

STORMWATER FEES, ORDINANCE ENFORCEMENT OPTIONS AND OTHER SPECIAL STORMWATER ISSUES

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Stormwater Funding Options

Stormwater Service Charges

Service charges are, of course, authorized by the Stormwater Management Act [See Tennessee Code Annotated, § 68-221-1107], and are imposed in the MTAS Model Stormwater Utility Ordinance.

Stormwater Revenue Bonds

Municipalities are authorized to issue both revenue bonds (and presumably general obligation bonds) under the Stormwater Management Act [See Tennessee Code Annotated, § 68-221-1108], which expressly gives municipalities the authority to issue bonds for stormwater facilities under Tennessee Code Annotated, title 9, chapter 21. [Even in the absence of the former statute, municipalities would still have the authority to issue both revenue and general obligation bonds for stormwater facilities under the latter statute]. The same Act also provides that municipalities are authorized to pay for such facilities by using the procedures contained in Tennessee Code Annotated, §§ 68-221-208 and 68-221-209. Those statutes respectively authorize municipalities to establish and collect sewer user fees, and to require the owners or tenants of property to connect to the public sewers. Presumably, such charges would support the payment of revenue bonds.

Special Purpose Local Option Sales Tax

Although there is no special purpose sales tax law in Tennessee, presumably municipalities have the authority under the local option sales tax law [See Tennessee Code Annotated, § 67-6-701 et seq.] to vote on a local option sales tax that would be directed solely to the payment for stormwater facilities. Several municipalities have held referenda in which the local option sales tax increase is devoted to specific municipal purposes. Thus far nobody has challenged those referenda.

Clean Water State Revolving Loan Fund

Tennessee has a similar program authorized by Tennessee Code Annotated, § 68-221-1001 et seq. Sharon Rollins covers that program in *Finding Money For Municipal Water, Wastewater and Solid Waste in Tennessee*, 2003.

Impact Fees

Impact fees must be supported by general state law, or by a municipality's charter. There is no general state law in Tennessee authorizing municipalities to impose impact fees. However, a number of private act cities have private acts authorizing the imposition of such fees. The general law mayor-aldermanic charter, specifically Tennessee Code Annotated, § 6-2-201, contains two provisions authorizing cities established under that charter to:

- Subsection (14):

Prescribe reasonable regulations regarding the construction, maintenance, equipment, operation and service of municipal utilities, compel reasonable extensions of facilities for these services, and assess fees for the use of or impact upon these services.

- Subsection (15):

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, public facilities, libraries and squares, wharves, bridges, viaducts, subways, tunnels, *sewers and drains* within or without the corporate limits, regulate their use within the corporate limits, *assess fees for the use of or impact upon such property and facilities...*

Those provisions also applied to the general law modified manager-council charter. [See Tennessee Code Annotated, § 6-33-101.]

For some reason, the general law manager-commission charter contains no similar authority. [See Tennessee Code Annotated, § 6-18-101, especially Tennessee Code Annotated, § 6-19-101].

Fees and Assessments

The following questions have arisen about stormwater fees and assessments:

1. Where a city has no utilities of its own and is served by several different utility providers, can the city impose the stormwater fee as a “special assessment,” and collect—or contract with the county to collect—the assessment conjunction with its property taxes?

The answer is probably no.

It appears that the answer is probably no. The principal reason is that no authority in the general state law authorizes local governments to impose or collect stormwater fees as special assessments. The general assessment laws under which that action could conceivably be taken were not designed for such use. They were designed to finance public improvements after the specific character of those improvements have been determined. The concept of stormwater fees as a “special assessment” speaks of them in the context of a vehicle for collecting such fees long before any decision has been made with respect to their use for improvement purposes.

There are two forms of special assessments contained in the general law of Tennessee. Both those forms apply only to municipalities. The first form is the “Abutting Property Law,” contained in Tennessee Code Annotated, §§ 7-32-101–141. It authorizes special assessments based upon a front footage measurement of the property abutting the improvement to which the special assessment applies. This form can be used only for the construction, reconstruction or improvement of streets, avenues, alleys, highways, or other public places. But such improvements include “guttering” and “draining,” “or otherwise improving the same [street, alley, etc.] in such manner and with such materials and with such culverts and drains as the legislative body of such municipality may prescribe...” *Not less than 2/3* the cost of the improvement may be assessed against the property abutting the street, avenue, alley, or any other public place so improved.

The second form is contained in Tennessee Code Annotated, §§ 7-33-301–318. It requires assessments based upon the assessed value of *benefitted* property. But it can be used for a wider range of improvements. The term “improvements” is defined as:

the construction, substantial reconstruction, or widening of streets, sidewalks and other public ways, including necessary *storm drain facilities*, or any combination of the foregoing; provided, that “improvement does not include any improvement of a street, other than necessary drainage facilities exceeding thirty-six feet (36’) in width...”

With respect to storm drain facilities, arguably that definition limits special assessments to storm drain facilities connected with streets. In addition, the statute contains certain restrictions that may limit its usefulness in many municipalities:

- The definition of “*benefitted property*,” means “as determined by the governing body, land (excluding improvement) which is within a reasonable distance from a sanitary sewer and to which is made available a means of drainage for sewerage, or which abuts on a street or other public way to be improved.” This definition was written when sanitary sewers handled both sewerage and storm water, but this form of assessment can apparently be used for those separate stormwater facilities associated with streets.

- No more than 75% of the total cost of the improvement is assessed against “benefitting” property owners, unless the municipality pledges its full faith and credit toward the payment of the deficiency in assessment collection, in which case 100% of the cost of improvements may be assessed against those property owners.

- Improvement assessments cannot be levied against undeveloped or largely undeveloped

areas; they are limited to “areas in which a majority of the lots or parcels of land contains buildings or other structures.”

- Municipal, state and (where authorized by federal law) federal property is subject to the special assessments the same as private property.

Those statutes contemplate the issuance of bonds to finance the improvements authorized under them, but at least one municipality had done special assessments without issuing bonds.

Tennessee Attorney’s General Opinion (TAG) 93-57 opines on several issues related to the imposition and collection of the stormwater fee authorized by Tennessee Code Annotated, § 68-221-1101 et seq. With respect to the above question, it opines that the stormwater fee cannot be collected in conjunction with the property tax, reasoning that:

The Act only provides for the collection of the user fee by a public utility, such as a water, gas, or electric utilities board or commission. Section 7(b). While this is, albeit, only an option which a municipality may choose as a collection method, there is no specific authorization for a municipality to bill property owners via the ad valorem property tax notice. Accordingly, it is the opinion of this office that such a billing practice is not permitted by this act.

It appears to me that sound legal reasoning supports that opinion.

Those statutes contemplate the issuance of bonds to finance the improvements authorized under them, but at least one municipality had done special assessments without issuing bonds. But as I have noted above, those statutes were designed for use in financing major public works improvements *after* such improvements have been determined; they were not designed for the regular collection of stormwater fees.

The general law mayor-aldermanic charter municipalities and the general law manager-commission charter municipalities have authority in their charters to levy special assessments “for local improvements.” [Tennessee Code Annotated, § 6-2-201; Tennessee Code Annotated, § 6-19-101]. A number of private act charters also authorize the municipality to make special assessments. The general law charters, and most of the private act charters that contain special assessment provisions do not provide any method of making special assessments, but a few private act charters contain provisions for special assessments that roughly parallel the purpose and function of the two general special assessment statutes.

2. Are stormwater fees a tax or a fee?

Tennessee Code Annotated, § 68-221-1112 provides that each bill that contains the stormwater user’s fees “shall” include this statement in bold:

THIS TAX HAS BEEN MANDATED BY CONGRESS

But a number of Tennessee cases undertake the distinction between taxes and special assessments, and that distinction indicates that by whatever name they might be called “special assessments” for stormwater fees are not taxes. However, only a consideration of West Tennessee Flood Control & Soil Conservation District v. Wyatt, 247 S.W.2d 56 (Tenn. 1952), is necessary to make that point. In that case, the public act establishing the plaintiff flood control district authorized the board of commissioners of the district to “levy special assessments against any and all lands within the district which may be benefitted by said improvements in an amount that is necessary, not to exceed fifty cents per acre in any one year, said benefits to be determined by said Commissioners after a hearing before said board.” The board of commissioners levied a general “special assessment” of \$.50 per acre against all the land in the flood control district. The principal question before the Court was whether the \$.50 per acre levy was a tax or a special assessment.

Holding that it was a tax, the Court distinguished between a tax and a special assessment:

Whether or not the Act in question is an unlawful delegation of the taxing power is not determined by the term “special assessments.” While the law recognizes differences between special assessments and a tax, the purpose for which it is levied is controlling. The differences between a special assessment and a tax are (1) a special assessment can be levied only on land for special purposes; (2) a special assessment is based wholly on lands benefitted. The imposition of a charge on all property, real and personal in a prescribed area, is a tax and not an assessment. Where the assessment is to provide revenue for both general and special purposes it must be denominated a tax as distinguished from a special assessment. In other words if the money collected, all or any part of it, is used for some purpose other than as a direct benefit to the land assessed, it is a tax. The Constitution expressly forbids the Legislature from delegating to a subordinate agency, such as the defendant “Flood Control and Soil Conservation District”, the power to levy such a tax. [At 58.]

However, continued the Court, “It cannot be doubted that the Legislature has the authority to select or create new governmental agencies and delegate to them the power to make ‘special assessments’ for the benefit of lands located in a specified area.” [At 58] [Citations omitted.]

Why was the “special assessment” levied by the flood control district actually a tax (which the district had no constitutional authority to levy)? The Court reasoned that:

1. The Act did not provide that the assessment levied be for any particular purpose. In fact, it provided that the levy was “*to provide revenue for the operation of the district.*” [The Court’s emphasis.]

2. The Act did not define the improvements to be made, nor for the filing of any

pleading or procedure specifying in detail the planned improvements.

3. The Act contained no planned procedures or specifications of any kind providing the manner of determining special benefits and their ratio. The Court, citing an earlier case, acknowledged the difficulty of formulating a plan or method by which to determine which and by how much lands are benefitted by a local improvement project, but that difficulty did not negate the requirement that the Act contain such a plan.

Finally, declared the Court:

The whole theory upon which “special assessments” are upheld as not violative of constitutional limitations upon the power to tax, is that the property assessed “will be specially benefitted thereby above the benefits received by the public at large; and, while the results may not be such as are anticipated, still the principle holds good. And it is likewise held that the burden may be apportioned between the public and the property benefitted, and between the property owners themselves, according to actual benefits expected, or according to value, or, in some jurisdictions, according to the area of frontage, as the Legislature may direct. [Arnold v. City of Knoxville, supra [115 Tenn. 195, 90 S.W. 473.] [At 61.]

[Also see Reasoner v. Memphis, 39 S.W. 2d 1029 (1931); Rockwood v. Rogers, 290 S.W.2d 381 (1926); Obion County v. Massengill, 151 S.W.2d 156 (1941).]

Tennessee Code Annotated, § 68-221-1107 requires that stormwater fees be “used exclusively by the municipality for the purposes set forth in this part.” For that reason, the stormwater fee, whether it is levied simply as a fee or a special assessment, is not a tax.

3. Can cities collect overdue stormwater fees through a collection agency?

There is in Tennessee Code Annotated, § 78-221-1101 et seq. no express authority in the general state law for municipalities to collect stormwater fees as a debt. However, such authority is probably implied in municipalities’ right to impose and collect fees and costs of various kinds. In this day and time a corollary implied right would be the use of whatever fee collection methods are acceptable in the ordinary debt collection world, including collection agencies. [Municipalities are expressly authorized by Tennessee Code Annotated, § 409-24-105(d)(1) to employ collection agencies to collect overdue fines].

4. Can cities include in the cost of the stormwater fee, the cost of collection of the fee?

Generally, the law in Tennessee is that the imposition of fees and costs must be supported by a statute. In City of Tullahoma v. Bedford County, 939 S.W.2d 408 (Tenn. 1997), the Tennessee Supreme Court, distinguishing between a fee and a tax, cited with approval Crocker v. Finley, 459 N.E.2d 1346 (Ill. 1997), in which it is said that:

A fee is defined as a “*charge fixed by law* for services of public

officers.” (Black’s Law Dictionary 553 (5th ed. 1979), and is regarded as compensation for the services rendered (36 A C.J.S. Fees, at 248 (1961)).... [At 452]

It is also said in 4 McQuillin, Municipal Corporations, § 12.189, that:

Fees and commissions of officers are due and payable in accordance with the conditions only as provided or contemplated in the applicable law. Fees cannot be taken by an officer for the performance of duties prescribed by law, except where the authority to collect fees is expressly provided by law, and it is frequently provided that fees collected by an officer shall be turned into the treasury.

I can think of no reason that rule would not apply to costs involved in the collection of overdue stormwater fee bills.

A recent law review article deals with a number of issues involving stormwater utilities, including fees and assessments charged by such entities: Brisman, Avi, *Considerations In Establishing a Stormwater Utility*, 26 Southern Illinois University Law Journal 505 (Spring 2002).

Stormwater Ordinance Enforcement—Generally

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.

Although neither Tennessee Code Annotated, § 68-221-1101 et seq. nor the model MTAS ordinance provide that a person who violates the ordinance be tried for the violation in the municipal court, Vandergriff v. City of Chattanooga, 44 F. Supp.2d 927 (E.D. Tenn. 1998), upheld the provision in the Chattanooga stormwater ordinance that permitted violators of the ordinance to be tried in the municipal court. For that reason, it appears that a municipality could add a provision to the MTAS model stormwater ordinance that would allow violators of the ordinance to be tried in municipal court.

Vandergriff also involved the challenge of the City of Chattanooga’s stormwater ordinance on various other grounds. Apparently, Vandergriff died and his executor, Rush continued the challenge in the U.S. Sixth Circuit Court of Appeals. There, in Rush v. City of Chattanooga, 199 WL 459153 (6th Cir. Tenn.) (Unreported), the Sixth Circuit upheld the ordinance against challenges that it violated: the Stormwater Management Act; Equal Protection

Clause of the Fourteenth Amendment to the U.S. Constitution, Article I, § 8 (due process) of the Tennessee Constitution; Article II, §§ 29 (illegal taxation) of the Tennessee Constitution, Article II, §§ 1-2 (separation of powers), of the Tennessee Constitution.

Stormwater Enforcement--Remedies Contained in the Ordinance

Pre-Penalty Remedies

Section 9 of the Model MTAS Stormwater Ordinance contains its enforcement provisions. They are typical of those found in code enforcement ordinances, including due process provisions that are critical to the validity of such ordinances such as:

- Written notice of violation;
- right to a hearing on the violation.

The courts are generally sticklers about making sure that governments comply with due process requirements contained in statutes, codes and ordinances.

The municipality and the violator also have the right to enter into consent and compliance orders:

- Consent order is a voluntary agreement between the violator and the municipality under which the violator agrees to correct the violation.
- Compliance order is an order from the municipality to the violator to correct a violation.

Both orders generally should be as detailed as necessary to insure that both the municipality and the violator are on the same page.

The municipality also has the right to issue cease and desist orders, which are commonly known as “stop work orders.” Tennessee Attorney General’s Opinion 1-105 (June 27, 2001) calls a stop work order “in essence, an ‘administrative’ injunction.” The question in that opinion was whether the Tennessee Department of Environment and Conservation could adopt a rule under which the Commissioner could issue a stop work order for construction activity that violated the Tennessee Water Quality Control Act. In opining that the answer was no, the opinion reasoned that there was no statutory authority authorizing TDEC to adopt such a rule and that the rule would conflict with the part of the Water Quality Control Act that governed stop work orders.

There is no specific authority in Tennessee Code Annotated, § 68-221-1101 for municipalities or counties to issue stop work orders in stormwater ordinance violation cases. However, Tennessee Code Annotated, § 68-221-1106 authorizes local governments to adopt stormwater regulations in a number of areas, including:

- “(5) Suspend or revoke permits when it is determined that the person has violated an applicable ordinance, resolution, or condition of the permit.”

- (7) “Regulate and prohibit discharges into storm water facilities of sanitary, industrial, or commercial sewerage or waters that have otherwise been contaminated.”

Is this language sufficient to support stop work orders on the part of municipalities and counties?

There are surprisingly few cases in Tennessee involving the *authority* of local governments to issue stop work orders. Most of those few cases involve stop work orders in zoning and building permit cases, and consider only the question of whether the stop work order in the particular case was justified. The Standard Building Code (and other housing and utility codes) that most municipalities have adopted under the authority of Tennessee Code Annotated, § 6-54-501 et seq. expressly authorize stop work orders, as do most zoning ordinances. But Tennessee Code Annotated, title 13, which authorizes municipalities and counties to adopt zoning and subdivision regulations does not appear to contain any express authority for local governments to issue stop work orders. However, it does contain various provisions authorizing municipalities to enforce zoning and subdivision regulations. For example, with respect to city and county zoning regulations, Tennessee Code Annotated, § 13-7-208(2) and Tennessee Code Annotated, § 13-7-111, respectively provide that where there is a violation of a zoning regulation, the building commissioner and various other city and county officials have “in addition to other remedies [provided by law]” the right to institute injunction, mandamus, abatement, or other appropriate action to prevent the violation or occupancy of the property. Arguably, those statutes reflect implied authority for municipalities and counties to issue stop work orders in the area of zoning.

The authority of municipalities and counties to adopt regulations to suspend and revoke permits, and to regulate and prohibit discharges into stormwater facilities, under Tennessee Code Annotated, § 68-221-1105, is not as broad as the language governing remedies for zoning violations contained in Tennessee Code Annotated, § 13-7-208(2) and 13-7-111, but it still might reflect implied authority for counties and municipalities to issue stop work orders in the stormwater area. However, it is probably the general rule that county action must be based on the express authority of statutes more so than in the case of municipalities.

Needless to say, most code enforcement ordinances contemplate and rely heavily upon voluntary compliance. The extent to which voluntary compliance can be achieved may be an important measure of the success of the enforcement program. It is probably not feasible for most municipalities to manage a large number of difficult stormwater enforcement cases.

The downside of a reliance upon voluntary compliance is that some violators quickly learn that they can “jockey” the enforcement system, and ultimately negotiate themselves into a favorable enforcement outcome. In that respect such violators are rewarded for violating the law.

Penalty and Damages Remedies

Tennessee Code Annotated, § 68-221-1101 et seq. and the MTAS Model Stormwater

Ordinance 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]

Section 10 of the MTAS Model Stormwater Ordinance contains the penalty and damages provisions.

Where the municipality imposes a penalty, it is highly recommended that the stormwater official or board that levies the penalty, and the stormwater official or board that hears appeals from the penalty, make written findings to support the penalty, and that touches each of the seven (7) factors.

Where the municipality assesses damages proximately caused by the violator, that assessment should be supported by solid documentation of those damages. It may be difficult to determine whether a particular violation is the proximate cause of the damage or the remote cause.

Stormwater Ordinance Enforcement–Creation of Municipal Ordinance Violation

Under the MTAS Model Stormwater Ordinance violations of the ordinance are “tried” administratively by a non-judicial official of the municipality, and appeals from his decisions, are heard by the governing body of the city. A violator may appeal from the decision of the governing body of the municipality on a writ or certiorari to the circuit or chancery court, under Tennessee Code Annotated, title 27, chapter 8. However, as pointed out above, 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.

Are stormwater ordinance violation cases better tried administratively by the municipality, or judicially by the municipal court?

Generally, under City of Chattanooga v. Davis, 54 S.W.3d 248 (Tenn. 2001), municipal courts are limited to fines or civil penalties of \$50 where the fine or civil penalty is punitive, and to \$500 where the fine or civil penalty is remedial. From a practical standpoint, the distinction between “punitive” and “remedial” is a difficult one even for municipal courts to understand. In fact, the seven factors that Tennessee Code Annotated, § 68-221-1106 provides that a municipality “may” consider when levying the administrative penalty for violations of the stormwater ordinance appear to be a mixture of remedial and punitive factors. In addition, the appeal of a municipal court judgement is to the circuit court, at which the violator is entitled to an entirely new trial from the ground up, and to a trial by jury if he wants one.

The civil penalty authorized to be imposed under Tennessee Code Annotated, § 68-221-1106 for stormwater ordinance violations is \$50 to \$5,000. In addition, the person or body levying the civil penalty “may” take into consideration the mixture of punitive and remedial factors listed in Tennessee Code Annotated, § 68-221-1106 in fixing the amount of the penalty, but is not required to get into the fine distinctions between “punitive” and “remedial” The same is true of the governing body of the municipality when it hears appeals from civil penalties imposed administratively.

Finally, appeals from the decisions of a local government board are generally subject to a limited range of review. Such appeals are heard by the chancery or circuit court on a writ of certiorari under Tennessee Code Annotated, title 27, chapter 8. It appears that the court’s right of review on a writ of certiorari is limited to a consideration of whether the body exceeded its jurisdiction, or acted illegally or arbitrarily or fraudulently. In making that determination the court does not hear the case from the ground up; it determines whether there is any material evidence to support the governing body’s decision. [The strictness of this standard in favor of governments can be seen in Hoover v. Metropolitan Housing Appeals of the Metropolitan Government of Nashville and Davidson County, 936 S.W.2d 950 (Tenn. Ct. App. 1997).] It is for that reason that the findings of fact by the person or body that imposed the administrative penalty and that heard appeals therefrom are important.

However, if the municipality decides to insert a provision into its stormwater ordinance under which the violation of that ordinance can be tried in municipal court, the determination of whether to try a particular ordinance violation case administratively or judicially might depend upon a number of factors that could influence the outcome of the case. Those factors will differ among municipalities.

Stormwater Ordinance Enforcement-Nuisance Remedy

Generally

It is common for statutes, ordinances, and building and housing codes to declare property

used in certain ways, or property in a certain condition, a “nuisance.” However, such a declaration in an ordinance does not necessarily make the use of the property contrary to the ordinance a nuisance. The declaration that the use of property is a nuisance should be made by a court. For that reason, the MTAS Model Stormwater Ordinance contains no declarations that the violation of the ordinance is a nuisance. But in some cases property that is used in violation of the stormwater ordinance may rise to the level of a nuisance. In those cases, the municipality can seek to have a court declare the use of the property a nuisance. But the conditions under which that can be done are highly fact-dependent.

Definition of Nuisance; Private and Public Nuisances

Sadler v. State, 56 S.W.3d 508 (Tenn. Ct. App. 2001), says:

A nuisance has been defined as anything which annoys or disturbs the free use of one’s property, or which renders its ordinary use of physical occupation uncomfortable. *Pate v. City of Martin*, 614 S.W.2d 46 at 47 (Tenn. 1981)....A private nuisance is created where a landowner uses his property in such a manner as to unreasonably interfere with plaintiff’s use or enjoyment of his own property. *Metro. Govt. of Nashville & Davidson County v. Counts*, 541 S.W.2d 133, 138 (Tenn. 1976). In contrast, a public nuisance is the interference with the public’s use and enjoyment of a public place or with other common rights of the public. *Id.* The key element of any nuisance is the reasonableness of the defendant’s conduct under the circumstances. See 58 Am.Jur.2d *Nuisances* § 76. [At 511]

The question of whether the use of property is a private or public nuisance generally turns upon how many people are affected by the use of the property.

Nuisances *Per Se* (At Law) and Nuisances *Per Accidens* (In Fact)

It is said in Cunningham v. Freezell, 400 S.W.2d 716 (Tenn. 1966), that:

A nuisance at law or a nuisance per se in an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of Location [sic] or surrounding. Nuisances in fact or per accidens are ones which become nuisances by reason or circumstances and surroundings and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger or inflict injury on person or property. 66 C.J.S. Nuisances § 3 1950. [At 718-19]

Courts will rarely declare to be a nuisance per se a business that is not inherently unlawful or dangerous, but may declare the business a nuisance in fact because of the conditions under which it operates. In that connection, it has been held that noise and dust generated by the use of property is not a nuisance per se. No one is entitled to absolute quiet, or dust-free enjoyment

of their property.

Generally, whether noise or dust becomes a nuisance per accidens depends upon the circumstances. For example, in Sherrod v. Dutton, 635 S.W.2d 117, the court refused to totally enjoin the operation of a go cart track in the county but enjoined its operation, but held that the defendant must pave the access road to the racetrack and water the tracks as frequently as necessary to prevent unreasonable dust during races, and was further enjoined from conducting races, or operating a public address system, after sunset, or permitting others to use the track in the night-time. The Court took into consideration scientific noise measurements and expert testimony in reaching its decision with respect to noise.

Sherrod v. Dutton was a private nuisance action, but had the racetrack been inside a city, there is probably no reason the city could not have taken action against the racetrack as being a public nuisance.

Abatement of Nuisances Under Nuisance Statute

Tennessee Code Annotated, § 29-3-101 et seq., provides a statutory means to abate nuisances. Tennessee Code Annotated, §§ 29-3-102 and 103, provide that when a *public nuisance*, as defined in § 29-3-101, exists the chancery, circuit and certain environmental courts have the jurisdiction to abate the nuisance. The petition to abate the nuisance must be brought in name of the state, upon the relation of the attorney general and reporter, or any district attorney general, or any city or county attorney, or with the concurrence of any of those officers upon the relation of ten (10) or more citizens and freeholders of the county in which the nuisance exists, in the manner prescribed by the statute.

Tennessee Code Annotated, § 29-3-101 defines “Nuisance” as:

....that which is declared to be such by other statutes, and, in addition thereto, means any place in or upon which lewdness, assignation, promotion of prostitution, patronizing prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, any sale, exhibition or prohibition of any material determined to be obscene or pornographic with intent to exhibit, sell, deliver or distribute matter or materials in violation of §§ 39-17-901–39-17-908, § 39-17-911, § 39-17-914, § 39-17-918, or §§ 39-17-1003–39-17-1005, quarreling, drunkenness, fighting or breaches of the peace are carried on or permitted, and personal property, contents, furniture, fixtures, equipment and stock used in or in connection with the conducting and maintaining any such place for any such purpose;...

This statute has been used to restrict certain sexual activities in adult businesses [See State v. Jackson, 16 S.W.3d 797 (Tenn. Ct. App. 2000)], but has apparently not been used by municipalities to address code enforcement, property maintenance and stormwater control, problems. One reason may be that it does not appear designed to address those problems, although if a municipality can point to any state statute declaring the use of property in a certain

way to be a nuisance, or has a private act that made property maintenance offenses nuisances, presumably, that statute or private act might fit within the phrase, “that which is declared to be such by other statutes.” However, as indicated above, a statute or ordinance declaring certain uses of property to be a nuisance does not necessarily make that use a nuisance. Another reason that statute does not appear to be used to enforce municipal code and property maintenance regulations is that it appears to be a cumbersome to use.

However, the Tennessee Supreme Court in Town of Nolensville v. King, 151 S.W.3d (Tenn. 2004), in discussing remedial, as opposed to punitive, fines, declared, “Additionally, when confronted with cases [property maintenance] similar to this one, we point out that municipalities continue to have the option of pursuing remedy through other courts by filing suits to abate a nuisance.” That statement by itself is accurate, but the Court in Footnote 9 of that case pointed for support the Abatement of Nuisances Statute found in Tennessee Code Annotated, § 29-3-101 et seq. However, the court’s reference to that statute is dicta.

Common Law Nuisances

The doctrine of common law nuisance is more broad than is commonly realized. It is within the police power of municipalities to abate public nuisances, either by first obtaining a declaration from the courts that the use of the property sought to be abated is a nuisance, or by taking a risk of using “self-help” to abate the nuisance, and if challenged, hope that the courts will agree that the use of the property was indeed a nuisance.

It is said in 20 Tenn. Juris., Nuisances, § 18, that:

It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notation of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extraterritorial condemnation and destruction of that as a nuisance which, in its natural situation or use, is not such. The abatement of nuisance, of dwellings which are unfit for occupancy due to dilapidation, defects increasing a fire hazard, lack of sanitary conditions, or which for other reasons are detrimental to public health, safety or morals, is a valid exercise of the police power.

In City of Nashville v. Weakley, 170 Tenn. 278 (1936), the City of Nashville passed an ordinance under which any building condemned by the supervisor of buildings and ordered demolished was declared a public nuisance from the time the building superintendent ordered the demolition. The ordinance did not define a nuisance, or provide the property owner with a notice and a hearing, or any other remedy, before the condemnation. It provided only for a notice to the property owner that if he did not tear down the building within X days the city would demolish it. The Court held the ordinance as invalid on the ground that it delegated judicial power to the supervisor of buildings, but went on to declare that:

....we are of the opinion, however, that Mrs. Weakley is not in a position to attack the validity of the act or ordinance, insofar as it may bear upon the city's right to demolish her building as a nuisance. This is true because in the stipulation of facts it appears that the supervisor of buildings will testify that in his opinion this building was in a ruinous, dilapidated, and dangerous condition, and was a public nuisance; that various notices to that effect had been given to Mrs. Weakley in 1926 and 1927, and that she made written reply to some of these notices on August 26, 1927, stating that she would endeavor to comply with the inspector's requirement; the chancellor found that the building was in fact a nuisance, subject to condemnation as such, and it was admitted at the bar, by Mrs. Weakley's counsel that the building was so dilapidated as to properly require its demolition. *She has no just reason to complain that the building was torn down, and her rights were not affected by the fact that she had no notice of the condemnation of her building by the supervisor of buildings. And regardless of the statute or ordinance, the city had a common-law right to abate the nuisance.* Theilan v. Porter, 82 Tenn. (14 Lea) 622, 51 Am Rep. 173; State v. Keller, 108 Neb. 742, 189 N.W.374, 25 A.L.R., 115; Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385; 20 R.C.L. 487. [At 282]

The police power of a city must be exercised in the manner directed by the Legislature. [Nichols v. Tullahoma Open Door, 640 S.W.2d 13 (Tenn. Ct. App. 1982)]

But as suggested above, a municipality takes a considerable risk in abating a nuisance without obtaining from a court a decision that the nuisance to be abated is actually a nuisance. Such risks should not be approached lightly. In Winters v. Sawyer, 463 S.W.2d 705 (1971), the Tennessee Supreme Court upheld the validity of the ordinance providing for demolition of buildings after notice and hearing, and subject to judicial review, but warned that it "...will again reiterate the statement of Mr. Justice Green in Jackson v. Bell, supra, that such statute or ordinance should be administered with caution." The Court went on to note that the order of demolition in that case involved five buildings, "four of which, among other things, are shown to be fire hazards due to inadequate electrical wiring. The fifth dwelling is shown to be in very dilapidated condition." The cautionary note applies to any statute or ordinance under which a municipality seeks to abate a nuisance.

Enforcement as Component of Zoning or Subdivision Regulations

Both municipalities and counties have the authority to adopt zoning regulations. [Municipalities --Tennessee Code Annotated, § 13-7-201 et seq.; Counties--Tennessee Code Annotated, §13-7-201]. Under certain conditions municipalities may have zoning authority outside their municipal limits. In addition, Tennessee Code Annotated, § 13-3-401 et sq. also authorizes regional planning commissions to adopt subdivision regulations.

Does a municipality's zoning or subdivision regulation authority permit it to include stormwater regulations as a component of its zoning or subdivision regulations?

With respect to zoning authority, Tennessee Code Annotated, § 13-7-201 gives municipalities authority:

[T]o regulate the location height, bulk, number of stories and size of buildings and other structures, the percentage of the lot which may be occupied, the sizes of yards, courts and other open spaces, the density of population, and the uses of buildings, structures and land for trade, industry, residences, recreation, public activities and other purposes.

Similar authority in almost identical language is found in Tennessee Code Annotated, § 13-7-202. It seems difficult to imply from that language municipal authority to adopt stormwater regulations. However, the same statute gives municipalities the authority to establish “[s]pecial districts or zones...in those areas deemed subject to seasonal or periodic flooding, and such regulations may be applied therein as will minimize danger to life and property, and as will secure to the citizens of Tennessee the eligibility for flood insurance....” That statute may cover all of some municipalities, and part of some of them, but it does appear to have general application to every part of every municipality.

The planning commission's authority to adopt a regional plan and subdivision regulations appears more broad. With respect to its regional planning authority, it

...may include, among other things, the general location, character and extent of public ways, ground and other public property; the general location and extent of public utilities and terminals, whether publically or privately owned, for power, light, heat, sanitation, transportation, communications, water and other purposes; the removal, relocation, extension, widening, narrowing, vacating, abandonment or change of use of existing public ways, grounds, open spaces, extent of community centers, town sites or housing developments; the location and extent of forests, agricultural areas and open development areas for purposes of conservation, food and water supply, sanitary and drainage facilities or [sic?] the protection of urban development; a land classification and utilization program; and a zoning plan for the regulation of height, area, bulk, location and use of buildings, the distribution of population, and the uses of land for trade, industry, habitation, recreation, agriculture, forestry, soil and water conservation and other purposes.

With respect to the planning commission's platting regulations, it can adopt regulations:

Governing the subdivision of land within its jurisdiction. Such regulations...[including] drainage and sanitary facilities; and for the avoidance of such scattered or premature subdivision of land as

would involve danger or injury to health, safety or prosperity by reason of the lack of water supply or drainage... Such regulations may include requirements as to the extent to which and the manner in which roads shall be graded and improved, and water sewer and other utility mains, piping, connections to other facilities shall be installed as a condition precedent to the approval of the plat....

. However, Tennessee Code Annotated, § 68-221-1105(1) provides that municipalities have the authority to “Exercise general regulation over the planning, location, construction, and operation and maintenance over stormwater facilities *in the municipality*....” Does that limitation prohibit municipalities from adopting stormwater regulations through their zoning and subdivision regulation authority that apply outside their municipal boundaries? The answer is not clear, but Tennessee Code Annotated, § 68-221-1109 says, “The powers conferred by this part are in addition and supplemental to the powers conferred by any other law, charter or home rule charter provision.” It was probably not the intention of the General Assembly through Tennessee Code Annotated, § 68-221-1105(1) to diminish the zoning and subdivision regulation authority municipalities have in Tennessee.

But it does not appear wise for municipalities to adopt the kind of stormwater regulations contemplated by Tennessee Code Annotated, § 68-221-1101 as a component of their zoning and subdivision regulations any more than it is wise for municipalities to adopt building, utility and housing codes as a component of such regulations. In fact, many of the stormwater regulations in the MTAS Model Stormwater Ordinance (and virtually every other stormwater ordinance anywhere) contain regulations that have nothing to do with zoning and subdivision regulations.

Natural Flow Rule

In Tennessee, drainage law is governed by the natural flow rule. Under that rule water has a natural easement; that is, it must be permitted to flow along its natural path, and a lower land owner must accept the water that naturally flows onto the property from the upper landowner. [Dixon v. Nashville, 301 S.W.2d 178 (1976); Miller v. City of Brentwood, 548 S.W.2d 878 (1977); Butts v. City of South Fulton, 565 S.W.2d 879 (Ten. App. 1978); Tate v. Metropolitan Government Nashville & Davidson County, 451 S.W.2d 437 (1969)]. The natural flow rule applies to municipalities and other governments as well as private property owners.

That rule is easier to state than apply in many cases, but generally a landowner cannot:

1. Impede the natural flow of water;
2. Increase the natural volume of water;
3. Increase the natural velocity of water;
4. Concentrate the natural flow of water.

Any property owner who does any of those four things is liable for any damage resulting flooding of upper or lower property. A local government is liable only to the limits of the Tennessee Tort Liability Act contained in Tennessee Code Annotated, title 29, chapter 20. Tennessee Code Annotated, § 68-221-1101 did not alter the natural flow rule, but it remains to be seen whether it may have increased the potential liability of local governments for stormwater decisions.

Presently, a municipality is not liable under the natural flow rule for the issuance of a building permit for property that is the source of flooding. The municipality must itself do something that interferes with the natural flow of water and floods private property. Needless to say, its own stormwater facilities may interfere with the natural flow of water.

In Miller v. City of Brentwood, 548 S.W.2d 878 (Tenn. App. 1977), certain property owners living in a subdivision sued the city for granting building permits for construction on land above the subdivision, claiming that the construction reduced the absorption of the soil and increased water runoff into the subdivision. The Court rejected their claim on essentially four grounds, one of which was that approving their claim would have changed the natural flow rule. The Court reasoned that the lower land was the subservient estate, and the upper land the dominant estate, and that it was inappropriate for the city to impair the usefulness of vacant property to protect property upon which construction had already been completed. For the city to have done that would have had the effect of transferring the subservient status of the subdivision property to that of the upper landowners; that is, reversing the order of subservience as recognized by Tennessee law, and of exercising a sort of favoritism for land already improved over land not yet improved.

The other three grounds upon which the court rejected the plaintiff's claims were:

1. No court had held a local government liable for the failure to assure that a building project would not injure its neighbors before issuing a permit for construction. To initiate such a rule, continued the Court, would make it necessary for every municipality to require indemnity bonds from builders in fantastic amounts before issuing permits for construction, in which case the cities would be liability insurers upon each building constructed with permission of the city.
2. The watershed that drained into the drainage ditch that flooded the subdivision property was not entirely within the city, and construction outside the city contributed to the flooding.
3. There was no authority to compel a city to construct an artificial drainage sewer.

A similar result was reached in M Al-Abdullah v. Riverview, Ltd., Tenn. App. MS Sept. 28, 1944.

But ask this question: Although Tennessee Code Annotated, § 68-221-1101 did not alter the natural flow rule, does it shift more liability to cities (and counties) that adopt stormwater regulations, the application of which in some cases might be the source of drainage problems? In that connection consider closely the Tennessee Tort Liability Act, codified at Tennessee Code Annotated, title 29, chapter 20.

