Green v. Eastland Homes, Inc.,* 284 Ga. App. 643, 644 S.E.2d 479 (2007). In other words, a defendant cannot escape liability for creating a nuisance by selling the property.

As previously mentioned, a subsequent property owner can be liable for maintaining a nuisance. "[T]he maintenance of the nuisance after notice is continuance of the nuisance, and the [purchaser] of the property causing the nuisance is responsible for that continuance, if there is a request for abatement before action is filed. [Cit.]" *Hoffman v. Atlanta Gas Light Co.,* 206 Ga.App. at 732, 426 S.E.2d 387.

Furthermore, under Georgia law, if the nuisance is caused by the actions of a corporate agent, the plaintiff "may sue the individual agent, the corporation, or both." *Foxchase, LLP v. Cliatt,* 254 Ga. App. 239, 241 (2002). Moreover, defendants may be liable for nuisances created by independent contractors if the defendant accepts the independent contractor's work with knowledge under a rule similar to that which makes a principal responsible for unauthorized wrongs committed by his agent by ratifying them. *Greenwald v. Kersh,* 265 Ga. App. 196, 199-200 (2004).

Damages and Relief

A plaintiff in a continuing nuisance case can elect to treat the nuisance as temporary and sue for all damages which have occurred within the last four years before filing suit, or the plaintiff "may elect to sue for all future damages as well and put an end to the matter." *Cox v. Cambridge Square Towne Houses, Inc.*, 239 Ga. 127, 129, 236 S.E.2d 73, 75 (1977); *Raymar*, 161 Ga. App. at 337, 287 S.E.2d at 770. This election becomes important if the plaintiff needs injunctive relief because the plaintiff cannot recover both prospective damages and an injunction. *Id.* Because most plaintiffs desire an end to the continuing damage of their property and because prospective damages can be risky and challenging to assess, most suits involve injunctive relief and past damages.

Damages available to a plaintiff in a continuing abatable nuisance case include nominal damages, costs of repair, diminution in rental value of the property during the existence of the nuisance, personal injuries (loss of use and enjoyment and inconvenience, and unhappiness), attorney's fees pursuant to O.C.G.A. § 13-6-11, and punitive damages.

Cost of Repair. Georgia law entitles an injured property owner to recovery the cost of repair or restoring the damage property as long as restoration would not be an

absurd undertaking. *See Georgia Northeastern Railroad, Inc. v. Lusk,* 227 Ga. 245, 247 (2003). Plaintiffs may recover repair or restoration costs that exceed the diminution in the property's value. *Id.* Restoration and repair costs generally stem from efforts needed to repair eroded portions of the property or stream banks and channels, to replace lost or damaged trees and vegetation, to remove silt, sand or sediment from the property, stream channels, ponds and lakes.

Diminution in Value. In a continuing nuisance case, a plaintiff may recover the diminution in the yearly rental value of the property during the continuance of the nuisance and within the statute of limitations. *See Ledbetter Brothers, Inc., v. J.A. Holcomb,* 108 Ga. App. 282, 285 (1963). "If the nuisance is permanent, the measure of damages in the diminution of fair market value of the property." *City of Warner Robbins v. Holt*, 220 Ga. App. 794, 797 (1996).

Personal Damages (e.g. Annoyance and Inconvenience Damages). Georgia law also allows a plaintiff injured by a nuisance to recover for personal injuries. Damages to the person include the discomfort, loss of peace of mind, unhappiness, and annoyance caused by the defendant as determined by the enlightened conscience of the jury. *See Waters*, 258 Ga. App. at 558, 574 S.E.2d at 638; *Segars*, 255 Ga. App. at 296, 564 S.E.2d at 878; *Baumann*, 243 Ga. App. at 528, 532 S.E.2d at 472; *Jordan*, 231 Ga. App. at 519, 499 S.E.2d at 902; *Hadaway*, 227 Ga. App. at 340, 489 S.E.2d at 129; *Murphy*, 194 Ga. App. at 653, 391 S.E.2d at 474.

Nominal Damages. Nominal damages are also recoverable in nuisance cases. A verdict of at least nominal damages is required if the plaintiff presents undisputed evidence that property rights were tortiously invaded. *Kiel v. Johnson*, 179 Ga. App. 43,

44 (1986). Indeed, "[n]ominal damages are always allowed for any invasion of a property right whether or not actual damages result therefrom. And the law presumes and infers some damage from the invasion of a property right." *Marshall v. Georgia Power,* 134 Ga. App. 479, 480 (1975). A recovery of nominal damages may be sufficient to support an award of attorney's fees and punitive damages. *Savannah College of Art and Design, Inc. v. Nulph,* 265 Ga. 662, 663 (1995), *Bauer v. North Fulton Medical Ctr., Inc.,* 241 Ga. App. 568 (1999).

Attorney's Fees. Pursuant to O.C.G.A. § 13-6-11, "[t]he expenses of litigation generally shall not be allowed as part of the damages; but where the plaintiff has specially pleaded and has made prayer therefore and where the defendant has acted in bad faith, has been stubbornly litigious, or has cause the plaintiff unnecessary trouble and expense, the jury may allow them." Nuisance claims arising from repeated storm water discharges are intentional torts and "every intentional tort invokes a species of bad faith that entitles a person wronged to recover the expenses of litigation including attorney fees." *See Tyler v. Lincoln,* 272 Ga. 118, 120 (2000), *Ponce de Leon Condominiums,* 238 Ga. at 190. Attorney's fees are authorized even when only nominal damages are recovered. *See Savannah College of Art & Design v. Nulph*, 265 Ga. 662, 663 (1995). The question of bad faith is generally a question of fact for the jury to decide. *See Tyler,* 272 Ga. at 121.

Punitive Damages. Georgia law allows punitive damages when there is a finding of "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). Because nuisance actions involve intentional

torts, punitive damages are often awarded in these cases. Punitive damages may be awarded even when actual damages are small. *Tyler,* 272 Ga. at 121. Punitive damages can also be appropriate against defendants who maintained but did not create the nuisance. *Ponce De Leon Condominiums,* 238 Ga. at 189-90.

Liability of the Local Governing Authority (Municipality / County)

Municipalities and counties have long been subject to suit for their mismanagement or poor handling of storm water runoff, the premise of the claims being much the same as discussed above. Where surface water is diverted from its natural drainage onto the property of another, such conduct may constitute a nuisance, *see Goble v. Louisville,* 187 Ga. 243 (1954), and is actionable even without the presence of an element of danger to the public health, *see 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, however, 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).

The duty of 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. *Fulton County v. Wheaton,* 252 Ga. 49 (1984), *DeKalb County v. Orwig,* 261 Ga. 137 (1991), *Provost v. Gwinnett County,* 199 Ga. App. 713 (1991). In the context of design and construction, local governments have traditionally sought to use natural drainage components, such as creeks, streams, ponds and lakes, as opposed to acquiring easements.

In several instances, local governments have diverted water from their own property, such as a new roadway, into a catch basin that empties at the edge of the right-of-way onto private property. *See e.g. City of Atlanta v. Williams,* 218 Ga. 379 (1962). From that point, the water generally flowed to a low-point, such as a dry creek bed or a small creek, and in some instances on into larger streams, ponds and lakes. The problem in many of these types of cases is that the government has not acquired an express drainage easement through which to drain the water. While prescriptive easements may be acquired through adverse usage for a period of 20 years, continuing invasions of storm water amount to a continuing trespass, which is equivalent to a continuing nuisance. *Hibbs v. City of Riverdale,* 219 Ga. App. 457 (1995). Also, with a prescriptive easement there are no ascertainable or defined bounds, so a local government remains at risk of suit for the flooding of adjacent lands each time it rains. If the local government 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 flow of storm water does not overflow to the damage of adjacent property owners. *Columbus, Ga. v. Smith,* 170 Ga. App. 276 (1984).

With growth and development comes the addition of impervious surfaces, other than public streets and roads, which can compound the local governing authority's

storm water management responsibilities and ultimately, exposure to liability. In some instances, private drainage systems have been constructed and dedicated to the local governing authority. Upon acceptance of dedication of the drainage system, which can be direct or implied, 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.

In most instances, storm water from private developments is ultimately diverted, whether directly or indirectly, into the local government's drainage system, which raises another frequently reoccurring situation – the local government's failure to make downstream improvements to its drainage system due to the approval of upstream development. *See e.g., City of Macon v. Cannon,* 89 Ga. App. 484 (1954), *City of Columbus v. Myszka,* 246 Ga. 571 (1980). The Georgia Supreme Court subsequently characterized *Myszka*, as requiring more than a government's mere approval of a development project, stating, "liability of a municipality cannot arise *solely* from its approval of construction projects which increase surface water runoff. Rather, it is the county's *failure to maintain* properly the culvert, resulting in a nuisance, which creates its liability." *Fulton County v. Wheaton*, 252 Ga. 49, 50 (1984) (citing *Myzska*, 246 Ga. at 572). Georgia law is full of nuances as it pertains to the difference between municipal and county liability in this context.

Municipal Liability. Municipal immunity from tort liability does not extend to nuisance actions. "A municipality like any other individual or private corporation may be liable for damages it causes … from the operation or maintenance of a nuisance, irrespective of whether it is exercising a government or ministerial function." *City of*

Thomasville, v. Shank, 263 Ga. 624 (1993). The policy underlying this exception to sovereign immunity is "based on the principle that 'a municipal corporation can not, under the guise of performing a governmental function, create a nuisance dangerous to life and health or take or damage private property for public purpose, without just and adequate compensation being first paid." *Id.*

In establishing municipal liability, Georgia courts have set various factors: "the defect or degree of misfeasance must exceed mere negligence (as distinguished from a single act); the act complained of must be of some duration and the maintenance of the act or defect must be continuous and regularly repetitious; and there must be a failure of municipal action within a reasonable time after knowledge of the defect or dangerous condition." *Hibbs v. City of Riverdale,* 267 Ga. 337, 338 (1996). Where a municipality negligently constructs or undertakes to maintain a sewer or drainage system which causes the repeated flooding of property, a continuing, abatable nuisance is established, for which the municipality is liable. *City of Atlanta v. Hofrichter/Stiakakis*, 291 Ga. App. 883, 886, 663, S.E.2d 379, 383 (2008) citing *Hibbs v. City of Riverdale*, 267 Ga. 337, 338, 478 S.E.2d 121 (1996). See also *City of Gainesville v. Waters*, 258 Ga.App. 555, 557(1), 574 S.E.2d 638 (2002); *Martin v. City of Fort Valley*, 235 Ga.App. 20, 21(1), 508 S.E.2d 244 (1998). To prevail on a nuisance claim against a municipality, one is required to establish a municipality's notice of the nuisance and its failure to correct the problem once the municipality has notice of the problem. Notice can be direct or constructive.

County Liability. Counties are also liable for nuisances under certain circumstances. The Georgia Constitution provides for a waiver of a county's sovereign

immunity in cases where a county creates a nuisance "which amounts to an inverse condemnation." *Duffield v. DeKalb County,* 242 Ga. 432, 433 (1978). Although a county is generally not liable for creating nuisances, "[w]here a county causes, creates, or maintains a nuisance which amounts to an inverse condemnation, the county is liable in damages that would be recoverable in an action for inverse condemnation." O.C.G.A. § 41-1-1; *See also DeKalb County v. Orwig,* 261 Ga. 137, 138(1), 402 S.E.2d 513 (1991); *Fulton County v. Wheaton,* 252 Ga. 49, 50(1), 310 S.E.2d 910 (1984), overruled on other grounds, *DeKalb County v. Orwig,* supra; *City of Columbus v. Myszka,* 246 Ga. 571, 572(1), 272 S.E.2d 302 (1980), overruled on other grounds, *DeKalb County v. Orwig,* supra; *Duffield v. DeKalb County,* 242 Ga. 432, 433(1), 249 S.E.2d 235 (1978).

An inverse condemnation claim will, of course, arise where: a county causes a continuing nuisance; the nuisance results in damage to real property; and the county fails to remedy the nuisance within a reasonable time after it has knowledge of the nuisance. See Columbia County v. Doolittle, 270 Ga. 490, 493, 512 S.E.2d 236 (1999). Private property owners may be compensated in inverse condemnation actions for the temporary taking of land for flooding, siltation and pollution from surface water. *Reid v. Gwinnett County,* 242 Ga. 88, 89, 249 S.E.2d 559 (1978); *Fulton County v. Baranan,* 240 Ga. at 837, 242 S.E.2d 617; *McFarland,* 224 Ga. at 619, 163 S.E.2d 827; see generally Charles N. Pursley, Jr., Georgia Eminent Domain § 8.2 (Daniel F. Hinkel ed.1993) (inverse condemnation action may be brought against public body for diverting water, impairing access, causing mud and silt to flow onto property and for damaging property by noise, odors, or pollution). "Where a county maintains a continuing nuisance by diverting surface water which causes damage to property, a claim arises in

favor of the property owner each time such flooding, siltation, pollution, or other damage occurs." *Etheridge et al v. Dougherty County*, 174 Ga.App. 87, 329 S.E.2d 201(March 5, 1985), citing *Reid v. Gwinnett County,* 242 Ga. 88, 89, 249 S.E.2d 559 (1978). See also *Anderson v. Columbus, Ga.,* 152 Ga.App. 772, 775(3), 264 S.E.2d 251 (1979); *Ingram v. Baldwin County,* 149 Ga.App. 422, 422-423, 254 S.E.2d 429 (1979).

O.C.G.A. § 36-11-1 provides, "[a]ll claims against counties must be presented within 12 months after they accrue or become payable or the same are barred, provided that minors or other persons laboring under disabilities shall be allowed 12 months after the removal of the disability to present their claims." The application of the ante-litem notice and the timing of the same remains an issue of much debate.

With regard to damages, a county may be liable to an owner in damages to property, either real or personal, through inverse condemnation by a nuisance, created, maintained, or worsened by such county. The measure of damages in such cases is the same as in condemnation cases. The measure of damages is the actual depreciation in market value of the property and effect on the property. *DeKalb County v. Daniels*, 174 Ga.App. 319, 319-20 (Ga.App.,1985), *certiorari denied* (measure of damages is "the value of the property taken and damage done to the value of the remaining"); *Fulton County v. Baranan*, 240 Ga. 837 (1978); *See also, Pribeagu v. Gwinnett County*, 336 Ga. App. 753, 785 S.E.2d 567 (2016); *DeKalb County v. Orwig*, 261 Ga. 137, 139 (3), 402 S.E.2d 513 (1991) ("*Orwig II*"). In an inverse condemnation action based on a continuing nuisance or trespass, damages are authorized through trial where the nuisance or trespass has not been abated. *DeKalb County v. Daniels*, 174 Ga.App. at 319-20 (1985) (date of taking is trial where payment not previously made and nuisance or trespass is continuing); *Fulton*

County v. Baranan, 240 Ga. 837 (1978) (date of taking is trial date where storm water flows were not abated).

The cost of repair may be considered as a factor in establishing the reduced fair market value of the remaining property after the taking. *Pribeagu*, 336 Ga. App. at 758-759, citing *Ogburn Hardware*, 273 Ga.App. at 126(1), 614 S.E.2d 108; *Steele v. Dept. of Transp.*, 295 Ga.App. 244, 247(2), 671 S.E.2d 275 (2008) (cost to cure cannot be considered as a separate element of damages, but may be used to show how the cost to cure adversely affected the value of their remaining property); *Dept. of Transp. v. Morris*, 263 Ga.App. 606, 608(1), 588 S.E.2d 773 (2003) (evidence of damage to a fence as a result of taking may be considered as a factor in the fair market value of the property after the taking); *Dept. of Transp. v. 2.953 Acres of Land*, 219 Ga.App. 45, 47(1), 463 S.E.2d 912 (1995) ("evidence as to the cost to cure may be admissible as a factor to be considered in determining the amount of recoverable consequential damages to the remainder") (citation and punctuation omitted). See also *DeKalb County v. Heath*, 331 Ga.App. 179, 770 S.E.2d 269 (2015) (allowing consideration of evidence of cost of repairs in inverse condemnation action arising from flooding of plaintiff's land resulting from County's maintenance of sewer and storm water drainage system).

Business losses are also recoverable in an inverse condemnation action, either as a separate element of just and adequate compensation or where such evidence is relevant to the value issue of the amount of consequential damages to the remainder. *Buck's Service Station, Inc. v. Department of Transp.*, 259 Ga. 825, 826, 387 S.E.2d 877 (1990).