ORDINANCE NO. 606

AN ORDINANCE ESTABLISHING STORMWATER MANAGEMENT REGULATIONS FOR THE CITY OF CLINTON, TENNESSEE

WHEREAS, the City of Clinton's charter, Article III, Section 1 (o) authorizes the City to establish, open, relocate, vacate, alter, widen, extend, grade, improve, repair, construct, reconstruct, maintain, light, sprinkle, and clean public highways, streets, boulevards, parkways, sidewalks, alleys, parks, public grounds, and squares, wharves, bridges, viaducts, subways, tunnels, sewers, and drains within or without the corporate limits and to regulate the use thereof within the corporate limits, and property may be taken and appropriated therefor under the provisions of state law; and

WHEREAS, the City of Clinton's charter, Article III, Section 1 (r) authorizes the city to acquire, purchase, provide for, construct, regulate, and maintain and do things relating to all public buildings, market places, bridges, sewers and all other structures, works and improvements; and

WHEREAS, the City of Clinton's charter, Article III, Section 1 (s) authorizes the city to collect, dispose of, or recycle drainage, sewage, ashes, garbage, refuse or other waste; or to license and regulate such collection, disposal or recycling, and to fund the cost of such collection, regulation, disposal or recycling by taxation or special assessment of the property owner;

WHEREAS, the city of Clinton, Tennessee desires to properly maintain and enhance the City's Stormwater Management System and lakes, rivers, streams, ponds, wetlands, and groundwater which receive stormwater runoff; and

WHEREAS, the adoption of this ordinance will bring the City into compliance with the National Pollution Discharge Elimination System requirements as set out in 40 CFR 122,26 and related regulations, and allow the City to exercise the power granted in *Tennessee Code Annotated* § 68-221-1105 regarding the management of stormwater runoff.

NOW THEREFORE BE IT ORDAINED by the City Council of Clinton, Tennessee that:

SECTION 1. Title 14, is hereby amended by adding the following as a new Chapter 14:

CHAPTER 14

STORMWATER MANAGEMENT

SECTION

14-1401. General provisions.
14-1402. Definitions.
14-1403. Waivers.
14-1404. Stormwater system design: Construction and Permanent stormwater management.
14-1405. Permanent stormwater management: operation, maintenance, and inspection.
14-1406. Existing locations and ongoing developments.
14-1407. Illicit discharges.
14-1408. Enforcement.
14-1409. Penalties.
14-1410. Appeals.
14-1411. Modifications

14-1401. 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, 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 or commercial developments;

(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's Stormwater Administer shall administer the provisions of this chapter.

(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. This ordinance supersedes and replaces Stormwater requirements in Article III section G and H of the City of Clinton Subdivision Regulations adopted December 1991.

14-1402. 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.1

(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 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. The goal of the water quality buffer is to preserve undisturbed vegetation that is native to the streamside habitat in the area of the project. 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 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. The MS4 must develop and apply criteria for determining the circumstances under which these averages will be available. A determination that standards cannot be met may not be based solely on the difficulty or cost associated with implementation. Every attempt should be made for development and redevelopment activities not to take place within the buffer zone. If water quality buffer widths as defined above cannot be fully accomplished on-site, the MS4 must develop and apply criteria for determining the circumstances under which alternative buffer widths will be available. A determination that water quality buffer widths cannot be met on site may not be based solely on the difficulty or cost of implementing measures, but must include multiple criteria, such as: type of project, existing land use and physical conditions that preclude use of these practices.

(6) "Buffer Zone Requirements"

(a) "Construction" applies to all streams adjacent to construction sites, with an exception for streams designated as impaired or Exceptional Tennessee waters, as designated by the Tennessee Department of Environment and Conservation. A 30-foot natural riparian buffer zone adjacent to all streams at the construction site 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

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1 Appendix A contains a defense of the proposition that a municipality can legally impose an administrative penalty of more than $50.

necessary, for improvement of its effectiveness of protection of the waters of the state. The buffer zone requirement only applies to new construction sites. The riparian buffer zone should be preserved between the top of stream bank and the disturbed construction area. The 30-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 15 feet at any measured location.

(b) Buffer zone requirements for discharges into impaired or exceptional waters: A 60-foot natural riparian buffer zone adjacent to the receiving stream designated as impaired or exceptional waters 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 (e.g.,perennial and intermittent streams, rivers, lakes, wetlands) located within or immediately adjacent to the boundaries of the project, as identified on a 7.5-minute USGS quadrangle map, or as determined by the director. Buffer zones are not sediment control measures and should not be relied upon as primary sediment control measures. 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 sites. The riparian buffer zone should be established between the top of stream bank and the disturbed construction area. 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 25 feet at any measured location.

(c) "Permanent" new development and significant redevelopment sites are required to preserve water quality buffers along waters within the MS4. Buffers shall be clearly marked on site development plans, Grading Permit applications, and/or concept plans. 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 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.

(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 occurring on contiguous areas. 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?bkmrk=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, city 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 deemed 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 "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.

(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 entity designated by the city to administer the stormwater management ordinance, and other stormwater rules and regulations adopted by the city.

(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.

(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".

(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)).

14-1403. <u>Waivers</u>.

(1) General. No waivers will be granted any construction or site work project. All construction and site work shall provide for stormwater management as required by this ordinance. However, alternatives to the 2010 NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems 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. This first inch of rainfall must be 100% managed with no discharge to surface waters.

(b) It can be demonstrated that the proposed development 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, etc. prohibited. In order to receive consideration, the applicant must demonstrate to the satisfaction of the Stormwater Administer 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 streambank or streambed erosion or siltation;
(d) Increased threat of flood damage to public health, life or property.

(3) Grading permit 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.

14-1404. Stormwater system design: Construction and Permanent stormwater management.

(1) MS4 Stormwater design or BMP manuals.
(a) Adoption. The city adopts as its MS4 stormwater design and best management practices (BMP) manuals for stormwater management, construction and permanent, the following publications, which are incorporated by reference in this ordinance as if fully set out herein:
(i) TDEC Erosion Prevention and Sediment Control Handbook; most current edition.
(ii) Best Management Practices (BMP) Manual,
City of Knoxville
Engineering Department
Stormwater Engineering Division
(most current edition).
(iii) A collection of MS4 approved BMP's developed or collected by the MS4 that comply with the goals of the MS4 permit and/or the CGP.
(b) The city's BMP manual(s) include a list of acceptable BMP's including the specific design performance criteria and operation and maintenance requirements for each stormwater practice. These include city approved BMP's for permanent stormwater management including green infrastructure BMP's.
(c) The city manual(s) may be updated and expanded from time to time, at the discretion of the governing body of the city, upon the recommendation of the Stormwater Administer, based on improvements in engineering, science, monitoring and local maintenance experience, or changes in federal or state 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, land disturbance applications and grading 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 that involves land development activities of one (1) acre or more;

(2) Redevelopment that involves other land development activity of 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:

(1) the Stormwater Administer 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 Stormwater Administer has determined that the stormwater discharge is, or is likely to be a significant contributor of pollutants to waters of the state;

(3) 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;

(4) Any new development or redevelopment, regardless of size, that is defined by the Stormwater Administer to be a hotspot land use; or

(5) Minimum applicability criteria set forth in item (a) above if such activities are part of a larger common plan of development, even multiple, that is part of a separate and distinct land development activity that may take place at different times on different schedules.

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 to the local MS4

Permittees who discharge stormwater through an NPDES-permitted municipal separate storm sewer system (MS4) who are not exempted in section 1.4.5 (Permit Coverage through Qualifying Local Program) of the Construction General Permit (CGP) 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 Administer. Permitting status of all permittees covered (or previously covered) under this general permit as well as the most current list of all MS4 permits is available at the TDEC's DataViewer web site.

Copies of additional applicable local, state or federal permits (i.e.: ARAP, etc.) must also be provided upon request.

If requested, these permits must be provided before the issuance of any land disturbance permit or the equivalent.

(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 subsection (5) below. The purpose of this plan is to identify construction/contractor activities that could cause pollutants in the stormwater, and to describe measures or practices to control these pollutants during project construction.

(5) Stormwater Pollution Prevention Plan requirements. The erosion prevention and sediment control plan component of the SWPPP shall accurately describe the potential for soil erosion and sedimentation problems resulting from land disturbing activity and shall explain and illustrate the measures that are to be taken to control these problems. The length and complexity of the plan is to be commensurate with the size of the project, severity of the site condition, and potential for off-site damage. If necessary, the plan shall be phased so that changes to the site during construction that alter drainage patterns or characteristics will be addressed by an appropriate phase of the plan. The plan shall be sealed by a registered professional engineer or landscape architect licensed in the state of Tennessee. The plan shall also conform to the requirements found in the MS4 BMP manual, and shall include at least the following:

(a) Project description - Briefly describe the intended project and proposed land disturbing activity including number of units and structures to be constructed and infrastructure required.

(b) A topographic map with contour intervals of five (5) feet or less showing present conditions and proposed contours resulting from land disturbing activity.

(c) All existing drainage ways, including intermittent and wet-weather. Include any designated floodways or flood plains.

(d) A general description of existing land cover. Individual trees and shrubs do not need to be identified.

(e) Stands of existing trees as they are to be preserved upon project completion, specifying their general location on the property. Differentiation shall be made between existing trees to be preserved, trees to be removed and proposed planted trees. Tree protection measures must be identified, and the diameter of the area involved must also be identified on the plan and shown to scale. Information shall be supplied concerning the proposed destruction of exceptional and historic trees in setbacks and buffer strips, where they exist. Complete landscape plans may be submitted separately. The plan must include the sequence of implementation for tree protection measures.

(f) Approximate limits of proposed clearing, grading and filling.

(g) Approximate flows of existing stormwater leaving any portion of the site.

(h) A general description of existing soil types and characteristics and any anticipated soil erosion and sedimentation problems resulting from existing characteristics.

(i) Location, size and layout of proposed stormwater and sedimentation control improvements.

(j) Existing and proposed drainage network.

(k) Proposed drain tile or waterway sizes.

(l) Approximate flows leaving site after construction and incorporating water run-off mitigation measures. The evaluation must include projected effects on property adjoining the site and on existing drainage facilities and systems. The plan must address the adequacy of outfalls from the development: when water is concentrated, what is the capacity of waterways, if any, accepting stormwater off-site; and what measures, including infiltration, sheeting into buffers, etc., are going to be used to prevent the scouring of waterways and drainage areas off-site, etc.

(m) The projected sequence of work represented by the grading, drainage and sedimentation and erosion control plans as related to other major items of construction, beginning with the initiation of excavation and including the construction of any sediment basins or retention/detention facilities or any other structural BMP's.

(n) Specific remediation measures to prevent erosion and sedimentation run-off. Plans shall include detailed drawings of all control measures used; stabilization measures including vegetation and non-vegetation measures, both temporary and permanent, will be detailed. Detailed construction notes

and a maintenance schedule shall be included for all control measures in the plan.

(o) Specific details for: the construction of stabilized construction entrance/exits, concrete washouts, and sediment basins for controlling erosion; road access points; eliminating or keeping soil, sediment, and debris on streets and public ways at a level acceptable to the city. Soil, sediment, and debris brought onto streets and public ways must be removed by the end of the work day to the satisfaction of the city. Failure to remove the sediment, soil or debris shall be deemed a violation of this ordinance.

(p) Proposed structures: location and identification of any proposed additional buildings, structures or development on the site.

(q) A description of on-site measures to be taken to recharge surface water into the ground water system through runoff reduction practices.

(r) Specific details for construction waste management. Construction site operators shall control waste such as discarded building materials, concrete truck washout, petroleum products and petroleum related products, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality. When the material is erodible, such as soil, the site must be treated as a construction site.

(6) General design performance criteria for permanent stormwater management: the following performance criteria shall be addressed for permanent stormwater management at all development 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) 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.

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

(d) 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 the paragraph 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).

(e) 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.

(f) For projects that cannot meet 100% of the runoff reduction requirements, the Stormwater Administer 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 Stormwater Administer. The Stormwater Administer shall identify priority areas within the watershed in which mitigation projects can be completed. The Stormwater Administer must create an inventory of appropriate mitigation projects, and develop appropriate institutional standards and management systems to value, evaluate and track transactions. Mitigation can be used for retrofit or redevelopment projects, but should be avoided in areas of new development.

(g) To protect stream channels from degradation, specific channel protection criteria shall be provided as prescribed in the MS4 BMP manual.

(h) 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.

(i) 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.

(j) Prior to or during the site design process, applicants for land disturbance permits shall consult with the Stormwater Administer to determine if they are subject to additional stormwater design requirements.

(k) The calculations for determining peak flows as found in the MS4 BMP manual shall be used for sizing all stormwater facilities.

(7) Minimum volume control requirements. (Note: the volume control requirements are by the MS4 and not the TDEC MS4 Permit) in accordance with 14-501(1)(c)(iii) the MS4 may establish standards to regulate the quantity of stormwater discharged, therefore:

(a) Stormwater designs shall meet the multi-stage storm frequency storage requirements as identified in the MS4 BMP manual.

(b) If hydrologic or topographic conditions warrant greater control than that provided by the minimum control requirements, the Stormwater Administer may impose any and all additional requirements deemed necessary to control the volume, timing, and rate of runoff.

(8) Permanent Stormwater management plan requirements. The stormwater management plan shall include sufficient information to allow the Stormwater Administer to evaluate the environmental characteristics of the project site, the potential impacts of all proposed development of the site, both present and future, on the water resources, and the effectiveness and acceptability of the measures proposed for managing stormwater generated at the project site. To accomplish this goal the stormwater management plan shall include the following:

(a) Topographic base map: Topographic base map of the site which extends a minimum of 100 feet beyond the limits of the proposed development and indicates:

(i) Existing surface water drainage including streams, ponds, culverts, ditches, sink holes, wetlands; and the type, size, elevation, etc., of nearest upstream and downstream drainage structures;

(ii) Current land use including all existing structures, locations of utilities, roads, and easements;

(iii) All other existing significant natural and artificial features;

(iv) Proposed land use with tabulation of the percentage of surface area to be adapted to various uses; drainage patterns; locations of utilities, roads and easements; the limits of clearing and grading.

(b) Proposed structural and non-structural BMP's;

(c) A written description of the site plan and justification of proposed changes in natural conditions may also be required;

(d) Calculations: Hydrologic and hydraulic design calculations for the pre-development and post-development conditions for the design storms specified in the MS4 BMP manual. These calculations must show that the proposed stormwater management measures are capable of controlling runoff from the

site in compliance with this chapter and the guidelines of the MS4 BMP manual. Such calculations shall include:

(i) A description of the design storm frequency, duration, and intensity where applicable;

(ii) Time of concentration;

(iii) Soil curve numbers or runoff coefficients including assumed soil moisture conditions;

(iv) Peak runoff rates and total runoff volumes for each watershed area;

(v) Infiltration rates, where applicable;

(vi) Culvert, stormwater sewer, ditch and/or other stormwater conveyance capacities;

(vii) Flow velocities;

(viii) Data on the increase in rate and volume of runoff for the design storms referenced in the MS4 BMP manual; and

(ix) Documentation of sources for all computation methods and field test results.

(e) Soils information: If a stormwater management control measure depends on the hydrologic properties of soils (e.g., infiltration basins), then a soils report shall be submitted. The soils report shall be based on on-site boring logs or soil pit profiles and soil survey reports. The number and location of required soil borings or soil pits shall be determined based on what is needed to determine the suitability and distribution of soil types present at the location of the control measure.

(9) Maintenance and repair plan: The design and planning of all permanent stormwater management facilities shall include detailed maintenance and repair procedures to ensure their continued performance. These plans will identify the parts or components of a stormwater management facility that need to be maintained and the equipment and skills or training necessary. 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.

(10) Buffers and buffer zones: Buffer and buffer zones shall be those buffers and buffer zones as those terms are defined in 14-502(5) and (6), above, and shall met the requirements contained in those provisions.

(a) Construction

(1) Construction requires buffer zone widths of a minimum of thirty (30) feet. The thirty (30) foot criterion for the width of the buffer zone can be established on an average width basis. As long as the minimum width of the buffer zone is fifteen (15) feet. The buffer zone shall meet all the other applicable requirements of 14-502 (5) and (6).

(2) Construction on impaired or exceptional waters. The width of the buffer zone shall be a minimum of sixty (60) feet. The sixty (60) feet criterion for the width of the buffer zone can be established on an average basis at a project as long as the minimum width of the buffer is more than thirty (30) feet at any measured location. The buffer zone shall meet all the other applicable requirements of 14-502(5) and (60).

(b) Permanent

(1) More than one (1) square mile drainage area will require buffer zones of a minimum of sixty (60) feet. The sixty (60) foot criterion for the width of the buffer zone can be established on an average width basis, as long as the minimum width of the buffer zone is more than thirty (30) feet at any measured location.

(2) Less than one (1) square mile drainage area. Less than one (1) square mile drainage area will require buffer zones of a minimum of thirty (30) feet. The thirty (30) foot criterion for the width of the buffer zone can be established on an average width basis, as long as the minimum width of the buffer zone is more than thirty (30) feet at any measured location. The buffer zone shall meet all the other applicable requirements of 14-502(5) and (6).

14-1405. Permanent stormwater management: operation, maintenance, and inspection.

(1) As built plans. All applicants are required to submit actual 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. A final inspection by the city is required before any performance security or performance bond will be released. The city shall have the discretion to adopt provisions for a partial pro-rata release of the performance security or performance bond on the completion of various stages of development. In addition, occupation permits shall not be granted until corrections to all BMP's have been made and accepted by the city.

(2) Landscaping and stabilization requirements.

(a)Any area of land from which the natural vegetative cover has been either partially or wholly cleared by development activities shall stabilize. Stabilization measures shall be initiated as soon as possible in portions of the site where construction activities have temporarily or permanently ceased. Temporary or permanent soil stabilization at the construction site (or a phase of the project) must be completed not later than 15 days after the construction activity in that portion of the site has temporarily or permanently ceased. In the following situations, temporary stabilization measures are not required:

(i) where the initiation of stabilization measures is precluded by snow cover or frozen ground conditions or adverse soggy ground conditions, stabilization measures shall be initiated as soon as practicable; or

(ii) where construction activity on a portion of the site is temporarily ceased, and earth disturbing activities will be resumed within 15 days.

(b)Permanent stabilization with perennial vegetation (using native herbaceous and woody plants where practicable) or other permanently stable, non-eroding surface shall replace any temporary measures as soon as practicable. Unpacked gravel containing fines (silt and clay sized particles) or crusher runs will not be considered a non-eroding surface.

(c)The following criteria shall apply to revegetation efforts:

(i) Reseeding must be done with an annual or perennial cover crop accompanied by placement of straw mulch or its equivalent of sufficient coverage to control erosion until such time as the cover crop is established over ninety percent (90%) of the seeded area.

(ii) Replanting with native woody and herbaceous vegetation must be accompanied by placement of straw mulch or its equivalent of sufficient coverage to control erosion until the plantings are established and are capable of controlling erosion.

(iii) Any area of revegetation must exhibit survival of a minimum of seventy-five percent (75%) of the cover crop throughout the year immediately following revegetation. Revegetation must be repeated in successive years until the minimum seventy-five percent (75%) survival for one (1) year is achieved.

(iv) In addition to the above requirements, a landscaping plan must be submitted with the final design describing the vegetative stabilization and management techniques to be used at a site after construction is completed. This plan will explain not only how the site will be stabilized after construction, but who will be responsible for the maintenance of vegetation at the site and what practices will be employed to ensure that adequate vegetative cover is preserved.

(3) Inspection of stormwater management facilities. Periodic inspections of facilities shall be performed, documented, and reported in accordance with this chapter, as detailed in §14-506.

(4) Records of installation and maintenance activities. Parties responsible for the operation and maintenance of a stormwater management facility shall make records of the installation of the stormwater facility, and of all maintenance and

repairs to the facility, and shall retain the records for at least three (3) years. These records shall be made available to the city during inspection of the facility and at other reasonable times upon request.

(5) Failure to meet or maintain design or maintenance standards. If a responsible party fails or refuses to meet the design or maintenance standards required for stormwater facilities under this chapter, the city, after reasonable notice, may correct a violation of the design standards or maintenance needs by performing all necessary work to place the facility in proper working condition. In the event that the stormwater management facility becomes a danger to public safety or public health, the city shall notify in writing the party responsible for maintenance of the stormwater management facility. Upon receipt of that notice, the responsible person shall have thirty (30) days to effect maintenance and repair of the facility in an approved manner. In the event that corrective action is not undertaken within that time, the city may take necessary corrective action. The cost of any action by the city under this section shall be charged to the responsible party.

14-1406. Existing locations and ongoing developments.

(1) On-site stormwater management facilities maintenance agreement:[2]

(a) Where the stormwater facility is located on property that is subject to a development agreement, and the development agreement provides for a permanent stormwater maintenance agreement that runs with the land, the owners of property must execute an inspection and maintenance agreement that shall operate as a deed restriction binding on the current property owners and all subsequent property owners and their lessees and assigns, including but not limited to, homeowner associations or other groups or entities.

(b) The maintenance agreement shall:

(1) Assign responsibility for the maintenance and repair of the stormwater facility to the owners of the property upon which the facility is located and be recorded as such on the plat for the property by appropriate notation.

(2) Provide for a periodic inspection by the property owners in accordance with the requirements of subsection (5) below for the purpose of documenting maintenance and repair needs and to ensure compliance with the requirements of this ordinance. The property owners will arrange for this inspection to be conducted by a registered professional engineer licensed to practice in the State of Tennessee, who will submit a signed written report of the inspection to the Stormwater Administer. It shall also grant permission to the city to enter the property at reasonable times and to inspect the stormwater facility to ensure that it is being properly maintained.

(3) Provide that the minimum maintenance and repair needs include, but are not limited to: the removal of silt, litter and other debris, the cutting of grass, cutting and vegetation removal, and the replacement of landscape vegetation, in detention and retention basins, and inlets and drainage pipes and any other stormwater facilities. It shall also provide that the property owners shall be responsible for additional maintenance and repair needs consistent with the needs and standards outlined in the MS4 BMP manual.

(4) Provide that maintenance needs must be addressed in a timely manner, on a schedule to be determined by the Stormwater Administer.

(5) Provide that if the property is not maintained or repaired within the prescribed schedule, the City of Clinton shall perform the maintenance and repair at its expense, and bill the same to the property owner. The

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2 Appendix B contains a sample maintenance agreement that runs with the land. Numerous other maintenance agreements are available from MTAS and Tennessee cities. Appendix C contains an outline of the law governing covenants that run with the land.

maintenance agreement shall also provide that the cost of performing the maintenance shall be a lien against the property.

(2) Existing problem locations – no maintenance agreement.

(a) The Stormwater Administer 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 have not been maintained and/or inspected in accordance with 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) Owner/Operator Inspections - generally. The owners and/or the operators of stormwater management practices shall:

(a) Perform routine inspections to ensure that the BMP's are properly functioning. These inspections shall be conducted on an annual basis, at a minimum. These inspections shall be conducted by a person familiar with control measures implemented at a site. Owners or operators shall maintain documentation of these inspections. The Stormwater Administer may require submittal of this documentation.

(b) Perform comprehensive inspection of all stormwater management facilities and practices. These inspections shall be conducted once every five years, at a minimum. Such inspections must be conducted by either a professional engineer or landscape architect, licensed in the State of Tennessee. Complete inspection reports for these five year inspections shall include:

(i) Facility type,
(ii) Inspection date,
(iii) Latitude and longitude and nearest street address,
(iv) BMP owner information (e.g. name, address, phone number, fax, and email),
(v) A description of BMP condition including: vegetation and soils; inlet and outlet channels and structures; embankments, slopes, and safety benches; spillways, weirs, and other control structures; and any sediment and debris accumulation,
(vi) Photographic documentation of BMP's, and
(vii) Specific maintenance items or violations that need to be corrected by the BMP owner along with deadlines and reinspection dates.

(c) Owners or operators shall maintain documentation of these inspections. The Stormwater Administer may require submittal of this documentation.

(4) 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 areas must be vegetated or covered under the standards and guidelines specified in 14-505 (2)(c)(i), (ii), (iii) and on a schedule acceptable to the Stormwater Administer.
(b) Cuts and slopes must be properly covered with appropriate vegetation and/or retaining walls constructed.
(c) Drainage ways shall be properly covered in vegetation or secured with rip-rap, channel lining, etc., to prevent erosion.
(d) Trash, junk, rubbish, etc. shall be cleared from drainage ways.
(e) Stormwater runoff shall, at the discretion of the Stormwater Administer be controlled to the maximum extent practicable to prevent its pollution. Such control measures may include, but are not limited to, the following:
  (i) Ponds
    (1) Detention pond
    (2) Extended detention pond
    (3) Wet pond
    (4) Alternative storage measures
  (ii) Constructed wetlands
  (iii) Infiltration systems
    (1) Infiltration/percolation trench
    (2) Infiltration basin
    (3) Drainage (recharge) well
    (4) Porous pavement
  (iv) Filtering systems
    (1) Catch basin inserts/media filter
    (2) Sand filter
    (3) Filter/absorption bed
    (4) Filter and buffer strips
  (v) Open channel
    (1) Swale

(5) Corrections of problems subject to appeal. Corrective measures imposed by the Stormwater Administer under this section are subject to appeal under section 14-510 of this chapter.

14-1407. 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 any discharge that is not composed entirely of stormwater or any discharge that flows from stormwater facility that is not 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 specified in writing by the city as being necessary to protect public health and safety.

(c) Dye testing is an allowable discharge if the city has so specified in writing.

(d) 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 flushings from which chlorine has been removed to the maximum extent practicable;

(v) routine external building washdown 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 emergency response agencies 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 the next business day. 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.

14-1408. Enforcement.[3]

(1) Enforcement authority. The Stormwater Administer shall have the authority to issue notices of violation and citations, and to impose the civil penalties provided in this section. Measures authorized include:

(a) Verbal Warnings – At a minimum, 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 MS4 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, the MS4's own approval process affecting the facility's ability to discharge to the MS4 can be used to abate the violation.

(f) Additional Measures – The MS4 may also use other escalated measures provided under local legal authorities. The MS4 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 bond 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 Administer 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 Stormwater Administer 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 Stormwater Administer. 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 Stormwater Administer 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 Stormwater Administer 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

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3 See Appendix D for consideration of possible conflicts between building codes and stormwater regulations.

or certified mail (return receipt requested) at least ten (10) days prior to the hearing.

(e) Compliance order. When the Stormwater Administer 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 Stormwater Administer finds that any person has violated or continues to violate this chapter or any permit or order issued hereunder, the Stormwater Administer 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 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 Stormwater Administer 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 Stormwater Administer may deem necessary to enable the applicant or other responsible person to take the necessary remedial measures to cure such violations.

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

14-1409. 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 Stormwater Administer, 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 City of Clinton 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.4 Each day of violation shall constitute a separate violation.

(3) Measuring civil penalties. In assessing a civil penalty, the Stormwater Administer 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;

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4 Appendix A contains a defense of the proposition that municipalities can legally impose an administrative fine of more than $50.00.

(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 or size or type of industrial activity (including SIC code, if known);
(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.

14-1410. Appeals. 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 city's governing body.

(1) Appeals to be in writing. The appeal shall be in writing and filed with the municipal recorder or clerk within fifteen (15) days after the civil penalty and/or damage assessment is served in any manner authorized by law.

(2) Public hearing. Upon receipt of an appeal, the city's governing body, or other appeals board established by the city's governing body shall hold a public hearing within thirty (30) days. 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 governing body of the city shall be final.

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

14-1411. Modifications- Being necessary for the public good, health, safety and welfare and required by the State of Tennessee this ordinance shall become effective upon adoption with the exception of the provisions requiring permanent stormwater controls retaining one hundred (100%) percent of the first inch of a rainfall event (i.e. 14-504-6 ca). Provisions shall become effective on May 4, 2018. (48 months after NOC), Until such time permanent stormwater controls shall be designed and constructed such that post development flows are less than or equal to pre developed flows.

SECTION 2. If any section, phrase, sentence or portion of this ordinance is held invalid or unconstitutional for any reason by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision; and such holding shall not affect the validity of remaining portions thereof.

SECTION 3. This ordinance shall take effect from and after its final passage, the public welfare requiring it.

Passed on 1st reading: May 18, 2015

Passed on 2nd reading: June 22, 2015

Signed: _____
Mayor Scott Burton

Attest: _____
Regina Ridenour, City Recorder

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.]

1There 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.

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 nor 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 entity). 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 _____ County, 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 parities 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 parties 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 brochures 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 county 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 county building code:

> Under the statutory framework, the county 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.