ORDINANCE NO. 1034

AN ORDINANCE AMENDING TITLE 14 ENTITLED 'ZONING AND LAND USE CONTROL' BY AMENDING CHAPTER 5 OF THE ATHENS MUNICIPAL CODE TO INCLUDE A STORMWATER MANAGEMENT ORDINANCE.

BE IT ORDAINED BY THE CITY OF ATHENS, TENNESSEE, AS FOLLOWS:

SECTION 1. That Title 14 entitled "Zoning and Land Use Control" be amended by deleting Chapter 5 in its entirety and substituting a new Chapter 5 as follows:

CHAPTER 5

STORMWATER MANAGEMENT ORDINANCE

SECTION

14-501. General provisions. (1) Purpose. It is the purpose of this chapter to:

(a) Protect, maintain, and enhance the environment of the city and the public health, safety and the general welfare of the citizens of the city, by controlling discharges of pollutants to the city's stormwater system and to maintain and improve the quality of the receiving waters into which the stormwater outfalls flow, including, without limitation, lakes, rivers, streams, springs, ponds, wetlands, and groundwater of the city;

(b) Enable the city to comply with the National Pollution Discharge Elimination System permit (NPDES) and applicable regulations, 40 CFR 122.26 for stormwater discharges;

(c) Allow the city to exercise the powers granted in Tennessee Code Annotated § 68-221-1105, which provides that, among other powers cities have with respect to stormwater facilities, is the power by ordinance or resolution to:

(i) Exercise general regulation over the planning, location, construction, and operation and maintenance of stormwater facilities in the city, whether or not owned and operated by the city;

(ii) Adopt any rules and regulations deemed necessary to accomplish the purposes of this statute, including the adoption of a system of fees for services and permits;

(iii) Establish standards to regulate the quantity of stormwater discharged and to regulate stormwater contaminants as may be necessary to protect water quality;

(iv) Review and approve plans and plats for stormwater management in proposed subdivisions, commercial developments, or other development;

(v) Issue permits for stormwater discharges, or for the construction, alteration, extension, or repair of stormwater facilities;

(vi) Suspend or revoke permits when it is determined that the permittee has violated any applicable ordinance, resolution, or condition of the permit;

(vii) Regulate and prohibit discharges into stormwater facilities of sanitary, industrial, or commercial sewage or waters that have otherwise been contaminated; and

(viii)Expend funds to remediate or mitigate the detrimental effects of contaminated land or other sources of stormwater contamination, whether public or private.

(2) Administering entity. The City of Athens shall administer the provisions of this ordinance.

(3) Stormwater management ordinance. The intended purpose of this ordinance is to safeguard property and public welfare by regulating stormwater drainage and requiring temporary and permanent provisions for its control. It should be used as a planning and engineering implement to facilitate the necessary control of stormwater.

14-502. Definitions. For the purpose of this chapter, the following definitions shall apply: Words used in the singular shall include the plural, and the plural shall include the singular; words used in the present tense shall include the future tense. The word "shall" is mandatory and not discretionary. The word "may" is permissive. Words not defined in this section shall be construed to have the meaning given by common and ordinary use as defined in the latest edition of Webster's Dictionary.

(1) "Administrative or Civil Penalties." Under the authority provided in Tennessee Code Annotated § 68-221-1106, the city declares that any person violating the provisions of this chapter may be assessed a civil penalty by the city of not less than fifty dollars ($50.00) and not more than five thousand

dollars ($5,000.00) per day for each day of violation. Each day of violation shall constitute a separate violation.

(2) "As built plans" means drawings depicting conditions as they were actually constructed.

(3) "Best Management Practices" ("BMP's") means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to waters of the state. BMP's also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

(4) "Borrow Pit" is an excavation from which erodible material (typically soil) is removed to be fill for another site. There is no processing or separation of erodible material conducted at the site. Given the nature of activity and pollutants present at such excavation, a borrow pit is considered a construction activity for the purpose of this permit.

(5) "Buffer Zone" means a permanent setback from the top of water body's bank of undisturbed vegetation, including trees, shrubs and herbaceous vegetation; enhanced or restored vegetation; or the re-establishment of native vegetation bordering streams, ponds, wetlands, springs, reservoirs or lakes, which exists or is established to protect those water bodies from any construction or non-agricultural land altering activity. The goal of the water quality buffer is to preserve undisturbed vegetation that is native to the streamside habitat in the area of any land disturbance project or land development platting. Vegetated, preferably native, water quality buffers protect water bodies by providing structural integrity and canopy cover, as well as stormwater infiltration, filtration and evapotranspiration. Buffer width depends on the size of a drainage area. Streams or other waters with drainage areas less than 1 square mile will require buffer widths of 30 feet minimum. Streams or other waters with drainage areas greater than 1 square mile will require buffer widths of 60 feet minimum. The stormwater department buffer regulations contain more detailed requirements and criteria for determining the circumstances under which a variance to these standards can be obtained.

(6) "Buffer Zone Requirements"

(a) Construction Sites – State Minimum Requirements

A minimum 30-foot natural riparian buffer zone adjacent to all streams at any construction site requiring a State Construction General Permit (CGP) shall be preserved, to the maximum extent practicable, during construction activities at the site. The water quality buffer zone is required to protect waters of the state, located within or immediately adjacent to the boundaries of the project, as identified using methodology from Standard Operating Procedures for Hydrologic Determinations (see rules to implement a certification program for Qualified Hydrologic Professionals, TN Rules Chapter 0400-40-17). Buffer zones are not primary sediment control measures and should not be relied on as such. Rehabilitation and enhancement of a natural buffer zone is allowed, if necessary, for improvement of its effectiveness of protection of the waters of the state. The buffer zone requirement only applies to new construction or redevelopment sites. The riparian buffer zone should be preserved between the top of stream bank and the disturbed construction area. The minimum 30-feet criterion for the width of the buffer zone may be established by variance on an average width basis at a project, as long as the minimum width of the buffer zone is more than 15 feet at any measured location.

(b) Buffer zone additional requirements for discharges into impaired or Exceptional TN Waters – State Minimum Requirements

A 60-foot natural riparian buffer zone adjacent to the receiving stream designated as impaired or Exceptional TN Waters shall be preserved, to the maximum extent practicable, during construction activities at any site. The 60-feet criterion for the width of the buffer zone can be established on an average width basis at a project, as long as the minimum width of the buffer zone is more than 30 feet at any measured location.

(c) City of Athens Buffer Zone Widths and Variances

The Athens Buffer Zone Policy contains more detailed requirements and criteria for buffers and determining the circumstances under which a variance to those standards to allow the State Minimum Requirements (including the averaging provisions) or more significant major variances can be considered or the averaging provisions can be obtained.

(7) "Channel" means a natural or artificial watercourse with a definite bed and banks that conducts flowing water continuously or periodically.

(8) "Common plan of development or sale" is broadly defined as any announcement or documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot. A common plan of development or sale identifies a situation in which multiple areas of disturbance are, or may be, occurring on contiguous areas owned or controlled by the same land owner or developer. This applies because the activities may take place at different times, on different schedules, by different operators.

(9) "Design storm event" means a hypothetical storm event, of a given frequency interval and duration, used in the analysis and design of a stormwater facility. The estimated design rainfall amounts, for any return period interval (i.e., 2-yr, 5-yr, 25-yr, etc.,) in terms of either 24-hour depths or intensities for any duration, can be found by accessing the following NOAA National Weather Service Atlas 14 data for Tennessee: http://hdsc.nws.noaa.gov/hdsc/pfds/pfds_map_cont.html?bkmrkS=tn. Other data sources may be acceptable with prior written approval by TDEC Water Pollution Control.

(10) "Contaminant" means any physical, chemical, biological, or radiological substance or matter in water.

(11) "Discharge" means dispose, deposit, spill, pour, inject, seep, dump, leak or place by any means, or that which is disposed, deposited, spilled, poured, injected, seeped, dumped, leaked, or placed by any means including any direct or indirect entry of any solid or liquid matter into the municipal separate storm sewer system.

(12) "Easement" means an acquired privilege or right of use or enjoyment that a person, party, firm, corporation, county or other legal entity has in the land of another.

(13) "Erosion" means the removal of soil particles by the action of water, wind, ice or other geological agents, whether naturally occurring or acting in conjunction with or promoted by human activities or effects.

(14) "Erosion prevention and sediment control plan (EPSCP)" means a written plan (including drawings or other graphic representations) that is designed to minimize the erosion and sediment runoff at a site during construction activities.

(15) "Hotspot" means an area where land use or activities generate highly contaminated runoff, with concentrations of pollutants in excess of those typically found in stormwater. The following land uses and activities are generally deemed potential stormwater hot spots, but that term is not limited to only these land uses:

(a) vehicle salvage yards and recycling facilities
(b) vehicle service and maintenance facilities
(c) vehicle and equipment cleaning facilities
(d) fleet storage areas (bus, truck, etc.)
(e) industrial sites (included on Standard Industrial Classification code list)
(f) marinas (service and maintenance)
(g) public works storage areas
(h) facilities that generate or store hazardous waste materials
(i) commercial container nursery
(j) restaurants and food service facilities
(k) other land uses and activities as designated by an appropriate review authority

(16) "Illicit connections" means illegal and/or unauthorized connections to the municipal separate stormwater system whether or not such connections result in discharges into that system.

(17) "Illicit discharge" means any discharge to the municipal separate storm sewer system that is not composed entirely of stormwater and not specifically exempted under §14-507(2).

(18) "Improved sinkhole" is a natural surface depression that has been altered in order to direct fluids into the hole opening. Improved sinkhole is a type of injection well regulated under TDEC's Underground Injection Control (UIC) program. Underground injection constitutes an intentional disposal of waste waters in natural depressions, open fractures, and crevices (such as those commonly associated with weathering of limestone).

(19) "Inspector" An inspector is a person that has successfully completed (has a valid certification from) the TDEC "Fundamentals of Erosion Prevention and Sediment Control Level I" course or equivalent course. An inspector performs and documents the required inspections, paying particular attention to time-sensitive permit requirements such as stabilization and maintenance activities. An inspector may also have the following responsibilities:

(a) oversee the requirements of other construction-related permits, such as Aquatic Resources Alteration Permit (ARAP) or Corps of Engineers permit for construction activities in or around waters of the state;

(b) update field SWPPP's;

(c) conduct pre-construction inspection to verify that undisturbed areas have been properly marked and initial measures have been installed; and

(d) inform the permit holder of activities that may be necessary to gain or remain in compliance with the Construction General Permit (CGP) and other environmental permits.

(20) "Land disturbing activity" means any activity on property that results in a change in the existing soil cover (both vegetative and non-vegetative) and/or the existing soil topography. Land-disturbing activities include, but are not limited to, development, re-development, demolition, construction, reconstruction, clearing, grading, filling, and excavation.

(21) "Maintenance" means any activity that is necessary to keep a stormwater facility in good working order so as to function as designed. Maintenance shall include complete reconstruction of a stormwater facility if reconstruction is needed in order to restore the facility to its original operational design parameters. Maintenance shall also include the correction of any problem on the site property that may directly impair the functions of the stormwater facility.

(22) "Maintenance agreement" means a document recorded in the land records that acts as a property deed restriction, and which provides for long-term maintenance of stormwater management practices. For Athens this is the "Agreement for Permanent Inspection and Maintenance of Stormwater Facilities".

(23) "Municipal separate storm sewer system (MS4)" means the conveyances owned or operated by the city for the collection and transportation of stormwater, including the roads and streets and their drainage systems, catch basins, curbs, gutters, ditches, man-made channels, and storm drains, and where the context indicates, it means the municipality that owns the separate storm sewer system.

(24) "National Pollutant Discharge Elimination System permit" or a "NPDES permit" means a permit issued pursuant to 33 U.S.C. 1342.

(25) "Off-site facility" means a structural BMP located outside the subject property boundary described in the permit application for land development activity.

(26) "On-site facility" means a structural BMP located within the subject property boundary described in the permit application for land development activity.

(27) "Peak flow" means the maximum instantaneous rate of flow of water at a particular point resulting from a storm event.

(28) "Person" means any and all persons, natural or artificial, including any individual, firm or association and any municipal or private corporation organized or existing under the laws of this or any other state or country.

(29) "Runoff" means that portion of the precipitation on a drainage area that is discharged from the area into the municipal separate storm sewer system.

(30) "Sediment" means solid material, both inorganic and organic, that is in suspension, is being transported, or has been moved from its site of origin by air, water, gravity, or ice and has come to rest on the earth's surface either above or below sea level.

(31) "Sedimentation" means soil particles suspended in stormwater that can settle in stream beds.

(32) "Soils Report" means a study of soils on a subject property with the primary purpose of characterizing and describing the soils. The soils report shall be prepared by a qualified soils engineer, who shall be directly involved in the soil characterization either by performing the investigation or by directly supervising employees conducting the investigation.

(33) "Stabilization" means providing adequate measures, vegetative and/or structural, that will prevent erosion from occurring.

(34) "Stormwater" means stormwater runoff, snow melt runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration and drainage.

(35) "Stormwater entity" means the City of Athens

(36) "Stormwater management" means the programs to maintain quality and quantity of stormwater runoff to pre-development levels.

(37) "Stormwater management facilities" means the drainage structures, conduits, ponds, ditches, combined sewers, sewers, and all device appurtenances by means of which stormwater is collected, transported, pumped, treated or disposed of.

(38) "Stormwater management plan" means the set of drawings and other documents that comprise all the information and specifications for the programs, drainage systems, structures, BMP's, concepts and techniques intended to maintain or restore quality and quantity of stormwater runoff to pre-development levels.

(39) "Stormwater Pollution Prevention Plan (SWPPP)" means a written plan that includes site map(s), an identification of construction/contractor activities that could cause pollutants in the stormwater, and a description of measures or practices to control these pollutants. It must be prepared and approved before construction begins. In order to effectively reduce erosion and sedimentation impacts, Best Management Practices (BMP's) must be designed, installed, and maintained during land disturbing activities. The SWPPP should be prepared in accordance with the current Tennessee Erosion and Sediment Control Handbook. The handbook is intended for use during the design and construction of projects that require erosion and sediment controls to protect waters of the state. It also aids in the development of SWPPPs and other reports, plans, or specifications required when participating in Tennessee's water quality regulations. All SWPPP's shall be prepared and updated in accordance with Section 3 of the General NPDES Permit for Discharges of Stormwater Associated with Construction Activities. (CGP)

(40) "Stormwater runoff" means flow on the surface of the ground, resulting from precipitation.

(41) "Structural BMP's" means facilities that are constructed to provide control of stormwater runoff.

(42) "Surface water" includes waters upon the surface of the earth in bounds created naturally or artificially including, but not limited to, streams, other water courses, lakes and reservoirs.

(43) "Waste site" means an area where waste material from a construction site is deposited. When the material is erodible, such as soil, the site must be treated as a construction site.

(44) "Water Quality Buffer" see "Buffer Zone".

(45) "Watercourse" means a permanent or intermittent stream or other body of water, either natural or man-made, which gathers or carries surface water.

(46) "Watershed" means all the land area that contributes runoff to a particular point along a waterway.

(47) "Waters" or "waters of the state" means any and all water, public or private, on or beneath the surface of the ground, which are contained within, flow through, or border upon Tennessee or any portion thereof except those bodies of water confined to and retained within the limits of private property in single ownership which do not combine or effect a junction with natural surface or underground waters.

(48) "Wetland(s)" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of vegetation typically adapted

to life in saturated soil conditions. Wetlands include, but are not limited to, swamps, marshes, bogs, and similar areas.

(49) "Wet weather conveyances" are man-made or natural watercourses, including natural watercourses that have been modified by channelization, that flow only in direct response to precipitation runoff in their immediate locality and whose channels are above the groundwater table and are not suitable for drinking water supplies; and in which hydrological and biological analyses indicate that, under normal weather conditions, due to naturally occurring ephemeral or low flow, there is not sufficient water to support fish or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two months. (Rules and Regulations of the State of Tennessee, Chapter 1200-4-3-.04(3)).

14-503. Permitting and Waivers.

Permitting

(1) General. Every person will be required to obtain a grading permit also referred to as a land disturbance permit from the City of Athens based on 14-504 (2) criteria using the Stormwater Departments latest "Grading Permit Application" form and other required information. No building permit shall be issued until the applicant has obtained a grading permit. Each application for a grading permit shall be accompanied by payment of grading permit and other stormwater management fees, as set by resolution. The Public Works Department will review each application to determine its conformance with the provisions of this ordinance and the Public Works Department regulations and guidelines.

(2) Approval and Duration. Within 30 days after receiving an application, the Public Works Department shall provide one of the following responses in writing:

(a) Approval of the permit application after any changes required by the Stormwater Department have been submitted to and addressed by the permittee.

(b) Denial of the permit application, indicating the reason(s) for the denial.

Every land disturbance permit shall expire and become null and void if substantial work authorized by such permit has not commenced within one hundred eighty (180) calendar days of issuance, or is not complete within eighteen (18) months from the date of the commencement of construction.

(3) Performance surety. The Public Works Department may, at its discretion, require the submittal of a performance security prior to issuance of a permit for any grading in order to ensure that the stormwater practices are installed by the permit holder as required by the approved plan and all applicable regulations. The amount of the performance security shall be set by the Public Works Department. The applicant shall provide an itemized construction cost estimate complete with unit prices which shall be subject to acceptance, amendment or rejection by the Public Works Department. Alternatively the Public Works Department shall have the right to establish in full only upon submission of as-built plans and written certification by a registered professional engineer licensed to practice in Tennessee that the project has been completed in substantial compliance with the approved plan and other applicable provisions of this ordinance. The Stormwater Department will make a final inspection of the project for general verification. Provisions for a partial pro-rata release of the performance security based on the completion of various development stages can be made at the discretion of the Public Works Department.

Waivers

(1) General. No waivers will be granted any construction, development or site work project. All work shall provide for stormwater management as required by this ordinance. However, alternatives to the State of Tennessee 2010 NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems (MS4 Permit) primary requirement for on-site permanent stormwater management may be considered, if:

(a) Management measures cannot be designed, built and maintained to infiltrate, evapotranspire, harvest and/or use, at a minimum, the first inch of every rainfall event preceded by 72 hours of no measurable precipitation.

(b) It can be demonstrated that the proposed project is not likely to impair attainment of the objectives of this chapter. Alternative minimum requirements for on-site management of stormwater discharges have been established in a stormwater management plan that has been approved by the city.

(2) Downstream damage, prohibited. In order to receive consideration, the applicant must demonstrate to the satisfaction of the Stormwater Department that the proposed alternative will not lead to any of the following conditions downstream:

(a) Deterioration of existing culverts, bridges, dams, and other structures;
(b) Degradation of biological functions or habitat;
(c) Accelerated stream bank or stream bed erosion or siltation;
(d) Increased threat of flood damage to public health, life or property.

(3) Grading Permits not to be issued where alternatives requested. No Grading Permit shall be issued where an alternative has been requested until the alternative is approved. If no alternative is approved, the plans must be resubmitted with a stormwater management plan that meets the primary requirement for on-site stormwater management.

(4) Less than One Acre Projects. Projects required to obtain a grading permit under 14-504 (2) (b) may request a waiver for consideration by the Director of the Public Works Department for requirements of this ordinance not needed to address the unique threat that resulted in the project being required to obtain a grading permit.

(5) Agricultural Exemption. The following activities are exempt from the grading permit requirement:

(a) Existing nursery and agricultural operations conducted as a permitted main or accessory use.

(b) Any logging or agricultural activity that is consistent with an approved farm conservation plan or a timber management plan prepared or approved by the appropriate federal or state agency.

(6) Any emergency activity that is immediately necessary for the protection of life, property, or natural resources.

14-504. Stormwater system design: Construction and Permanent stormwater management.

(1) The City of Athens Stormwater design or BMP manuals.

(a) Adoption. The city adopts as its stormwater design best management practices (BMP) manual the following publications and documents, which are incorporated by reference in this ordinance as if fully set out herein. Applicants should site which manual out of the list below they will use and reference in their drawings:

(1) TDEC Erosion and Sediment Control Handbook; most current edition.

(2) TDEC's current guidance for permanent stormwater management.

(3) The Nashville-Davidson County Metro Stormwater Management Manual BEST MANAGEMENT PRACTICES (BMP) MANUAL - Volume 4 and LOW IMPACT DESIGN MANUAL – Volume 5

(4) http://www.cityofknoxville.org/engineering/bmp_manual/knoxvilleBMP.pdf

(5) The Nashville-Davidson County Metro Stormwater Management Chapter (6) TECHNICAL GUIDELINES AND CRITERIA 6.1 Adequate Stormwater Management Systems
http://www.nashville.gov/Portals/0/SiteContent/WaterServices/Stormwater/docs/SWMM/2013/Vol1/07_Chapter06.pdf

(b) The BMP manual includes a list of acceptable BMP's including the specific design performance criteria and operation and maintenance requirements for each stormwater practice.

(c) The BMP manual may be updated and expanded from time to time based on improvements in engineering, science, monitoring and local maintenance experience, or changes in federal, state or local law or regulation. Stormwater facilities that are designed, constructed and maintained in accordance with these BMP criteria will be presumed to meet the minimum water quality performance standards.

(2) Land development. This section shall be applicable to all land development, including, but not limited to, site plan applications, subdivision applications, and land disturbance applications. These standards apply to any new development or redevelopment site that meets one or more of the following criteria:

(a) One (1) acre or more;

(1) New development or redevelopment that involves land disturbance activities of one (1) acre or more including activities

(2) New development or redevelopment that is part of a larger common plan of development or sale where the common plan land disturbance is one (1) acre or more.

(b) Projects or developments of less than one acre of total land disturbance may also be required to obtain authorization under this ordinance if the activity poses a unique threat to water, public health or safety such as:

(1) The Public Works Department has determined that the stormwater discharge from a site is causing, contributing to, or is likely to contribute to a violation of a state water quality standard;

(2) The Public Works Department has determined that the stormwater discharge is, or is likely to be a significant contributor of pollutants to waters of the state;

(3) Any new development or redevelopment, regardless of size, that is defined by the Public Works Department to be a hotspot land use; or

(4) Changes in state or federal rules require sites of less than one acre that are not part of a larger common plan of development or sale to obtain a stormwater permit.

Note: Any discharge of stormwater or other fluid to an improved sinkhole or other injection well, as defined, must be authorized by permit or rule as a Class V underground injection well under the provisions of Tennessee Department of Environment and Conservation (TDEC) Rules, Chapter 1200-4-6.

(3) Submittal of a copy of the NOC, SWPPP and NOT

Land disturbance permit applicant must provide proof of coverage under the Construction General Permit (CGP); submit a copy of the Stormwater Pollution Prevention Plan (SWPPP); and at project completion, a copy of the signed notice of termination (NOT) to the Stormwater Department. Copies of additional applicable local, state or federal permits (i.e.: ARAP, COE, TDOT etc.) must also be provided upon request before the issuance of any land disturbance permit.

(4) Stormwater Pollution Prevention Plan (SWPPP) for Construction Stormwater Management: The applicant must prepare a stormwater pollution prevention plan for all construction activities that complies with the current State of TN –NPDES Construction General Permit.(CGP)

(5) General design performance criteria for permanent stormwater management: The following performance criteria shall be addressed for permanent stormwater management at all development or redevelopment sites:

(a) Site design standards for all new and redevelopment require, in combination or alone, management measures that are designed, built and maintained to infiltrate, evapotranspire, harvest and/or use, at a minimum, the first inch of every rainfall event preceded by 72 hours of no measurable precipitation. This first inch of rainfall must be 100% managed with no discharge to surface waters.

(b) These management measures for runoff reduction shall be installed on private property, not within the public right-of-way, for all private projects.

(c) Limitations to the application of runoff reduction requirements include, but are not limited to:

(i) Where a potential for introducing pollutants into the groundwater exists, unless pretreatment is provided;

(ii) Where pre-existing soil contamination is present in areas subject to contact with infiltrated runoff;

(iii) Presence of sinkholes or other karst features.

(d) Pre-development infiltrative capacity of soils at the site must be taken into account in selection of runoff reduction management measures.

(e) Incentive Standards for re-developed sites: a 10% reduction in the volume of rainfall to be managed for any of the following types of development. Such credits are additive such that a maximum reduction of 50% of the standard in paragraph (a) above is possible for a project that meets all 5 criteria:

(i) Redevelopment;

(ii) Brownfield redevelopment;

(iii) High density (>7 units per acre);

(iv) Vertical Density, (Floor to Area Ratio (FAR) of 2 or >18 units per acre); and

(v) Mixed use and Transit Oriented Development (within ½ mile of transit station or proposed station).

(f) For projects that cannot meet 100% of the runoff reduction requirement, unless subject to the incentive standards; the remainder of the stipulated amount of rainfall must be treated prior to discharge with a technology documented to remove 80% total suspended solids (TSS) unless an alternative provided under this ordinance is approved. The treatment technology must be designed, installed and maintained to continue to meet this performance standard.

(g) For projects that cannot meet 100% of the runoff reduction requirements, the Public Works Department may allow runoff reduction measures to be implemented at another location within the same USGS 12-digit hydrologic unit code (HUC) as the original project. Off-site mitigation must be a minimum of 1.5 times the amount of water not managed on site. The off-site mitigation location (or alternative location outside the 12-digit HUC) and runoff reduction measures must be approved by the Public Works Department. If this mitigation is permitted by the Public Works Department then it shall identify priority areas within the watershed in which mitigation projects can be completed.

(h) To protect stream channels from degradation, specific channel protection criteria shall be provided as prescribed in the adopted BMP manual.

(i) Stormwater discharges to critical areas with sensitive resources (i.e., cold water fisheries, shellfish beds, swimming beaches, recharge areas, water supply reservoirs) may be subject to additional performance criteria, or may need to utilize or restrict certain stormwater management practices.

(j) Stormwater discharges from hot spots may require the application of specific structural BMP's and pollution prevention practices. In addition, stormwater from a hot spot land use may not be infiltrated.

(k) Prior to or during the site design process, applicants for grading/land disturbance permits shall consult with the Public Works Department to determine if they are subject to additional stormwater design requirements.

(l) The calculations for determining peak flows as found in the adopted BMP manual shall be used for sizing all stormwater facilities.

(6) Minimum volume control requirements.

(a) Stormwater designs shall meet the multi-stage storm frequency storage requirements as identified in the BMP manual. Metropolitan Nashville **Chapter 6 TECHNICAL GUIDELINES AND CRITERIA**
6.1 Adequate Stormwater Management Systems
http://www.nashville.gov/Portals/0/SiteContent/WaterServices/Stormwater/docs/SWMM/2013/Vol1/07_Chapter06.pdf

(b) If downstream flooding, hydrologic or topographic conditions warrant greater control than that provided by the minimum control requirements, the Public Works Department may impose additional requirements deemed necessary to control the volume, timing, and/or peak rate of runoff.

(7) Permanent Stormwater management plan requirements. The permanent stormwater management plan shall be completed in accordance with the CGP and the BMP Manual.

(8) Maintenance Agreement:

(a) All projects shall prepare and record at the McMinn County Registrar of Deeds the Public Works Department standard "Agreement for Permanent Inspection and Maintenance of Stormwater Facilities" (Maintenance Agreement) after approval of it by the Public Works Department.

(b) The design and planning of all permanent stormwater management facilities shall include detailed long term maintenance and repair plan prepared by a licensed engineer to ensure their continued performance. This plan shall be done in accordance with the MS4 Permit requirements. Provisions for the periodic review and evaluation of the effectiveness of the maintenance program and the need for revisions or additional maintenance procedures shall be included in the plan. This site specific plan will be recorded attached to the Maintenance Agreement.

14-505. Permanent stormwater management: operation, maintenance, and inspection.

(1) As built plans. All applicants are required to submit as built plans for any structures located on-site after final construction is completed. The plan must show the final design specifications for all stormwater management facilities and must be sealed by a registered professional engineer licensed to practice in Tennessee. Permanent use and occupation permits shall not be granted until corrections to all BMP's have been made, the site is stabilized and accepted by the city.

(2) Landscaping and stabilization requirements.
Landscaping and stabilization measures for any project shall meet all requirements under the CGP.

(3) Inspection of stormwater management facilities. Periodic inspections of facilities shall be performed, documented, and reported in accordance with the Maintenance Agreement in 6.1(8) Appendix C.

14-506. Existing locations and ongoing developments.

(1) On-site stormwater management facilities- Maintenance agreement recorded:
Where the stormwater facility is located on property that is subject to a recorded Maintenance Agreement it shall be maintained per that Agreement.

(2) Existing problem locations – No maintenance agreement.

(a) The Public Works Department shall in writing notify the owners of existing locations and developments of specific drainage, erosion or sediment problems affecting or caused by such locations and developments, and the specific actions required to correct those problems. The notice shall also specify a reasonable time for compliance. Discharges from existing BMP's that are in violation of this ordinance shall be regarded as illicit.

(b) Inspection of existing facilities. The city may, to the extent authorized by state and federal law, enter and inspect private property for the purpose of determining if there are illicit non-stormwater discharges, and to establish inspection programs to verify that all stormwater management facilities are functioning within design limits. These inspection programs may be established on any reasonable basis, including but not limited to: routine inspections; random inspections; inspections based upon complaints or other notice of possible violations; inspection of drainage basins or areas identified as higher than typical sources of sediment or other contaminants or pollutants; inspections of businesses or industries of a type associated with higher than usual discharges of contaminants or pollutants or with discharges of a type which are more likely than the typical discharge to cause violations of the city's NPDES stormwater permit; and joint inspections with other agencies inspecting under environmental or safety laws. Inspections may include, but are not limited to: reviewing maintenance and repair records; sampling discharges, surface water, groundwater, and material or water in drainage control facilities; and evaluating the condition of drainage control facilities and other BMP's.

(3) Requirements for all existing locations and ongoing developments. The following requirements shall apply to all locations and development at which land disturbing activities have occurred previous to the enactment of this ordinance:

(a) Denuded or stabilized areas must be vegetated or stabilized in accordance with the CGP requirements on a schedule acceptable to the Stormwater Department.

(b) Cuts and slopes must be properly stabilized with appropriate vegetation and/or retaining walls constructed.

(c) Drainage ways shall be properly stabilized to prevent erosion.

(d) Trash, junk, rubbish, debris shall be cleared from drainage ways

(e) Stormwater quality shall, at the discretion of the Public Works Department be controlled to the maximum extent practicable to prevent pollution. Such control measures may include, but are not limited to tree planting, storage measures, infiltration systems, filtering systems, restoration of stream buffer zones, stream restoration, or other green infrastructure.

(4) Corrections of problems subject to appeal. Corrective measures imposed by the Public Works Department under this section are subject to appeal under section 14-510 of this chapter.

14-507. Illicit discharges.

(1) Scope. This section shall apply to all water generated on developed or undeveloped land entering the city's separate storm sewer system.

(2) Prohibition of illicit discharges. No person shall introduce or cause to be introduced into the municipal separate storm sewer system or any waters any discharge that is not composed entirely of stormwater or any discharge that flows from a stormwater facility that is not maintained and/or inspected in accordance with section 14-506 shall be an illicit discharge. Non-stormwater discharges shall include, but shall not be limited to, sanitary wastewater, car wash wastewater, radiator flushing disposal, spills from roadway accidents, carpet cleaning wastewater, effluent from septic tanks, improper oil disposal, laundry wastewater/gray water, improper disposal of auto and household toxics. The commencement, conduct or continuance of any non-stormwater discharge to the municipal separate storm sewer system is prohibited except as described as follows:

(a) Uncontaminated discharges from the following sources:

(i) Water line flushing or other potable water sources;
(ii) Landscape irrigation or lawn watering with potable water;
(iii) Diverted stream flows;
(iv) Rising ground water;
(v) Groundwater infiltration to storm drains;
(vi) Pumped groundwater;
(vii) Foundation or footing drains;
(viii) Crawl space pumps;
(ix) Air conditioning condensation;
(x) Springs;
(xi) Non-commercial washing of vehicles;
(xii) Natural riparian habitat or wetland flows;
(xiii) Swimming pools (if dechlorinated - typically less than one PPM chlorine);
(xiv) Firefighting activities;
(xv) Any other uncontaminated water source.

(b) Discharges authorized by the Construction General Permit (CGP), which comply with Section 3.5.9 of the same:

(i) dewatering of work areas of collected stormwater and ground water (filtering or chemical treatment may be necessary prior to discharge);

(ii) waters used to wash vehicles (of dust and soil, not process materials such as oils, asphalt or concrete) where detergents are not used and detention and/or filtering is provided before the water leaves site;

(iii) water used to control dust in accordance with CGP section 3.5.5;

(iv) potable water sources including waterline flushing from which chlorine has been removed to the maximum extent practicable;

(v) routine external building wash down that does not use detergents or other chemicals;

(vi) uncontaminated groundwater or spring water; and

(vii) foundation or footing drains where flows are not contaminated with pollutants (process materials such as solvents, heavy metals, etc.).

(3) Prohibition of illicit connections. The construction, use, maintenance or continued existence of illicit connections to the municipal separate storm sewer system is prohibited. This prohibition expressly includes, without limitation, illicit connections made in the past, regardless of whether the connection was permissible under law or practices applicable or prevailing at the time of connection.

(4) Reduction of stormwater pollutants by the use of best management practices. Any person responsible for a property or premises, which is, or may be, the source of an illicit discharge, may be required to implement, at the person's expense, the BMP's necessary to prevent the further discharge of pollutants to the municipal separate storm sewer system. Compliance with all terms and conditions of a valid NPDES permit authorizing the discharge of stormwater associated with industrial activity, to the extent practicable, shall be deemed in compliance with the provisions of this section. Discharges from existing BMP's that have not been maintained and/or inspected in accordance with this ordinance shall be regarded as illicit.

(5) Notification of spills. Notwithstanding other requirements of law, as soon as any person responsible for a facility or operation, or responsible for emergency response for a facility or operation has information of any known or suspected release of materials which are resulting in, or may result in, illicit discharges or pollutants discharging into, the municipal separate storm sewer system, the person shall take all necessary steps to ensure the discovery, containment, and cleanup of such release. In the event of such a release of hazardous materials the person shall immediately notify the McMinn County Emergency Management Agency of the occurrence via emergency dispatch services. In the event of a release of non-hazardous materials, the person shall notify the city in person or by telephone, fax, or email, no later than two (2) business days. Notifications in person or by telephone shall be confirmed by written notice addressed and mailed to the city within three (3) business days of the telephone notice. If the discharge of prohibited materials emanates from a commercial or industrial establishment, the owner or operator of such establishment shall also retain an on-site written record of the discharge and the actions taken to prevent its recurrence. Such records shall be retained for at least three (3) years.

(6) No illegal dumping allowed. No person shall dump or otherwise deposit outside an authorized landfill, convenience center or other authorized garbage or trash collection point, any trash or garbage of any kind or description on any private or public property, occupied or unoccupied, inside the city. The City of Athens Department of Community Development and the Department of Public Works enforces illegal dumping under existing city ordinances; however, repeat or non-compliant offenders may be referred to the Stormwater Division of the Public Works Department for enforcement action under this ordinance.

14-508. Enforcement.

(1) Enforcement authority. The Stormwater Department shall have the authority to issue notices of violation and citations, and to impose the civil penalties provided in this section as described in the Stormwater Department "Enforcement Response Plan" (ERP). Measures authorized include:

(a) Verbal Warnings – At a minimum, the verbal warnings must specify the nature of the violation and required corrective action.

(b) Written Notices – Written notices must stipulate the nature of the violation and the required corrective action, with deadlines for taking such action.

(c) Citations with Administrative Penalties – The City of Athens has the authority to assess monetary penalties, which may include civil and administrative penalties.

(d) Stop Work Orders – Stop work orders that require construction activities to be halted, except for those activities directed at cleaning up, abating discharge, and installing appropriate control measures.

(e) Withholding of Plan Approvals or Other Authorizations – Where a facility is in noncompliance, Athens City's own approval process affecting the facility's ability to discharge to the City of Athens can be used to abate the violation.

(f) Additional Measures – The City of Athens may also use other escalated measures provided under local legal authorities. The City of Athens may perform work necessary to improve erosion control measures and collect the funds from the responsible party in an appropriate manner, such as collecting against the project's letter of credit or directly billing the responsible party to pay for work and materials.

(2) Notification of violation:

(a) Verbal warning. Verbal warning may be given at the discretion of the inspector when it appears the condition can be corrected by the violator within a reasonable time, which time shall be approved by the inspector.

(b) Written notice. Whenever the Stormwater Department finds that any permittee or any other person discharging stormwater has violated or is violating this ordinance or a permit or order issued hereunder, the Public Works Department may serve upon such person written notice of the violation. Within ten (10) days of this notice, an explanation of the violation and a plan for the satisfactory correction and prevention thereof, to include specific required actions, shall be submitted to the Public Works Department. Submission of this plan in no way relieves the discharger of liability for any violations occurring before or after receipt of the notice of violation.

(c) Consent orders. The Public Works Department is empowered to enter into consent orders, assurances of voluntary compliance, or other similar documents establishing an agreement with the person responsible for the noncompliance. Such orders will include specific action to be taken by the person to correct the noncompliance within a time period also specified by the order. Consent orders shall have the same force and effect as administrative orders issued pursuant to paragraphs (d) and (e) below.

(d) Show cause hearing. The Public Works Department may order any person who violates this chapter or permit or order issued hereunder, to show cause why a proposed enforcement action should not be taken. Notice shall be served on the person specifying the time and place for the meeting, the proposed enforcement action and the reasons for such action, and a request that the violator show cause why this proposed enforcement action should not be taken. The notice of the meeting shall be served personally or by registered or certified mail (return receipt requested) at least ten (10) days prior to the hearing.

(e) Compliance order. When the Public Works Department finds that any person has violated or continues to violate this chapter or a permit or order issued thereunder, he may issue an order to the violator directing that, following a specific time period, adequate structures or devices be installed and/or procedures implemented and properly operated. Orders may also contain such other requirements as might be reasonably necessary and appropriate to address the noncompliance, including the construction of appropriate structures, installation of devices, self-monitoring, and management practices.

(f) Cease and desist and stop work orders. When the Public Works Department finds that any person has violated or continues to violate this chapter or any permit or order issued hereunder, the Public Works Department may issue a stop work order or an order to cease and desist all such violations and direct those persons in noncompliance to:

(i) Comply forthwith; or

(ii) Take such appropriate remedial or preventive action as may be needed including judicial and/or injunctive relief to properly address a continuing or threatened violation; including halting operations except for terminating the discharge and installing appropriate control measures.

(g) Suspension, revocation or modification of permit. The Public Works Department may suspend, revoke or modify the permit authorizing the land development project or any other project of the applicant or other responsible person within the city. A suspended, revoked or modified permit may be reinstated after the applicant or other responsible person has taken the remedial measures set forth in the notice of violation or has otherwise cured the violations described therein, provided such permit may be reinstated upon such conditions as the Public Works Department may deem necessary to enable the applicant or other responsible person to take the necessary remedial measures to cure such violations.

(h) Enforcement Response Plan.(ERP) Enforcement procedures, guidelines for penalties and appeals are generally spelled out in the ERP for the Public Works Department.

(i) Conflicting standards. Whenever there is a conflict between any standard contained in this chapter and the BMP manual adopted by the city under this ordinance, the strictest standard shall prevail.

14-509. Penalties.

(1) Violations. Any person who shall commit any act declared unlawful under this chapter, who violates any provision of this chapter, who violates the provisions of any permit issued pursuant to this chapter, or who fails or refuses to comply with any lawful communication or notice to abate or take corrective action by the Public Works Department, shall be guilty of a civil offense.

(2) Penalties. Under the authority provided in Tennessee Code Annotated § 68-221-1106, the city declares that any person violating the provisions of this chapter may be assessed a civil penalty by the Public Works Department of not less than fifty dollars ($50.00) and not more than five thousand dollars ($5,000.00) per day for each day of violation. Each day of violation shall constitute a separate violation.

(3) Measuring civil penalties. In assessing a civil penalty, the Public Works Department may consider:

(a) The harm done to the public health or the environment;

(b) Whether the civil penalty imposed will be a substantial economic deterrent to the illegal activity;

(c) The economic benefit gained by the violator;

(d) The amount of effort put forth by the violator to remedy this violation;

(e) Any unusual or extraordinary enforcement costs incurred by the city;

(f) The amount of penalty established by ordinance or resolution for specific categories of violations; and

(g) Any equities of the situation which outweigh the benefit of imposing any penalty or damage assessment.

(4) Recovery of damages and costs. In addition to the civil penalty in subsection (2) above, the city may recover:

(a) All damages proximately caused by the violator to the city, which may include any reasonable expenses incurred in investigating violations of, and enforcing compliance with, this chapter, or any other actual damages caused by the violation.

(b) The costs of the city's maintenance of stormwater facilities when the user of such facilities fails to maintain them as required by this chapter.

(5) Referral to TDEC. Where the city has used progressive enforcement to achieve compliance with this ordinance, and in the judgment of the city has not been successful, the city may refer the violation to TDEC. For the purposes of this provision, "progressive enforcement" shall mean two (2) follow-up inspections and two (2) warning letters. In addition, enforcement referrals to TDEC must include, at a minimum, the following information:

(a) Construction project or industrial facility location;

(b) Name of owner or operator;

(c) Estimated construction project, size or type of activity

(d) Records of communications with the owner or operator regarding the violation, including at least two follow-up inspections, two warning letters or notices of violation, and any response from the owner or operator.

(6) Other remedies. The city may bring legal action to enjoin the continuing violation of this chapter, and the existence of any other remedy, at law or equity, shall be no defense to any such actions.

(7) Remedies cumulative. The remedies set forth in this section shall be cumulative, not exclusive, and it shall not be a defense to any action, civil or criminal, that one (1) or more of the remedies set forth herein has been sought or granted.

14-510. Appeals.

(1) General. Pursuant to Tennessee Code Annotated § 68-221-1106(d), any person aggrieved by the imposition of a civil penalty or damage assessment as provided by this chapter may appeal said penalty or damage assessment to the Board of Zoning Appeals.

(2) Appeals to be in writing. The appeal shall be in writing and filed in triplicate with the Public Works Department Director within fifteen (15) days after the civil penalty and/or damage assessment is served in any manner authorized by law. The Director shall distribute the copies to the appealing party, the BZA, and keep one copy for his records.

(3) Public hearing. Upon receipt of an appeal, the BZA shall hold a public hearing within thirty (30) days. This time may be extended by agreement of the parties. Ten (10) days prior notice of the time, date, and location of said hearing shall be published in a daily newspaper of general circulation. Ten (10) days' notice by registered mail shall also be provided to the aggrieved party, such notice to be sent to the address provided by the aggrieved party at the time of appeal. The decision of the BZA of the city shall be final.

(4) Appealing decisions of the city's governing body. Any alleged violator may appeal a decision of the BZA pursuant to the provisions of Tennessee Code Annotated, title 27, chapter 8.

14-511. Effective Date.

(1) General. The provisions of this ordinance shall become effective on the date spelled out in the Ordinance for approval by the City Council of Athens Tennessee.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ATHENS, TENNESSEE:

SECTION 2. That all Ordinances or parts of ordinances in conflict with this ordinance are hereby repealed to the extent necessary to implement this ordinance.

SECTION 3: In the event that any part of this ordinance is invalidated by a court of competent jurisdiction, all other parts shall remain in full force and effect unless otherwise lawfully repealed or amended.

SECTION 4: This ordinance shall take effect immediately upon passage on second reading, the public necessity requiring it.

PASSED ON FIRST READING: November 18, 2014

PASSED ON SECOND READING: December 16, 2014

DATE OF PUBLIC HEARING: December 16, 2014

Ann S. Davis
ANN S. DAVIS, Mayor

Mitchell B. Moore
MITCHELL B. MOORE, City Manager

APPROVED AS TO FORM:

H. CHRIS TREW, City Attorney

APPENDIX A

ENFORCING STORMWATER AND PRETREATMENT ORDINANCES THROUGH THE ADMINISTRATIVE PROCESS, INCLUDING THE USE OF CIVIL PENALTIES

Sid Hemsley and John Chlarson
MTAS
January, 2011

GENERALLY

Several statutes in Tennessee authorize the enforcement of municipal ordinances administratively, and include as an administrative enforcement mechanism, the imposition by the enforcing municipal official or body, of a monetary civil penalty. However, this treatment of administrative hearings is principally concerned with certain statutes that allow municipalities to adopt sewer pretreatment and stormwater ordinances, and that authorize municipal officials and boards to enforce those ordinances administratively through the imposition of civil monetary penalties for violations of those ordinances.

- Tennessee Code Annotated, § 69-3-125: Under this statute municipal officials can levy civil monetary penalties up to $10,000 per day for certain pretreatment ordinance violations.

- Tennessee Code Annotated, § 69-221-1106: Under this statute, municipal officials can levy civil monetary penalties up to $5,000 per day for stormwater ordinance violations.

Two of the principal questions this treatment will consider are:

- Will such civil monetary penalties pass legal muster?

- What are the legal rules governing administrative hearings?

CIVIL MONETARY PENALTIES FOR PRETREATMENT AND STORMWATER ORDINANCE VIOLATIONS ARE PRESCRIBED BY STATUTE

Tennessee Code Annotated, § 69-3-115(a)(1) (Pretreatment ordinance)

As indicated above Tennessee Code Annotated, § 69-3-101 et seq., speaks both of civil and criminal penalties. But that statutory scheme clearly discriminates with respect to *who* can levy those civil and criminal penalties. As will be shown below, municipal administrative agencies are authorized to levy only civil penalties.

Civil Penalties

- Tennessee Code Annotated, § 69-3-115(a)(1) authorizes the *commissioner* to impose *civil penalties* of up to $10,000 per day for various violations contained in that statute. The same statute contains a list of things the *commissioner* must consider in determining the amount of a civil penalty, and provides that the penalty is clearly collected through the courts as a civil judgment.

- Tennessee Code Annotated, § 69-3-125 authorizes the "*local administrative officer*" to impose *civil penalties* of up to $10,000 per day for various violations contained in that statute. The same statute also contains a list of things the local administrative officer must consider in determining the amount of the civil penalty, and likewise clearly provides that the penalty is collected through the courts as a civil judgment.

Criminal Penalties

- Tennessee Code Annotated, § 69-3-115(b) provides for certain criminal penalties for pretreatment violations. It declares that "Any person polluting the waters of this state or violating or failing, neglecting, or refusing to comply with any of the provisions of this part, commits a Class C Misdemeanor. Each day upon which such violation occurs constitutes a separate offense. Tennessee Code Annotated, § 69-3-115(c) provides that, "Any person who willfully and knowingly falsifies any records [etc.] required by the board or the commissioner or who willfully and knowingly pollutes the waters of the state, or who willfully fails, neglects or refuses to comply with any of the provisions of this part commits a Class E Felony and shall be punished by a fine of not more than twenty-five thousand dollars ($25,000) or incarceration or both." However, Tennessee Code Annotated, § 69-3-115(d) says that "No *warrant or indictment* under this part shall be issued except upon application by the *board or the commissioner* or upon such application authorized in writing by either of them." Those criminal violations are obviously charged in a court, and the criminal penalties imposed for those violations, are imposed by a court.

But when the pretreatment statute speaks of civil penalties it is obviously referring to those penalties levied by the state administrative agents, and by municipal administrative agents, rather than by a court. Nothing in the pretreatment statutes, nor in any other statute that applies to sewer use ordinances, authorizes the local administrative officer or entity to impose *criminal* penalties for the violation of a municipality's sewer use ordinances.

Tennessee Code Annotated, § 68-221-1106 (Stormwater Ordinance)

This statute provides that a municipality may adopt an ordinance or resolution providing that any person violating the provisions of any ordinance or resolution regulating storm water discharges or facilities "shall be subject to a civil penalty of not less than fifty dollars ($50) per day or more than $5,000 per day for each day of violation. Each day of violation may constitute a separate violation."

The Problem of Article VI, § 14 of the Tennessee Constitution On "Fines" In Municipal Ordinance Violation Cases

Generally

Where a municipal *court* levies fines of greater than $50 in municipal ordinance violation cases, it runs head on into Article VI, § 14, of the Tennessee Constitution, which provides that:

> No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine shall be more than fifty dollars.

City of Chattanooga v. Davis

In City of Chattanooga v. Davis, above, the Tennessee Supreme Court held that the levy of municipal civil penalties in excess of $50 violated Article VI, § 14, of the Tennessee Constitution, where their purpose was punitive, rather than remedial. That case also involved the consolidated case of Barrett v. Metropolitan Government of Nashville-Davidson County.

The City of Chattanooga is a home rule city.[1] In City of Chattanooga v. Davis, the city court fined Davis $300 for reckless driving, under the authority Tennessee Code Annotated, § 6-54-306 gives home rule municipalities to levy monetary penalties of up to $500. In Barrett v. Metropolitan Government of Nashville-Davidson County, Title 16 of the Nashville-Davidson County Metropolitan Code regulated buildings and construction. The Nashville-Davidson County Metropolitan Court levied on Barrett a civil penalty of $500 for each of five civil warrants issued over a period of months for various building code violations, and violating a stop work order. It is worthwhile to note that Tennessee Code Annotated, § 7-3-507, provides that:

> All metropolitan governments are empowered to set a penalty of up to five hundred dollars ($500) per day for each day during which the violation of ordinances, laws or regulation of such metropolitan government continues or occurs. [The statute prescribes lesser penalties for certain housing and zoning violations].

[The constitutionality of that statute under Article VI, § 14, of the Tennessee Constitution was not an issue in Barrett; indeed, it was not even mentioned except in a footnote in connection with Davis.]

In overturning the $300 fine on both Davis and Barrett, the court declared that the $50 fine limitation in Article 6, § 14 applied to punitive, but not to remedial fines. Whether a fine was punitive or remedial depends upon a two-step inquiry:

> Is the language of the pertinent ordinances punitive or remedial?
>
> Is the "actual purpose and effect" of the ordinances punitive or remedial?

The "fine" or "civil penalty" in both Davis and Barrett was punitive rather than remedial because, under a "totality of circumstances" test, the intent of the fine was to punish the defendant rather than to

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[1]There are 14 home rule cities in Tennessee: Chattanooga, Clinton, East Ridge,

Etowah, Johnson City, Lenoir City, Memphis, Oak Ridge, Red Bank, Sevierville, Sweetwater, Whitwell, Knoxville, and Mt. Juliet.

remedy the violations at issue. In Davis, more so than in Barrett, the language of the ordinance was clearly punitive.

Article 6, § 14 does not apply to administrative penalties

There are no cases dealing with the question of whether Article 6, § 14 of the Tennessee Constitution applies to administrative penalties imposed by local government officials or boards. However, Tenn. Op. Atty. Gen. No. 05-056 (April 20, 2005) opines that the administrative penalty of $1,500 beer boards are authorized to levy under Tennessee Code Annotated, § 57-5-108(a)(A) are not intercepted by $50 fine limitation contained in Article VI, § 14 of the Tennessee Constitution under the logic of Dickson v. State, 116 S.W.3d 738 (Tenn. Ct. App. 2003).

That case considered the question of whether a $15,000 fine levied by the Petroleum Underground Storage Tank Division of the Department of Environment and Conservation, under the authority of the Underground Petroleum Storage Act, codified at Tennessee Code Annotated, § 68-215-101 et seq., was subject to the $50 fine limitation contained in Article 6, § 14.

The answer was no, held the Court, reasoning that the $50 fine limitation in Article 6, § 14, applied only to *fines levied by the judiciary and not to the* government as a *whole. For that reason, it did not apply to administrative agencies. (The court did conclude that had the fine been levied by a court, it would have been punitive rather than remedial* and subject to Article VI, § 14). Presumably, the same logic would apply to municipal administrative penalties.

The recent unreported case of Barrett v. Tennessee Occupational and Health Review Commission, 2007 WL 4562889 (Tenn. Ct. App.) is consistent with Dickson v. State. There, a TOSHA employee inspected Barrett's construction site, and cited him for several violations. After a hearing before the Tennessee Occupational Safety and Health Review Commission, Barrett was fined $950. Barrett appealed, arguing that the fine violated the $50 fine limit of Article 6, § 14 of the Tennessee Constitution. The Court rejected that argument, concluding that Dickson had been correctly decided, "unless the Supreme court instructs us otherwise." [At 3] With respect to Barrett's argument that the $950 fine was "punitive" under City of Chattanooga v. Davis, the Court declared that "*Dickson* tells us that regardless of the punitive nature of a fine, Article VI, § 14 does apply to a state agency. *Dickson*, 1216 S.W.3d 740." [At 3-4] In Footnote 3 of that case, the Court also pointed out that:

> "The commissioner of labor and workforce development has the authority to assess monetary penalties as provided in §§ 50-3-402-- 3-408 for any violation of this chapter or of any standard, rule or order adopted by regulation promulgated by the commission pursuant to this chapter." The statute goes on to provide for the assessment of a penalty up to $7,000 for both serious and non-serious violations. Tenn. Code Ann. § 50-3-403 and 50-3-405 (2005). [At 4]

Selected Statutes Governing Pretreatment and Stormwater Ordinances Enforcement

Pretreatment ordinances

Tennessee Code Annotated, §§ 69-3-123–124, contain procedures for handling pretreatment violations by the "local administrative officer" and the "local hearing authority." The latter statute contains the standards for hearings. Among the hearing requirements are notice of a hearing, a verbatim record of the hearing and findings of facts and conclusions of law, and the right to appeal final orders.

In providing that any person (including industrial users) who violate various enumerated pretreatment requirements can be fined up to $10,000 per day, ***Tennessee Code Annotated, § 63-3-125, lists the factors that the local administrative office may consider in assessing the fine:***

- Whether the civil penalty imposed will be a substantial economic deterrent to the illegal activity;

- Damages to the pretreatment agency, including compensation for the damage or destruction of the facilities of the publically owned treatment works, and also including any penalties, costs and attorneys' fees incurred by the pretreatment agency as the result of the illegal activity, as well as the expenses involved in enforcing this section and the costs involved in rectifying any damages;

- Cause of the discharge or violation;

- Severity of the discharge and its effect upon the facilities of the publically owned treatment works and upon the quality of the receiving waters;

- Effectiveness of action taken by the violator to cease the violation;

- The technical and economic reasonableness of reducing or eliminating the discharge; and

- The economic benefit gained by the violator.

The same statute provides that the local hearing authority may establish by regulation a schedule of the amount of civil penalty that can be assessed by the local administrative officer for certain specific violations or categories of violations.

Tennessee Code Annotated, §§ 69-3-123–126 also contain other remedies for pretreatment violations, including the recovery of damages caused by pretreatment violations.

Stormwater ordinances

Tennessee Code Annotated, § 68-221-1101 et seq. is the state law that authorizes municipalities and counties to adopt stormwater ordinances (in the case of municipalities) and resolutions (in the case of counties). Public officials familiar with the enforcement of building, utility, and housing codes will recognize that the MTAS model stormwater ordinance has two significant things in common with those codes: both contain detailed rules and regulations governing the subject matter they regulate, and both contain an administrative process for addressing violations of those rules and regulations. For that reason, it is likely that public officials who enforce building, utility and housing codes are generally a good source of information on the legal and practical pitfalls in the administrative enforcement process.

Tennessee Code Annotated, § 68-221-1106, requires a municipality that assesses a penalty for a stormwater ordinance violation to provide the violator "reasonable notice of the assessment..." It also requires a municipality to "establish a procedure for a review of the civil penalty or damage assessment by either the governing body of the municipality or a board established to hear appeals by any person incurring a damage assessment or a civil penalty."

With respect to civil monetary penalties that can be imposed by a city administratively for stormwater ordinance violations, Tennessee Code Annotated, § 68-221-1101 et seq., authorizes municipalities to:

- Impose a penalty of not less than $50 no more than $5,000 per day for the violation of any stormwater ordinance or resolution. ***The amount of the penalty is to be calculated based on seven (7) factors:***

(1) The harm done to the public health or environment;

(2) Whether the city penalty imposed will be a substantial economic deterrent;

(3) The economic benefit gained by the violator;

(4) The amount of effort put forth by the violator to remedy the violation;

(5) Any unusual or extraordinary enforcement costs incurred by the municipality;

(6) The amount of penalty established by ordinance or resolution for specific categories of violations; and

(7) Any equities of the situation which outweigh the benefit of imposing any penalty or damage assessment.

- Assess damages to the municipality "proximately" caused by the violator. [Tennessee Code Annotated, § 68-221-106]

Proof in Pretreatment and Stormwater Cases Resolved Administratively

The common law writ of certiorari (Tennessee Code Annotated, § 27-8-101) and sometimes the statutory writ of certiorari (Tennessee Code Annotated, § 27-8-102) (Tennessee Code Annotated, § 27-9-101 et seq. supplies the procedural framework for both writs), are the avenues for appeals from the decisions of governmental administrative bodies and officers. It is not worthwhile here to attempt to make a lucid distinction between the two writs. What is pertinent here is that under the common law writ of certiorari, under which most challenges to administrative decisions will be brought, those decisions will be upheld by the courts if there is "any material evidence" to support the administrative decision at issue.

There are few cases involving administrative hearings and monetary penalties in the enforcement of pretreatment ordinances, and no cases involving stormwater ordinances. However, the recent case of Leonard Plating Company v. Metropolitan Government of Nashville and Davidson County, 213 S.W.3d 898 (Tenn.Ct.App. 2006) (Permission to appeal denied by Supreme Court, December 27, 2006), reflects an appeal of the administrative decisions of local government officials pertinent to the enforcement of pretreatment regulations. It is a good model for the application of the law governing the standard of proof that applies to a government's administrative decisions.

In that case, an inspection of Metro's sewer lines connected to Leonard Plating Company's plant disclosed damages to a significant length of Metro's sewer lines. Metro. Water Services charged Leonard Plating with violations of its pretreatment permit, and after a hearing imposed penalties on that company of $1,362.50, and assessed it damages of $306,380 under Tennessee Code Annotated, § 69-3-126(a), which authorizes a local government to assess a pretreatment violator for damages caused by its violation. On Leonard Plating's appeal to the Metro. Wastewater Hearing Authority, the Authority affirmed Metro. Water Service's assessment. Leonard Plating appealed the Authority's decision to the Davidson County Chancery Court, which overturned the Authority's assessment, for three reasons: (1) The record did not contain material evidence to establish that the wastewater discharge from Leonard Plating's plant had caused the damage to the sewer pipes; (2) The Authority had improperly placed the burden on Leonard Plating to prove that the damage to the sewer lines had not been caused by the wastewater from its plant; (3) The Authority had relied solely on its own expertise to make up for the lack of other evidence connecting Leonard Plating's wastewater to the damage to the sewer pipes.

The Court of Appeals overturned the Davidson County Chancery Court's decision, in language that I will quote at length because it is highly instructive on the standard of proof that applies in the case of an administrative penalty appealed to the chancery court,

> ... we find that the trial court exceeded its authority by weighing the evidence. Because we have determined that the record contains material evidence to support the Authority's decision, we reverse the trial court's conclusion that the record does not contain sufficient evidence to support the Authority's conclusion that the wastewater discharge from Leonard Plating's plant caused the damage to the sewer lines. [At 903]

The court said this about the scope of review of administrative decisions:

> The scope of review afforded by a common-law writ of certiorari is extremely limited. [Citations omitted by me.] Reviewing courts may grant relief only when the board or agency whose decision is being reviewed has exceeded its jurisdiction or has acted illegally, arbitrarily, or fraudulently. Tenn. Code Ann. § 27-8-101 (2000). [Other citations omitted by me.]
>
> Review under a common-law writ of certiorari does not extend to a redetermination of the facts found by the board or agency whose decision is being reviewed. [Citations omitted by me.] The courts may not (1) inquire into the intrinsic correctness of the decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the board of agency. However, they may review the record solely to determine whether it contains any material evidence to support the decisions because a decision without evidentiary support is an arbitrary one. [Citations omitted by me.]
>
> Ascertaining whether the record contains material evidence to support the board's or agency's decision is a question of law. [Citation omitted.] For the purpose of this inquiry, "material evidence" is relevant evidence that a reasonable person would accept as adequate to support a rational conclusion. [Citations omitted by me.] The amount of material evidence required to support a board's or agency's decision must exceed a scintilla of evidence but may be less than a preponderance of the evidence. [Citation omitted by me.] [At 903-04]

The trial court's dissatisfaction with the evidence establishing that the damage to metro's sewer lines was not justified under the above scope of review, concluded the court of appeals:

> While the [trial] court determined that the record contained sufficient evidence to conclude that Leonard Plating had violated its permit by discharging wastewater into the sewer plant that exceeded the permissible level of acidity, the court decided that the record does not

> contain material evidence establishing that the wastewater from Leonard's Plating plant caused the damage to the sewer line. We have determined that the trial court reached this result by impermissibly weighing the evidence. [At 904]

The court of appeals focused on the trial court's choosing between the evidence that the damage was caused by Leonard Plating and the evidence that the damage could have had other causes. In particular the court of appeals pointed to the testimony of a Mr. Wingo for Metro that:

> "...acid is not very friendly to concrete pipe" and that discharges with level of acidity similar to the one involved in this case could damage concrete pipes in "a matter of a few months." He also testified that he had observed damaged sewer pipe "strikingly similar" to the damaged pipe involved in this case at other plating companies. [At 904]

The trial court characterized Mr. Wingo's testimony as "equivocal and inconclusive," then turned its attention to the evidence presented by Leonard Plating, stating, declaring that:

> Detracting from the claim that the petitioner's discharge corroded the pipe was the testimony of Mr. Kisselvoich, a consultant with an environmental firm of PSI. He testified that the activity of the former occupant of the building, a barbeque [sic] restaurant known as Coursey's, had deposited food in the pipe, and that he could not say that the pH level of the petitioner had caused the pipe to wear out.

The court of appeals also noted that the trial court had determined that a Mr. Powers testimony had "detract[ed]" from placing causation on the petitioner [Leonard Plating], apparently referring to Footnote 17 in which the court of appeals noted that "Mr. Power speculated that the damage could have been caused by tomato acid." [At 905]

The court of appeals view of the trial court's weighing of evidence was plain:

> The trial court's memorandum reflects that it overstepped the permissible boundaries of the search for material evidence. The Metropolitan Government presented evidence establishing (1) that the wastewater from Leonard Plating comprised essentially all of the flow in the most severely damaged sewer pipes, (2) that Leonard Plating uses acids in its electroplating processes which it discharges into the sewer, (3) that until July, 2002 Leonard Plating made no effort to monitor or control the acidity of its wastewater, and (4) that samples of the wastewater discharged for Leonard Plating's plant exceeded permissible levels of acidity. All of this is material evidence upon which a reasonable person could rely to make a rational decision that the excess acidity in Leonard Plating's wastewater caused the damage in the sewer pipes that required them to be replaced. Although the trial court acknowledged this evidence, it went further and weighed the Metropolitan government's evidence against the evidence offered by Leonard Plating. This a trial court cannot do when reviewing a board's or agency's decision pursuant to a common law writ of certiorari. [At 905]

On the question of who had the burden of proof in an administrative hearing, the court of appeals observed that "The trial court had found as a matter of law that Authority had impermissibly placed the burden on Leonard plating to provide that the acid in its wastewater had not caused the damage to the sewer pipes that required their replacement...." [At 905] But the court of appeals explained how the burden of proof works in administrative hearings:

> The Metropolitan Government proved (1) that the sewer line serving Leonard Plating was severely damaged, (2) that the damage was consistent with damage caused by acid, (3) that sewer lines serving other electroplating businesses had similar damage, and (4) that Leonard Plating's wastewater was acidic enough to cause the sort of damage observed in the sewer lines. This evidence, circumstantial as it is, was sufficient to make out a prima facie case that the wastewater from Leonard Plating caused the damage that required the sewer line to be replaced. It was also sufficient to shift the burden of going forward with the evidence to Leonard Plating to prove that the damage was caused by something else.

> The Authority's deliberations reflect the fact that its members accredited the Metropolitan Government's evidence that the wastewater from Leonard Plating plant had damaged the sewer lines and that the wastewater exceeded the pH limits in Leonard Plating's permit. The Authority's comments that concerned the trial court simply reflect that its members decided that Leonard Plating had failed to produce sufficient evidence to rebut the Metropolitan Government's evidence. The Authority did not improperly allocate the burden of proof. To the contrary, its reasoning is entirely consistent with a rational and reasonable assessment of the evidence. [At 905-06]

Finally, the court of appeals addressed the trial court's conclusion that the members of the Authority based their decision on their own knowledge and expertise rather than on the evidence:

> One of the principal reasons for the creation of administrative agencies is the expectation that the agency members will bring substantive expertise to the matters within their jurisdiction. 1 CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 1.2(G), AT 9 (2D ED. Supp. 2002-03) (KOCH). Thus, the expertise of members of administrative boards and commissions plays a central role in administrative proceedings. *Martin v. Sizemore*, 78 S.W.3d at 269. Agencies are not law juries, 2 RICHARD J. PIERCE, JR. ADMINISTRATIVE LAW TREATISE § 10.2, AT 708 (4TH ED. 2002), and, therefore, they are permitted to rely on their expertise in evaluating the evidence submitted to them as long as they disclose they are doing so. 3 KOCH § 9.2[4], at 5.
>
> However, a board's or agency's findings must be based on evidence presented to them. Courts should decline to accept agency findings that are not supported by evidence simply because the findings were made by experts. 3 KOCH § 12, 24[3](a), at 222. Accordingly, this court has held that members of boards and agencies cannot rely on their own expertise as a substitute for expert testimony that should have been presented during the hearing because doing so seriously compromises the fairness of the administrative proceedings. *Martin v. Sizemore*, 68 S.W.3d at 269-70. [At 906]

There was no "evidentiary void" in this case, concluded the court of appeals:

> The record in this case contains evidence regarding the acidity of the wastewater discharged by Leonard Plating, the history of Leonard Plating's failure to monitor or mitigate the acidity of its wastewater, the fact that Leonard Plating's wastewater accounted for virtually all of the flow in the sewer lines, the similarity between the damage to the sewer line serving Leonard Plating and the damage found in sewer lines serving other electroplating businesses, and the conclusion of an expert employed by Metro Water Services that the damage to the sewer line was caused by acid. This evidence provided an ample basis for the chairman of the Authority and the other members, in the exercise of their training and experience, to conclude that the damage to the sewer pipes was caused by the excess acidity of the wastewater discharged from Leonard Plating. [At 907]

The unreported case of Harless v. City of Kingsport, 1998 WL 131519 (Tenn. App. 1998), also discusses other legal issues involved in the appeals from administrative decisions. There, under the authority of Tennessee Code Annotated, § 13-21-101 et seq., the city had adopted the ordinance required by that statute, which contained an administrative process for handling dilapidated structures. The city issued two demolition orders under that ordinance against structures owned by Harless. Harless appealed on a number of grounds:

1. That the person who served as the investigator and the hearing officer was the same person, which Harless argued resulted in (1) a denial of due process, and (2) a biased decision, given that the investigating/hearing officer was also a city employee;

2. The hearing officer's decision was arbitrary and capricious, or unsupported by the evidence;

3. The ordinances of the city were facially unconstitutional.

The court's scope of review of the administrative decision of the investigating/hearing officer was limited, said the Court:

> Common law certiorari, as provided in T.C.A. § 27-8-101 (Supp. 1997), is available for judicial review of a decision of an administrative body acting in a judicial-or quasi-judicial capacity. Davidson v. Carr, 659 S.W.2d 361, 363 (Tenn. 1983). *The Supreme Court has stated that...administrative decisions are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges that action.* McCallen v. City of Memphis, 786 S.W.2d 633, 641 (Tenn. 1990). Generally speaking, review of an administrative decision by way of the common law writ is confined to the question of whether the inferior board or tribunal has exceeded its jurisdiction or acted illegally, arbitrarily, capriciously, or fraudulently. T.C.A. § 27-8-101 (Supp. 1997). [Remaining citation omitted] This question typically involves a determination of whether the record contains material evidence to support the decision below. [Citations omitted.]... If a reviewing court determines that there is no material evidence to support an administrative decision, it must conclude that the administrative body acted illegally. [Citation omitted.] An administrative decision may be found to be illegal, arbitrary or fraudulent in other circumstances as well: for example where the standards of due process have not been met, where a constitutional or statutory provision has been violated, or where some unlawful procedure has been followed. [Citations omitted.].... The reviewing court does not inquire into the correctness of the inferior tribunal's finding of fact [Citations omitted]; nor is it permitted to weigh the evidence. [Citations omitted] Moreover, the reviewing court "should refrain from substituting its judgment for the broad discretionary authority of the local government body." [Citation omitted.]

Under that standard, the Court replied to the first two arguments as follows:

> [The Supreme Court has stated] the mere fact that both investigative and adjudicative functions have been granted to an administrative body...does not itself create an unconstitutional risk of bias in an administrative adjudication....[citations omitted.]

It cited Withrow v. Larkin, 421 U.S. 35 [parallel citations omitted], in which the United States Supreme Court declared that:

> [t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a ... difficult burden of persuasion to carry. [Citation omitted.] [At 5]

Harless offered no evidence of bias on the part of the investigator/hearing officer, and the record did not indicate that his dual roles resulted in a denial of due process. The record clearly showed that the structures met the standards for demolition under the Slum Clearance Statute. Harless could not question the constitutionality of the statute because he had not notified the attorney general as he was required to do under Tennessee Code Annotated, § 29-14-107(b).

Necessity for adequate proof in administrative hearings

While the level of proof supporting a government's administrative decisions is relatively low, the evidence supporting those decisions must meet the standards required by law or ordinance.

The plaintiff in Boyd v. Forbes, 2003 Tenn. App. LEXIS 760, raised the issue of whether the administrative officer made the value/cost of repair findings as required by the City of Jackson's ordinance adopted under Tennessee Code Annotated, § 13-21-101 et seq. That ordinance provided that "if the repair, alteration or improvement cost exceeds seventy-five (75) percent of the taxable value of the property, the director may order the structure to be removed or demolished." [At 5] The Court, concluding that the ordinance had not been followed, reasoned that:

> By his own testimony, James Maholmes, the housing code enforcement officer at the time notice was sent and the improvements were demolished, admitted that the City made no estimates of the repair costs. Ronald Boyd testified that the property had a total tax appraisal value of

> $140,600. Therefore, in order for Maholmes to order demolition pursuant to the City's Ordinance 12-708, the cost of repairing the improvements would need to exceed $105,450. Given that the parties stipulated the improvements themselves were only worth $49,000 and that the only problems with the property were broken windows and unhinged doors, we conclude that the record supports the finding that the City failed to prove it had made a determination that the cost of repairs would exceed 75% of the property value. [At 5]

Violations of Stormwater Ordinances Can Also be Made Municipal Ordinance Violations Subject to Trial in Municipal Court

Tennessee Code Annotated, § 68-221-1101 et seq., appears to contemplate that violations of the stormwater ordinance are to be "tried" administratively, and that the violator's appeal of administrative decisions be appealed by writ or certiorari to the circuit or chancery court, under Tennessee Code Annotated, title 27, chapter 8. However, under Vandergriff v. City of Chattanooga, 44 F. Supp.2d 927 (E.D. Tenn. 1998), and Rush v. City of Chattanooga, 1999 WL 459153 (6th Cir. Tenn.) (Unreported), apparently a municipality can make a violation of the stormwater ordinance a municipal ordinance violation triable in municipal courts.

APPENDIX B

INSPECTION AND MAINTENANCE AGREEMENT FOR PRIVATE STORMWATER MANAGEMENT FACILITIES

Property Identification ("Property"): City Use:

Map: _____ Parcel No. _____ Land Dist. Permit No.: _____
Record Book: _____ Page No. _____

Project Name: _____
Project Address: _____
Owner(s): _____
Owner Address: _____
City: _____ State:_____ Zip Code: _____

SEE LEGAL DESCRIPTION ATTACHED HERETO AS EXHIBIT A.

This Inspection and Maintenance Agreement ("Agreement") is made this ____ day of _____, 20__, by and between _____ ("Owner", whether one or more), and the City of _____ ("City").

WHEREAS, the City is required by federal and state surface water quality regulations and its National Pollutant Discharge Elimination System (NPDES) permit to prevent surface water quality degradation from development or redevelopment activities within its jurisdiction, and the City has adopted surface water quality regulations as required and such regulations are contained in the Stormwater Management chapter of the City Code; and

WHEREAS the Owner owns the Property identified above and has or will construct certain stormwater management facilities on the Property, and has developed a Stormwater Maintenance Plan (SWMP No. _____), as may be amended from time to time (the "Plan") for the maintenance of those facilities, which the City has reviewed and approved, and a copy of which will be maintained at the _____ Stormwater Department. A drawing showing the general area of the facilities covered by the Plan is attached to this Agreement for ease of identification.

THEREFORE, in consideration of the benefits received by the Owner as a result of the approval by the City of the Plan, the Owner does hereby covenant and agree with the City as follows:

1. The Owner shall provide adequate long term maintenance and continuation of the stormwater control measures described in the Plan, to ensure that all stormwater facilities are and remain in proper working condition. The Owner shall perform inspection and preventative maintenance activities in accord with the Plan.

2. The Owner shall maintain a copy of the Plan on site, together with a record of inspections and maintenance actions required by the Plan. The Owner shall document the times of inspections, remedial actions taken to repair, modify or reconstruct the system, the state of control measures, and notification of any planned change in responsibility for the system. The City may require that the Owner's records be submitted to the City.

3. If it is later determined that the City's NPDES permit clearly directs Owners or the City to manage stormwater treatment systems differently than specified in the Plan, the direction of the NPDES permit shall override the provisions of the Plan.

4. The Owner hereby grants to the City the right of ingress, egress and access to enter the Property at reasonable times and in a reasonable manner for the purpose of inspecting, operating, installing, constructing, reconstructing, maintaining or repairing the facilities. The Owner hereby grants to the City the right to install and maintain equipment to monitor or test the performance of the stormwater control system for quality and quantity upon reasonable notice to Owner.

5. If the City finds that the Owner has not maintained the facilities, the City may order the Owner to make repairs or improvements to bring the facilities up to the standards set forth in the Plan. If the work is not performed within the time specified by the City, the City may enter the property and take any action necessary to maintain or repair the stormwater management facilities; PROVIDED, HOWEVER, that the City shall in no event be deemed obligated to maintain or repair the stormwater management facilities, and nothing in this Agreement shall ever be construed to impose or create any such obligation on the City.

6. If the City incurs expenses in maintaining the stormwater control facilities, and the Owner fails to reimburse the City for such expenses within 45 days after a written notice, the City may collect said expenses from the Owner through appropriate legal action, and the Owner shall be liable for the reasonable expenses of collection, including all court costs and attorney fees.

7. The Owner and the Owner's heirs, administrators, executors, assigns, and any other successor in interest shall indemnify and hold the City harmless from any and all damages, accidents, casualties, occurrences, claims or attorney's fees which might arise or be asserted, in whole or in part, against the City from the construction, presence, existence, or maintenance of the stormwater control facilities subject to the Plan and this Agreement. In the event a claim is asserted against the City, its officers, agents or employees, the City shall notify the Owner, who shall defend at Owner's expense any suit or other claim. If any judgment or claims against the City shall be allowed, the Owner shall pay all costs and expenses in connection therewith. The City will not indemnify, defend or hold harmless in any fashion the Owner from any claims arising from any failure, regardless of any language in any attachment of other document that the Owner may provide.

8. No waiver of any provision of this Agreement shall affect the right of any party thereafter to enforce such provision or to exercise any right or remedy available to it in the event of any other default.

9. The City, at Owner's expense, shall record this Agreement with the Register of Deeds of _____ City, Tennessee; this Agreement shall constitute a covenant running with the land, and shall be binding upon the Owner and the Owner's heirs, administrators, executors, assigns, and any other successors in interest.

10. The Owner shall have the facilities inspected in accordance with § 14-506 of the City's stormwater ordinance and certify to the City that the constructed facilities conform and purport substantially to the approved Plan. If the constructed condition of the facility or its performance varies significantly from the approved Plan, appropriately revised calculations shall be provided to the City and the Plan shall be amended accordingly.

11. Owner agrees that the failure to follow the provisions and requirements of the Plan may result in the revocation of previously approved credits to stormwater user fees, or the imposition of such stormwater user fees or of additional stormwater user fees.

12. The Owner agrees that for any systems to be maintained by a property owner's association, deed restrictions and covenants for the subdivision or other development will include mandatory membership in the property owners' association responsible for providing maintenance of the system, will require the association to maintain the stormwater system, will prohibit termination of this covenant by unilateral action of the association, and provide for unpaid dues or assessments to constitute a lien upon the property of an owner upon recording a notice of non-payment.

13. This Agreement must be re-approved and re-executed by the City if all or a portion of the Property is subdivided or assembled with other property.

Owner: _____ Date: _____
Signature by Individual

Owner: _____ Date: _____
Signature by Individual

State of _____ County of _____

Personally appeared before me, the undersigned Notary Public of the state and county mentioned, _____, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and executed this Agreement (Inspection and Maintenance Agreement for Private Stormwater Management Facilities) for the purposes contained herein.

Witness my hand and official seal at office, this _____ day of _____, of the year _____.

Notary Public: _____

My Commission Expires: _____

Accepted by:

_____
For the City of _____

State of _____ County of _____

Personally appeared before me, the undersigned Notary Public of the state and county mentioned, _____, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and executed this Agreement (Inspection and Maintenance Agreement for Private Stormwater Management Facilities) on behalf of the City of _____ for the purposes contained herein.

Witness my hand and official seal at office, this _____ day of _____, of the year _____.

Notary Public: _____

My Commission Expires: _____

APPENDIX C

THE LAW OF RESTRICTIVE COVENANTS THAT RUN WITH THE LAND AND STORMWATER MAINTENANCE

Sid Hemsley
MTAS
February 15, 2011

The law of restrictive covenants, in one sentence

> When a covenant runs with the land liability to assume its burdens or right to use its benefits passes to the landowner's assignees. Such a covenant is a promise, the effect of which is to bind the promisor and his lawful successors to the burdened land for the benefit of the promisee and his lawful successors to the benefitted land. [Tennessee Supreme Court, in American Oil Company v. Rasar, 308 S.W.2d (Tenn. 1957), at 941.]

Two kinds of restrictive covenants in Tennessee

> - **Real covenants, or covenants that run with the land at law**. These covenants require that:
>
> (1) The covenants must "touch and concern" the land;
>
> (2) The original covenanting parties intended the covenant to run;
>
> (3) Some form of privity of estate;
>
> (4) The covenant be in writing.
>
> - **Equitable servitudes** (variously called "reciprocal negative easements," "implied equitable reciprocal servitudes," and "equitable restrictions."). These covenants require that:
>
> (1) The covenants must "touch and concern" the land;
>
> (2) The original covenanting parties intended the covenant to run with the land;

Montie, Diane, *A Survey Of The Law Of Restrictive Covenants That Run With The Land In Tennessee*, 50 Tenn. Law Review 149 (1982). Also see Tennsco Corporation v. Attea, 2002 WL 1298808 (Tenn. Ct. App.) for probably the shortest primer on restrictive covenants].

Restrictive covenants are tied to land development

It is said in Montie, Diane, that:

> The law relating to restrictive covenants has changed little during the last one hundred years in Tennessee, but the reasons for using restrictive covenants have changed to reflect a more complex society. Historically, the usual purpose of restrictive covenants was to protect the grantor's residence. Today, the use of the land is more complex. Subdivisions, condominiums, apartments, and single family residences require diversified land use planning to protect those communities of purchasers. [At 149]

One of the modern complexities of the development of land, for whatever its intended use, is that such development is subject to stormwater management requirements. A tool for managing stormwater that appears in stormwater regulations is the maintenance agreement for the stormwater facilities that appear in developments. Those maintenance agreements commonly contain restrictive covenants that run with the land, that obligate both present and subsequent owners of the property to continue the maintenance of the stormwater facilities.

For example, the Knox County Stormwater Maintenance Manual contains a document entitled COVENANTS FOR PERMANENT MAINTENANCE OF STORMWATER FACILITIES, which contains various covenants the property owner must agree to *as a condition of the development* of his property. Paragraph 5 provides that:

> To ensure that subsequent property owners have notice of these Covenants and the obligations therein, the Property owner will include in all instruments conveying any or all of the above described property on which the stormwater and/or water quality facilities are located, the specific instrument numbered referencing these Covenants and the recorded subdivision plat as indicated in paragraph 12 herein.

Paragraph 11 provides that "These Covenants are permanent and shall run with the land."

Questions related to restrictive covenants in stormwater context

Similar documents are used by cities and counties across Tennessee and in other states. Such maintenance agreements that run with the land raised at least two questions in the stormwater seminars held last year:

1. What is the legal status of such agreements, applying as they do, to the *subsequent* development of property?

As far as I can determine, there are no Tennessee cases involving stormwater infrastructure. But for reasons that will appear below, restrictive covenants containing stormwater infrastructure generally arise from new property development mandates and agreements between local governments and developers. For that reason such restrictive covenants will generally reflect real covenants running with the land at law. However, where, for some reason, the restrictive covenant fail the real covenants test, equity might, depending on the circumstances, intervene to impose the covenants as an equitable servitude.

2. What is the legal status of such agreements with respect to property that has already been developed?

For reasons that will appear below, generally, such agreements with respect to such property will probably neither qualify as real covenants that run with the land at law, nor as equitable servitudes.

Restrictive covenants are contracts between the parties to them

Restrictive covenants are contracts between the parties to them. Maples Homeowner's Association, Inc. v. T & R Nashville Limited Partnership, 993 S.W.2d 36 (Tenn. Ct. App. 1999), says on that subject:

> Covenants, conditions and restrictions such as the ones contained in the Maples Declarations are property interests that run with the land. [Citations omitted by me.] They arise, however, from a series of overlapping contractual transactions. [Citations omitted by me.} Accordingly, they should be viewed as contracts. [Citations omitted by me.], and they should be construed using the rules of construction generally applicable to the construction of other contracts ... [Citations omitted by me.]
>
> The courts enforce restrictive covenants according to the clearly expressed intentions of the parties manifested in the restrictions themselves. [Citations omitted by me.] We give the terms used in restrictions their fair and reasonable meaning... [Citations omitted by me.], and we decline to extend them beyond their clearly expressed scope. [Citations omitted by me.] We also construe the terms of a restriction in light of the context in which they appear.
>
> When the restrictions terms are capable of more than one construction, we should adopt the construction that advances the unrestricted use of the property. [Citations omitted by me.] We should also resolve ambiguities in the restrictions against the party who drafted them ... [Citations omitted by me.], and finally we should resolve all doubts concerning covenant's applicability against the covenant. [Citations omitted by me.] [At 38-39]

While the Maples Declarations were part of a property development scheme that reflected real covenants that ran with the land at law, the contractual aspect of restrictive covenants applies to both kinds of restrictive covenants. We will see below that equitable servitudes reflect the intent of the original covenanting parties even where that intent does not necessarily appear in one or more deeds in the chain of title reflecting the conveyance of the property at issue.

It is also said in Gambrell v. Nivens, 275 S.W.3d 429 (Tenn. Ct. App. 2008), that:

> An owner of land may sell portions of it and make restrictions as to its use for the benefit of himself as well as for the benefit of those to whom he sells. [Citations omitted by me.] Even though Tennessee law does not favor private restrictions upon the use and enjoyment of land, our courts will enforce the covenants as they would contracts, according to the clearly expressed intention of the parties. [Citations omitted by me.] Covenants that fail the more exacting requirements for real covenants at law may still be enforced in equity as an equitable servitude. An equitable servitude is a "covenant respecting the use of land enforceable against successor owners or possessors in equity regardless of its enforceability at law." [Citation omitted by me.] [At 436-37]

Differences and similarities between the two kinds of restrictive covenants

It was said in Turnley v. Garfinkel, 362 S.W.2d 921, that:

> It is a common practice for developers of high-class residential subdivisions to provide restrictions to protect the beauty of the neighborhood and the value of the property for residential use. Such restrictions are usually regarded as covenants running with the land, binding on anyone who purchases with notice of them, and enforceable by the owner of any of the lots so protected.... [At 923]

The Court appears to have been speaking of covenants that run with the land at law. As the Court itself noted, the lots were part of a subdivision approved by the Davidson County Planning Commission and recorded in the registrar's office, and that the subdivision's developer had filed a set of restrictive covenants that were referred to and made a part of the deeds conveying the lots at issue. There were 11 covenants "and provide that they are deemed covenants running with the land until December 1985."

Citing that case, Maples Homeowner's Association, Inc., above, declared that, "Covenants, conditions and restrictions such as the ones contained in the Maples Declarations are property interests that run with the land." [At 38-39] The "Maples Declarations involved a planned unit development named The Maples under the Horizontal Property Act," codified in Tennessee Code Annotated, §§ 66-27-101-123. In describing The Maples Declarations, the Court declared that:

> The Maples Declarations contain a fairly standard set of land use restrictions as well as a mechanism for their enforcement. They establish a homeowner's association whose membership consists of the "owners of lots" in The Maples, and Article VII (1) provides in part:
>
> The Association, or any Owner, shall have the right to enforce, by any proceedings *at law or in equity*, all restrictions, conditions, covenants, reservations, liens and charges now or hereinafter imposed by the provisions of this Declaration. [At 37] [Emphasis is mine.]

Montie, Diane, above, says, "The restrictive covenant is generally created by a specific grant in a deed or by reference in a deed to a general plan of development." [At 150]

The touch and concern requirement

With respect to the "touch and concern" requirement, it is said in Gambrell v. Nivens, 275 S.W.3d (Tenn. Ct. App. 2008), that:

> Although there is some dispute among authorities as to the test [that the covenant must Atouch and concern" the land, there is little question that building restrictions embodied in a covenant between owners in fee satisfy this test, both as to the benefit and the burden. [Citing unreported *Attea v. Tennsco*, 2002 WL 1298808 (Tenn. Ct. App.).

Also see Arthur v. Lake Tansi Village, Inc., 590 S.W.2d 923 (Tenn. 1979).

Intention of parties that covenant run with the land

With respect to the requirement that the covenanting parties intended that the covenant run with the land, it is further said in Gambrell, above, that:

> The covenants in *Tennsco* and *Essary* failed to express a *substantive element of a real covenant at law: the intent to bind the successors, heirs, and assigns*. Equity requires proof of the same substantive intent but does not confine the scope of inquiry to the language of the covenant itself. Nonetheless, *Tennsco* and *Essary* together stand for the proposition that our courts will broaden the scope of inquiry only where the vendor imposed the restrictions according to a *general plan of development*. A development plan logically supports a finding that the parties intended the covenant to run with the land and bind the grantees' successors, assigns and heirs. The very concept of a development plan and the subsequent expectations of the purchasers require the individual burdens and their corresponding benefits to inhere in the land and to benefit and bind whoever occupies that land. This much seems implicit, for a common plan would crumble if the burdens and benefits were merely personal to the contracting parties. [At 441-42] [Emphasis is mine.]

In Essary v. Cox, 844 S.W.2d 169 (Tenn. Ct. App. 1992), the Essarys owned a service station, and on an adjoining lot, a convenience store. They sold the convenience store the deed to which contained this covenant: "It is expressly understood and agreed that the above described premises [the convenience store] shall not be used for the purpose of any sales of oil and gas supplies or products." The convenience store was subsequently resold several times, the deeds to which contained mention of the covenant. But on the sale of the convenience store to Cox in 1989, the deed, at the request of Cox, did not contain the covenant. In 1985, the Essarys had also sold their service station adjacent to the convenience store, to their children. The Essary children subsequently sued Cox for selling oil and gas supplies from the convenience store in violation of the "restrictive covenant" that appeared in the first deed of sale of the convenience store.

The court held that there was not a restrictive covenant running with the land, for two reasons:

First, the covenant in the deed of the first sale of the convenience store by the Essarys did not contain language indicating that it applied to "the party's successors and assigns, i.e. remote grantees." The Court pointed to Lowe v. Wilson, 250 S.W.2d 366 (1952), in which the Tennessee Supreme Court had held that even this language in a deed did not qualify as a restrictive covenant:

> It is hereby agreed and understood between the parties hereto that no beer, beverages, or intoxicants of any kind or character shall *ever* be sold upon the lot or parcel of land herein conveyed, and this agreement is a part of the consideration for this sale. [At172]

Second:

> In cases involving a common development plan, therefore, courts have demonstrated a willingness to enforce restrictive covenants, in the form of equitable servitude, under the rationale that a remote grantee's knowledge of such restrictions may be imputed from the existence of a common plan as evidenced in deeds or on the plat itself....Outside the context of restrictions which evidence a common development plan, however, Plaintiffs have cited no authority in this jurisdiction for the proposition that restrictive covenants may be imposed on remote grantees based upon their knowledge of the existence of a prior restriction. [At 171]

In Tennsco, above, the Daugherty's owned a large piece of property north of Cool Springs Shopping Center in Williamson County, in the middle of which their historic home sat. They sold the property north and south of their home to Wills, "effectively dividing the property into three parts," according to the Court. The Daugherty's deed to Wills contained this restriction:

> This conveyance is made subject to the restriction that any buildings constructed on the land shall be single family dwellings of traditional design at least 4,000 square feet in size and on lots of one (1) acre or more.

Wills subsequently quit-claimed the property to Mallory Park, "subject to all restrictions, easements and encumbrances or [sic] record." Park gave Tennsco a deed of trust to secure a loan. He defaulted on the loan and conveyed the property to Tennsco, but the deed did not contain those restrictions. Two conveyances later, the property ended up in Attea's hands, and he attempted to enforce the restrictions contained in Daugherty's deed to Wills.

The Court held that the restriction did not operate as a restrictive covenant that ran with the land. It met the requirement for a real covenant that ran with the land at law as to the "touch and concern" requirement because the covenant was a building restriction. But it failed the intent of the original covenanting parties that the covenant run with the land because the covenant did not include the magic words that it bound the heirs and assigns of the grantees.

As to the enforceability of the restrictions as equitable servitude, the Court said:

> Therefore, in order to enforce an equitable servitude or a reciprocal negative easement it must appear that the grantor had in mind a general plan of development and intended for the restrictive covenant to benefit all the property involved [At 3] [Citations omitted.]

It also declared that:

> We think the undisputed facts show that there was no general plan or scheme of development adopted to cover the property held by the Daughertys. As the trial judge observed there was no map or sales brochure showing the restriction. And there is no restriction on the property the Daughertys retained. When they conveyed the property to the Butters, they did not include any restrictions. Since, there was no reciprocal easement, the conclusion is inescapable that the restriction placed in the Wills deed was personal to the Daughertys. [At 3]

General plan of development required in both kinds of restrictive covenants

That general rule applies in Tennessee, to both types of restrictive covenants. The Tennessee Supreme Court said in Land Developers v. Maxwell, 537 S.W.2d 2d 904 (Tenn. 1976), that:

> Ordinarily when the owner of a tract of land subdivides it and sells different lots to separate grantees, and puts in each deed restrictions upon the use of the property conveyed, in accordance with a general building improvement or development plan, such restrictions may be enforced by any grantee against any other grantee. Likewise, the property remaining in the hands of the vendor may also be held in equity to be subject to a servitude so as not to be used in a manner different from that contained in the restrictions..... This rule was recognized in this state in the leading case of *Ridley v. Haiman*, 164 Tenn. 239, 47 S.W.2d 750 (1932)...

It appears that the Court was speaking of two classes of restrictive covenants: The first is those put in each deed to each grantee of separate lots, "in accordance with a general building, improvement or development plan...." and which appear to meet all the requirements of covenants that run with the land at law; and the property remaining in the hands of the vendor which "may also be held in equity to be subject to a servitude so as not to be used in a manner different from that contained in the restrictions." In this case, the Court held that:

> Upon the facts shown in this record, we have no hesitancy in holding that the unsold lands of Mr. M.L.Tipton, and his corporation, here in issue, were restricted in his hands by essentially the same covenants as he had imposed in the deed to his various grantees, by an equitable servitude because there seems to be little question but that he did intend a general plan of development of the entire area as a residential "suburb" or subdivision. [At 913]

When do restrictive covenants take effect?

It is said in East Sevier County Utility District of Sevier County v. Wachovia Bank & Trust Company, 570 S.W.2d 850 (Tenn. 1978), that:

> Likewise, petitioner now concedes that none of the restrictive covenants could be given retroactive effect, absent an express contract so providing, although its contentions in the trial court in that regard were unclear and seem to have been to the contrary....We have already stated that no set of covenants should be given any general retroactive effect. [At 852-53]

Southern Advertising Co. Inc. v. Sherman, 38 S.W.2d 491 (Tenn. Ct. App. 1957), also declares that:

> If it is a covenant running with the land, at least in the absence of an expressed contrary intention, its operation must be confined to the property as it existed at the time of the covenant. And the rule of strict construction applies when an attempt is made to apply the covenant to other lands. [At 493]

Remedies for the violation of both kinds of restrictive covenants

It is said in Monte, Diane, that, "A complainant can sue either at law or equity to enforce restrictive covenants." At law, the remedy for the violation of restrictive covenants that run with the land at law is damages. At equity, the remedies of specific performance and injunction have been used to enforce restrictive covenants.

But that distinction appears to be meaningless. In most of the Tennessee cases in which the violation of restrictive covenants is an issue by far the most requested remedy in both kinds of covenants, is the enforcement of the restrictive covenants rather than damages. A large number of those cases requesting the enforcement of restrictive covenants involve alleged covenants that do not qualify as real covenants that run with the land at law, but where the court is being asked to find a restrictive covenant in the form of an equitable servitude.

APPENDIX D

CONFLICTS BETWEEN MUNICIPAL BUILDING CODES AND STORMWATER REGULATIONS

Sid Hemsley and John Chlarson
MTAS, 2010
February 8, 2011

Tennessee Code Annotated, § 68-120-101 et seq., authorizes the state fire marshal to adopt statewide building and fire safety code standards, which municipalities can choose to adopt under the statutory scheme. Municipalities that choose to adopt and enforce building construction standards for one and two family dwellings will adopt the International Residential Code. Municipalities that choose to adopt and enforce building and fire safety code standards for other buildings, will adopt the International Building Code, and either the International Fire Code or the Uniform Fire Code.

It is made unlawful in Tennessee Code Annotated, § 68-120-102(a) to:

(1) Construct, alter or repair any building or structure....in violation of any rule duly promulgated as provided in this chapter; or
(2) Maintain, occupy or use a building or structure or part of any building or structure that has been erected or altered in violation of any rule promulgated as provided in this chapter.

****

Tennessee Code Annotated, § 68-120-106, which is part of the above statutory scheme, further provides that:

> The state fire marshal, such fire marshal's deputies and assistants, including all municipal fire prevention or building or officials in those municipalities having such officers, and where no such officer exists, the chief of the fire department of every incorporated City or place in which a fire department is established, and the mayor of each incorporated place in which no fire department exists, and all state officials, now having jurisdiction or as directed by the governor, or City officers having jurisdiction in regard to any matter regulated in this chapter shall have concurrent jurisdiction. *No regulation shall be issued or enforced by any such official that is in conflict with the provisions of this chapter. The provisions of this chapter shall supercede all less stringent provisions of municipal ordinances.* [Emphasis is mine.]

It is also a Class B Misdemeanor for any person "who violates a provision of this chapter or fails to comply with this chapter, *or with any requirements of this chapter, or who erects, constructs, alters, or has erected, constructed or altered a building or structure in violation of this chapter.* [Emphasis is mine.]

The unreported case of Wilkes v. Shaw Enterprises, 2008 WL 695882 (Tenn. Ct. App.), also said in finding for the plaintiff in his complaint that the defendant contractor did not install flashing and weep holes in connection with brick veneer walls of his house, as required by the City building code:

> Under the statutory framework, the City attorney or any other official vested with enforcement powers, such as the Maury County Office of Building and Zoning, may institute an injunction to prevent the violation of the code. Tenn. Code Ann. § 5-20-104. Further, any person who violates the adopted code provision commits a Class C Misdemeanor. Tenn. Code Ann. 5-20-105. Therefore, according to the applicable statutes, state law in this situation requires compliance with the adopted 1995 CABO One and Two Family Residential Code. [At 7]

Under those two state statutes, it appears that neither municipalities nor counties can adopt building code provisions that are less stringent than are the provisions of the building and fire codes adopted by the state and approved by the state for adoption by local governments.

It remains to be seen whether there will be municipal building codes that conflict with stormwater regulations and what the legal outcome of such conflicts will be.

Athens Riparian Buffer Policy

Introduction

Riparian Buffers -Buffers are an essential component of stream protection and enhancement in Athens, TN adjacent to waters of the state (streams, rivers, ponds, and wetlands). Lack of buffer is one of the key elements that are a cause of stream impairment that will result in significant cost to the city in the future. It is essential that we establish, protect, preserve and enhance buffers where possible for the public benefit. In the event of any conflict between or within these regulations and any other State or Federal regulation the larger buffer or more stringent requirement shall apply. Buffers shall be measured perpendicular to and from the top of bank, meaning the highest elevation of land which confines water flowing in a stream to the channel.
Buildings – All buildings proposed adjacent to a buffer shall provide adequate space between the edge of building and the buffer to allow for normal construction practices without disturbance to the buffer.

Width

Permanent undisturbed buffer widths shall be as follows:

- Streams draining less than one square mile watershed – 30 ft.
- Streams draining one square mile or greater watershed - 60 ft.
- Exceptional TN Waters (as shown on TDEC's online tool) – 60 ft.
- Wetlands – 30 ft. from delineated edge of any wetland
- Lakes or ponds -60 ft. from normal water contour or 30 ft. if less than one square mile watershed.
- Sinkholes – 30 ft.

Averaging Provisions – These widths can be applied during construction activity as an average within the property being developed as long as they meet minimum state requirements.

Preservation

Buffers, wherever possible, shall be located in dedicated open space maintained by a Homeowners Association (HOA) or property owner established in accordance with the Athens Zoning Ordinance. They shall be clearly marked and noted on recorded plats.

Buffers shall be part of the recorded "Maintenance Agreement" for Stormwater Facilities with all maintenance to be the responsibility of the HOA or lot owner.

It is desirable that in all other situations, the buffers shall be located on one large lot with the lot owner responsible for maintenance or with some other special provisions to ensure long term maintenance.

During construction the buffer shall be included in those areas to be labeled as undisturbed on the plans that must also be clearly marked in the field. Any silt fence placed adjacent to a buffer shall be wire backed.

6.4 Maintenance

Maintenance shall be limited to removing dead or diseased plant material, replacing trees, repairing erosion problems, cleanup projects with Public Works Department approval, or removal of invasive plants. Woody vegetation shall be removed by hand. Vegetative root systems shall be left intact to hold the soil. Stumps shall remain where dead or diseased trees are cut.

Uses in the Buffer Permissible with Conditions
Use of Riparian Buffer Zone areas
(1) Acceptable uses of the RBZ may include: yards, picnic areas, walking trails, greenways, landscaped areas, wildlife habitat, primitive areas, roadway and sidewalk stream crossings, or other similar uses approved by the director.

(2) Specifically prohibited uses include, but are not limited to: parking lots, dumpster storage, material storage, grease-bin storage, vehicle storage/maintenance, animal lots or kennels, or other uses known to contribute pollutants to waterways.

6.7 Buffer Rehabilitation and Enhancement Plan
Buffer restoration and/or enhancement are required when a buffer is disturbed without approval or as a condition to a buffer variance granted by the City of Athens. A property owner or developer may choose to enhance a buffer to improve its undisturbed native forest condition. Prior to starting any work the plan must be submitted to and approved by the Public Works Department.

Buffer rehabilitation and/or enhancement plans must include the following:

1. A drawing or plan that shows the location of the buffer in relation to the existing or planned development; the disturbance limits for the buffer plan; direction of runoff flow and stream flow; erosion prevention and sediment control measures; any existing or proposed stream crossings (must be minimum needed to access property); existing or proposed streambank stabilization measures; access to a water source for the purposes of watering vegetation; and other pertinent information. The plan must be stamped by an experienced stream restoration landscape architect or prepared by a qualified experienced stream restoration expert approved by the Stormwater Department.
2. Visual and/or narrative documents that describe the vegetation plan for the buffer. The buffer must be planted with native trees, shrubs, and grasses that will not be mowed. (Reference TVA native plant finder or TN Exotic Pest Plant Council's Landscaping in Middle TN web sites or the Natural Resources Conservation Service office.)
3. The schedule when plantings will occur and the acceptable two year survival rate for those plantings.
4. A two year survival guarantee acceptable to the Public Works Department.

6.8 Variances

Variances may be considered in hardship cases. The request cannot be based solely on the difficulty or cost to the project, but must include other multiple site specific issues such as; type of project, existing land use, physical conditions and other reasons for the hardship. Variance requests shall be submitted in writing to the Public Works Director and heard before the BZA.

The basis for approval of any variance shall be hardship conditions. For significant variances, a site specific "Rehabilitation and Enhancement Plan" approved by the Athens Public Works Department for the entire buffer on the property will be required. Only the minimum necessary variance shall be granted.

Variances may be considered for reducing widths to less than the State minimum buffers based on the following conditions:

- Existing land uses as of January 1, 2015 that are proposed to remain in place limited to buildings, parking lots, roadways, utility lines and on site sanitary sewage systems. Only the portion of the required buffer that contains the footprint of the existing uses can be considered, along with activities necessary to maintain uses provided no additional vegetation is removed.
- Existing lots of record or property with vested development rights as of January 1, 2015 where a reasonable building site, including subsurface sewage disposal system areas, is not available anywhere on the lot outside the buffer, due to the shape and or size of the lot or a topographic hardship. The topographic hardship will be considered where the potential damage to the environment to create a reasonable building site is potentially greater than the impact of the buffer variance.
- An approved unexpired preliminary plat, PUD Master Development plan, final plat, or site plan that met previous buffer requirements at the time of approval which was approved prior to January 1, 2015.
- The existing land use in the watershed.

Site specific hardships which may include soils needed for a subsurface sewage disposal system.