

LENOIR CITY STORMWATER UTILITY ORDINANCE

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LENOIR CITY STORMWATER UTILITY ORDINANCE

ORDINANCE NO.

WHEREAS, The Federal Clean Water Act, 33 U.S.C. 1251 et seq., requires certain political entities, such as the city, to implement stormwater management programs within prescribed time frames, and the Environmental Protection Agency, pursuant to the Federal Clean Water Act, 33 U.S.C. 1251 et seq., has published rules for stormwater outfall permits;

WHEREAS, Tennessee Code Annotated, § 68-221-1101, provides that the purpose of the stormwater management statute is to facilitate municipal compliance with the Water Quality Act of 1977, and applicable EPA regulations, particularly those arising from § 405 of the Water Quality Act of 1987, and § 402(p) of the Clean Water Act of 1977, and to enable municipalities to regulate stormwater discharges, establish a system of drainage facilities, construct and operate a system of stormwater management and flood control facilities, and to “fix and require payment of fees for the privilege of discharging stormwater,”

WHEREAS, Tennessee Code Annotated, § 68-221-1105 provides that among other powers municipalities have with respect to stormwater facilities, is the power by ordinance or resolution to:

- (1) Exercise general regulation over the planning, location, construction, and operation and maintenance of stormwater facilities in the municipality, whether or not owned and operated by the municipality;
- (2) 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;

- (3) Establish standards to regulate the quantity of stormwater discharged and to regulate stormwater contaminants as may be necessary to protect water quality;
- (4) Review and approve plans and plats for stormwater management in proposed subdivisions or commercial developments;
- (5) Issue permits for stormwater discharges, and for the construction, alteration, extension, or repair of stormwater facilities;
- (6) Suspend or revoke permits when it is determined that the permittee has violated any applicable ordinance, resolution, or condition of the permit;
- (7) Regulate and prohibit discharges into stormwater facilities of sanitary, industrial, or commercial sewage or waters that have otherwise been contaminated;
- (8) Expend funds to remediate or mitigate the detrimental effects of contaminated land or other sources of stormwater contamination, whether public or private; and

WHEREAS, The city desires to develop a stormwater utility to be responsible for the operation, construction and maintenance of stormwater facilities; for stormwater system planning, and for review of stormwater development plans for compliance with stormwater management codes.

NOW THEREFORE, BE IT ENACTED BY THE MAYOR AND BOARD OF THE CITY OF LENOIR CITY, TENNESSEE, THAT:

Section 1. Legislative findings and policy. The Mayor and Board of the City of Lenoir City, Tennessee finds, determines and declares that the stormwater system which provides for the collection, treatment, storage and disposal of stormwater provides benefits and services to all property within the incorporated city limits. Such benefits include, but are not limited to: the

provision of adequate systems of collection, conveyance, detention, treatment and release of stormwater; the reduction of hazards to property and life resulting from stormwater runoff; improvements in general health and welfare through reduction of undesirable stormwater conditions; and improvements to the water quality in the stormwater and surface water system and its receiving waters.

Section 2. Creation of stormwater utility. For those purposes of the Federal Clean Water Act and of Tennessee Code Annotated, § 68-221-1101 et seq., there is created a stormwater utility which shall consist of a manager or director and such staff as the municipality's governing body shall authorize.

[NOTE: Organizational variations are possible depending upon the wants, needs and capabilities of individual municipalities. For example, the stormwater utility could be made a stand-alone department, or placed under an existing department].

The stormwater utility, under the legislative policy, supervision and control of the governing body of the city, shall:

- (1) Administer the acquisition, design, construction, maintenance and operation of the stormwater utility system, including capital improvements designated in the capital improvement program;
- (2) Administer and enforce this ordinance and all regulations and procedures adopted relating to the design, construction, maintenance, operation and alteration of the utility stormwater system, including, but not limited to, the quantity, quality and/or velocity of the stormwater conveyed thereby;
- (3) Advise the municipality's governing body and other city departments on matters relating to the utility;

- (4) Prepare and revise a comprehensive drainage plan for adoption by the municipality's governing body;
- (5) Review plans and approve or deny, inspect and accept extensions and connections to the system;
- (6) Enforce regulations to protect and maintain water quality and quantity within the system in compliance with water quality standards established by state, regional and/or federal agencies as now adopted or hereafter amended;
- (7) Annually analyze the cost of services and benefits provided, and the system and structure of fees, charges, civil penalties and other revenues of the utility.

Section 3. Definitions. For the purpose of this ordinance, 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) "Base rate" means the stormwater user's fee for a detached single family residential property in the city.
- (2) "Construction" means the erection, building, acquisition, alteration, reconstruction, improvement or extension of stormwater facilities; preliminary planning to determine the economic and engineering feasibility of stormwater facilities; the engineering, architectural, legal, fiscal and economic investigations

- and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action necessary in the construction of stormwater facilities; and the inspection and supervision of the construction of stormwater facilities;
- (3) “Developed property” means real property which has been altered from its natural state by the creation or addition of impervious areas, by the addition of any buildings, structures, pavement or other improvements.
- (4) “Equivalent residential unit” or “ERU” means the average square footage of a detached single family residential property determined pursuant to this ordinance.
- (5) “Exempt property” means all properties of the federal, state, county, and city governments, and any of their divisions or subdivisions, and property that does not discharge stormwater runoff into the stormwater or flood control facilities of the municipality. (i.e. Undeveloped parcel in their natural state.)
- (6) “Fee” or “Stormwater user’s fee” means the charge established under this ordinance and levied on owners or users of parcels or pieces of real property to fund the costs of stormwater management and of operating, maintaining, and improving the stormwater system in the municipality. The stormwater user’s fee is in addition to any other fee that the municipality has the right to charge under any other rule or regulation of the municipality.
- (7) “Fiscal year” means July 1 of a calendar year to June 30 of the next calendar year, both inclusive.
- (8) “Impervious surface” means a surface which is compacted or covered with material that is resistant to infiltration by water, including, but not limited to, most

conventionally surfaced streets, roofs, sidewalks, patios, driveways, parking lots, and any other oiled, graveled, graded, compacted, or any other surface which impedes the natural infiltration of surface water.

- (9) "Impervious surface area" means the number of square feet of horizontal surface covered by buildings, and other impervious surfaces. All building measurements shall be made between exterior faces of walls, foundations, columns or other means of support or enclosure.
- (10) "Other developed property" means developed property other than single-family residential property. Such property shall include, but not be limited to, commercial properties, industrial properties, parking lots, hospitals, schools, recreational and cultural facilities, hotels, offices, and churches.
- (11) "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.
- (12) "Property owner" means the property owner of record as listed in the county's assessment roll. A property owner includes any individual, corporation, firm, partnership, or group of individuals acting as a unit, and any trustee, receiver, or personal representative.
- (13) "Single family residential property" means a developed property which serves the primary purpose of providing a permanent dwelling unit to a single family. A single family detached dwelling or a townhouse containing an accessory apartment or second dwelling unit is included in this definition.

- (14) "Stormwater" means stormwater runoff, snow melt runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration, and drainage.
- (15) "Stormwater management fund" or "fund" means the fund created by this ordinance to operate, maintain, and improve the city's stormwater system.
- (16) "Stormwater management" means the planning, design, construction, regulation, improvement, repair, maintenance, and operation of facilities and programs relating to water, flood plains, flood control, grading, erosion, tree conservation, and sediment control.
- (17) "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.
- (18) "User" shall mean the owner of record of property subject to the stormwater user's fee imposed by this ordinance.

Section 4. Funding of stormwater utility. Funding for the stormwater utility's activities may include, but not be limited to, the following:

- (1) Stormwater user's fees.
- (2) Civil penalties and damage assessments imposed for or arising from the violation of the city's stormwater management ordinance.
- (3) Stormwater permit and inspection fees.
- (4) Other funds or income obtained from federal, state, local, and private grants, or revolving funds, and from the Local Government Public Obligations Act of 1986 (Tennessee Code Annotated, title 9, chapter 21).

To the extent that the stormwater drainage fees collected are insufficient to construct needed stormwater drainage facilities, the cost of the same may be paid from such city funds as may be determined by the municipality's governing body.

Section 5. Stormwater fund. All revenues generated by or on behalf of the stormwater utility shall be deposited in a stormwater utility fund and used exclusively for the stormwater utility.

Section 6. Operating budget. The municipality's governing body shall adopt an operating budget for the stormwater utility each fiscal year. The operating budget shall set forth for such fiscal year the estimated revenues and the estimated costs for operations and maintenance, extension and replacement and debt service.

Section 7. Stormwater user's fees established. There shall be imposed on each and every developed property in the city, except exempt property, a stormwater user's fee, which shall be set from time to time by ordinance or resolution, and in the manner and amount prescribed by this ordinance.

Prior to establishing or amending user's fees, the municipality shall advertise its intent to do so by publishing notice in a newspaper of general circulation in the city following normal City protocol for advertising Public Hearing.

Section 8. Equivalent residential unit (ERU).

(1) Establishment. There is established for purposes of calculating the stormwater user's fee the equivalent residential unit (ERU).

(2) Definition. The ERU is the average square footage of a detached single family residential property.

- (3) Setting the ERU. The ERU shall be set by the municipality's governing body from time to time by ordinance or resolution.
- (4) Source of ERU. The municipality's governing body shall have the discretion to determine the source of the data from which the ERU is established, taking into consideration the general acceptance and use of such source on the part of other stormwater systems, and the reliability and general accuracy of the source. The municipality's governing body shall have the discretion to determine the impervious surface area of other developed property through property tax assessor's rolls or site examination, mapping information, aerial photographs, and other reliable information.

(1) **Section 9. Property classification for stormwater user's fee.** Property classifications.

For purposes of determining the stormwater user's fee, all properties in the city are classified into one of the following classes:

- (a) Single family residential property;
 - (b) Other developed property;
 - (c) Exempt property.
- (2) Single family residential fee. The municipality's governing body finds that the intensity of development of most parcels of real property in the municipality classified as single family residential is similar and that it would be excessively and unnecessarily expensive to determine precisely the square footage of the improvements (such as buildings, structures, and other impervious areas) on each such parcel. Therefore, all single family residential properties in the city shall be

charged a flat stormwater management fee of \$3.00, regardless of the size of the parcel or the improvements.

- (3) Other developed property fee. The fee for other developed property (i.e., non-single-family residential property) in the municipality shall be the base rate multiplied by the numerical factor obtained by dividing the total impervious area (square feet) of the property by one ERU. The impervious surface area for other developed property is the square footage for the buildings and other improvements on the property. The minimum stormwater management fee for other developed property shall equal the base rate for single family residential property.

- (4) Exempt property. There shall be no stormwater user's fee for exempt property.

[Note: Appendix A contains an outline of how to calculate the stormwater user's fee based on this ordinance.

Section 10. Base Rate. The municipality's governing body shall, by ordinance or resolution, establish the base rate for the stormwater user's fee. The base rate shall be calculated to insure adequate revenues to fund the costs of stormwater management and to provide for the operation, maintenance, and capital improvements of the stormwater system in the city.

Section 11. Adjustments to stormwater user's fees. The stormwater utility shall have the right on its own initiative to adjust upward or downward the stormwater user's fees with respect to any property, based on the approximate percentage on any significant variation in the volume or rate of stormwater, or any significant variation in the quality of stormwater, emanating from the property, compared to other similar properties. In making determinations of the similarity of property, the stormwater utility shall take into consideration the location,

geography, size, use, impervious area, stormwater facilities on the property, and any other factors that have a bearing on the variation.

Section 12. Property owners to pay charges. The owner of each non-exempt lot or parcel shall pay the stormwater user's fees and charges as provided in this ordinance.

[NOTE: This section makes property owners liable for the stormwater user's fees. See Appendix B for an analysis of the question of whether the "user" is the land owner or the occupant of the property within the meaning of Tennessee Code Annotated, § 68-221-1107(a). There are other alternatives:

- ! Make utility customers liable for the stormwater user's fee, and collect the fee from those customers in the same manner as utility bills are collected. There are administrative difficulties inherent in that alternative in the case of municipalities that provide only some or no utilities.
- ! Make occupants of property liable for the stormwater user's fees. There are also administrative difficulties inherent in this alternative where the municipality has no efficient method of determining the occupants of structures, such as in the case where multiple tenants are served by a single utility meter, and in the case of multi-family dwellings generally.

In addition, any alternative where occupants other than the land owner are made liable for the stormwater user's fee requires that the formulae for calculating the stormwater user's fee take into account the proportionate allocation of the fee among multiple tenants.]

Section 13. Billing procedures and penalties for late payment. (1) Rate and collection schedule. The stormwater user's fee must be set at a rate, and collected on a schedule, established by ordinance or resolution.

(2) Delinquent bills. The stormwater user's fee shall be paid in person or by mail at

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- (3) Penalties for late payment. Stormwater user's fees shall be subject to a late fee established by LCUB Policy. The municipality shall be entitled to recover attorney's fees incurred in collecting delinquent drainage fees. Any charge due under this ordinance which shall not be paid may be recovered at law by the municipality.

[NOTE: Tennessee Attorney General's Opinion 93-59, opines that it is not legal for a municipality to bill the stormwater user's fee on property tax bills or to make such fees a lien on property.]

- (4) Mandatory statement. Pursuant to Tennessee Code Annotated § 68-221-1112, each bill that shall contain stormwater user's fees shall contain the following statement in bold:

THIS TAX HAS BEEN MANDATED BY CONGRESS.

[NOTE: Notwithstanding the statement required to be contained on the stormwater user's fee bill, the fee is probably not a tax. The distinction between fees and taxes with respect to the stormwater user's fee authorized by Tennessee Code Annotated, § 68-221-1107(a) are outlined in Tennessee Attorney's General Opinions 93-59 and 94-039.]

Section 14. Appeals of fees.

- (1) Generally. Any person who disagrees with the calculation of the stormwater user's fee, as provided in this ordinance, or who seeks a stormwater user's fee adjustment based upon stormwater management practices, may appeal such fee determination to the stormwater utility within thirty (30) days from the date of the last bill containing stormwater user's fees charges. Any appeal shall be filed in writing and shall state the grounds for the appeal. The stormwater utility director may request additional information from the appealing party.

- (2) Adjustments. Stormwater user's fee adjustments for stormwater management

practices may be considered for: reductions in runoff volume including discharge to a non-city drainage system; and properly designed constructed and maintained existing retention facilities, i.e. evaporation and recharge. Based upon the information provided by the utility and the appealing party, the stormwater utility shall make a final calculation of the stormwater drainage fee. The stormwater utility shall notify the parties, in writing, of its decision.

APPENDIX A

Calculating Stormwater User Fees

Calculating Stormwater User Fees can be done in a simple, equitable manner. The annual budget of the Stormwater Utility is divided by the total number of Equivalent Residential Units (ERU's) in the Stormwater System limits. Division of the result by 12 would yield the monthly fee per ERU. An Equivalent Residential Unit is based on the average square footage of a detached single residential family property. This average can be obtained from a variety of sources. If the average is not available through your tax assessor or another internal department, averages may be obtained from the U.S. Census Bureau, your local Area Association of Realtors, or some other credible source. Each detached single residential family property would be one (1) ERU. Other developed proposer users would divide their total amount of impervious surface area (in square feet) by the number of square feet in an ERU, to get the number of ERU's for that property. The sum of all other developed property ERU's and single family residential ERU's would be the total number of ERU's.

Annual Budget. The annual costs for the storm drainage system includes permitting, maintaining, planning, designing, reconstructing, constructing, environmentally restoring, regulating, testing, inspection of the system, management and administration, and the establishment of a reserve balance.

Equivalent Residential Unit (ERU). The average square footage of a single family residential property is equivalent to one ERU.*

Total ERU's. The Total ERU's within the limits of the stormwater utility is calculated according to the following formula:

$$\text{Total ERU's} = \text{Other Developed Property ERU's} + \text{Single Family Residential ERU's}$$

Single Family Residential User Fee. The fee that residential users within the limits of the stormwater utility pay for their share of the annual budget. The fee is calculated according to the following formula:

$$\text{Single Family Residential User Fee} = \frac{\text{Annual Budget}}{\text{Total ERU's within Stormwater Utility limits}}$$

This number should be divided by 12 to establish the monthly User Fee:

$$\frac{\text{Single Family Residential User Fee}}{12} = \text{Monthly Single Family Residential User Fee}$$

Other Developed Property User Fee. The fee that other developed property users within the limits of the stormwater utility pay for their share of the annual budget. The fee is calculated according to the following formula:

Other Developed Property ERU's = Impervious Surface Area square feet) ERU square feet

Other Developed Property User Fee = Single Family Residential User Fee x Other Developed Property ERU's

Other Developed Property User Fee) 12 = Monthly Other Developed Property User Fee

The calculated ERU Units will be charged by the following rate chart.

0-5,000 sq. ft.	= \$25
5,001-35,000 sq. ft.	= \$50
35,001-70,000 sq. ft.	= \$100
70,001-100,000 sq. ft.	= \$200
100,001-200,00 sq. ft.	= \$300
200,001-300,000 sq. ft.	= \$400
300,001-400,000 sq. ft.	= \$500
400,001-500,000 sq. ft.	= \$600
500,001-600,000 sq. ft.	= \$700
600,001-700,000 sq. ft.	= \$800
700,001-800,000 sq. ft.	= \$900
800,001-900,000 sq. ft.	= \$1,000
900,001-1,500,000 sq. ft.	= \$1,500
1,500,001-2,000,000 sq. ft.	= \$2,000
2,000,001+	= \$3,000

APPENDIX B

Tennessee Code Annotated, § 68-221-1107(a), provides that, “All municipalities constructing, operating, or maintaining stormwater or flood control facilities are authorized to establish a graduated stormwater user’s fee which may be assessed and collected from each *user* of the stormwater facilities provided by the municipality...” It does not define “user,” providing only that, “To ensure a proportionate distribution of all costs to each user or user class, the user’s contribution shall be based on factors such as the amount of impervious area utilized by the user, the water quality of user’s stormwater runoff or the volume or rate of stormwater runoff...” It also provides that:

- § “Users whose stormwater runoff is not discharged into or through the stormwater and/or flood control facilities of the municipality shall be exempted from the payment of the graduated stormwater user fee authorized by this section.”
- § “The fee structure shall provide adjustments for users who construct facilities to retain and control the quantity of stormwater runoff.”

Generally, the term “user” with respect to utilities probably means the beneficial user of the utility rather than the title holder of the property. In Village of Sauget v. Cohn, 610 N.E.2d 104 (Ill. App. 5th Dist. 1993), an ordinance required that the “user” pay sewer charges, but did not define the term “user.” The Court held that the title holder of the property was not the “user,” reasoning that:

This is consistent with the Black’s Law Dictionary definition of user. Black’s defines a user as “[t]he actual exercise or enjoyment of any right, property, drugs, franchise, etc”....Because the defendant [the title holder of the property] is not the person who receives the services, he is not the person who actually exercises or enjoys the benefits provided by American Bottoms. He is, at most, an indirect beneficiary of the services, i.e., his properties are more marketable because they have indoor plumbing.” [At 108]

It is not clear from Tennessee Code Annotated, § 68-221-1107(a) that the municipality can make the landowner rather than the tenant or occupant of the property a “user” for the purposes of the stormwater user’s fee. Arguably it limits the city to the actual or beneficial user. Tennessee Code Annotated, § 68-221-1107(b), appears by implication to support that conclusion because it provides that the stormwater utility is authorized to enter into a contract with any other public or private utility (except an electrical cooperative organized under the Electric Cooperative Law) or city or town to bill and collect stormwater fees as a designated item on its utility bill, and to discontinue utility services where the stormwater utility fee is not paid. In most cases any utility bills would be in the name of the actual or beneficial user or users of the

property. But that statute may reflect only a method for municipalities to collect stormwater management fees through various utility entities rather than an implication that cities must impose stormwater management fees on the beneficial users of the stormwater utility as opposed to land owners.

An argument can also be made that Tennessee Code Annotated, § 68-221-1107(a), authorizes a city to name the property owner the “user” within the meaning of that statute. A number of cases from other jurisdictions declare that utility user fees differ from taxes in that the payment of utility service fees is voluntary while the payment of taxes is involuntary. [See Pinellas County v. State, 776 So.2d 262 (Fla. 2001); City of Gary v. Indiana Bell Telephone Co., Inc., 732 N.E.2d 149 (Ind. 2000); Bolt v. City of Lansing, 587 N.W.2d 264 (Mich. 1998); State v. City of Port Orange, 650 So.2d 1 (Fla. 1994).] But our sister State of Arkansas has held that mandatory fees levied on property owners under the state’s police powers are still user fees rather than taxes. [See Holman v. City of Dierks, 233 S.W.2d 392 (Ark. 1950); Vandiver v. Washington County, 628 S.W.2d 1 (Ark. 1982).]

In either case, a person who obtains or continues electric, water, even sewer, or most other utility services is a voluntary “user” of the service to a degree that does not typically apply to the user of a stormwater utility. In providing that the “user’s contribution [fee] shall be based on factors such as the amount of *impervious areas utilized by the user*, the water quality of user’s stormwater runoff or the volume or rate of stormwater runoff,” Tennessee Code Annotated, § 68-221-1107, contemplates that virtually all developed property will be subject to a mandatory stormwater management fee. In addition, the stormwater user’s fee connected to the impervious areas of land under that statute is more closely tied to the land than is the fee for most other utility services. The stormwater utility service is always “on” with respect to the impervious surface of the land no matter who is the beneficial user of other utility services that serve the land. The decision to develop the land on the part of its owner (or even by its occupant) may be voluntary, but any development that leads to the creation of impervious area leads to the involuntary subjection of the land to a stormwater user’s fee. The only way the owner (or occupant) of the land can voluntarily “shut-off” the stormwater utility service is perhaps to return the land to its natural state. Finally, the impervious area component of stormwater management would necessarily apply to *all* developed land, including presently-developed land for which development decisions have already been made, many years ago. Generally, the extent to which property is developed is a function of the past and future decisions of the owner of the property.

Some of the literature dealing with stormwater utilities also distinguishes between stormwater “user” fees which are billed to utility customers in much the same manner as are other utility bills, and stormwater assessment fees, which are billed to property owners. There is no general law in Tennessee authorizing cities to impose special assessments for stormwater purposes, but some cities may have provisions in their charters generally authorizing them to levy special assessments on property. Those provisions in *some* cases may be sufficient authority for a particular city to impose the stormwater user’s fee as a special assessment on property. Special assessments are generally not taxes. The question of whether a particular charter permits the stormwater user’s fee to be levied as a special assessment should be determined on a case-by-cases basis.