

ORDINANCE NO. 2002-4

## STORMWATER UTILITY ORDINANCE

WHEREAS, The Federal Clean Water Act, 33 U. S. C. 1251 et seq., requires certain political entities, such as the Town, 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 they have the power by ordinance or resolution and consistent with all requirements of state or federal law to:

- (1) Exercise general regulation over the planning, location, construction, and operation and maintenance over 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, or 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 Town desires to develop a stormwater utility to be responsible for the operation, construction, and maintenance of stormwater devices; for stormwater system planning, and for review of stormwater development plans for compliance with stormwater management codes.

NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE TOWN OF SIGNAL MOUNTAIN, TENNESSEE, THAT:

**Section 1. Legislative findings and policy.** The Town Council 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 Town 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 board and utility.** For those purposes of the Federal Clean Water Act and of Tennessee Code Annotated, §68-221-1011 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.

The stormwater utility, under the legislative policy and supervision and control of the stormwater management board, 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 Town Council and other Town departments on matters relating to the utility;
- (4) Prepare and revise a comprehensive drainage plan for adoption by the Town Council;
- (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, 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) "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;
- (2) "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.
- (3) "Exempt property" means all properties of the federal, state, county, and Town of Signal Mountain 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.
- (4) "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 Town. 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.

- (5) "Fiscal year" means July 1 of a calendar year to June 30 of the next calendar year, both inclusive.
- (6) "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.
- (7) "Impervious surface" means a surface area 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, compacted, or any other surface which impedes the natural infiltration of surface water.
- (8) "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.
- (9) "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.
- (10) "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.

- (11) "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.
- (12) "Stormwater" means stormwater runoff, snow melt runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration (other than infiltration contaminated by seepage from sanitary sewers or by other discharges) and drainage.
- (13) "Stormwater management fund" or "fund" means the fund created by this ordinance to operate, maintain, and improve the Town's stormwater system.
- (14) "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.
- (15) "Stormwater management board" means the Signal Mountain Town Council.
- (16) "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.
- (17) "User" shall mean the owner of record of property subject to the stormwater user's fee imposed by this ordinance.
- (18) "Stormwater appeals board" is the board established by Town of Signal Mountain Ordinance 2001-6.

**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 imposed for the violation of the Town'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 Grant Public Obligations Act of 1986 (Tennessee Code Annotated, Title 9, Chapter 2).

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 Town funds as may be determined by the Town Council.

**Section 5. Stormwater fund.** All revenues generated by or on behalf of the stormwater utility, including stormwater user's fees, civil penalties for the violation of the Town's stormwater management ordinance, permit and inspection fees, and interest earnings on those revenues, shall be deposited in a stormwater utility fund and used exclusively for the stormwater utility.

**Section 6. Operating budget.** The Town Council 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 Town, 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 Town shall advertise its intent to do so by publishing notice in a newspaper of general circulation in the Town at least thirty (30) days in advance of the meeting of the stormwater management board which shall consider the adoption of the fee or its amendment.

**Section 8. Rate.** The stormwater management board shall, by ordinance or resolution, establish the rate for the stormwater user's fee. The 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 9. Adjustment 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 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. The stormwater utility shall make upward or downward adjustments in the stormwater user's fees, based on the approximate percentage of the variance of volume or rate of stormwater, or variance in the quality of stormwater, emanating from the property, compared to other similar properties.

**Section 10. Property owners to pay charges.** The owner of each lot or parcel which directly or indirectly uses the stormwater system maintained by the Town shall pay the stormwater user's fees and charges as provided in this ordinance.

**Section 11. Billing procedure and penalties for late payment.**

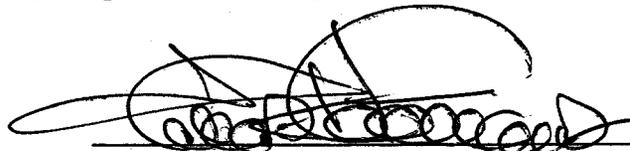
- (1) The stormwater user's fee shall become effective at the rates set by a separate ordinance or resolution, shall be billed annually.
- (2) The stormwater charge shall be paid in person or by mail at the Town Hall and shall become delinquent as of ninety (90) days following the billing. Any unpaid stormwater user's fee shall bear interest at the legal rate if it remains unpaid after ninety (90) days following the billing.
- (3) Penalties for late payment. Stormwater user's fees shall be subject to a late fee of five percent per month, not to exceed twenty-five (25) percent. The Town 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 Town.
- (4) Pursuant to Tennessee Code Annotated §68-221-1112, each bill that shall contain stormwater charge shall contain the following statement in bold:

**THIS TAX HAS BEEN MANDATED BY CONGRESS**

**Section 12. 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 appeals board 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 appeals board chairman may request additional information from the appealing party.
- (2) Upward or downward adjustments based on stormwater volume, rate or quality.

Stormwater user's fee adjustments for stormwater management practices may be considered for reductions in stormwater release rates and provision of additional storage volume; improvements in stormwater quality; reductions in runoff volume including discharging to a non-Town drainage system; and properly designed constructed and maintained existing detention facilities. 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.



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James H. Althaus, Mayor



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Recorder

Passed on First Reading July 8, 2002

Passed on Second Reading August 12, 2002



## 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. 5<sup>th</sup> 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) what, if any, latitude a city has to 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 an option on the part of municipalities to collect stormwater management through various utility entities as opposed to an implication that cities must impose stormwater management fees on the beneficial users of the stormwater utility.

However, an argument can 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 is the property owner. 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 a (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 impervious 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 space leads to the involuntary subjection of the land to a stormwater user 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 natural state. Finally, the impervious area component of the stormwater management would necessarily apply to all developed land, including presently-developed land for which development decisions have already been made, some 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 distinguished 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 provision in some cases may be sufficient authority for a particular city to impose the stormwater user’s fee as a special assessment on property. Although special assessments are generally not taxes, under the right circumstances it might be possible to impose a lien upon property for unpaid stormwater user’s fee assessments. 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-case basis.