

Mount Pleasant Tributary to Sugar Creek Drainage Report

April 2021

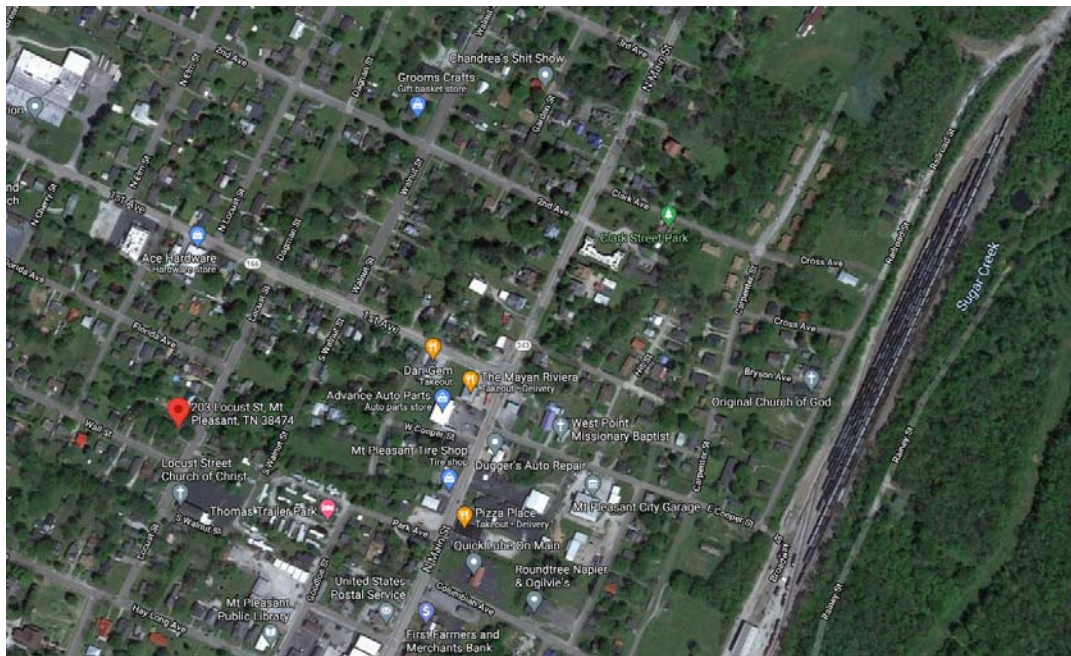
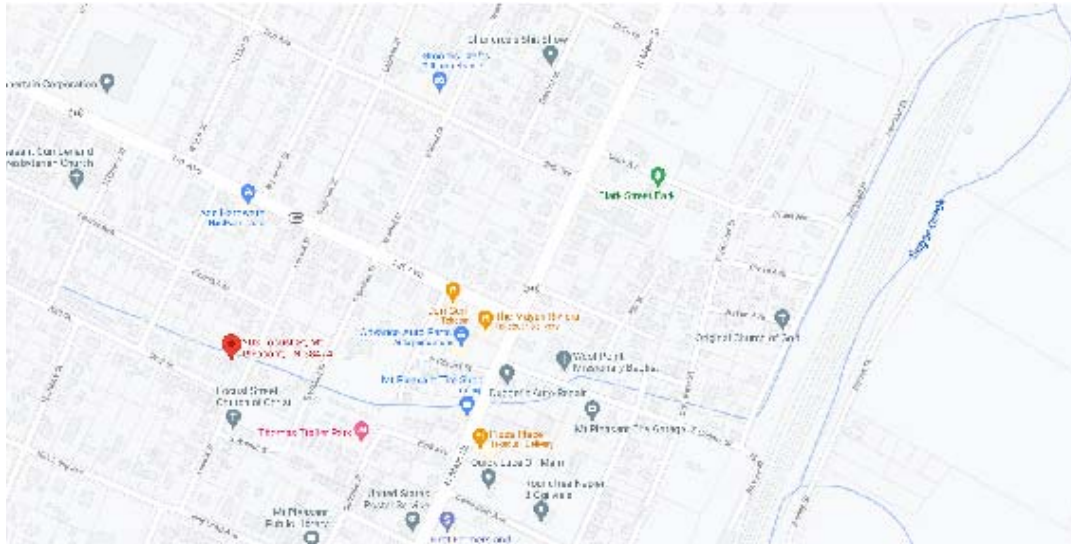


Municipal Technical
Advisory Service

INSTITUTE *for* PUBLIC SERVICE

Mount Pleasant requested that the Municipal Technical Advisory Service (MTAS) conduct a field visit to make observations on drainage issues with a tributary to Sugar Creek and to use those observations to make a report and recommendations to the City.

Examination in the field and interviews with staff, photo evidence, citizen complaints, all tell the same story. We have here a case where multiple property owners are being flooded: Wall Street, Locust Street, West Cooper, North Main Street, and Railroad Street; and where Locust Street and others are overtopped by flooding. Field observation and satellite photography reveal conveyance capacity of the tributary has been severely impacted by vegetative growth within the banks. Clearing the obstacles to the flow would possibly alleviate the reported flooding issues on the upper reaches of the tributary.



The first question to MTAS is as to whether it is the City's responsibility to address the drainage problems in question and if the City has the legal authority to do so.

Legal Issues:

As to the City doing drainage work on private property, I wanted to share a legal opinion prepared by Mr. Dennis Huffer, an MTAS Legal Consultant:

Article II, § 29, of the Tennessee Constitution provides that “The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes, respectively....” From this language has grown the public purpose doctrine, which dictates that public funds can be used only for public purposes. Courts have reasoned that, since taxes can be levied for only corporation or public purposes, expenditures can legally be made for only those same purposes. A public purpose is generally anything that promotes the public health, safety, welfare, morals, security, prosperity, or contentment of the residents of the municipality. *Shelby Co. v. The Exposition Company*, 96 Tenn. 653, 36 S.W. 696(1896). Incidental benefit to an individual or individuals will not invalidate an expenditure, but its primary purpose must be to benefit the public. *City of Chattanooga v. Harris*, 223 Tenn. 51, 442 S.W.2d 602 (1969).

In cases where City right-of-way is involved, or the general public, rather than a specific property owner, is involved, the City has a defensible reason to do work, but not a legal obligation.

We have here a case where multiple property owners are being flooded, and where the City has been advised that the road is calculated to be overtopped by flooding.

Therefore, we have case made that the “public health, safety, welfare” etc. would be promoted by addressing the flooding issue.

The ditches in question all serve as part of the Mount Pleasant public street drainage network, rather than just draining private property.

The next question would be about the need for drainage easements.

It is said in 10A McQuillin, Municipal Corporations, ' 30.03, that “Street in a legal sense, usually includes all parts of the way--the roadway, the gutters and the sidewalks.” The same authority, ' 30.22, further says that:

It has been held that the width of a prescriptive easement is not limited to that portion of the road actually traveled, and it may include the shoulders *and the ditches that are needed and have actually been used to support and maintain the traveled portion*. [Emphasis is mine.]

29 Am. Jur.2d Highways and Streets, ' 52, says that, “*Ditches along the side of a highway acquired by prescription or user are generally regarded as within the boundaries of a highway.*” [Emphasis is mine.]

...The above cases make it clear that a street is wider than the paved portion, and that it includes the shoulders, ditches, gutters, and waterways. Common sense also supports those cases. A ditch that drains a street is logically a part of the street.

Municipalities have police power over their streets regardless of how those streets were created. [*Collier v. Baker*, 27 S.W.2d 1085 (1030); *Brimer v. Municipality of Jefferson City*, 216 S.W.2d 1(1948); *Paris v. Paris-Henry County Utility District*, 340 S.W.2d 885 (1960).]

The police power cannot be contracted away or surrendered. In addition, in Tennessee (as in other states) municipalities have an affirmative obligation to prevent the obstruction of their streets. [City of Nashville v. Hager, 5 Tenn. Civ. App. (Higgins) 192 (1914); State v. Stroud, 52 S.W. 697 (Chan. App. Tenn. 1898); Stewart v. Illinois Central Railroad Co., 143 Tenn. 146 (Tenn. 1920).]

Where the street includes a ditch adjacent to and draining the surface of the street, that police power and that affirmative obligation, extends to the ditch.

So, given that Mount Pleasant can legally do this drainage work, how should they proceed?

Before cleaning the channel of the tributary, Mount Pleasant should seek a determination from TDEC as to the classification. Is this a wet weather conveyance or something else?

Are TDEC and/or USACE permits needed?

Mount Pleasant should consult the engineering firm that is working on their drainage problems.

Then, although Mount Pleasant has prescriptive easements that would allow them to maintain this drainageway, they should seek permanent drainage easements on the drainageway where they do not have them.

Caution:

Next, as we look downstream at Railroad Street, The tributary crosses under the railroad. Flooding is also a major issue on Railroad Street. Clearing the tributary channel will likely alleviate some of the flooding issues upstream of Railroad Street only to exacerbate them on Railroad.

Staff interviews and photos produced, however, also show that when some of the worst flooding was occurring on Railroad Street, Sugar Creek, the receiving waterbody for the tributary drainage, was out of its banks in flood stage and the culvert under the railroad was submerged.

Improving drainage on Railroad Street or increasing discharge capacity under the railroad would not help the situation under such circumstances. Railroad Street Properties may need to be part of a mitigation program to be purchased by the City with either TEMA funds or other funds if possible.

All this shows us that drainage problems do not happen in a vacuum. Any problem and any localized solution will have impacts up and downstream.

Possibilities:

Therefore, MTAS would recommend that Mount Pleasant have an engineering firm develop a comprehensive drainage map and drainage plan. In the long run, such a plan can save Mount Pleasant funds and ensure that what funds are spent are not spent ineffectively, dealing with localized problems while creating or exacerbating other problems, possibly without even solving the localized problem.

There are possibilities of funds From the Corps, TEMA, and CBDG for dealing with flooding. The Tennessee State Revolving Loan Fund has a dedicated pool of money for Stormwater issues with

low/no interest and principal forgiveness available in some cases. Mapping and Planning are eligible for a 5 year loan under this program, with amounts from the thousands to the millions. Construction projects and equipment are also eligible, with longer loan periods.

Mount Pleasant could establish a dedicated revenue stream that the loans could leverage short term, that would provide long term funding for drainage projects and maintenance. This could take the form of a stormwater utility fee. A model ordinance for establishing a stormwater utility fee is included in the appendix of this report.

Tennessee Code Annotated, § 68-221-1105 provides that among other powers municipalities have with respect to stormwater facilities, is the power by ordinance or resolution to: (1) Exercise general regulation over the planning, location, construction, and operation and maintenance of stormwater facilities in the municipality, whether or not owned and operated by the municipality; (2) Adopt any rules and regulations deemed necessary to accomplish the purposes of this statute, including the adoption of a system of fees for services and permits....

If Mount Pleasant is interested in pursuing any of these possibilities, MTAS stands ready to assist with any and all of them.

APPENDIX

**STORMWATER
UTILITY ORDINANCE
MODEL**

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ORDINANCE NO. _____

**AN ORDINANCE ESTABLISHING A STORMWATER UTILITY FEE FOR THE _____,
TENNESSEE.**

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

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

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

- (1) Exercise general regulation over the planning, location, construction, and operation and maintenance of stormwater facilities in the municipality, whether or not owned and operated by the municipality;
- (2) Adopt any rules and regulations deemed necessary to accomplish the purposes of this statute, including the adoption of a system of fees for services and permits;
- (3) Establish standards to regulate the quantity of stormwater discharged and to regulate stormwater contaminants as may be necessary to protect water quality;
- (4) Review and approve plans and plats for stormwater management in proposed subdivisions or commercial developments;
- (5) Issue permits for stormwater discharges, and for the construction, alteration, extension, or repair of stormwater facilities;
- (6) Suspend or revoke permits when it is determined that the permittee has violated

any applicable ordinance, resolution, or condition of the permit;

(7) Regulate and prohibit discharges into stormwater facilities of sanitary, industrial, or commercial sewage or waters that have otherwise been contaminated;

(8) Expend funds to remediate or mitigate the detrimental effects of contaminated land or other sources of stormwater contamination, whether public or private; and

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

NOW THEREFORE, BE IT ORDAINED BY THE BOARD OF MAYOR AND ALDERMEN OF THE _____, TENNESSEE, THAT:

Section 1. Legislative findings and policy. The Board of Mayor and Aldermen of the _____, Tennessee finds, determines and declares that the stormwater system which provides for the collection, treatment, storage and disposal of stormwater provides benefits and services to all property within the incorporated city limits. Such benefits include, but are not limited to: the provision of adequate systems of collection, conveyance, detention, treatment and release of stormwater; the reduction of hazards to property and life resulting from stormwater runoff; improvements in general health and welfare through reduction of undesirable stormwater conditions; and improvements to the water quality in the stormwater and surface water system and its receiving waters.

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

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

(1) Administer the acquisition, design, construction, maintenance and operation of the stormwater utility system, including capital improvements designated in the capital improvement program;

(2) Administer and enforce this ordinance and all regulations and procedures adopted relating to the design, construction, maintenance, operation and alteration of the utility stormwater system, including, but not limited to, the quantity, quality and/or

velocity of the stormwater conveyed thereby;

(3) Advise city departments on matters relating to the utility;

(4) Prepare and revise a comprehensive drainage plan for adoption by the municipality's governing body;

(5) Review plans and approve or deny, inspect and accept extensions and connections to the system;

(6) Enforce regulations to protect and maintain water quality and quantity within the system in compliance with water quality standards established by state, regional and/or federal agencies as now adopted or hereafter amended;

(7) Annually analyze the cost of services and benefits provided, and the system and structure of fees, charges, civil penalties and other revenues of the utility.

Section 3. Definitions. For the purpose of this ordinance, the following definitions shall apply: Words used in the singular shall include the plural, and the plural shall include the singular; words used in the present tense shall include the future tense. The word "shall" is mandatory and not discretionary. The word "may" is permissive. Words not defined in this section shall be construed to have the meaning given by common and ordinary use as defined in the latest edition of Webster's Dictionary.

(1) "Base rate" means the stormwater user's fee for a detached single family residential property in the city.

(2) "Construction" means the erection, building, acquisition, alteration, reconstruction, improvement or extension of stormwater facilities; preliminary planning to determine the economic and engineering feasibility of stormwater facilities; the engineering, architectural, legal, fiscal and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action necessary in the construction of stormwater facilities; and the inspection and supervision of the construction of stormwater facilities;

(3) "Developed property" means real property which has been altered from its natural state by the creation or addition of impervious areas, by the addition of any buildings, structures, pavement or other improvements.

- (4) "Equivalent residential unit" or "ERU" means the average square footage of a detached single family residential property determined pursuant to this ordinance.
- (5) "Exempt property" means all property that does not discharge stormwater runoff into the stormwater or flood control facilities of the municipality.
- (6) "Fee" or "Stormwater user's fee" means the charge established under this ordinance and levied on owners or users of parcels or pieces of real property to fund the costs of stormwater management and of operating, maintaining, and improving the stormwater system in the municipality. The stormwater user's fee is in addition to any other fee that the municipality has the right to charge under any other rule or regulation of the municipality.
- (7) "Fiscal year" means July 1 of a calendar year to June 30 of the next calendar year, both inclusive.
- (8) "Impervious surface" means a surface which is compacted or covered with material that is resistant to infiltration by water, including, but not limited to, most conventionally surfaced streets, roofs, sidewalks, patios, driveways, parking lots, and any other oiled, graveled, graded, compacted, or any other surface which impedes the natural infiltration of surface water.
- (9) "Impervious surface area" means the number of square feet of horizontal surface covered by buildings, and other impervious surfaces. All building measurements shall be made between exterior faces of walls, foundations, columns or other means of support or enclosure.
- (10) "Other developed property" means developed property other than single-family residential property. Such property shall include, but not be limited to, commercial properties, industrial properties, parking lots, hospitals, schools, recreational and cultural facilities, hotels, offices, and churches.
- (11) "Person" means any and all persons, natural or artificial, including any individual, firm or association, and any municipal or private corporation organized or existing under the laws of this or any other state or country.
- (12) "Property owner" means the property owner of record as listed in the county's

assessment roll. A property owner includes any individual, corporation, firm, partnership, or group of individuals acting as a unit, and any trustee, receiver, or personal representative.

(13) "Single family residential property" means a developed property which serves the primary purpose of providing a permanent dwelling unit to a single family. A single family detached dwelling or a townhouse containing an accessory apartment or second dwelling unit is included in this definition.

(14) "Stormwater" means stormwater runoff, snow melt runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration, and drainage.

(15) "Stormwater management fund" or "fund" means the fund created by this ordinance to operate, maintain, and improve the city's stormwater system.

(16) "Stormwater management" means the planning, design, construction, regulation, improvement, repair, maintenance, and operation of facilities and programs relating to water, flood plains, flood control, grading, erosion, tree conservation, and sediment control.

(17) "Surface water" includes waters upon the surface of the earth in bounds created naturally or artificially including, but not limited to, streams, other water courses, lakes and reservoirs.

(18) "User" shall mean the owner of record of property subject to the stormwater user's fee imposed by this ordinance.

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

(1) Stormwater user's fees.

(2) Civil penalties and damage assessments imposed for or arising from the violation of the city's stormwater management ordinance.

(3) Stormwater permit and inspection fees.

(4) Other funds or income obtained from federal, state, local, and private grants, or revolving funds, and from the Local Government Public Obligations Act of 1986

(Tennessee Code Annotated, title 9, chapter 21).

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

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

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

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

In the event the owner and non-owner users of a particular property are not the same, the liability for each the owner and non-owner user for the stormwater user fee attributable to that property shall be joint and several. The stormwater user fee shall be a monthly or a regular interval service charge and shall be determined by the provisions of this chapter and the ERU and ERU rate which shall be established and changed from time to time by the board of mayor and aldermen.

The stormwater user fee rate per equivalent residential unit, as defined in this chapter, shall be (\$.) per month until and unless the user fee rate is changed by the Board of Mayor and Aldermen of the _____.

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).

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

residential property.

(3) Setting the ERU. The ERU shall be set by the municipality's governing body from time to time by ordinance or resolution.

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

Section 9. Property classification for stormwater user's fee.

(1) Property classifications. For purposes of determining the stormwater user's fee, all properties in the city are classified into one of the following classes:

- (a) Single family residential property;
- (b) Other developed property;
- (c) Exempt property.

(2) Single family residential fee. The municipality's governing body finds that the intensity of development of most parcels of real property in the municipality classified as single family residential is similar and that it would be excessively and unnecessarily expensive to determine precisely the square footage of the improvements (such as buildings, structures, and other impervious areas) on each such parcel. Therefore, all single family residential properties in the city shall be charged a flat stormwater management fee, equal the base rate, regardless of the size of the parcel or the improvements.

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

square footage for the buildings and other improvements on the property. The minimum stormwater management fee for other developed property shall equal the base rate for single family residential property.

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

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

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

Section 12. Billing procedures and penalties for late payment. Stormwater user fee collection.

The stormwater user fee for metered property shall be billed and collected monthly with the monthly city's utility services bill for those properties within the corporate limits of the city utilizing the city utilities and billed and collected separately as stormwater user fees for those properties not utilizing other city utilities. All such bills for stormwater user fees shall be rendered monthly by the utilities department. The stormwater 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. If a partial payment is received, the payment shall be applied pro-rata to each account billed on the consolidated statement in the proportion that an individual account bears to the total consolidated statement of all current charges for all accounts. The stormwater user fee for unmetered property shall be billed at regular intervals. All bills for stormwater user fees shall become due and payable in accordance with the rules and regulations of the utilities department pertaining to the collection of the stormwater user fees.

Section 13. Appeals of fees.

- (1) Generally. Any person who disagrees with the calculation of the stormwater user's fee, as provided in this ordinance, or who seeks a stormwater user's fee adjustment based upon stormwater management practices, may appeal such fee determination to the stormwater utility within thirty (30) days from the date of the last bill containing stormwater user's fees charges. Any appeal shall be filed in writing and shall state the grounds for the appeal. The stormwater utility may request additional information from the appealing party.
- (2) Adjustments. Stormwater user's fee adjustments for stormwater management practices may be considered for: reductions in runoff volume including discharge to a non-city drainage system; and properly designed constructed and maintained existing retention facilities, i.e. evaporation and recharge. Based upon the information provided by the utility and the appealing party, the stormwater utility shall make a final calculation of the stormwater drainage fee. The stormwater utility shall notify the parties, in writing, of its decision.

This ordinance shall become effective on the ____ day of _____, 20____, the public welfare requiring it.

Passed first consideration _____, 20____

Passed second consideration _____, 20 ____

Mayor

Attest:

Recorder