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**Stormwater Utilities in Georgia**

## Introduction

Because of many factors, including new EPA regulations, communities throughout Georgia are looking for ways to better manage their stormwater. One tool these communities are using is a stormwater utility. A stormwater utility is a distinct fiscal entity, funded by a stormwater “fee” paid by all customers serviced, and established by local governments to provide a consistent source of money to manage their stormwater needs. Similar in concept to other common utilities like power and water, a stormwater utility provides a service. Rather than delivering electricity or running water, a stormwater utility provides stormwater services, including infrastructure improvements, maintenance, and treatment of stormwater to its customers. Managing stormwater properly has several benefits, including state and federal environmental compliance, economic development benefits, and improved water quality for all.

Proper management of stormwater is essential to maintaining acceptable water quality standards. As a result of nonpoint source pollutants, such as fecal coliform bacteria, nutrients, pesticides, etc., contained in stormwater discharge, water quality can be severely impaired. Many aquatic organisms are adversely affected by the sediment, organic chemicals, and elevated water temperatures caused by stormwater runoff.<sup>1</sup> Elevated water temperature and nonpoint source pollutants are two significant factors that reduce dissolved oxygen levels in water bodies. Adequate levels of dissolved oxygen are needed to support aquatic life. Humans are affected by exposure to contaminated fish or high concentrations of dangerous bacteria in areas where people swim and recreate. Degraded waterways may also have reduced aesthetic value.<sup>2</sup>

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<sup>1</sup> Avi Brisman, Comment, Considerations in Establishing a Stormwater Utility, 26 S. Ill. U. L.J. 505, 512-513 (2002).

<sup>2</sup> Id. at 514-515.

Managing different sources of nonpoint source pollution is integral to improving the water quality of local streams, rivers, and lakes. Runoff from residential properties can contribute pesticides, herbicides, fecal coliform bacteria, oil, paint, and solvents. Construction projects can contribute copious amounts of sediment into the water system, reducing water clarity, increasing turbidity and ultimately resulting in a degradation of the water resource and negatively affecting the ecosystem. Agricultural systems contribute fertilizers, pesticides and herbicides, while industrial sites can cause any number of chemicals and chemical residues to flow into nearby waterways.<sup>3</sup>

### **Benefits**

When part of a comprehensive stormwater plan, a stormwater utility can assist in meeting the guidelines set forth by the Metropolitan North Georgia Water Planning District, as well as state and federal NPDES and TMDL legislation. Below is a summary of the requirements of each of these regulatory schemes and how a stormwater utility can help meet those requirements.

The Metropolitan North Georgia Water Planning District oversees the management of stormwater in a 16-county area around Metropolitan Atlanta, creates policy, and facilitates multi-jurisdictional projects.<sup>4</sup> One of the main requirements of the District is implementation of the Model Ordinance for Post-Development Stormwater Management. Along with site-specific performance criteria for managing run-off, the ordinance also requires on-going maintenance and inspection of stormwater structures and facilities.<sup>5</sup> Local governments within the district may be ineligible for state grants or loans on stormwater related projects if they do not follow the

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<sup>3</sup> Kurt Spitzer, Establishing a Stormwater Utility in Florida (2003), available at <http://www.florida-stormwater.org/manual/chapter1/1-3.html>.

<sup>4</sup> Atlanta Regional Commission, About the District (2006), available at <http://www.northgeorgiawater.com>.

<sup>5</sup> <http://www.northgeorgiawater.org/pdfs/modordfin-task10/tab1.pdf> at 20.

recommendations of the board.<sup>6</sup> A stormwater utility can assist a local community in complying by providing a reliable means of funding with which to implement these requirements.

Under the Clean Water Act (CWA), the National Pollutant Discharge Elimination System (NPDES) Stormwater Program requirements establish the amount of pollutant discharge a community can have from its storm sewer system. NPDES is a mandated process by which communities affected must apply for all required permits. Phase II of the program expands the list of communities covered under the Stormwater Program to include certain small municipal separate storm sewer systems (MS4s). These are MS4s serving populations of 100,000 or less which are located in urbanizing areas or have been otherwise designated by state permitting authorities. Phase II requires small MS4s to design stormwater management programs that will protect water quality and meet the appropriate water quality standards of the Clean Water Act as well as manage runoff from construction sites that disturb one to five acres of land.<sup>7</sup> Noncompliance with NPDES could result in loss of permits and fines for local governments.<sup>8</sup> However, complying with the EPA program directly burdens a community with the costs associated in hiring new employees for new or improved stormwater programs as well as for improvements to the infrastructure.<sup>9</sup>

Along with NPDES the federal system also mandates Total Maximum Daily Loads (TMDLs) for Georgia waterways that do not meet water quality standards. TMDL refers to the total amount of specific pollutant, including non-point source pollution, a river, stream, or lake is able to assimilate and still meet water quality standards. Stormwater runoff is a major non-point

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<sup>6</sup> Supra note 4.

<sup>7</sup> Brisman, supra note 1, at 506, 508.

<sup>8</sup> Kurt Spitzer, Establishing a Stormwater Utility in Florida (2003), available at <http://www.florida-stormwater.org/manual/chapter1/1-7.html>.

<sup>9</sup> See id. § 1.7.3.

pollution source. A stormwater utility can be a reliable and stable source of stormwater funding in a community plan that will meet the TMDL requirements established for Georgia rivers.<sup>10</sup>

An important economic benefit of a stormwater utility is that the utility becomes a new source of sustainable funding which will grow in the future along with development in the county or city and always be dedicated to stormwater management. When stormwater programs are funded out of the general fund, the money is not guaranteed to be available for stormwater purposes and many times can be diverted to other projects.<sup>11</sup> A dedicated source of income can be important in allowing for continuity in stormwater management. Enabling the stormwater program to operate with stable funding will help to establish a long term view within the county or city, because program administrators can rely on money coming into the system and can thereby plan ambitious projects that are necessary to maintain the stormwater management system.<sup>12</sup>

### **Preliminary Actions**

In planning a stormwater utility it is important to first determine the needs of the community to be served. Preliminary considerations include: defining the existing stormwater program components, assessing the existing and anticipated problems, determining priorities in each of the key program areas (staffing, financial resources, activities, controls and systems), estimating future costs and resources, planning on educating the public, and determining how to assemble the billing database.<sup>13</sup>

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<sup>10</sup> Georgia Conservancy, What are TMDLs (2005), available at [http://www.georgiaconservancy.org/WaterQuality/WQ\\_whataretmdls.asp](http://www.georgiaconservancy.org/WaterQuality/WQ_whataretmdls.asp).

<sup>11</sup> Janice Kaspersen, The Stormwater Utility: Will It Work in Your Community (2001), Stormwater, available at [http://www.forester.net/sw\\_0011\\_utility.html](http://www.forester.net/sw_0011_utility.html).

<sup>12</sup> Spitzer, supra note 3.

<sup>13</sup> Brant D. Keller, Stormwater Management Utility: City of Griffin (no date), available at <http://www.accg.org/detail.asp?ID=155>.

The amount charged in each jurisdiction may vary depending on local conditions and the duties on the stormwater utility. Factors include the amount of treatment required by the stormwater runoff,<sup>14</sup> the sensitivity of the surrounding area, and the state of the infrastructure.<sup>15</sup> If the surrounding watershed is very sensitive to nonpoint source pollutants, it may cost more to treat a community's drinking water supply to meet state and federal standards drinking water standards, which in turn requires higher overall costs for the drinking water consumer. Besides stormwater's effects on a community's drinking water sewer supply, the cost to maintain, upgrade and replace a community's stormwater infrastructure is best provided for with a stormwater utility.<sup>16</sup>

There is no substitute for having the political backing of local government officials early in the process to help plan and foster support throughout the community for a stormwater utility.<sup>17</sup> Community acceptance and awareness can be gained through civic clubs, professional organizations, public hearings, newspapers, radio, television, or other outlets.<sup>18</sup> One idea that should be prominently promoted is that, though a stormwater utility can help with stormwater management, it is only one step towards finding a sustainable long term solution.<sup>19</sup> The utility should be part of a larger plan to encourage growth that is consistent with sound stormwater management policy, a long-term solution including both the prevention and mitigation of stormwater runoff quantity and its impact on water quality.<sup>20</sup>

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<sup>14</sup> Grant Hoag, Developing Equitable Stormwater Fees (2004), available at [http://www.forester.net/sw\\_0401\\_developing.html](http://www.forester.net/sw_0401_developing.html).

<sup>15</sup> Hector Cyre, Five Phases In Developing and Implementing a Stormwater Utility, Water Resources Associates, Inc., Kirkland, Washington.

<sup>16</sup> Richard Whitt, Cobb County: Olens wants fee on storm runoff, ATLANTA JOURNAL CONSTITUTION, Feb. 2, 2006, available at [http://www.ajc.com/search/content/auto/epaper/editions/thursday/cobb\\_341ec61fb11ff0e110e1.html](http://www.ajc.com/search/content/auto/epaper/editions/thursday/cobb_341ec61fb11ff0e110e1.html).

<sup>17</sup> Keller, supra note 11.

<sup>18</sup> See id.

<sup>19</sup> See id.

<sup>20</sup> Georgia Stormwater Management Manual Volume 1 Stormwater Policy Guidebook (2001), at 30, available at <http://www.georgiastormwater.com/vol1/gsmmvol1.pdf>.

## Expenditures

Establishing a stormwater utility does have start up costs and almost all stormwater utilities are created with money from the general fund.<sup>21</sup> Many localities conduct studies prior to the establishment of the utility in order to tailor the program to the specific stormwater needs of the community.<sup>22</sup> Other steps include hiring of staff, rate analysis (determining how much to charge, normally a parcel-by-parcel analysis of the amount of stormwater contributed by each piece of property), exploration of all potential additional revenues and their uses, the actual creation of the utility, and public information programs.<sup>23</sup> The City of Griffin, for example, spent \$180,000 on background research and public education over four years setting up the state's first stormwater utility in 1997.<sup>24</sup>

Once a utility is up and running supplemental sources of income include grants, loans, taxes, or bonds.<sup>25</sup> Possible grants include Nonpoint-Source Implementation Grants from the EPA<sup>26</sup> and Hazardous Mitigation Grants from the Georgia Emergency Management Agency (GEMA). Hazardous Mitigation Grants go toward projects that reduce or eliminate long-term risks to human life and property from the effects of natural hazards, for which the federal government will provide 75 percent funding, with a 25 percent local contribution.<sup>27</sup> Nonpoint-Source Implementation Grants are to implement non-point source mitigation projects, and

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<sup>21</sup> Telephone Interview with Larry Kaiser, General Manager, Rockdale County Capital and Community Improvements (Apr. 27, 2006).

<sup>22</sup> Brant D. Keller, Buddy Can You Spare a Dime? What's Stormwater Funding (2001), available at [http://www.forester.net/sw\\_0103\\_buddy.html](http://www.forester.net/sw_0103_buddy.html).

<sup>23</sup> See *id.*

<sup>24</sup> Center for Urban Policy and the Environment, Stormwater Management Financing Case Study Griffin, Georgia (2002), available at <http://stormwaterfinance.urbancenter.iupui.edu/PDFs/GriffinGeorgia.pdf>.

<sup>25</sup> See *id.*

<sup>26</sup> Information on applying and administering such grants can be found here, Applying for and Administering CWA Section § 319 Grants: A guide for State Nonpoint Source Agencies (2003), available at <http://www.eap.gov/owow/nps/319/319guide.htm#Chapter1>.

<sup>27</sup> Keller, supra note 21.

provide 60 percent federal funding with a 40 percent local match<sup>28</sup> Other supplemental sources include the Clean Water State Revolving Loan Fund, administered by the Georgia Environmental Facilities Authority (GEFA),<sup>29</sup> which provides loans for major capital improvements related to water quality and wastewater treatment, and the Special Purpose Local Option Sales Tax (SPLOST) which allows local jurisdictions in Georgia to charge a 1 percent sales tax for designated projects to be levied for a period not to exceed six years.<sup>30</sup>

Also, for on-going costs after the utility is established stormwater revenue bonds may be issued with the stormwater utility identified as the dedicated revenue stream demonstrating the ability to payback the bonds. To successfully secure the bonds a utility must show a stormwater master plan, a capital improvement plan, and a history of collection.<sup>31</sup>

In 2004, a sample of on-going expenditures for stormwater utilities in North Carolina showed that approximately 44 percent was spent on system operations and maintenance, 20 percent on capital improvements, 12 percent on administration, 8 percent on planning and engineering, and less than one percent on public education.<sup>32</sup>

### **Rate Structures**

Because a stormwater utility is meant to be a self-sustaining operation, collected funds are placed in an account dedicated to stormwater management.<sup>33</sup> Either a special revenue fund or enterprise fund can be used. A special revenue fund provides for the isolation of stormwater

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<sup>28</sup> See *id.*

<sup>29</sup> The Georgia Environmental Facilities Authority, Clean Water State Revolving Loan Fund (CWSRF) Summary (2006), available at <http://www.state.ga.us/gefa/cwsrf.html>.

<sup>30</sup> Keller, *supra* note 21.

<sup>31</sup> See *id.*

<sup>32</sup> Stacy Isaac, Financing Local Government Stormwater Programs: Examples from North Carolina (2005), available at [http://www.efc.unc.edu/publications/Presentations/Isaac\\_Financing%20local%20government%20stormwater%20programs\\_Examples%20from%20NC.pdf](http://www.efc.unc.edu/publications/Presentations/Isaac_Financing%20local%20government%20stormwater%20programs_Examples%20from%20NC.pdf).

<sup>33</sup> Kurt Spitzer, Establishing a Stormwater Utility in Florida (2003), available at <http://www.florida-stormwater.org/manual/chapter4/4-1.html>.

utility revenues and expenditures.<sup>34</sup> An enterprise fund is typically used to account for operations financed and operated in a manner similar to private business enterprises, where the costs of providing services to the public are financed primarily through user charges.<sup>35</sup> The enterprise fund and special revenue fund differ in accounting obligations but both clearly establish the organizational entity of the utility and isolation of its funding.<sup>36</sup> A survey of the ordinances within the state shows the enterprise fund being used more frequently used in Georgia.<sup>37</sup>

As discussed below, an acceptable rate structure under Georgia law should be based on linking the fee to the amount of runoff generated by a parcel. Typically this is done by using the amount of impervious surface on the property as the main factor. Impervious surfaces are any “hard” surfaces which rainwater cannot penetrate.<sup>38</sup> Impervious surface area is estimated using a variety of techniques. Appraisals, aerial photos, plats, site plans, and field measurement can be used to determine the amount of impervious surface on a given piece of property.<sup>39</sup> Some jurisdictions also establish Geographic Information System (GIS)<sup>40</sup> databases to both determine the amount of impervious surface on properties and to analyze their entire stormwater systems.<sup>41</sup>

Some common devices used to calculate charges are the ERU, the quality charge, and quality charge. An ERU (Equivalent Runoff Unit) is the baseline measurement of impervious surface area that will be used to compare the amount of runoff from different sized properties.

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<sup>34</sup> See *id.*

<sup>35</sup> City of Monterey, Budget 1999-2000 (2002), available at <http://www.monterey.org/budget/1999/specialrev.html>.

<sup>36</sup> Spitzer, *supra* note 32.

<sup>37</sup> GRIFFIN, GA., CODE § 94-162 (2005), COLUMBIA COUNTY, GA., CODE § 34-108 (2006), ATHENS-CLARKE COUNTY, GA., CODE § 5-5-5 (2005), DEKALB, GA., CODE § 25-364 (2005), DECATUR, GA., CODE § 42-226 (2004).

<sup>38</sup> Kurt Spitzer, Establishing a Stormwater Utility in Florida (2003), available at <http://www.florida-stormwater.org/manual/chapter4/4-2.html>.

<sup>39</sup> See *id.*

<sup>40</sup> For more on GIS see <http://www.florida-stormwater.org/manual/chapter5/5-6.html>.

<sup>41</sup> Center for Urban Policy and the Environment, *supra* note 17, City of Decatur, Preliminary Draft Storm Water Master Plan (2004), available at [http://www.decaturga.com/client\\_resources/cgs/citysvcs/eng/swmp\\_summary0604.pdf](http://www.decaturga.com/client_resources/cgs/citysvcs/eng/swmp_summary0604.pdf).

Each ordinance will define what number of square feet is equivalent to one ERU in their jurisdiction. Typically jurisdictions will equate an ERU with the average amount of impervious surface area for a single family dwelling.<sup>42</sup> For example, the fictional city of Greenacre, filled with many large single family homes, may define one ERU to be 2000 ft<sup>2</sup> to equate to the amount of runoff from one large single family home. On the other hand, Whiteacre, filled with lots of row houses may define one ERU to be 500ft<sup>2</sup> so that each row house was equivalent to one ERU. Or Greenacre might also decide to make one ERU equivalent to 100 ft<sup>2</sup> and adjust the amount billed per ERU accordingly (charge less per ERU because each property would then have more of them). There are many potential variations. After the ERU for a parcel has been established, the final charge is determined either by simply multiplying the ERU by a single monetary factor,<sup>43</sup> as in Columbia County,<sup>44</sup> or by adding several component charges together, as in Athens-Clarke County.<sup>45</sup>

Collection is the last step in the billing process. Ordinances in Georgia thus far have not specified how stormwater charges will be collected, instead leaving that decision to be made by a local governing body.<sup>46</sup> The City of Decatur in Georgia attaches its stormwater fees to the annual property tax bill,<sup>47</sup> while Columbia County “piggybacks” its stormwater utility charges onto their monthly water and sewer bill.<sup>48</sup> Athens-Clarke County sends a stormwater utility bill

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<sup>42</sup> See id.

<sup>43</sup> The factor is established by the municipality and representative of how much money the utility needs to conduct its business. A jurisdiction with low stormwater treatment needs might have a lower charge per ERU, whereas a jurisdiction high in industrial area with contaminated runoff and therefore higher stormwater treatment costs would have a higher charge per ERU for those parcels. See Hoag, supra note 12.

<sup>44</sup> COLUMBIA COUNTY, GA., CODE § 34-113 (2006).

<sup>45</sup> ATHENS-CLARKE COUNTY, GA., CODE § 5-5-8 (2005),

<sup>46</sup> COLUMBIA COUNTY, GA., CODE § 34-115 (2006), ATHENS-CLARKE COUNTY, GA., CODE § 5-5-12(a)(2) (2005), GRIFFIN, GA., CODE § 94-171 (2005).

<sup>47</sup> City of Decatur, Real Property Taxes & Fees (2006), available at [http://www.decaturga.com/cgs\\_citysvcs\\_atr\\_taxesandfees.aspx](http://www.decaturga.com/cgs_citysvcs_atr_taxesandfees.aspx).

<sup>48</sup> Columbia County, Columbia County Stormwater Utility Information Package (2005), available at [http://www.columbiacountyga.gov/docs/informationpckg\\_udpated1-05\\_\\_2\\_.pdf](http://www.columbiacountyga.gov/docs/informationpckg_udpated1-05__2_.pdf).

to each customer once every three months. Rockdale County sends a stormwater utility bill to its residential customers on an annual basis and to commercial properties monthly.

### **Legal Authority to establish a stormwater utility in Georgia.**

While stormwater utilities have been springing up across the state since Griffin established its utility in 1997, only two of the ordinances have been challenged in court. The first case, Fulton County Taxpayers Association v. City of Atlanta<sup>49</sup> declared the City of Atlanta's stormwater utility to be invalid for reasons discussed below. However, in 2003, Columbia County's stormwater utility ordinance was upheld unanimously by the Georgia Supreme Court.<sup>50</sup> The court's reasoning in the Columbia County case provides a good template for the appropriate way to set up a stormwater utility. When a utility is created according to the established framework it will be on very sound legal footing.

Pursuant to the Home Rule section of the Georgia Constitution local governments have the power to charge for the services they provide, and specific authority to provide stormwater systems.<sup>51</sup> Georgia law also grants local governments the power to operate and maintain any "undertaking" related to the collection, treatment, and disposal of stormwater.<sup>52</sup> The law states that "the governmental body is authorized to prescribe, revise, and collect rates, fees, tolls, or charges for the services, facilities, or commodities furnished or made available by such undertaking."<sup>53</sup>

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<sup>49</sup> Fulton County Taxpayers Association v. City of Atlanta, No. 1999CV05897, 1999 WL 1102795 (Ga. Super, Sept. 22, 1999).

<sup>50</sup> McLeod et al. v. Columbia County, 278 Ga. 242, 599 S.E.2d 152 (2004).

<sup>51</sup> Ga. Const. art. IX, §. II, par. III(a)(6) authorizes any county to provide "Stormwater...collection and disposal systems."

<sup>52</sup> Ga. Code Ann. § 36-82-62(a)(2) (2006), Ga. Code Ann. § 36-82-61(4)(c)(ii) (2006).

<sup>53</sup> Ga. Code Ann. § 36-82-62(a)(3) (2006).

The most common legal challenge to stormwater utilities relates to whether the charge is considered a fee or a tax.<sup>54</sup> While local governments can raise taxes to pay for stormwater management, in doing so, those taxes must be ad valorem (“according to value”)<sup>55</sup> and uniform, meaning that all kinds of property of the same class must be taxed alike and by the same standard of valuation,<sup>56</sup> as set out in the Georgia constitution.<sup>57</sup> If the stormwater utility charge is found to be a fee then it is not subject to this requirement, whereas if the stormwater charge is characterized as a tax, unless it is ad valorem, it will be invalid. The benefit of using a fee rather than simply raising property taxes is that the utility/fee system is more equitable and stable.<sup>58</sup> Money generated for ad valorem taxes goes into the general fund whereas money collected by the stormwater utility can only be used for stormwater purposes.

#### Fulton County Taxpayers Association v. City of Atlanta

In 1999 the City of Atlanta passed an ordinance creating a stormwater utility funded by annual charges based on the size of the parcel of property owned by the landowner. The City charged 11.99 per year for each 10,000 ft<sup>2</sup> of property. Parcels less than 10,000 ft<sup>2</sup> were charged \$11.99 per year with larger parcels charged \$11.99 per 10,000 ft<sup>2</sup> of property or portion thereof. (For example a parcel with area between 10,001 ft<sup>2</sup> and 20,000 ft<sup>2</sup> would be charged \$23.98.) That area-based charge was then multiplied by a factor of 1-4 (the development intensity factor code) depending on the specific use (commercial, residential, industrial) of the land.<sup>59</sup>

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<sup>54</sup> Brisman, *supra* note 1, at 520.

<sup>55</sup> *Hutchins v. Howard*, 211 Ga. 830, 89 S.E.2d 183, 830 (1955).

<sup>56</sup> *Id.* at 830.

<sup>57</sup> Ga. Const. art. VII, §. I, par. III, Ga. Const. art. VII, § II, par. I.

<sup>58</sup> Innovations in American Government, *Stormwater Utilities/Holistic Watershed Tool* (2003), available at <http://services.login-inc.com/works/nonmember/SignInDoc1.html>.

<sup>59</sup> *Fulton County Taxpayers Association*, 1999 WL 1102795 at \*1.

When the ordinance was challenged in the late 1990s the court ruled that while the City had the power to provide stormwater management services, the manner in which the city assessed its service charge was characteristic of a tax rather than a fee.<sup>60</sup> The charge was declared unlawful because the city had not followed the proper procedures for enacting a new tax. Furthermore, the court held that even if the charge was ruled a fee it was still unlawful because not all landowners received a direct benefit.<sup>61</sup> The court also rejected the argument made by the City that each landowner, regardless of the size of their lot, received an “inchoate” benefit because of the mere existence of the stormwater utility.

The court cited to Gunby v. Yates, which defines a tax as "an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered."<sup>62</sup> In considering whether the stormwater utility charge was designed to generate revenue or whether it was a fee for services rendered, the court looked at how the charge was imposed. It found that the charge imposed was not based on the special benefit received by each parcel; the city's formula merely looked to the size and use of each.<sup>63</sup> The court also noted that, consistent with a tax, the ordinance allowed the City to impose a lien directly on the landowner's property for failure to pay, and that the charge appeared to be imposed to help the city raise revenue generally rather than for stormwater specifically.<sup>64</sup>

Had the court ruled the charge a fee, the charge was still undermined by the fact that the City's rate structure required some landowners who contributed little stormwater, and therefore

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<sup>60</sup> Id. at 1.

<sup>61</sup> Id. at 3.

<sup>62</sup> Id. at 3 (internal citation omitted).

<sup>63</sup> Fulton County Taxpayers Association, 1999 WL 1102795 at \*3.

<sup>64</sup> Id. at 3. This portion of the opinion is curious because the Atlanta ordinance did establish an enterprise fund and required the proceeds from the charge to go to stormwater projects.

received little benefit, to pay a disproportionate amount based on simply the size of their land. This was not consistent with Monticello, Ltd. v. City of Atlanta,<sup>65</sup> which held that “a municipality cannot impose a fee for services that have not been provided.” By looking at the size and use of the property only, rather than the amount of impervious surface on a parcel (the most important factor in determining the amount of stormwater services required) the ordinance effectively distributed the cost of stormwater services to all citizens, some of whom may not have contributed to the problem, and thereby received no services and no benefit. The Atlanta ordinance also did not take into account private mechanisms a landowner may have for disposing of their own stormwater runoff, such as ponds, which might lessen the services received from the City and benefit received.<sup>66</sup>

The effect of Fulton County Taxpayers Association was not to preclude the use of stormwater utilities in Georgia but to provide a case study on how not to structure a stormwater ordinance. In the next challenge of a stormwater utility, the ordinance was unanimously upheld by the Georgia Supreme Court.

#### McLeod v. Columbia County

Established in 1999, the Columbia County ordinance charges landowners in the designated service area a monthly stormwater utility charge based on the amount of impervious service area on their property.<sup>67</sup> The ordinance charges \$0.0875 per month for every 100 ft<sup>2</sup> of impervious surface area with a single family dwelling defined as having 100 ft<sup>2</sup>. The ordinance defines which parcels are eligible for an exemption or credit, and what procedures must be followed to obtain that credit.

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<sup>65</sup> Monticello, Ltd. v. City of Atlanta, 231 Ga. App. 382, 499 S.E.2d 157, 386 (1998).

<sup>66</sup> Fulton County Taxpayers Association, 1999 WL 1102795 at \*3.

<sup>67</sup> McLeod et. al., 278 Ga. at 242.

In McLeod v. Columbia County, the court ruled on four issues surrounding the enactment of a stormwater utility; the County was authorized to establish the utility and to impose a charge for stormwater management services; the County was not required to establish a Community Improvement District (CID) before establishing the utility; Columbia County's stormwater utility charge was not an invalid tax; and the County's method of apportioning the costs of stormwater services was not arbitrary and did not violate equal protection or the right to due process.<sup>68</sup>

First, the court affirmed that local governments had the constitutional and statutory authority to set up stormwater utilities for their citizens.<sup>69</sup> The second challenge made to the Columbia County ordinance was that the County was required to establish a CID (Community Improvement District) pursuant to the procedures in the Georgia Constitution prior to the enactment of such a utility. The court rejected this argument, stating that the CID provisions were not applicable, and that the provisions in the Georgia Constitution allowing for the creation of a CID by the Georgia Legislature to fund stormwater improvement did not limit the powers given to local governments by the Home Rule section of the Constitution.<sup>70</sup>

The most important aspect of the court's ruling was the finding that the charge imposed by Columbia County was a fee and not a tax. Building on its own jurisprudence, and after considering much persuasive authority, the court found that the stormwater charge was a fee because it provided compensation for direct benefits conferred on the land and was not intended to raise general revenue, the cost of the services were properly apportioned, the charge was not mandatory, and there was no lien directly against the property.<sup>71</sup> Starting with what was said in

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<sup>68</sup> Id. at 243.

<sup>69</sup> Id. at 243.

<sup>70</sup> Id. at 243.

<sup>71</sup> Id. at 245.

Gunby,<sup>72</sup> that a charge is generally not a tax if its object and purpose is to provide compensation for services rendered, the court gave great weight to opinions from courts in other states stating that the properties charged received a special benefit for stormwater services through the control and treatment of the polluted stormwater runoff from those properties.<sup>73</sup>

That the charge was not mandatory in nature was further support that it was a fee and not a tax. If a charge is not mandatory then it is not a tax.<sup>74</sup> Because the ordinance allowed property owners to reduce the amount of their charge by providing their own private stormwater management systems the charge was not mandatory, and therefore not a tax.<sup>75</sup>

The fourth consideration for determining that the charge was a fee and not a tax was that the ordinance did not permit the imposition of a lien directly against the property of those who fail to pay the charge.<sup>76</sup> Liens directly against the property for failing to pay are likened to a tax lien and therefore support the argument that a charge is a tax.<sup>77</sup>

The last challenge to the Columbia ordinance was that the utility charge was arbitrary and violated the citizens' rights of due process and equal protection. Citing the trial court findings that: 1) the utility charge is used only to pay for stormwater management in the service area, 2) the facilities and systems within that area receive runoff from primarily that area, and 3) that the amount of impervious surface is the most important factor influencing the costs of stormwater management, the court agreed that a "rational relationship" existed between the county's method of apportioning cost and the benefit received.<sup>78</sup>

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<sup>72</sup> Gunbv v. Yates, 214 Ga. 17, 102 S.E.2d 548, 19 (1958).

<sup>73</sup> McLeod et. al., 278 Ga. at 245.

<sup>74</sup> Luke v. Dept. of Natural Resources, 270 Ga. 647, 513 S.E.2d 728, 648 (1999).

<sup>75</sup> McLeod et. al., 278 Ga. at 245. As a corollary the court also noted that funding the stormwater management services through a general tax would shift the cost of managing stormwater problems to owners of undeveloped land who neither contribute to nor cause stormwater issues, Id. at 245.

<sup>76</sup> Id. at 245.

<sup>77</sup> Id. at 245.

<sup>78</sup> Id. at 246.

## Ordinances

Common to any stormwater utility ordinance are sections detailing the purpose, findings, definitions for the utility. Typically, the stormwater utility ordinance will also contain a section establishing the stormwater utility and enterprise fund, setting out the scope of responsibility for the utility, declaring the rates to be charged, establishing exemptions and credits, and creating a procedure for billing,<sup>79</sup> delinquencies, and appeals. Each jurisdiction typically also has a procedure for determining where credit will be given and how much. A handbook of some kind is normally developed to assist the public in finding out how they can help themselves save money and help control stormwater runoff.<sup>80</sup> While other variations are possible, the following is a sampling of ordinances currently in effect in Georgia.

### Athens-Clarke County

In December 2004, Athens-Clarke County (ACC) voted to create a stormwater utility that recently began monthly billing.<sup>81</sup> Overall the ACC ordinance is significantly more complex than others enacted around Georgia. The rate structure is broken down into three components, the base charge, the quantity charge, and the quality charge.<sup>82</sup>

Every landowner with impervious surface on their property is first required to pay a “base charge” of \$2.07 x ERU which is money used to pay for the administrative and management costs of running the utility.<sup>83</sup> Added to the base charge is a quantity charge. The quantity charge

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<sup>79</sup> Setting out the methods which local governing bodies may choose to collect bills, when charges begin to accrue, and the frequency of billing charges.

<sup>80</sup> Ogden Environmental and Energy Services, Inc., Stormwater Utility Service Charge Credit Technical Manual (1997), available at [http://www.griffinstorm.com/SW/Documents/Home/Credit\\_Manual.htm](http://www.griffinstorm.com/SW/Documents/Home/Credit_Manual.htm), Columbia County, Stormwater Management Design Manual, Information Package, Pond Credit Application (2005), available at <http://www.columbiacountyga.gov/home/index.asp?page=2725>, Athens-Clarke County Stormwater, Utility Credit System (2004), available at <http://www.accstormwater.com/billing/utilitycredits.asp>, DECATUR, GA., CODE §42-229 (2004).

<sup>81</sup> Athens-Clarke County Stormwater, supra note 46.

<sup>82</sup> ATHENS-CLARKE COUNTY, GA., CODE § 5-5-8(d) (2005).

<sup>83</sup> See id. § 5-5-8(e), § 5-5-8(d)(1).

is analogous to the amount of stormwater that is discharged from certain types of property. Different types of property are assigned an ERU value that represents the amount of water typically discharged from that type of property.<sup>84</sup> A single family home, for example, would be said to discharge (0.6) ERU. In ACC the quantity charge is calculated by  $\$0.86 \times \text{ERU}$ . If land does not fit into a predetermined category with a set ERU, the ACC ordinance defines 1 ERU as being 2682 ft<sup>2</sup> of impervious surface.<sup>85</sup> Therefore for 8046 ft<sup>2</sup> impervious surface the ERU value would be 3.

The third calculation used by ACC in determining the stormwater fee, the quality charge, recognizes that runoff from some types of property, such as industrial property, have more pollutants, or different types of pollutants requiring more treatment.<sup>86</sup> The water quality factor ensures that those landowners whose land contributes more polluted runoff requiring more treatment pay more for those services. In ACC the quality charge is calculated by  $\$0.57 \times \text{ERU} \times \text{Water Quality Factor (WQF)}$ .<sup>87</sup> For example Water Quality Factors are 0.5 for low density residential and 1.9 for commercial/industrial land.<sup>88</sup>

After all three calculations, the sum total of each of the three products is the final stormwater charge. For a low density residential single family home, the charge would be  $\$2.07 \times 0.6$  (base charge) +  $\$0.86 \times 0.6$  (quantity charge) +  $\$0.57 \times 0.6 \times 0.5$  (quality factor). The resulting charges are  $\$1.242 + \$0.516 + \$0.1711$  for a total charge of  $\$1.93$  a month.

Apart from the detailed rate structure the ACC ordinance also contains a section detailing the stormwater service areas detailed list of exemptions and credits. (Being able to get credit

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<sup>84</sup> See *id.* § 5-5-8(d)(2).

<sup>85</sup> See *id.* § 5-5-8(e).

<sup>86</sup> See *id.* § 5-5-8(d)(3).

<sup>87</sup> See *id.* § 5-5-8(e).

<sup>88</sup> See *id.* § 5-5-8(e)(2)(ii).

towards the stormwater bill is an important aspect of the “fee” characterization of the stormwater charge being voluntary as stated in McLeod.)

The ACC ordinance breaks exemptions down into four classifications.<sup>89</sup> Type 1 parcels are exempt from all stormwater utility charges. Type 1 parcels include undeveloped land (because it contains no impervious surfaces), railroad tracks, and public highways.<sup>90</sup> Type 2 and type 3 exemptions apply only to certain parcels within designated areas in which stormwater services are not provided by Athens-Clarke County. These include the riparian service area,<sup>91</sup> the University of Georgia service area, and non-Athens-Clark County NPDES Phase II stormwater service areas.<sup>92</sup> Those parcels are exempted from the quantity charge (type 2) and the quality charge (type 3).<sup>93</sup> Type 4 exemptions include parcels which have on-site stormwater management systems for which a property owner can get up to one hundred percent credit for the quantity and quality charges by following procedures from the Georgia Stormwater Manual and practices designed to mitigate the impact of their stormwater.<sup>94</sup> Public and private schools are also included in type 4 exemptions and can receive a discount of up to twenty percent off their total charge for teaching a curriculum that promotes water awareness and protection measures.<sup>95</sup> Lastly, the type 4 exemption includes a provision for agricultural landowner to be exempt from the quality charge if they follow a specific government endorsed farm plan.<sup>96</sup>

### Griffin

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<sup>89</sup> See id. § 5-5-10.

<sup>90</sup> See id. § 5-5-10(a).

<sup>91</sup> See id. § 5-5-9(a), Riparian areas are those which drain directly into “riparian waters” (designated rivers and large creeks) without the stormwater entering the Athens-Clarke County stormwater system.

<sup>92</sup> See id. § 5-5-10(b), Athens-Clarke County Stormwater, supra note 46.

<sup>93</sup> See id. § 5-5-10(b) and (c).

<sup>94</sup> See id. § 5-5-10(d)(1) and (2).

<sup>95</sup> See id. § 5-5-10(d)(3).

<sup>96</sup> See id. § 5-5-10(d)(4).

The Griffin, Georgia stormwater utility, established in 1997, was the first in the state. Like ACC, Griffin bills monthly,<sup>97</sup> but unlike ACC, the City of Griffin's uses a much simpler system for calculating rates. Under the Griffin ordinance, developed property is separated into three classes and one ERU is charged \$2.95 a month.<sup>98</sup> Single family parcels of less than 1600 ft<sup>2</sup> are charged 0.6 ERU (\$1.77), while large single family parcels are charged one ERU (\$2.95). The third class includes all other developed land where the rate is determined simply by the number of ERUs the property contains. This is calculated by dividing the total impervious area of the parcel by 2200 ft<sup>2</sup> (2200 ft<sup>2</sup> is said to equal one ERU in this case).<sup>99</sup>

With regard to credits and exemptions, Griffin exempts undeveloped land and railroad tracks completely, but also allows other developed land to receive credit of up to 100 percent of their service charge by providing their own on-site systems and facilities for stormwater management which reduce or mitigate the stormwater utility's cost by 100 percent.<sup>100</sup> If those on-site systems do not mitigate the stormwater utility's cost 100 percent then the bill will still be reduced in proportion to the amount that onsite systems are able mitigate the stormwater utility's cost of handling runoff from that parcel.<sup>101</sup> For, example if on-site systems mitigate the impact of 30 percent of the stormwater runoff from that parcel, then the bill for providing stormwater services to that parcel would be reduced by 30 percent. Public and private schools can receive credit of up to 50 percent of their stormwater charge by agreeing to teach the "water wise" program, an environmental science curriculum approved by the Georgia Department of Education, in grades one through twelve.<sup>102</sup>

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<sup>97</sup> GRIFFIN, GA., CODE § 94-168(3) (2005).

<sup>98</sup> Center for Urban Policy and the Environment, *supra* note 23.

<sup>99</sup> GRIFFIN, GA., CODE § 94-168 (2005).

<sup>100</sup> *See id.* § 94-169(a)(1), (2), (3).

<sup>101</sup> *See id.* § 94-169(a)(3).

<sup>102</sup> *See id.* § 94-169(b).

## Columbia County

The Columbia County stormwater utility, which began billing in 2000,<sup>103</sup> uses an even simpler rate structure than Griffin. Columbia County simply states that one ERU is equivalent to 100 ft<sup>2</sup> of impervious surface area and that for each ERU the landowner is charged \$0.0875 per month. Therefore the only calculations necessary are the amount impervious surface on a parcel divided by 100 ft<sup>2</sup> and then multiplied by \$0.0875 for any type of property.<sup>104</sup> Undeveloped property, railroad tracks, and public highways are all exempt from stormwater charges.<sup>105</sup> Developed land in Columbia County can receive no higher than a 50 percent credit towards their stormwater bill for on-site stormwater management and if less than 50 percent, a proportional credit is given to the extent on-site facilities reduce or mitigate the costs of the county's stormwater utility.<sup>106</sup> Public and private schools in Columbia County can receive a credit of 5 percent of their bill for teaching a general environmental science curriculum that includes water protection, but they can receive the maximum credit of 20 percent if they teach a specific water protection program including "water wise" or other programs approved by the board of commissioners.<sup>107</sup>

### **Conclusion**

The implementation of stringent federal clean water programs along with more environmental awareness is pushing stormwater management, once essentially an afterthought in the bundle of services provided by local governments, to become more of a priority. Stormwater utilities are justifiably playing a larger role than ever with an estimated 2000 communities in the

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<sup>103</sup> Columbia County, Frequently Asked Questions (2005), available at <http://www.columbiacountyga.gov/home/index.asp?page=2731>.

<sup>104</sup> COLUMBIA COUNTY, GA., CODE § 34-113 (2006).

<sup>105</sup> See id. § 34-114(c),(d),(e).

<sup>106</sup> See id. § 34-114(f), (g).

<sup>107</sup> See id. § 34-114(j).

U.S. having their own by 2010.<sup>108</sup> Here in Georgia there are several successfully run stormwater utilities which provide an example for other local governments who would like to create their own. For more information, some excellent resources regarding stormwater utilities include:

- Florida Stormwater Manual, <http://www.florida-stormwater.org/manual/sitemap.html>
- Information on Griffin, Georgia Stormwater Department, <http://www.griffinstorm.com>
- Athens-Clarke County Stormwater Program, <http://www.acstormwater.com>
- Columbia County website,  
<http://www.columbiacountyga.gov/home/index.asp?page=2455>
- Rockdale County Stormwater Program, [www.rockdalecounty.org](http://www.rockdalecounty.org)
- “Stormwater” – The journal for surface water quality professionals,
  - <http://www.stormh2o.com/sw.html>

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<sup>108</sup> Eric Woolson, Stormwater Utilities: Where Do They Stand Now? (2004), available at [http://www.forester.net/sw\\_0409\\_stormwater.html](http://www.forester.net/sw_0409_stormwater.html).