

Stormwater Utilities in Georgia

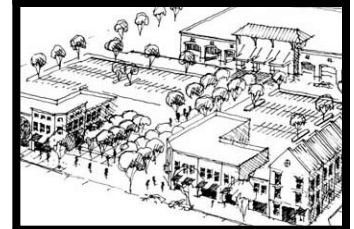
Joshua Smith
Spring 2006

Land Use Clinic



university of georgia

School of Law & College of Environment and Design



The **UGA Land Use Clinic** provides innovative legal tools and strategies to help preserve land, water and scenic beauty while promoting creation of communities responsive to human and environmental needs. The clinic helps local governments, state agencies, landowners, and non-profit organizations to develop quality land use and growth management policies and practices. The clinic also gives UGA law students an opportunity to develop practical skills and provides them with knowledge of land use law and policy.

For more information about the UGA Land Use Clinic contact:

Jamie Baker Roskie, Managing Attorney
UGA Land Use Clinic
110 Riverbend Road, Room 101
Athens, GA 30602-1510
(706) 583-0373 • Fax (706) 583-0612
jroskie@uga.edu

This report was written for the **Initiative for Watershed Excellence: Upper Altamaha Pilot Project**, which is made possible by US EPA Clean Water Act 319 program funds, administered by the Georgia Environmental Protection Division, Non-Point Source Program.

For more information about the IWE, contact:

Christine Rodick, Project Manager
UGA River Basin Center
110 Riverbend Road, Room 101
Athens, GA 30602-1510
(706) 542-9745 • Fax (706) 583-0612
christine.rodick@gmail.com

The author thanks Larry Kaiser, Laurie Fowler, Seth Wenger and Christine Rodick for their valuable assistance in creating this document.

Stormwater Utilities in Georgia

Author: Joshua Smith

Editor: Jamie Baker Roskie
University of Georgia Land Use Clinic

Spring 2006

Contents

| | |
|--|----|
| I. Introduction..... | 1 |
| II. Benefits | 1 |
| III. Preliminary Actions..... | 2 |
| IV. Expenditures..... | 3 |
| V. Rate Structures..... | 4 |
| VI. Legal Authority to Establish a Stormwater Utility in Georgia..... | 5 |
| A. <i>Fulton County Taxpayers Association v. City of Atlanta</i> | 6 |
| B. <i>McLeod v. Columbia County</i> | 7 |
| VII. Ordinances..... | 8 |
| A. Athens-Clarke County..... | 8 |
| B. City of Griffin..... | 9 |
| C. Columbia County..... | 10 |
| VIII. Conclusion..... | 10 |
| IX. For more information..... | 10 |

Stormwater Utilities in Georgia

Joshua Smith
Spring 2006

I. Introduction

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

Proper management of stormwater is essential to maintaining acceptable water quality standards. As a result of nonpoint source pollutants, such as fecal coliform bacteria, nutrients, pesticides, etc., contained in stormwater discharge, water quality can be severely impaired. Many aquatic organisms are adversely affected by the sediment, organic chemicals, and elevated water temperatures caused by stormwater runoff.¹ Elevated water temperature and nonpoint source pollutants are two significant factors that reduce dissolved oxygen levels in water bodies. Adequate levels of dissolved oxygen are needed to support aquatic life. Humans are affected by

exposure to contaminated fish or high concentrations of dangerous bacteria in areas where people swim and recreate. Degraded waterways may also have reduced aesthetic value.²

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

II. Benefits

When part of a comprehensive stormwater plan, a stormwater utility can assist in meeting the guidelines set forth by the Metropolitan North Georgia Water Planning District (Metro District), as well as state and federal National Pollutant Discharge Elimination System (NPDES) and Total Maximum Daily Load (TMDL) legislation. Below is a summary of the requirements of each of these regulatory schemes and how a stormwater utility can help meet those requirements.

The Metro District oversees the management of stormwater in a 16-county area around metropolitan Atlanta, creates policy, and facilitates multi-jurisdictional projects.⁴ One of the main requirements of the Metro District is implementation of the Model Ordinance for Post-Development Stormwater Management. Along with site-specific performance criteria for managing runoff, the

² *Id.* at 514-515.

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

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

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

ordinance also requires on-going maintenance and inspection of stormwater structures and facilities.⁵ Local governments within the Metro District may be ineligible for state grants or loans on stormwater-related projects if they do not follow the recommendations of the board.⁶ A stormwater utility can assist a local community in complying by providing a reliable means of funding with which to implement these requirements.

Under the Clean Water Act (CWA), the NPDES Stormwater Program requirements establish the amount of pollutant discharge a community can have from its storm sewer system. NPDES is a mandated process by which communities affected must apply for all required permits. Phase II of the program expands the list of communities covered under the Stormwater Program to include certain small municipal separate storm sewer systems (MS4s). These are MS4s serving populations of 100,000 or less that are located in urbanizing areas or have been otherwise designated by state permitting authorities. Phase II requires small MS4s to design stormwater management programs that will protect water quality and meet the appropriate water quality standards of the CWA as well as manage runoff from construction sites that disturb 1 to 5 acres of land.⁷ Noncompliance with NPDES could result in fines and loss of permits for local governments.⁸ However, complying with the NPDES program directly burdens a community with the costs associated with hiring new employees for new or improved stormwater programs as well as for improvements to the infrastructure.⁹

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

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

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

III. Preliminary Actions

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

The amount charged in each jurisdiction may vary depending on local conditions and the duties on the

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

6 *Supra* note 4.

7 Brisman, *supra* note 1, at 506, 508.

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

9 See *id.* § 1.7.3.

10 Georgia Conservancy, *What are TMDLs?* (2005), available at http://www.georgiaconservancy.org/WaterQuality/WQ_whataretmdls.asp.

11 Janice Kaspersen, "The Stormwater Utility: Will It Work in Your Community?" (2001), *Stormwater*, available at http://www.forester.net/sw_0011_utility.html.

12 Spitzer, *supra* note 3.

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

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

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

IV. Expenditures

Establishing a stormwater utility does have start-up costs, and almost all stormwater utilities are created with money from the general fund.²¹ Many localities conduct studies prior to the establishment of the utility in order to tailor the program to the specific stormwater needs of the community.²² Other steps include hiring of staff, rate analysis (determining how much to charge, normally a parcel-by-parcel analysis of the amount of stormwater contributed by each piece of property), exploration of all potential additional revenues and their uses, the actual creation of the utility, and public information programs.²³ The City of Griffin, for example, spent \$180,000 on background research and public education over 4 years setting up the state's first stormwater utility in 1997.²⁴

Once a utility is up and running, supplemental sources of income include grants, loans, taxes, or bonds.²⁵ Possible grants include Nonpoint-Source Implementation Grants from the EPA²⁶ and Hazardous Mitigation Grants from the Georgia Emergency Management Agency. Hazardous Mitigation Grants go toward projects that reduce or eliminate long-term risks to human life and property from the effects of natural hazards, for which the federal government will provide 75% funding, with a 25% local contribution.²⁷ Nonpoint-Source Implementation Grants are to implement nonpoint source mitigation projects and provide 60% federal funding with a 40% local match

14 Grant Hoag, *Developing Equitable Stormwater Fees* (2004), available at http://www.forester.net/sw_0401_developing.html.

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

16 Richard Whitt, "Cobb County: Olens wants fee on storm runoff," *Atlanta Journal Constitution*, Feb. 2, 2006, available at http://www.ajc.com/search/content/auto/epaper/editions/thursday/cobb_341ec61fb11ff0e110e1.html.

17 Keller, *supra* note 11.

18 See *id.*

19 See *id.*

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

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

22 Brant D. Keller, *Buddy Can You Spare a Dime? What's Stormwater Funding* (2001), available at http://www.forester.net/sw_0103_buddy.html.

23 See *id.*

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

25 See *id.*

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

27 Keller, *supra* note 21.

²⁸ Other supplemental sources include the Clean Water State Revolving Loan Fund, administered by the Georgia Environmental Facilities Authority,²⁹ which provides loans for major capital improvements related to water quality and wastewater treatment, and the Special Purpose Local Option Sales Tax (SPLOST) which allows local jurisdictions in Georgia to charge a 1% sales tax for designated projects to be levied for a period not to exceed 6 years.³⁰

Also, for ongoing costs after the utility is established, stormwater revenue bonds may be issued with the stormwater utility identified as the dedicated revenue stream demonstrating the ability to pay back the bonds. To successfully secure the bonds, a utility must show a stormwater master plan, a capital improvement plan, and a history of collection.³¹

In 2004, a sample of ongoing expenditures for stormwater utilities in North Carolina showed that approximately 44% was spent on system operations and maintenance, 20% on capital improvements, 12% on administration, 8% on planning and engineering, and less than 1% on public education.³²

V. Rate Structures

Because a stormwater utility is meant to be a self-sustaining operation, collected funds are placed in an account dedicated to stormwater management.³³ Either a special revenue fund or enterprise fund can be used. A special revenue fund provides for the isolation of stormwater utility revenues and expenditures.³⁴ An enterprise fund is typically used

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

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

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

²⁸ See *id.*

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

³⁰ Keller, *supra* note 21.

³¹ See *id.*

³² Stacey Isaac, *Financing Local Government Stormwater Programs: Examples from North Carolina* (2005), available at http://www.efc.unc.edu/publications/Presentations/Isaac_Financing%20local%20government%20stormwater%20programs_Examples%20from%20NC.pdf.

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

³⁴ See *id.*

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

³⁶ Spitzer, *supra* note 32.

³⁷ Griffin, Ga., Code § 94-162 (2005), Columbia County, Ga., Code § 34-108 (2006), Athens-Clarke County, Ga., Code § 5-5-5 (2005), DeKalb, Ga., Code § 25-364 (2005), Decatur, Ga., Code § 42-226 (2004).

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

³⁹ See *id.*

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

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

to 1 ERU in its jurisdiction. Typically jurisdictions will equate an ERU with the average amount of impervious surface area for a single family dwelling.⁴² For example, the fictional city of Greenacre, filled with many large single family homes, may define 1 ERU to be 2,000 ft² to equate to the amount of runoff from one large single family home. On the other hand, Whiteacre, filled with lots of row houses, may define 1 ERU to be 500 ft² so that each row house was equivalent to 1 ERU. Or Greenacre might also decide to make 1 ERU equivalent to 100 ft² and adjust the amount billed per ERU accordingly (charge less per ERU because each property would then have more of them). There are many potential variations. After the ERU for a parcel has been established, the final charge is determined either by simply multiplying the ERU by a single monetary unit,⁴³ as in Columbia County,⁴⁴ or by adding several component charges together, as in Athens-Clarke County.⁴⁵

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

42 See *id.*

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

44 Columbia County, Ga., Code § 34-113 (2006).

45 Athens-Clarke County, Ga., Code § 5-5-8 (2005),

46 Columbia County, Ga., Code § 34-115 (2006), Athens-Clarke County, Ga., Code § 5-5-12(a)(2) (2005), Griffin, Ga., Code § 94-171 (2005).

47 City of Decatur, *Real Property Taxes & Fees* (2006), available at http://www.decaluriga.com/cgs_citysvcs_attr_taxesandfees.aspx.

48 Columbia County, *Columbia County Stormwater Utility Information Package* (2005), available at http://www.columbiacountyga.gov/docs/informationpkgg_updated1-05__2_.pdf.

its residential customers on an annual basis and to commercial properties monthly.

VI. Legal Authority to Establish a Stormwater Utility in Georgia

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

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

The most common legal challenge to stormwater utilities relates to whether the charge is considered a fee or a tax.⁵⁴ While local governments can raise taxes

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

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

51 Ga. Const. art. IX, §. II, par. III(a)(6) authorizes any county to provide “Stormwater...collection and disposal systems.”

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

53 Ga. Code Ann. § 36-82-62(a)(3) (2006).

54 Brisman, *supra* note 1, at 520.

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

A. Fulton County Taxpayers Association v. City of Atlanta

In 1999 the City of Atlanta passed an ordinance creating a stormwater utility funded by annual charges based on the size of the parcel of property owned by the landowner. The City charged \$11.99 per year for each 10,000 ft² of property. Parcels less than 10,000 ft² were charged \$11.99 per year with larger parcels charged \$11.99 per 10,000 ft² of property or portion thereof. (For example a parcel with area between 10,001 ft² and 20,000 ft² would be charged \$23.98.) That area-based charge was then multiplied by a factor of 1-4 (the development intensity factor code) depending on the specific use (commercial, residential, industrial) of the land.⁵⁹

When the ordinance was challenged in the late 1990s, the court ruled that while the City had the power to provide stormwater management services, the manner in which the city assessed its service charge was characteristic of a tax rather than a fee.⁶⁰ The charge was declared unlawful because the city had

not followed the proper procedures for enacting a new tax. Furthermore, the court held that even if the charge was ruled a fee it was still unlawful because not all landowners received a direct benefit.⁶¹ The court also rejected the argument made by the City that each landowner, regardless of the size of his or her lot, received an “inchoate” benefit because of the mere existence of the stormwater utility.

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

Had the court ruled the charge a fee, the charge was still undermined by the fact that the City’s rate structure required some landowners who contributed little stormwater, and therefore received little benefit, to pay a disproportionate amount based on simply the size of their land. This was not consistent with *Monticello, Ltd. v. City of Atlanta*,⁶⁵ which held that “a municipality cannot impose a fee for services that have not been provided.” By looking at the size and use of the property only, rather than the amount of impervious surface on a parcel (the most important factor in determining the amount of stormwater

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

56 *Id.* at 830.

57 Ga. Const. art. VII, §. I, par. III, Ga. Const. art. VII, § II, par. I.

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

59 *Fulton County Taxpayers Association*, 1999 WL 1102795 at *1.

60 *Id.* at 1.

61 *Id.* at 3.

62 *Id.* at 3 (internal citation omitted).

63 *Fulton County Taxpayers Association*, 1999 WL 1102795 at *3.

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

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

services required) the ordinance effectively distributed the cost of stormwater services to all citizens, some of whom may not have contributed to the problem, and thereby received no services and no benefit. The Atlanta ordinance also did not take into account private mechanisms a landowner may have for disposing of his or her own stormwater runoff, such as ponds, which might lessen the services received from the City and benefit received.⁶⁶

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

B. McLeod v. Columbia County

Established in 1999, the Columbia County ordinance charges landowners in the designated service area a monthly stormwater utility charge based on the amount of impervious service area on their property.⁶⁷ The ordinance charges \$0.0875 per month for every 100 ft² of impervious surface area with a single family dwelling defined as having 100 ft². The ordinance defines which parcels are eligible for an exemption or credit and what procedures must be followed to obtain that credit.

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

First, the court affirmed that local governments had the constitutional and statutory authority to set up

stormwater utilities for their citizens.⁶⁹ The second challenge made to the Columbia County ordinance was that the County was required to establish a CID pursuant to the procedures in the Georgia Constitution prior to the enactment of such a utility. The court rejected this argument, stating that the CID provisions were not applicable and that the provisions in the Georgia Constitution allowing for the creation of a CID by the Georgia Legislature to fund stormwater improvement did not limit the powers given to local governments by the Home Rule section of the Constitution.⁷⁰

The most important aspect of the court's ruling was the finding that the charge imposed by Columbia County was a fee and not a tax. Building on its own jurisprudence, and after considering much persuasive authority, the court found that the stormwater charge was a fee because it provided compensation for direct benefits conferred on the land and was not intended to raise general revenue, the cost of the services were properly apportioned, the charge was not mandatory, and there was no lien directly against the property.⁷¹ Starting with what was said in *Gunby*,⁷² that a charge is generally not a tax if its object and purpose is to provide compensation for services rendered, the court gave great weight to opinions from courts in other states stating that the properties charged received a special benefit for stormwater services through the control and treatment of the polluted stormwater runoff from those properties.⁷³

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

69 *Id.* at 243.

70 *Id.* at 243.

71 *Id.* at 245.

72 *Gunby v. Yates*, 214 Ga. 17, 102 S.E.2d 548, 19 (1958).

73 *McLeod et. al.*, 278 Ga. at 245.

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

75 *McLeod et. al.*, 278 Ga. at 245. As a corollary the court also noted that funding the stormwater management services through a general tax would shift the cost of managing stormwater prob-

66 *Fulton County Taxpayers Association*, 1999 WL 1102795 at *3.

67 *McLeod et. al.*, 278 Ga. at 242.

68 *Id.* at 243.

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

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

VII. Ordinances

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

possible, the following is a sampling of ordinances currently in effect in Georgia.

A. Athens-Clarke County

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

Every landowner with impervious surface on his or her property is first required to pay a "base charge" of \$2.07 x ERU, which is money used to pay for the administrative and management costs of running the utility.⁸³ Added to the base charge is a quantity charge. The quantity charge is analogous to the amount of stormwater that is discharged from certain types of property. Different types of property are assigned an ERU value that represents the amount of water typically discharged from that type of property.⁸⁴ A single-family home, for example, would be said to discharge 0.6 ERU. In ACC the quantity charge is calculated by \$0.86 x ERU. If land does not fit into a predetermined category with a set ERU, the ACC ordinance defines 1 ERU as being 2,682 ft² of impervious surface.⁸⁵ Therefore for 8,046 ft² impervious surface, the ERU value would be 3.

The third calculation used by ACC in determining the stormwater fee, the quality charge, recognizes that runoff from some types of property, such as industrial property, have more pollutants or different types of pollutants requiring more treatment.⁸⁶ The water quality factor ensures that those landowners whose

lems to owners of undeveloped land who neither contribute to nor cause stormwater issues, *Id.* at 245.

76 *Id.* at 245.

77 *Id.* at 245.

78 *Id.* at 246.

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

80 *Ogden Environmental and Energy Services, Inc., Stormwater Utility Service Charge Credit Technical Manual (1997)*, available at <http://www.griffinstorm.com/SW/Documents/>

[Home/Credit_Manual.htm](#), Columbia County, *Stormwater Management Design Manual*, Information Package, *Pond Credit Application* (2005), available at <http://www.columbiacountyga.gov/home/index.asp?page=2725>, Athens-Clarke County Stormwater, Utility Credit System (2004), available at <http://www.accstormwater.com/billing/utilitycredits.asp>, Decatur, Ga., Code §42-229 (2004).

81 Athens-Clarke County Stormwater, *supra* note 46.

82 Athens-Clarke County, Ga., Code § 5-5-8(d) (2005).

83 See *id.* § 5-5-8(e), § 5-5-8(d)(1).

84 See *id.* § 5-5-8(d)(2).

85 See *id.* § 5-5-8(e).

86 See *id.* § 5-5-8(d)(3).

land contributes more polluted runoff requiring more treatment pay more for those services. In ACC the quality charge is calculated by $\$0.57 \times \text{ERU} \times \text{Water Quality Factor (WQF)}$.⁸⁷ For example, WQFs are 0.5 for low density residential and 1.9 for commercial/industrial land.⁸⁸

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

Apart from the detailed rate structure the ACC ordinance also contains a section detailing the stormwater service areas and a detailed list of exemptions and credits. (Being able to get credit towards the stormwater bill is an important aspect of the “fee” characterization of the stormwater charge being voluntary as stated in *McLeod*.)

The ACC ordinance breaks exemptions down into four classifications.⁸⁹ Type 1 parcels are exempt from all stormwater utility charges. Type 1 parcels include undeveloped land (because it contains no impervious surfaces), railroad tracks, and public highways.⁹⁰ Type 2 and type 3 exemptions apply only to certain parcels within designated areas in which stormwater services are not provided by ACC. These include the riparian service area,⁹¹ the University of Georgia service area, and non-ACC NPDES Phase II stormwater service areas.⁹² Those parcels are exempted from the quantity charge (type 2) and the quality charge (type 3).⁹³ Type 4 exemptions include parcels which have onsite

stormwater management systems for which property owners can receive up to 100% credit for the quantity and quality charges by following procedures from the *Georgia Stormwater Manual* and practices designed to mitigate the impact of their stormwater.⁹⁴ Public and private schools are also included in type 4 exemptions and can receive a discount of up to 20% off their total charge for teaching a curriculum that promotes water awareness and protection measures.⁹⁵ Lastly, the type 4 exemption includes a provision for agricultural landowners to be exempt from the quality charge if they follow a specific government-endorsed farm plan.⁹⁶

B. City of Griffin

The Griffin, Georgia, stormwater utility, established in 1997, was the first in the state. The City of Griffin bills monthly,⁹⁷ but uses a much simpler system than ACC does for calculating rates. Under the Griffin ordinance, developed property is separated into three classes and one ERU is charged $\$2.95$ a month.⁹⁸ Single family parcels of less than 1600 ft² are charged 0.6 ERU ($\$1.77$), while large single family parcels are charged one ERU ($\$2.95$). The third class includes all other developed land where the rate is determined simply by the number of ERUs the property contains. This is calculated by dividing the total impervious area of the parcel by 2,200 ft² (2,200 ft² is said to equal one ERU in this case).⁹⁹

With regard to credits and exemptions, Griffin exempts undeveloped land and railroad tracks completely, but also allows other developed lands to receive credit of up to 100% of their service charge by providing their own onsite systems and facilities for stormwater management which reduce or mitigate the stormwater utility’s cost by 100%.¹⁰⁰ If those onsite systems do not mitigate the stormwater utility’s cost 100%, then the bill will still be reduced in proportion to the amount that onsite systems are able mitigate the stormwater utility’s cost of handling runoff from that parcel.¹⁰¹

87 See *id.* § 5-5-8(e).

88 See *id.* § 5-5-8(e)(2)(ii).

89 See *id.* § 5-5-10.

90 See *id.* § 5-5-10(a).

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

92 See *id.* § 5-5-10(b), Athens-Clarke County Stormwater, *supra* note 46.

93 See *id.* § 5-5-10(b) and (c).

94 See *id.* § 5-5-10(d)(1) and (2).

95 See *id.* § 5-5-10(d)(3).

96 See *id.* § 5-5-10(d)(4).

97 Griffin, Ga., Code § 94-168(3) (2005).

98 Center for Urban Policy and the Environment, *supra* note 23.

99 Griffin, Ga., Code § 94-168 (2005).

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

101 See *id.* § 94-169(a)(3).

For example, if onsite systems mitigate the impact of 30% of the stormwater runoff from that parcel, then the bill for providing stormwater services to that parcel would be reduced by 30%. Public and private schools can receive credit of up to 50% of their stormwater charge by agreeing to teach the “water wise” program, an environmental science curriculum approved by the Georgia Department of Education, in grades 1 through 12.¹⁰²

C. Columbia County

The Columbia County stormwater utility, which began billing in 2000,¹⁰³ uses an even simpler rate structure than Griffin. Columbia County simply states that one ERU is equivalent to 100 ft² of impervious surface area and that for each ERU the landowner is charged \$0.0875 per month. Therefore the only calculations necessary are the amount of impervious surface on a parcel divided by 100 ft² and then multiplied by \$0.0875 for any type of property.¹⁰⁴ Undeveloped property, railroad tracks, and public highways are all exempt from stormwater charges.¹⁰⁵ Developed land in Columbia County can receive no higher than a 50% credit toward its stormwater bill for onsite stormwater management and if less than 50%, a proportional credit is given to the extent on-site facilities reduce or mitigate the costs of the county’s stormwater utility.¹⁰⁶ Public and private schools in Columbia County can receive a credit of 5% of their bill for teaching a general environmental science curriculum that includes water protection, but they can receive the maximum credit of 20% if they teach a specific water protection program including “water wise” or other programs approved by the board of commissioners.¹⁰⁷

VIII. Conclusion

The implementation of stringent federal clean water programs along with more environmental awareness is pushing stormwater management, once essentially an afterthought in the bundle of services provided by local governments, to become more of a priority. Stormwater utilities are justifiably playing a larger role than ever with an estimated 2000 communities in the U.S. having their own by 2010.¹⁰⁸ Here in Georgia there are several successfully-run stormwater utilities which provide an example for other local governments who would like to create their own.

IX. For more information

Some excellent resources regarding stormwater utilities include:

Florida Stormwater Manual,
www.florida-stormwater.org/manual/sitemap.html

Information on Griffin, Georgia Stormwater Department, www.griffinstorm.com

Athens-Clarke County Stormwater Program,
www.accstormwater.com

Columbia County Web site, www.columbiacountyga.gov/home/index.asp?page=2455

Rockdale County Stormwater Program,
www.rockdalecounty.org

Stormwater – The journal for surface water quality professionals, www.stormh2o.com/sw.html

102 See *id.* § 94-169(b).

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

104 Columbia County, Ga., Code § 34-113 (2006).

105 See *id.* § 34-114(c),(d),(e).

106 See *id.* § 34-114(f), (g).

107 See *id.* § 34-114(j).

108 Eric Woolson, *Stormwater Utilities: Where Do They Stand Now?* (2004), available at http://www.forester.net/sw_0409_stormwater.html.

Land Use Clinic
University of Georgia River Basin Center
110 Riverbend Road, Room 101
Athens, GA 30602-1510
(706) 583-0373 • Fax (706) 583-0612
<http://www.law.uga.edu/landuseclinic/>