

**DYERSBURG STORM WATER
UTILITY FEE ORDINANCE**

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**DYERSBURG STORM WATER 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 storm water 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 storm water outfall permits;

WHEREAS, Tennessee Code Annotated, § 68-221-1101, provides that the purpose of the storm water 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 storm water discharges, establish a system of drainage facilities, construct and operate a system of storm water management and flood control facilities, and to “fix and require payment of fees for the privilege of discharging storm water,”

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

- (1) Exercise general regulation over the planning, location, construction, and operation and maintenance of storm water 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 storm water discharged and to regulate storm water contaminants as may be necessary to protect water quality;
- (4) Review and approve plans and plats for storm water management in proposed subdivisions or commercial developments;

- (5) Issue permits for storm water discharges, and for the construction, alteration, extension, or repair of storm water 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 storm water 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 storm water contamination, whether public or private; and

WHEREAS, The City desires to develop a storm water utility to be responsible for storm water system planning, and for review of storm water development plans for compliance with storm water management codes. As it applies to the National Pollution Discharge Elimination System Permit (NPDES) all applicable regulations, 40 CFR, § 122.26 for storm water discharges.

NOW THEREFORE, BE IT ENACTED BY THE MAYOR OF THE CITY OF DYERSBURG, TENNESSEE, THAT:

Section 1. Legislative findings and policy. The Mayor and Board of Aldermen (governing body of the city) finds, determines and declares that the storm water system which provides for the collection, treatment, storage and disposal of storm water 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 storm water; the reduction of hazards to property and life resulting from storm water runoff; improvements in general health and welfare through reduction of undesirable storm water conditions; and improvements to the water quality in the storm water and surface water system and its receiving waters.

Section 2. Creation of storm water utility. For those purposes of the Federal Clean Water Act and of Tennessee Code Annotated, § 68-221-1101 et seq., there is created a storm

water utility which shall consist of a manager or director and such staff as the municipality's governing body shall authorize.

The storm water utility, under the direction of the Storm water Program Manager shall:

- (1) Administer and enforce this ordinance and all regulations and procedures adopted relating to the City's storm water ordinance;
- (2) Advise the municipality's governing body and other City departments on matters relating to the storm water utility;
- (3) Review plans and approve or deny, inspect and accept extensions and connections to the system;
- (4) 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;
- (5) 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 storm water 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 storm water facilities; preliminary planning to determine the economic and engineering feasibility of storm water 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 storm water facilities; and the inspection and supervision of the construction of storm water 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 public streets, public roads, public alleys, and property that does not discharge storm water runoff into the storm water or flood control facilities of the municipality.
- (6) “Fee” or “Storm water 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 storm water management and of improving the storm water system in the municipality. The storm water 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) “Storm water” means storm water runoff, snow melt runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration, and drainage.
- (15) “Storm water management fund” or “fund” means the fund created by this ordinance to improve the City’s storm water system.
- (16) “Storm water 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 storm water user’s fee imposed by this ordinance.
- (19) “Undisturbed property” means real property, which has not been altered from its natural state by dredging, filling, removal of trees and vegetation or other activities, which have disturbed or altered the topography or soils on the property.

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

- (1) Storm water user's fees.
- (2) Civil penalties and damage assessments imposed for or arising from the violation of the city's storm water management ordinance.
- (3) Storm water 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 storm water drainage fees collected are insufficient to construct needed storm water 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. Storm water fund. All revenues generated by or on behalf of the storm water utility shall be deposited in a storm water utility fund and used exclusively for the storm water utility.

Section 6. Operating budget. The municipality's governing body shall adopt an operating budget for the storm water 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. Storm water user's fees established. There shall be imposed on each and every property in the city, except exempt property, a storm water 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 at least thirty (30) days in advance of the meeting of the municipality's governing body which shall consider the adoption of the fee or its amendment.

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) equal to 1500 square feet of impervious surface area.
- (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 storm water 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.

Section 9. Property classification for storm water user's fee.

- (1) Property classifications. For purposes of determining the storm water user's fee, all properties in the city are classified into one of the following classes:
 - (a) Single family residential property;
 - (b) Developed property;
 - (c) Undeveloped property
 - (1) Disturbed (farm land)
 - (2) Undisturbed (grass land)
 - (d) 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 storm water management fee, equal the base rate, regardless of the size of the parcel or the improvements.
- (3) Developed property fee. The fee for 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 times a correction factor of 50

percent. The impervious surface area for developed property is the square footage for the buildings and other impervious improvements on the property. The minimum storm water management fee for developed property shall equal the base rate for single family residential property.

(4) Undeveloped property.

- (a) Disturbed (farm land). Parcels which are disturbed by farming activities which results in an annual cycle of planting and harvest, will be exempted unless significant erosion is allowed to occur. Then the rate will be set by the City of Dyersburg Storm Water Management Department based on environmental impact.
- (b) Undisturbed (grass land). Parcels which are undisturbed and remain in a natural state of vegetative growth (grass land) and are maintained to prevent erosion by periodic mowing or other appropriate means, will not be charged a storm water fee. These parcels will be evaluated yearly by the storm water manager for the purpose of determining the appropriate storm water fee. In the event the parcels are not maintained and soil erosion is allowed to occur, these parcels will be considered to be disturbed and a storm water fee as shown in paragraph (4)(a) above will be assessed.

(5) Exempt property. There shall be no storm water user's fee for exempt property.

Section 10. Base Rate. The municipality's governing body shall, by ordinance or resolution, establish the base rate for the storm water user's fee. The base rate shall be calculated to insure adequate revenues to fund the costs of storm water management and to provide for the improvements of the storm water system in the City. The base rate to be charged for storm water management utility fees for each ERU is hereby established to be \$1.00 per month.

Section 11. Adjustments to storm water user's fees (correction factor). The storm water utility shall have the right on its own initiative to adjust upward or downward the storm water user's fees with respect to any property, based on the approximate percentage on any

significant variation in the volume or rate of storm water, or any significant variation in the quality of storm water, emanating from the property, compared to other similar properties. In making determinations of the similarity of property, the storm water utility shall take into consideration the location, geography, size, use, impervious area, storm water 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 storm water user's fees and charges as provided in this ordinance.

Section 13. Billing procedures and penalties for late payment.

1. Billing Procedures

- a. The Storm Water User Fee for single-family residential and non-residential developed property shall be billed and collected monthly with the monthly utility service bill for those properties within the corporate limits of the City.
- b. Apartment buildings will be billed monthly to either a master meter (base rate times the number of individual apartments) or to the individual meters for each apartment resident, whichever the case may be.
- c. The owner of mobile home parks will receive a monthly bill for the entire complex (base rate times the number of individual mobile home sites).
- d. Undeveloped property will be billed yearly at the rate established by this ordinance if the property is utilized for farming activities and allowed to erode and contribute to pollution of Dyersburg's storm drainage system or waters of the State.

2. Penalties for Late or Non-Payment.

The Storm Water User Fee for those properties utilizing City utilities is part of a consolidated statement for utility customers, which is generally paid by a single payment to the Billing Department. In the event of non-payment or if a partial payment is received, the amount of the payment shall be applied pro-rata to each account billed on the consolidated statement of all current charges for all accounts. All bills, including Storm Water User Fees, shall become due

and payable in accordance with the rules and regulations of the utilities or Billing Department. Non-payment may result in canceling or shutting off of all utilities utilized.

3. Mandatory statement. Pursuant to Tennessee Code Annotated § 68-221-1112, each bill that shall contain storm water 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 storm water user's fee bill, the fee is probably not a tax. The distinction between fees and taxes with respect to the storm water 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 storm water user's fee, as provided in this ordinance, or who seeks a storm water user's fee adjustment based upon storm water management practices, may appeal such fee determination to the storm water utility within thirty (30) days from the date of the last bill containing storm water user's fees charges. Any appeal shall be filed in writing and shall state the grounds for the appeal. The storm water utility director may request additional information from the appealing party.
- (2) Adjustments. Storm water user's fee adjustments for storm water 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 storm water utility shall make a final calculation of the storm water drainage fee. The storm water utility shall notify the parties, in writing, of its decision.

APPENDIX A

Calculating Storm water User Fees

Single-Family Residential User Fee. The fee that residential users within the City limits will pay will be a flat charge of \$1.00 per month. The average square footage of a single-family residential property is equivalent to one “ERU” and is determined to be 1500 square feet from recent U.S. Census Bureau reports.

Developed Property Fee. The fee that developed property users within the City limits will pay will be determined from the following formula:

$$\text{Developed Property Fee/Month} = \frac{\text{Impervious Area} \times \$1.00 \times 50\% \text{ (correction factor)}}{1500 \text{ sq. ft.}}$$

APPENDIX B

Tennessee Code Annotated, § 68-221-1107(a), provides that, “All municipalities constructing, operating, or maintaining storm water or flood control facilities are authorized to establish a graduated storm water user’s fee which may be assessed and collected from each *user* of the storm water 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 storm water runoff or the volume or rate of storm water runoff....” It also provides that:

- “Users whose storm water runoff is not discharged into or through the storm water and/or flood control facilities of the municipality shall be exempted from the payment of the graduated storm water user fee authorized by this section.”
- “The fee structure shall provide adjustments for users who construct facilities to retain and control the quantity of storm water 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 storm water 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 storm water 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 storm water fees as a designated item on its utility bill, and to discontinue utility services where the storm water 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 storm water management fees through various utility entities rather than an implication that cities must impose storm water management fees on the beneficial users of the storm water 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 storm water 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 storm water runoff or the volume or rate of storm water runoff,” Tennessee Code Annotated, § 68-221-1107, contemplates that virtually all developed property will be subject to a mandatory storm water management fee. In addition, the storm water 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 storm water 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 storm water user’s fee. The only way the owner (or occupant) of the land can voluntarily “shut-off” the storm water utility service is perhaps to return the land to its natural state. Finally, the impervious area component of storm water 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 storm water utilities also distinguishes between storm water “user” fees which are billed to utility customers in much the same manner as are other utility bills, and storm water assessment fees, which are billed to property owners. There is no general law in Tennessee authorizing cities to impose special assessments for storm water 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 storm water user’s fee as a special assessment on property. Special assessments are generally not taxes. The question of whether a particular charter permits the storm water user’s fee to be levied as a special assessment should be determined on a case-by-cases basis.