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APPENDIXES

APPENDIX A

ENFORCING STORMWATER AND PRETREATMENT ORDINANCES THROUGH THE ADMINISTRATIVE PROCESS, INCLUDING THE USE OF CIVIL PENALTIES

GENERALLY

Several statutes in Tennessee authorize the enforcement of municipal ordinances administratively, and include as an administrative enforcement mechanism, the imposition by the enforcing municipal official or body, of a monetary civil penalty. However, this treatment of administrative hearings is principally concerned with certain statutes that allow municipalities to adopt sewer pretreatment and stormwater ordinances, and that authorize municipal officials and boards to enforce those ordinances administratively through the imposition of civil monetary penalties for violations of those ordinances.

- Tennessee Code Annotated, § 69-3-125: Under this statute, municipal officials can levy civil monetary penalties up to $10,000 per day for certain pretreatment ordinance violations.

- Tennessee Code Annotated, § 69-221-1106: Under this statute, municipal officials can levy civil monetary penalties up to $5,000 per day for stormwater ordinance violations.

Two of the principal questions this treatment will consider are:

- Will such civil monetary penalties pass legal muster?

- What are the legal rules governing administrative hearings?

CIVIL MONETARY PENALTIES FOR PRETREATMENT AND STORMWATER ORDINANCE VIOLATIONS ARE PRESCRIBED BY STATUTE

Tennessee Code Annotated, § 69-3-115(a)(1) (Pretreatment ordinance)

As indicated above Tennessee Code Annotated, § 69-3-101 et seq., speaks both of civil and criminal penalties. But that statutory scheme clearly discriminates with respect to who can levy those civil and criminal penalties. As will be shown below, municipal administrative agencies are authorized to levy only civil penalties.

Civil Penalties

- Tennessee Code Annotated, § 69-3-115(a)(1) authorizes the commissioner to impose

civil penalties of up to $10,000 per day for various violations contained in that statute. The same statute contains a list of things the commissioner must consider in determining the amount of a civil penalty, and provides that the penalty is clearly collected through the courts as a civil judgment.

• Tennessee Code Annotated, § 69-3-125 authorizes the "local administrative officer" to impose civil penalties of up to $10,000 per day for various violations contained in that statute. The same statute also contains a list of things the local administrative officer must consider in determining the amount of the civil penalty, and likewise clearly provides that the penalty is collected through the courts as a civil judgment.

Criminal Penalties

• Tennessee Code Annotated, § 69-3-115(b) provides for certain criminal penalties for pretreatment violations. It declares that "Any person polluting the waters of this state or violating or failing, neglecting, or refusing to comply with any of the provisions of this part, commits a Class C Misdemeanor. Each day upon which such violation occurs constitutes a separate offense. Tennessee Code Annotated, § 69-3-115(c) provides that, "Any person who willfully and knowingly falsifies any records [etc.l required by the board or the commissioner or who willfully and knowingly pollutes the waters of the state, or who willfully fails, neglects or refuses to comply with any of the provisions of this part commits a Class E Felony and shall be punished by a fine of not more than twenty-five thousand dollars ($25,000) or incarceration or both." However, Tennessee Code Annotated, § 69-3-115(d) says that "No warrant or indictment under this part shall be issued except upon application by the board or the commissioner or upon such application authorized in writing by either of them." Those criminal violations are obviously charged in a court, and the criminal penalties imposed for those violations, are imposed by a court.

But when the pretreatment statute speaks of civil penalties it is obviously referring to those penalties levied by the state administrative agents, and by municipal administrative agents, rather than by a court. Nothing in the pretreatment statutes, nor in any other statute that applies to sewer use ordinances, authorizes the local administrative officer or entity to impose criminal penalties for the violation of a municipality's sewer use ordinances.

Tennessee Code Annotated, § 68-221-1106 (Stormwater Ordinance)

This statute provides that a municipality may adopt an ordinance or resolution providing that any person violating the provisions of any ordinance or resolution regulating storm water discharges or facilities "shall be subject to a civil penalty of not less than fifty dollars ($50) per day or more than $5,000 per day for each day of violation. Each day of violation may constitute a separate violation."

The Problem of Article VI, § 14 Of The Tennessee Constitution On "Fines" In Municipal Ordinance Violation Cases

Generally

Where a municipal court levies fines of greater than $50 in municipal ordinance violation cases, it runs head on into Article VI, § 14, of the Tennessee Constitution, which provides that:

> No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine shall be more than fifty dollars.

City of Chattanooga v. Davis

In City of Chattanooga v. Davis, above, the Tennessee Supreme Court held that the levy of municipal civil penalties in excess of $50 violated Article VI, § 14, of the Tennessee Constitution, where their purpose was punitive, rather than remedial. That case also involved the consolidated case of Barrett v. Metropolitan Government of Nashville-Davidson County.

The City of Chattanooga is a home rule city.[1] In City of Chattanooga v. Davis, the city court fined Davis $300 for reckless driving, under the authority Tennessee Code Annotated, § 6-54-306 gives home rule municipalities to levy monetary penalties of up to $500. In Barrett v. Metropolitan Government of Nashville-Davidson County. Title 16 of the Nashville-Davidson County Metropolitan Code regulated buildings and construction. The Nashville-Davidson County Metropolitan Court levied on Barrett a civil penalty of $500 for each of five civil warrants issued over a period of months for various building code violations, and violating a stop work order. It is worthwhile to note that Tennessee Code Annotated, § 7-3-507, provides that:

> All metropolitan governments are empowered to set a penalty of up to five hundred dollars ($500) per day for each day during which the violation of ordinances, laws or regulation of such metropolitan government continues or occurs. [The statute prescribes lesser penalties for certain housing and zoning violations].
>
> [The constitutionality of that statute under Article VI, § 14, of the Tennessee

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[1]There are 14 home rule cities in Tennessee: Chattanooga, Clinton, East Ridge, Etowah, Johnson City, Lenoir City, Memphis, Oak Ridge, Red Bank, Sevierville, Sweetwater, Whitwell, Knoxville, and Mt. Juliet.

Constitution was not an issue in Barrett; indeed, it was not even mentioned except in a footnote in connection with Davis.

In overturning the $300 fine on both Davis and Barrett, the court declared that the $50 fine limitation in Article 6, § 14 applied to punitive, but not to remedial fines. Whether a fine was punitive or remedial depends upon a two-step inquiry:

Is the language of the pertinent ordinances punitive or remedial?

Is the "actual purpose and effect" of the ordinances punitive or remedial?

The "fine" or "civil penalty" in both Davis and Barrett was punitive rather than remedial because, under a "totality of circumstances" test, the intent of the fine was to punish the defendant rather than to remedy the violations at issue. In Davis, more so than in Barrett, the language of the ordinance was clearly punitive.

Article 6, § 14 does not apply to administrative penalties

There are no cases dealing with the question of whether Article 6, § 14 of the Tennessee Constitution applies to administrative penalties imposed by local government officials or boards. However, Tenn. Op. Atty. Gen. No. 05-056 (April 20, 2005) opines that the administrative penalty of $1,500 beer boards are authorized to levy under Tennessee Code Annotated, § 57-5-108(a) (A) are not intercepted by $50 fine limitation contained in Article VI, § 14 of the Tennessee Constitution under the logic of Dickson v. State, 116 S.W.3d 738 (Tenn. Ct. App. 2003).

That case considered the question of whether a $15,000 fine levied by the Petroleum Underground Storage Tank Division of the Department of Environment and Conservation, under the authority of the Underground Petroleum Storage Act, codified at Tennessee Code Annotated, § 68-215-101 et seq., was subject to the $50 fine limitation contained in Article 6, § 14.

The answer was no, held the Court, reasoning that the $50 fine limitation in Article 6, § 14, applied only to fines levied by the judiciary and not to the government as a whole. For that reason, it did not apply to administrative agencies. (The court did conclude that had the fine been levied by a court, it would have been punitive rather than remedial and subject to Article VI, § 14). Presumably, the same logic would apply to municipal administrative penalties.

The recent unreported case of Barrett v. Tennessee Occupational and Health Review Commission, 2007 WL 4562889 (Tenn. Ct. App.) is consistent with Dickson v. State. There, a TOSHA employee inspected Barrett's construction site, and cited him for several violations. After a hearing before the Tennessee Occupational Safety and

Health Review Commission, Barrett was fined $950. Barrett appealed, arguing that the fine violated the $50 fine limit of Article 6, § 14 of the Tennessee Constitution. The Court rejected that argument, concluding that Dickson had been correctly decided, "unless the Supreme court instructs us otherwise." [At 3] With respect to Barrett's argument that the $950 fine was "punitive" under City of Chattanooga v. Davis, the Court declared that "Dickson tells us that regardless of the punitive nature of a fine, Article VI, § 14 does apply to a state agency. Dickson, 1216 S.W.3d 740." [At 3-4] In Footnote 3 of that case, the Court also pointed out that:

> "The commissioner of labor and workforce development has the authority to assess monetary penalties as provided in §§ 50-3-402- 3-408 for any violation of this chapter or of any standard, rule or order adopted by regulation promulgated by the commission pursuant to this chapter." The statute goes on to provide for the assessment of a penalty up to $7,000 for both serious and non-serious violations. Tenn. Code Ann. § 50-3-403 and 50-3-405 (2005). [At 4]

Selected Statutes Governing Pretreatment And Stormwater Ordinances Enforcement

Pretreatment ordinances

Tennessee Code Annotated, §§ 69-3-123-124, contain procedures for handling pretreatment violations by the "local administrative officer" and the "local hearing authority." The latter statute contains the standards for hearings. Among the hearing requirements are notice of a hearing, a verbatim record of the hearing and findings of facts and conclusions of law, and the right to appeal final orders.

In providing that any person (including industrial users) who violate various enumerated pretreatment requirements can be fined up to $10,000 per day, Tennessee Code Annotated, § 63-3-125, lists the factors that the local administrative ofifice may consider in assessing the fine-

• Whether the civil penalty imposed will be a substantial economic deterrent to the illegal activity;

• Damages to the pretreatment agency, including compensation for the damage or destruction of the facilities of the publically owned treatment works, and also including any penalties, costs and attorneys' fees incurred by the pretreatment agency as the result of the illegal activity, as well as the expenses involved in enforcing this section and the costs involved in rectifying any damages;

• Cause of the discharge or violation;

• Severity of the discharge and its effect upon the facilities of the publically owned

treatment works and upon the quality of the receiving waters;

- Effectiveness of action taken by the violator to cease the violation;

- The technical and economic reasonableness of reducing or eliminating the discharge; and

- The economic benefit gained by the violator.

The same statute provides that the local hearing authority may establish by regulation a schedule of the amount of civil penalty that can be assessed by the local administrative officer for certain specific violations or categories of violations.

Tennessee Code Annotated, §§ 69-3-123-126 also contain other remedies for pretreatment violations, including the recovery of damages caused by pretreatment violations.

Stormwater ordinances

Tennessee Code Annotated, § 68-221-1101, et seq. is the state law that authorizes municipalities and counties to adopt stormwater ordinances (in the case of municipalities) and resolutions (in the case of counties). Public officials familiar with the enforcement of building, utility, and housing codes will recognize that the MTAS model stormwater ordinance has two significant things in common with those codes: both contain detailed rules and regulations governing the subject matter they regulate, and both contain an administrative process for addressing violations of those rules and regulations. For that reason, it is likely that public officials who enforce building, utility and housing codes are generally a good source of information on the legal and practical pitfalls in the administrative enforcement process.

Tennessee Code Annotated, § 68-221-1106, requires a municipality that assesses a penalty for a stormwater ordinance violation to provide the violator "reasonable notice of the assessment..." It also requires a municipality to "establish a procedure for a review of the civil penalty or damage assessment by either the governing body of the municipality or a board established to hear appeals by any person incurring a damage assessment or a civil penalty."

With respect to civil monetary penalties that can be imposed by a town administratively for stormwater ordinance violations, Tennessee Code Annotated, § 68-221-1101 et seq., authorizes municipalities to:

- Impose a penalty of not less than $50 nor more than $5,000 per day for the violation of any stormwater ordinance or resolution. The amount of the penalty is to be

calculated based on seven (7) factors:

(1) The harm done to the public health or environment;

(2) Whether the town penalty imposed will be a substantial economic deterrent;

(3) The economic benefit gained by the violator;

(4) The amount of effort put forth by the violator to remedy the violation;

(5) Any unusual or extraordinary enforcement costs incurred by the municipality;

(6) The amount of penalty established by ordinance or resolution for specific categories of violations; and

(7) Any equities of the situation which outweigh the benefit of imposing any penalty or damage assessment.

• Assess damages to the municipality "proximately" caused by the violator. [Tennessee Code Annotated, § 68-221-106]

Proof In Pretreatment And Stormwater Cases Resolved Administratively

The common law writ of certiorari (Tennessee Code Annotated, § 27-8-101) and sometimes the statutory writ of certiorari (Tennessee Code Annotated, § 27-8-102) (Tennessee Code Annotated, § 27-9-101 et seq. supplies the procedural framework for both writs), are the avenues for appeals from the decisions of governmental administrative bodies and officers. It is not worthwhile here to attempt to make a lucid distinction between the two writs. What is pertinent here is that under the common law writ of certiorari, under which most challenges to administrative decisions will be brought, those decisions will be upheld by the courts if there is "any material evidence" to support the administrative decision at issue.

There are few cases involving administrative hearings and monetary penalties in the enforcement of pretreatment ordinances, and no cases involving stormwater ordinances. However, the recent case of Leonard Plating Company v. Metropolitan Government of Nashville and Davidson County, 213 S.W.3d 898 (Tenn.Ct.App. 2006) (Permission to appeal denied by Supreme Court, December 27, 2006), reflects an appeal of the administrative decisions of local government officials pertinent to the enforcement of pretreatment regulations. It is a good model for the application of the law governing the standard of proof that applies to a government's administrative

decisions.

In that case, an inspection of Metro's sewer lines connected to Leonard Plating Company's plant disclosed damages to a significant length of Metro's sewer lines. Metro. Water Services charged Leonard Plating with violations of its pretreatment permit, and after a hearing imposed penalties on that company of $1,362.50, and assessed it damages of $306,380 under Tennessee Code Annotated, § 69-3-126(a), which authorizes a local government to assess a pretreatment violator for damages caused by its violation. On Leonard Plating's appeal to the Metro. Wastewater Hearing Authority, the Authority affirmed Metro. Water Service's assessment. Leonard Plating appealed the Authority's decision to the Davidson County Chancery Court, which overturned the Authority's assessment, for three reasons: (1) The record did not contain material evidence to establish that the wastewater discharge from Leonard Plating's plant had caused the damage to the sewer pipes; (2) The Authority had improperly placed the burden on Leonard Plating to prove that the damage to the sewer lines had not been caused by the wastewater from its plant; (3) The Authority had relied solely on its own expertise to make up for the lack of other evidence connecting Leonard Plating"s wastewater to the damage to the sewer pipes.

The Court of Appeals overturned the Davidson County Chancery Court's decision, in language that I will quote at length because it is highly instructive on the standard of proof that applies in the case of an administrative penalty appealed to the chancery court,

> ... we find that the trial court exceeded its authority by weighing the evidence. Because we have determined that the record contains material evidence to support the Authority's decision, we reverse the trial court's conclusion that the record does not contain sufficient evidence to support the Authority's conclusion that the wastewater discharge from Leonard Plating's plant caused the damage to the sewer lines. [At 903]
>
> The court said this about the scope of review of administrative decisions:
>
> The scope of review afforded by a common-law writ of certiorari is extremely limited. [Citations omitted by me.] Reviewing courts may grant relief only when the board or agency whose decision is being reviewed has exceeded its jurisdiction or has acted illegally, arbitrarily, or fraudulently. Tenn. Code Ann. § 27-8-101 (2000). [Other citations omitted by me.]
>
> Review under a common-law writ of certiorari does not extend to a redetermination of the facts found by the board or agency whose decision is being reviewed. [Citations omitted by me.] The courts may not (1) inquire into the intrinsic correctness of the decision, (2) reweigh the evidence, or (3)

> substitute their judgment for that of the board of agency. However, they may review the record solely to determine whether it contains any material evidence to support the decisions because a decision without evidentiary support is an arbitrary one. [Citations omitted by me.]
>
> Ascertaining whether the record contains material evidence to support the board's or agency's decision is a question of law. [Citation omitted.] For the purpose of this inquiry, "material evidence" is relevant evidence that a reasonable person would accept as adequate to support a rational conclusion. [Citations omitted by me.] The amount of material evidence required to support a board's or agency's decision must exceed a scintilla of evidence but may be less than a preponderance of the evidence. [Citation omitted by me.] [At 903-04]

The trial court's dissatisfaction with the evidence establishing that the damage to metro's sewer lines was not justified under the above scope of review, concluded the court of appeals:

> While the [trial] court determined that the record contained sufficient evidence to conclude that Leonard Plating had violated its permit by discharging wastewater into the sewer plant that exceeded the permissible level of acidity, the court decided that the record does not contain material evidence establishing that the wastewater from Leonard's Plating plant caused the damage to the sewer fine. We have determined that the trial court reached this result by impermissibly weighing the evidence. [At 904]

The court of appeals focused on the trial court's choosing between the evidence that the damage was caused by Leonard Plating and the evidence that the damage could have had other causes. In particular the court of appeals pointed to the testimony of a Mr. Wingo for Metro that:

> "...acid is not very friendly to concrete pipe" and that discharges with level of acidity similar to the one involved in this case could damage concrete pipes in "a matter of a few months." He also testified that he had observed damaged sewer pipe "strikingly similar" to the damaged pipe involved in this case at other plating companies. [At 904]

The trial court characterized Mr. Wingo's testimony as "equivocal and inconclusive," then turned its attention to the evidence presented by Leonard Plating, stating, declaring that:

> Detracting from the claim that the petitioner's discharge corroded the pipe was the testimony of Mr. Kisselvoich, a consultant with an environmental firm of PSI. He testified that the activity of the former occupant of the building, a

barbeque [sic] restaurant known as Coursey's, had deposited food in the pipe, and that he could not say that the pH level of the petitioner had caused the pipe to wear out.

The court of appeals also noted that the trial court had determined that a Mr. Powers testimony had "detracted" from placing causation on the petitioner [Leonard Plating], apparently referring to Footnote 17 in which the court of appeals noted that "Mr. Power speculated that the damage could have been caused by tomato acid." [At 905]

The court of appeals view of the trial court's weighing of evidence was plain:

> The trial court's memorandum reflects that it overstepped the permissible boundaries of the search for material evidence. The Metropolitan Government presented evidence establishing (1) that the wastewater from Leonard Plating comprised essentially all of the flow in the most severely damaged sewer pipes, (2) that Leonard Plating uses acids in its electroplating processes which it discharges into the sewer, (3) that until July, 2002 Leonard Plating made no effort to monitor or control the acidity of its wastewater, and (4) that samples of the wastewater discharged for Leonard Plating's plant exceeded permissible levels of acidity. All of this is material evidence upon which a reasonable person could rely to make a rational decision that the excess acidity in Leonard Plating's wastewater caused the damage in the sewer pipes that required them to be replaced. Although the trial court acknowledged this evidence, it went further and weighed the Metropolitan government's evidence against the evidence offered by Leonard Plating. This a trial court cannot do when reviewing a board's or agency's decision pursuant to a common law writ of certiorari. [At 905]

On the question of who had the burden of proof in an administrative hearing, the court of appeals observed that "The trial court had found as a matter of law that Authority had impermissibly placed the burden on Leonard Plating to provide that the acid in its wastewater had not caused the damage to the sewer pipes that required their replacement...." [At 905] But the court of appeals explained how the burden of proof works in administrative hearings:

> The Metropolitan Government proved (1) that the sewer line serving Leonard Plating was severely damaged, (2) that the damage was consistent with damage caused by acid, (3) that sewer lines serving other electroplating businesses had similar damage, and (4) that Leonard Plating's wastewater was acidic enough to cause the sort of damage observed in the sewer lines. This evidence, circumstantial as it is, was sufficient to make out a prima facie case that the wastewater from Leonard Plating caused the damage that required the sewer

line to be replaced. It was also sufficient to shift the burden of going forward with the evidence to Leonard Plating to prove that the damage was caused by something else.

The Authority's deliberations reflect the fact that its members accredited the Metropolitan Government's evidence that the wastewater from Leonard Plating plant had damaged the sewer lines and that the wastewater exceeded the pH limits in Leonard Plating's permit. The Authority's comments that concerned the trial court simply reflect that its members decided that Leonard Plating had failed to produce sufficient evidence to rebut the Metropolitan Government's evidence. The Authority did not improperly allocate the burden of proof. To the contrary, its reasoning is entirely consistent with a rational and reasonable assessment of the evidence. [At 905-06]

Finally, the court of appeals addressed the trial court's conclusion that the members of the Authority based their decision on their own knowledge and expertise rather than on the evidence:

One of the principal reasons for the creation of administrative agencies is the expectation that the agency members will bring substantive expertise to the matters within their jurisdiction. 1 CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 1.2(G), AT 9 (2D ED. Supp. 2002-03) (KOCH). Thus, the expertise of members of administrative boards and commissions plays a central role in administrative proceedings. Martin v. Sizemore, 78 S.W.3d at 269. Agencies are not law juries, 2 RICHARD J. PIERCE, JR. ADMINISTRATIVE LAW TREATISE § 10.2, AT 708 (4TH ED. 2002), and, therefore, they are permitted to rely on their expertise in evaluating the evidence submitted to them as long as they disclose they are doing so. 3 KOCH § 9.2[4], at 5.

However, a board's or agency's findings must be based on evidence presented to them. Courts should decline to accept agency findings that are not supported by evidence simply because the findings were made by experts. 3 KOCH § 12, 24[3](a), at 222. Accordingly, this court has held that members of boards and agencies cannot rely on their own expertise as a substitute for expert testimony that should have been presented during the hearing because doing so seriously compromises the fairness of the administrative proceedings. Martin v. Sizemore, 68 S.W.3d at 269-70. [At 906]

There was no "evidentiary void" in this case, concluded the court of appeals:

The record in this case contains evidence regarding the acidity of the wastewater discharged by Leonard Plating, the history of Leonard Plating's

> failure to monitor or mitigate the acidity of its wastewater, the fact that Leonard Plating's wastewater accounted for virtually all of the flow in the sewer lines, the similarity between the damage to the sewer line serving Leonard Plating and the damage found in sewer lines serving other electroplating businesses, and the conclusion of an expert employed by Metro Water Services that the damage to the sewer line was caused by acid. This evidence provided an ample basis for the chairman of the Authority and the other members, in the exercise of their training and experience, to conclude that the damage to the sewer pipes was caused by the excess acidity of the wastewater discharged from Leonard Plating. [At 907]

The unreported case of Hariess v. City of Kingsnort, 1998 WL 131519 (Tenn. App. 1998), also discusses other legal issues involved in the appeals from administrative decisions. There, under the authority of Tennessee Code Annotated, § 13-21-101 et seq., the city had adopted the ordinance required by that statute, which contained an administrative process for handling dilapidated structures. The city issued two demolition orders under that ordinance against structures owned by Hariess. Hariess appealed on a number of grounds:

1. That the person who served as the investigator and the hearing officer was the same person, which Hariess argued resulted in (1) a denial of due process, and (2) a biased decision, given that the investigating/hearing officer was also a city employee;

2. The hearing officer's decision was arbitrary and capricious, or unsupported by the evidence;

3. The ordinances of the city were facially unconstitutional.

The court's scope of review of the administrative decision of the investigating/hearing officer was limited, said the Court:

> Common law certiorari, as provided in T.C.A. § 27-8-101 (Supp. 1997), is available for judicial review of a decision of an administrative body acting in a judicial or quasi-judicial capacity. Davidson v. Carr, 659 S.W.2d 361, 363 (Tenn. 1983). The Supreme Court has stated that...administrative decisions are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges that action, McCallen v. City of Memphis, 786 S.W.2d 633, 641 (Tenn. 1990). Generally speaking, review of an administrative decision by way of the common law writ is confined to the question of whether the inferior board or tribunal has exceeded its jurisdiction or acted illegally, arbitrarily, capriciously, or fraudulently. T.C.A. § 27-8-101 (Supp. 1997). [Remaining citation omitted] This question typically involves a determination of whether the

> record contains material evidence to support the decision below. [Citations omitted.]... If a reviewing court determines that there is no material evidence to support an administrative decision, it must conclude that the administrative body acted illegally. [Citation omitted.] An administrative decision may be found to be illegal, arbitrary or fraudulent in other circumstances as well- for example, where the standards of due process have not been met, where a constitutional or statutory provision has been violated, or where some unlawful procedure has been followed. [Citations omitted.].... The reviewing court does not inquire into the correctness of the inferior tribunal's finding of fact [Citations omitted]; nor is it permitted to weigh the evidence. [Citations omitted] Moreover, the reviewing court "should refrain from substituting its judgment for the broad discretionary authority of the local government body." [Citation omitted.]

Under that standard, the Court replied to the first two arguments as follows:

> [The Supreme Court has stated] the mere fact that both investigative and adjudicative functions have been granted to an administrative body...does not itself create an unconstitutional risk of bias in an administrative adjudication....[citations omitted.]

It cited Withrow v. Larkin, 421 U.S. 35 [parallel citations omitted], in which the United States Supreme Court declared that:

> [t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a ... difficult burden of persuasion to carry. [Citation omitted.] [At 5]

Harless offered no evidence of bias on the part of the investigator/hearing officer, and the record did not indicate that his dual roles resulted in a denial of due process. The record clearly showed that the structures met the standards for demolition under the Slum Clearance Statute. Harless could not question the constitutionality of the statute because he had not notified the attorney general as he was required to do under Tennessee Code Annotated, § 29-14-107(b).

Necessity for adequate proof in administrative hearings

While the level of proof supporting a government's administrative decisions is relatively low, the evidence supporting those decisions must meet the standards required by law or ordinance.

The plaintiff in Bovd v. Forbes, 2003 Tenn. App. LEXIS 760, raised the issue of

whether the administrative officer made the value/cost of repair findings as required by the City of Jackson's ordinance adopted under Tennessee Code Annotated, § 13-21-101 et seq. That ordinance provided that "if the repair, alteration or improvement cost exceeds seventy-five (75) percent of the taxable value of the property, the director may order the structure to be removed or demolished." [At 5] The Court, concluding that the ordinance had not been followed, reasoned that:

> By his own testimony, James Maholmes, the housing code enforcement officer at the time notice was sent and the improvements were demolished, admitted that the City made no estimates of the repair costs. Ronald Boyd testified that the property had a total tax appraisal value of $140,600. Therefore, in order for Maholmes to order demolition pursuant to the City's Ordinance 12-708, the cost of repairing the improvements would need to exceed $105,450. Given that the parties stipulated the improvements themselves were only worth $49,000 and that the only problems with the property were broken windows and unhinged doors, we conclude that the record supports the finding that the City failed to prove it had made a determination that the cost of repairs would exceed 75% of the property value. [At 5]

Violations of Stormwater Ordinances Can Also be Made Municipal Ordinance Violations Subject to Trial In Municipal Court

Tennessee Code Annotated, § 68-221-1101 et seq., appears to contemplate that violations of the stormwater ordinance are to be "tried" administratively, and that the violator's appeal of administrative decisions be appealed by writ or certiorari to the circuit or chancery court, under Tennessee Code Annotated, title 27, chapter 8. However, under Vandergriff v. City of Chattanooga, 44 F. Supp.2d 927 (E.D. Tenn. 1998), and Rush v. City of Chattanooga, 1999 WL 459153 (6th Cir. Tenn.) (Unreported), apparently a municipality can make a violation of the stormwater ordinance a municipal ordinance violation triable in municipal courts.

APPENDIX B

INSPECTION AND MAINTENANCE AGREEMENT FOR PRIVATE STORMWATER MANAGEMENT FACILITIES

Property Identification ("Property"): Town Use:

Map:_____ Parcel No._____ Land Dist. Permit No.: _____
Record Book: _____ Page No. _____

Project Name: _____
Project Address: _____
Owner(s): _____
Owner Address: _____
Town:_____ State:_____ Zip Code: _____

SEE LEGAL DESCRIPTION ATTACHED HERETO AS EXHIBIT A.

This Inspection and Maintenance Agreement ("Agreement") is made this _____ day of _____, 20____, by and between _____ ("Owner", whether one or more), and the Town of White Bluff, Tennessee ("Town").

WHEREAS, the Town has adopted a Stormwater Ordinance to prevent surface water quality degradation from development or redevelopment activities within its jurisdiction, and the Town has adopted surface water quality regulations as required and such regulations are contained in the Stormwater Management chapter of the Town Code; and

WHEREAS the Owner owns the Property identified above and has or will construct certain stormwater management facilities on the Property, and has developed a Stormwater Maintenance Plan (SWMP No. _____), as may be amended from time to time (the "Plan") for the maintenance of those facilities, which the Town has reviewed and approved, and a copy of which will be maintained at the Town. A drawing showing the general area of the facilities covered by the Plan is attached to this Agreement for ease of identification.

THEREFORE, in consideration of the benefits received by the Owner as a result of the approval by the Town of the Plan, the Owner does hereby covenant and agree with the Town as follows:

1. The Owner shall provide adequate long term maintenance and continuation of the stormwater control measures described in the Plan, to ensure that all stormwater

facilities are and remain in proper working condition. The Owner shall perform inspection and preventative maintenance activities in accord with the Plan.

2. The Owner shall maintain a copy of the Plan on site, together with a record of inspections and maintenance actions required by the Plan. The Owner shall document the times of inspections, remedial actions taken to repair, modify or reconstruct the system, the state of control measures, and notification of any planned change in responsibility for the system. The Town may require that the Owner's records be submitted to the Town.

3. If it is later determined that any future NPDES permit for the Town clearly directs Owners or the Town to manage stormwater treatment systems differently than specified in the Plan, the direction of the NPDES permit shall override the provisions of the Plan.

4. The Owner hereby grants to the Town the right of ingress, egress and access to enter the Property at reasonable times and in a reasonable manner for the purpose of inspecting, operating, installing, constructing, reconstructing, maintaining or repairing the facilities. The Owner hereby grants to the Town the right to install and maintain equipment to monitor or test the performance of the stormwater control system for quality and quantity upon reasonable notice to Owner.

5. If the Town finds that the Owner has not maintained the facilities, the Town may order the Owner to make repairs or improvements to bring the facilities up to the standards set forth in the Plan. If the work is not performed within the time specified by the Town, the Town may enter the property and take any action necessary to maintain or repair the stormwater management facilities; PROVIDED, HOWEVER, that the Town shall in no event be deemed obligated to maintain or repair the stormwater management facilities, and nothing in this Agreement shall ever be construed to impose or create any such obligation on the Town.

6. If the Town incurs expenses in maintaining the stormwater control facilities, and the Owner fails to reimburse the Town for such expenses within 45 days after a written notice, the Town may collect said expenses from the Owner through appropriate legal action, and the Owner shall be liable for the reasonable expenses of collection, including all court costs and attorney fees.

7. The Owner and the Owner's heirs, administrators, executors, assigns, and any other successor in interest shall indemnify and hold the Town harmless from any and all damages, accidents, casualties, occurrences, claims or attorney's fees which might arise or be asserted, in whole or in part, against the Town from the construction, presence, existence, or maintenance of the stormwater control facilities subject to the Plan and this Agreement. In the event a claim is asserted against the Town, its

officers, agents or employees, the Town shall notify the Owner, who shall defend at Owner's expense any suit or other claim. If any judgment or claims against the Town shall be allowed, the Owner shall pay all costs and expenses in connection therewith. The Town will not indemnify, defend or hold harmless in any fashion the Owner from any claims arising from any failure, regardless of any language in any attachment of other document that the Owner may provide.

8. No waiver of any provision of this Agreement shall affect the right of any party thereafter to enforce such provision or to exercise any right or remedy available to it in the event of any other default.

9. The Town, at Owner's expense, shall record this Agreement with the Register of Deeds of Dickson County, Tennessee; this Agreement shall constitute a covenant running with the land, and shall be binding upon the Owner and the Owner's heirs, administrators, executors, assigns, and any other successors in interest.

10. The Owner shall have the facilities inspected in accordance with § 14-506 of the town's stormwater ordinance and certify to the Town that the constructed facilities conform and purport substantially to the approved Plan. If the constructed condition of the facility or its performance varies significantly from the approved Plan, appropriately revised calculations shall be provided to the Town and the Plan shall be amended accordingly.

11. Owner agrees that the failure to follow the provisions and requirements of the Plan may result in the revocation of previously approved credits to stormwater user fees, or the imposition of such stormwater user fees or of additional stormwater user fees.

12. The Owner agrees that for any systems to be maintained by a property owner's association, deed restrictions and covenants for the subdivision or other development will include mandatory membership in the property owners' association responsible for providing maintenance of the system, will require the association to maintain the stormwater system, will prohibit termination of this covenant by unilateral action of the association, and provide for unpaid dues or assessments to constitute a lien upon the property of an owner upon recording a notice of non-payment.

13. This Agreement must be re-approved and re-executed by the Town if all or a portion of the Property is subdivided or assembled with other property.

Owner: _____ Date: _____
Signature by Individual

Owner: _____ Date: _____

Signature by Individual

State of Tennessee, County of Dickson

Personally appeared before me, the undersigned Notary Public of the state and county mentioned, _____ with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and executed this Agreement (Inspection and Maintenance Agreement for Private Stormwater Management Facilities) for the purposes contained herein.

Witness my hand and official seal at office, this _____ day of _____, of the year _____.

Notary Public: _____

My Commission Expires: _____

Accepted by:

_____

For the Town of White Bluff, Tennessee

State of Tennessee County of Dickson

Personally appeared before me, the undersigned Notary Public of the state and county mentioned, _____, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and executed this Agreement (Inspection and Maintenance Agreement for Private Stormwater Management Facilities) on behalf of the Town of _____ for the purposes contained herein.

Witness my hand and official seal at office, this _____ day of _____, of the year _____.

Notary Public: _____

My Commission Expires: _____

APPENDIX C

THE LAW OF RESTRICTIVE COVENANTS THAT RUN WITH THE LAND AND STORMWATER MAINTENANCE

Sid Hemsley
MTAS
February 15, 2011

The law of restrictive covenants, in one sentence

> When a covenant runs with the land liability to assume its burdens or right to use its benefits passes to the landowner's assignees. Such a covenant is a promise, the effect of which is to bind the promisor and his lawful successors to the burdened land for the benefit of the promisee and his lawful successors to the benefitted land. [Tennessee Supreme Court, in American Oil Company v. Rasar, 308 S.W.2d (Tenn. 1957), at 941.]

Two kinds of restrictive covenants in Tennessee

- Real covenants, or covenants that run with the land at law. These covenants require that:

(1) The covenants must "touch and concern" the land;

(2) The original covenanting parities intended the covenant to run;

(3) Some form of privity of estate;

(4) The covenant be in writing.

- Equitable servitudes (variously called "reciprocal negative easements," "implied equitable reciprocal servitudes," and "equitable restrictions."). These covenants require that:

(1) The covenants must "touch and concern" the land;

(2) The original covenanting parties intended the covenant to run with the land;

Montie, Diane, *A Survey Of The Law Of Restrictive Covenants That Run With The Land In Tennessee*, 50 Tenn. Law Review 149 (1982). Also see Tennsco Corporation v. Attea, 2002 WL 1298808 (Tenn. Ct. App.) for probably the shortest primer on restrictive covenants].

Restrictive covenants are tied to land development

It is said in Montie, Diane, that:

> The law relating to restrictive covenants has changed little during the last one hundred years in Tennessee, but the reasons for using restrictive covenants have changed to reflect a more complex society. Historically, the usual purpose of restrictive covenants was to protect the grantor's residence. Today, the use of the land is more complex. Subdivisions, condominiums, apartments, and single family residences require diversified land use planning to protect those communities of purchasers. [At 149]

One of the modern complexities of the development of land, for whatever its intended use, is that such development is subject to stormwater management requirements. A tool for managing stormwater that appears in stormwater regulations is the maintenance agreement for the stormwater facilities that appear in developments. Those maintenance agreements commonly contain restrictive covenants that run with the land, that obligate both present and subsequent owners of the property to continue the maintenance of the stormwater facilities.

For example, the Knox County Stormwater Maintenance Manual contains a document entitled COVENANTS FOR PERMANENT MAINTENANCE OF STORMWATER FACILITIES, which contains various covenants the property owner must agree to as a condition of the development of his property. Paragraph 5 provides that:

> To ensure that subsequent property owners have notice of these Covenants and the obligations therein, the Property owner will include in all instruments conveying any or all of the above described property on which the stormwater and/or water quality facilities are located, the specific instrument numbered referencing these Covenants and the recorded subdivision plat as indicated in paragraph 12 herein.

Paragraph 11 provides that "These Covenants are permanent and shall run with the land."

Questions related to restrictive covenants in stormwater context

Similar documents are used by cities and counties across Tennessee and in other states. Such maintenance agreements that run with the land raised at least two questions in the stormwater seminars held last year:

1. What is the legal status of such agreements, applying as they do, to the subsequent development of property?

As far as I can determine, there are no Tennessee cases involving stormwater infrastructure. But for reasons that will appear below, restrictive covenants containing stormwater infrastructure generally arise from new property development mandates and agreements between local governments and developers. For that reason such restrictive covenants will generally reflect real covenants running with the land at law. However, where, for some reason, the restrictive covenant fail the real covenants test, equity might, depending on the circumstances, intervene to impose the covenants as an equitable servitude.

2. What is the legal status of such agreements with respect to property that has already been developed?

For reasons that will appear below, generally, such agreements with respect to such property will probably neither qualify as real covenants that run with the land at law, nor as equitable servitudes.

Restrictive covenants are contracts between the parties to them

Restrictive covenants are contracts between the parties to them. Maples Homeowner's Association, Inc. v. T & R Nashville Limited Partnership, 993 S.W.2d 36 (Tenn. Ct. App. 1999), says on that subject:

> Covenants, conditions and restrictions such as the ones contained in the Maples Declarations are property interests that run with the land. [Citations omitted by me.] They arise, however, from a series of overlapping contractual transactions. [Citations omitted by me.] Accordingly, they should be viewed as contracts. [Citations omitted by me.], and they should be construed using the rules of construction generally applicable to the construction of other contracts ... [Citations omitted by me.]
>
> The courts enforce restrictive covenants according to the clearly expressed intentions of the parties manifested in the restrictions themselves. [Citations omitted by me.] We give the terms used in restrictions their fair and reasonable meaning... [Citations omitted by me.], and we decline to extend them beyond their clearly expressed scope. [Citations omitted by me.] We also construe the terms of a restriction in light of the context in which they appear.

> When the restrictions terms are capable of more than one construction, we should adopt the construction that advances the unrestricted use of the property. [Citations omitted by me.] We should also resolve ambiguities in the restrictions against the party who drafted them ... [Citations omitted by me.], and finally we should resolve all doubts concerning covenants applicability against the covenant. [Citations omitted by me.] [At 38-39]

While the Maples Declarations were part of a property development scheme that reflected real covenants that ran with the land at law, the contractual aspect of restrictive covenants applies to both kinds of restrictive covenants. We will see below that equitable servitudes reflect the intent of the original covenanting parties even where that intent does not necessarily appear in one or more deeds in the chain of title reflecting the conveyance of the property at issue.

It is also said in Gambrell v. Nivens, 275 S.W.3d 429 (Tenn. Ct. App. 2008), that:

> An owner of land may sell portions of it and make restrictions as to its use for the benefit of himself as well as for the benefit of those to whom he sells. [Citations omitted by me.] Even though Tennessee law does not favor private restrictions upon the use and enjoyment of land, our courts will enforce the covenants as they would contracts, according to the clearly expressed intention of the parties. [Citations omitted by me.] Covenants that fail the more exacting requirements for real covenants at law may still be enforced in equity as an equitable servitude. An equitable servitude is a "covenant respecting the use of land enforceable against successor owners or possessors in equity regardless of its enforceability at law." [Citation omitted by me.] [At 436*37]

Differences and similarities between the two kinds of restrictive covenants

It was said in Turnlev v. Garfinkel, 362 S.W.2d 921, that:

> It is a common practice for developers of high-class residential subdivisions to provide restrictions to protect the beauty of the neighborhood and the value of the property for residential use. Such restrictions are usually regarded as covenants running with the land, binding on anyone who purchases with notice of them, and enforceable by the owner of any of the lots so protected.... [At 923]

The Court appears to have been speaking of covenants that run with the land at law. As the Court itself noted, the lots were part of a subdivision approved by the Davidson County Planning Commission and recorded in the registrar's office, and that the subdivision's developer had filed a set of restrictive covenants that were referred to and made a part of the deeds conveying the lots at issue. There were 11 covenants "and provide that they are deemed covenants running with the land until December

1985."

Citing that case, Maples Homeowner's Association. Inc., above, declared that, "Covenants, conditions and restrictions such as the ones contained in the Maples Declarations are property interests that run with the land." [At 38-39] The "Maples Declarations involved a planned unit development named The Maples under the Horizontal Property Act," codified in Tennessee Code Annotated, §§ 66-27-101-123. In describing The Maples Declarations, the Court declared that:

> The Maples Declarations contain a fairly standard set of land use restrictions as well as a mechanism for their enforcement. They establish a homeowner's association whose membership consists of the "owners of lots" in The Maples, and Article VH(l) provides in part:
>
> The Association, or any Owner, shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereinafter imposed by the provisions of this Declaration. [At 37] [Emphasis is mine.]

Montie, Diane, above, says, "The restrictive covenant is generally created by a specific grant in a deed or by reference in a deed to a general plan of development." [At 150]

The touch and concern requirement

With respect to the "touch and concern" requirement, it is said in Gambrell v. Nivens, 275 S.W.3d (Tenn. Ct. App. 2008), that:

> Although there is some dispute among authorities as to the test [that the covenant must Atouch and concern" the land, there is little question that building restrictions embodied in a covenant between owners in fee satisfy this test, both as to the benefit and the burden. [Citing unreported Attea v. Tennsco, 2002 WL 1298808 (Tenn. Ct. App.).

Also see Arthur v. Lake Tansi Village. Inc.. 590 S.W.2d 923 (Tenn. 1979). Intention of parties that covenant run with the land

With respect to the requirement that the covenanting parties intended that the covenant run with the land, it is further said in Gambrell, above, that:

> The covenants in Tennsco and Essary failed to express a substantive element of a real covenant at law, the intent to bind the successors, heirs, and assigns. Equity requires proof of the same substantive intent but does not confine the

> scope of inquiry to the language of the covenant itself. Nonetheless, Tennsco and Essary together stand for the proposition that our courts will broaden the scope of inquiry only where the vendor imposed the restrictions according to a general plan of development. A development plan logically supports a finding that the parties intended the covenant to run with the land and bind the grantees' successors, assigns and heirs. The very concept of a development plan and the subsequent expectations of the purchasers require the individual burdens and their corresponding benefits to inhere in the land and to benefit and bind whoever occupies that land. This much seems implicit, for a common plan would crumble if the burdens and benefits were merely personal to the contracting parties. [At 441-42] [Emphasis is mine.]

In Essary v. Cox, 844 S.W.2d 169 (Tenn. Ct. App. 1992), the Essarys owned a service station, and on an adjoining lot, a convenience store. They sold the convenience store the deed to which contained this covenant: "It is expressly understood and agreed that the above described premises [the convenience store] shall not be used for the purpose of any sales of oil and gas supplies or products." The convenience store was subsequently resold several times, the deeds to which contained mention of the covenant. But on the sale of the convenience store to Cox in 1989, the deed, at the request of Cox, did not contain the covenant. In 1985, the Essarys had also sold their service station adjacent to the convenience store, to their children. The Essary children subsequently sued Cox for selling oil and gas supplies from the convenience store in violation of the "restrictive covenant" that appeared in the first deed of sale of the convenience store.

The court held that there was not a restrictive covenant running with the land, for two reasons:

First, the covenant in the deed of the first sale of the convenience store by the Essarys did not contain language indicating that it applied to "the parties successors and assigns, i.e. remote grantees." The Court pointed to Lowe v. Wilson, 250 S.W.2d 366 (1952), in which the Tennessee Supreme Court had held that even this language in a deed did not qualify as a restrictive covenant:

> It is hereby agreed and understood between the parties hereto that no beer, beverages, or intoxicants of any kind or character shall ever be sold upon the lot or parcel of land herein conveyed, and this agreement is a part of the consideration for this sale. [At172]

Second:

> In cases involving a common development plan, therefore, courts have demonstrated a willingness to enforce restrictive covenants, in the form of

> equitable servitude, under the rationale that a remote grantee's knowledge of such restrictions may be imputed from the existence of a common plan as evidenced in deeds or on the plat itself...Outside the context of restrictions which evidence a common development plan, however, Plaintiffs have cited no authority in this jurisdiction for the proposition that restrictive covenants may be imposed on remote grantees based upon their knowledge of the existence of a prior restriction. [At 171]

In Tennsco, above, the Daugherty's owned a large piece of property north of Cool Springs Shopping Center in Williamson County, in the middle of which their historic home sat. They sold the property north and south of their home to Wills, "effectively dividing the property into three parts," according to the Court. The Daugherty's deed to Wills contained this restriction:

> This conveyance is made subject to the restriction that any buildings constructed on the land shall be single family dwellings of traditional design at least 4,000 square feet in size and on lots of one (1) acre or more.

Wills subsequently quit-claimed the property to Mallory Park, "subject to all restrictions, easements and encumbrances or [sic] record." Park gave Tennsco a deed of trust to secure a loan. He defaulted on the loan and conveyed the property to Tennsco, but the deed did not contain those restrictions. Two conveyances later, the property ended up in Attea's hands, and he attempted to enforce the restrictions contained in Daugherty's deed to Wills.

The Court held that the restriction did not operate as a restrictive covenant that ran with the land. It met the requirement for a real covenant that ran with the land at law as to the "touch and concern" requirement because the covenant was a building restriction. But it failed the intent of the original covenanting parties that the covenant run with the land because the covenant did not include the magic words that it bound the heirs and assigns of the grantees.

As to the enforceability of the restrictions as equitable servitude, the Court said:

> Therefore, in order to enforce an equitable servitude or a reciprocal negative easement it must appear that the grantor had in mind a general plan of development and intended for the restrictive covenant to benefit all the property involved [At 3] [Citations omitted.]

It also declared that:

> We think the undisputed facts show that there was no general plan or scheme of development adopted to cover the property held by the Daughertys. As the

> trial judge observed there was no map or sales brochures showing the restriction. And there is no restriction on the property the Daughertys retained. When they conveyed the property to the Butters, they did not include any restrictions. Since, there was no reciprocal easement, the conclusion is inescapable that the restriction placed in the Wills deed was personal to the Daughertys. [At 3]

General plan of development required in both kinds of restrictive covenants

That general rule applies in Tennessee, to both types of restrictive covenants. The Tennessee Supreme Court said in Land Developers v. Maxwell, 537 S.W.2d 2d 904 (Tenn. 1976), that:

> Ordinarily when the owner of a tract of land subdivides it and sells different lots to separate grantees, and puts in each deed restrictions upon the use of the property conveyed, in accordance with a general building improvement or development plan, such restrictions may be enforced by any grantee against any other grantee. Likewise, the property remaining in the hands of the vendor may also be held in equity to be subject to a servitude so as not to be used in a manner different from that contained in the restrictions..... This rule was recognized in this state in the leading case of *Ridley v. Haiman,* 164 Tenn. 239, 47 S.W.2d 750 (1932)...

It appears that the Court was speaking of two classes of restrictive covenants: The first is those put in each deed to each grantee of separate lots, "in accordance with a general building, improvement or development plan...." and which appear to meet all the requirements of covenants that run with the land at law; and the property remaining in the hands of the vendor which "may also be held in equity to be subject to a servitude so as not to be used in a manner different from that contained in the restrictions." In this case, the Court held that:

> Upon the facts shown in this record, we have no hesitancy in holding that the unsold lands of Mr. M.L.Tipton, and his corporation, here in issue, were restricted in his hands by essentially the same covenants as he had imposed in the deed to his various grantees, by an equitable servitude because there seems to be little question but that he did intend a general plan of development of the entire area as a residential "suburb" or subdivision. [At 913]

When do restrictive covenants take effect?

It is said in East Sevier County Utility District of Sevier County v. Wachovia Bank & Trust Company, 570 S.W.2d 850 (Tenn. 1978), that:

Likewise, petitioner now concedes that none of the restrictive covenants could be given retroactive effect, absent an express contract so providing, although its contentions in the trial court in that regard were unclear and seem to have been to the contrary....We have already stated that no set of covenants should be given any general retroactive effect. [At 852-53]

Southern Advertising Co. Inc. v. Sherman, 38 S.W.2d 491 (Tenn. Ct. App. 1957), also declares that:

> If it is a covenant running with the land, at least in the absence of an expressed contrary intention, its operation must be confined to the property as it existed at the time of the covenant. And the rule of strict construction applies when an attempt is made to apply the covenant to other lands. [At 493]

Remedies for the violation of both kinds of restrictive covenants

It is said in Monte, Diane, that, "A complainant can sue either at law or equity to enforce restrictive covenants." At law, the remedy for the violation of restrictive covenants that run with the land at law is damages. At equity, the remedies of specific performance and injunction have been used to enforce restrictive covenants.

But that distinction appears to be meaningless. In most of the Tennessee cases in which the violation of restrictive covenants is an issue by far the most requested remedy in both kinds of covenants, is the enforcement of the restrictive covenants rather than damages. A large number of those cases requesting the enforcement of restrictive covenants involve alleged covenants that do not qualify as real covenants that run with the land at law, but where the court is being asked to find a restrictive covenant in the form of an equitable servitude.

APPENDIX D

CONFLICTS BETWEEN MUNICIPAL BUILDING CODES AND STORMWATER REGULATIONS

Sid Hemsley and John Chlarson
MTAS, 2010
February 8, 2011

Tennessee Code Annotated, § 68-120-101 et seq., authorizes the state fire marshal to adopt statewide building and fire safety code standards, which municipalities can choose to adopt under the statutory scheme. Municipalities that choose to adopt and enforce building construction standards for one and two family dwellings will adopt the International Residential Code. Municipalities that choose to adopt and enforce building and fire safety code standards for other buildings, will adopt the International Building Code, and either the International Fire Code or the Uniform Fire Code.

It is made unlawful in Tennessee Code Annotated, § 68-120-102(a) to:

(1) Construct, alter or repair any building or structure....in violation of any rule duly promulgated as provided in this chapter; or
(2) Maintain, occupy or use a building or structure or part of any building or structure that has been erected or altered in violation of any rule promulgated as provided in this chapter.

****

Tennessee Code Annotated, § 68-120-106, which is part of the above statutory scheme, further provides that:

> The state fire marshal, such fire marshal's deputies and assistants, including all municipal fire prevention or building or officials in those municipalities having such officers, and where no such officer exists, the chief of the fire department of every incorporated city or place in which a fire department is established, and the mayor of each incorporated place in which no fire department exists, and all state officials, now having jurisdiction or as directed by the governor, or county officers having jurisdiction in regard to any matter regulated in this chapter shall have concurrent jurisdiction. No regulation shall be issued or enforced by any such official that is in conflict with the provisions of this chapter. The provisions of this chapter shall supercede all less stringent provisions of municipal ordinances. [Emphasis is mine.]

It is also a Class B Misdemeanor for any person "who violates a provision of this chapter or fails to comply with this chapter, or with any requirements of this chapter, or who erects, constructs, alters, or has erected, constructed or altered a building or structure in violation of this chapter [Emphasis is mine .]

The unreported case of Wilkes v. Shaw Enterprises, 2008 WL 695882 (Tenn. Ct. App.), also said in finding for the plaintiff in his complaint that the defendant contractor did not install flashing and weep holes in connection with brick veneer walls of his house, as required by the county building code:

> Under the statutory framework, the county attorney or any other official vested with enforcement powers, such as the Maury County Office of Building and Zoning, may institute an injunction to prevent the violation of the code. Tenn. Code Ann. § 5-20-104. Further, any person who violates the adopted code provision commits a Class C Misdemeanor. Tenn. Code Ann. 5-20-105. Therefore, according to the applicable statutes, state law in this situation requires compliance with the adopted 1995 CABO One and Two Family Residential Code. [At 7]

Under those two state statutes, it appears that neither municipalities nor counties can adopt building code provisions that are less stringent than are the provisions of the building and fire codes adopted by the state and approved by the state for adoption by local governments.

It remains to be seen whether there will be municipal building codes that conflict with stormwater regulations and what the legal outcome of such conflicts will be.