

TC-5-10 Stormwater Maintenance

Amends the City Code to allow the City to assess property owners for the maintenance or replacement of private stormwater devices in lieu of the current replacement (escrow) account annual payments.



Certified Recommendation

Raleigh Planning Commission

CR# 11388

Case Information: TC-5-10/Stormwater Replacement Fund

Comprehensive Plan Guidance

<i>Applicable Policy Statements</i>	Not applicable
<i>Action Items</i>	Not applicable

Summary of Text Change

<i>Summary</i>	<p>Amends Raleigh City Code sections 10-5006(a)(11)d, 10-5007(c) and 10-9027(b) to place the requirement for maintenance covenants for stormwater control facilities which serve more than one lot into one City Code section, 10-9027(b). Repeals in its entirety City Code section 10-9027(c), and its requirement for a three-party stormwater contribution replacement agreement. Repeals section 10-9003(b) in its entirety relating to entities exempted from Part 10 Chapter 9 regulations.</p> <p>Proposes to allow the City to assess property owners for the maintenance or replacement of private stormwater devices in lieu of the current replacement (escrow) account annual payments. As an alternative, this text change requires the establishment of a general replacement fund with the developer paying twenty-four percent of the replacement cost of the facility and the creation of a privately-maintained sinking fund with the full amount deposit being collected over the useful life of the facility.</p>
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Summary of Impacts

<i>Impacts Identified</i>	<p><u>Adoption of TC-5-10:</u></p> <ul style="list-style-type: none"> Land uses currently excluded from compliance with the City's Stormwater Control Regulations would no longer have exempt status. (NOTE: Mandated by the State Division of Water Quality.) <p><u>No Action:</u></p> <ul style="list-style-type: none"> Time and cost to developers and property owner associations for contract and legal document preparation. Higher annual amount due into the sinking fund for property owner associations. Time and cost to the City for securing Escrow Fund reimbursement. Land uses currently excluded from compliance with the City's Stormwater Control Regulations would continue to have exempt status.
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Public Meetings

<i>Public Hearing</i>	<i>Committee</i>		<i>Planning Commission</i>	
7-20-10	8-17-10 9-21-10	Text Change Committee	9-28-10	Action

Attachments

1. Staff report
2. Replacement Account Reimbursement Process
3. Ordinance (Revised)

Planning Commission Recommendation

<i>Recommendation</i>	That this text change be approved, as revised; and that the City Council adopt the “Replacement Account Reimbursement Process” proposed in the attached memo, dated September 20, 2010.
<i>Findings & Reasons</i>	<ol style="list-style-type: none"> 1. That Session Law 2009-293 authorizes the City of Raleigh to repair stormwater facilities required by City ordinance and allows public assessments for the repair of these stormwater facilities. This new authority and process will be an improvement to the current system of managing an escrow fund for the individual property owner associations, saving time and cost to developers, property owner associations and the City for contract and legal document preparation required by the current process. 2. The proposed revision to the text change eliminates the provisions for individual property owner associations to establish a specific sinking fund for the maintenance, repair and replacement of the stormwater device, with oversight by the City. Although it is acknowledged that the property owner associations are ultimately responsible for maintaining these facilities, the commission believes the requirement for a separate sinking fund is unnecessary. This belief is based on the CDM Report prepared by the City’s consultants and with the concurrence of the City Manager. 3. Approval of the new process will allow a significant portion of the existing escrow fund to be paid into the general replacement fund account with the remaining balance being equitably reimbursed to the property owner associations. 4. The effective date of the ordinance is recommended to be changed to December 1, 2010, to provide the Stormwater Division ample time to implement the revised process and prepare for the reimbursement program.
<i>Motion and Vote</i>	<p>Motion: Haq Second: Harris Edmisten</p> <p>In Favor: Anderson, Bartholomew, Batchelor, Butler, Harris Edmisten, Haq, Mattox, Mullins, Smith, Sterling</p>



Zoning Staff Report – TC-5-10

Stormwater Replacement Fund Text Change

Request

<i>Section Reference</i>	10-5006(a)(11)d. – Maintenance of Stormwater Control Measures 10-5007(c) – Responsibility of Maintenance of Stormwater Control Measures 10-9003(b) – Exclusions of Stormwater Control Measures 10-9027(b) – Maintenance Covenant of Stormwater Control Measures 10-9027(c) – Stormwater Contribution Replacement Agreement
<i>Basic Information</i>	<p>Amends the City Code to place the requirement for maintenance covenants for stormwater control facilities which serve more than one lot into one City Code section. Repeals the City Code requirement for a three-party stormwater contribution replacement agreement. Repeals entities exempted from Part 10 Chapter 9 regulations.</p> <p>Proposes to allow the City to assess property owners for the maintenance or replacement of private stormwater devices in lieu of the current replacement (escrow) account annual payments. As an alternative, this text change requires the establishment of a general replacement fund with the developer paying twenty-four percent of the replacement cost of the facility and the creation of a privately-maintained sinking fund with the full amount deposit being collected over the useful life of the facility.</p>
<i>PC Recommendation Deadline</i>	November 2, 2010

Comprehensive Plan Guidance

<i>Applicable Policies</i>	Not applicable
<i>Action Items</i>	Not applicable

Contact Information

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History/Overview

TC-5-10 was initiated by the City Attorney's office to incorporate recently approved State Enabling Legislation. State Session Law 2009-293 grants the City of Raleigh with the authority to repair and assess stormwater facilities that are required by City ordinance.

Currently, in order to ensure the proper maintenance and repair of stormwater facilities, the City requires the establishment of an escrow account which can be spent solely for sediment removal, structural replacement, major repair or reconstruction, if the repairs exceed one-third of the reconstruction costs. If control measures are not performing adequately or as intended or are not properly maintained, the City may remedy the situation and be fully reimbursed from the escrow account. The escrow account is funded by both developer contribution (fifteen percent of the initial construction cost plus the first-year annual payment which equates to a twenty-six percent upfront payment by the developer and annual sinking funds (full amount to be deposited within ten years). If a property owner's association is established to maintain the stormwater control facility, then a portion of the annual assessments of the association shall include an allocation into the escrow account.

TC-5-10 proposes to amend the City Code to allow the City to assess property owners for the maintenance or replacement of private stormwater devices in lieu of the current replacement (escrow) account annual payments. As an alternative, this text change requires the establishment of a general replacement fund with the developer paying twenty-four percent of the replacement cost of the facility and the creation of a privately-maintained sinking fund with the full amount deposit being collected over the useful life of the facility.

It is proposed that a significant portion of the existing escrow fund will be paid into the general replacement fund account with any remaining balance being equitably reimbursed to the previous contributors.

NOTE: The Planning Commission and City Council reviewed a similar proposal earlier this year applying only to stormwater facilities serving multiple lots. That text change (TC-14-09) was denied on the basis that it would be unfair to require the payment to the City of a replacement fund for stormwater facilities shared by multiple lots and not require this payment for facilities not shared by multiple lots when both developments could be subject to public assessments for maintenance and repair. The City Council authorized the drafting of this text change, which applies to both shared and non-shared facilities.

Purpose and Need

The proposed changes incorporate recently-adopted State Law and State Enabling Legislation into the City Code to address provisions of stormwater management. The establishment of a system to allow the City to assess individual owners and associations for the maintenance, repair and replacement of failed stormwater facilities eliminates the cost and time associated with contracts and legal documents necessary under the current escrow fund system and reduces the annual amount due into the sinking fund by extending the full amount term from ten years to the useful life of the facility.

Alternatives Considered

No alternative other than the No Action approach was considered.

Scoping of Impacts

Potential adverse impacts of the proposed text change have been identified as follows:

1. Those land uses currently excluded from compliance with the City's Stormwater Control Regulations, such as activities conducted by the State of North Carolina, persons having power of eminent domain, agricultural uses and forestry uses would no longer have exempt status. However, it should be noted that the State Division of Water Quality is requiring the City to amend our Code and to regulate these activities.

The adverse impacts of taking no action (retaining the existing regulations) have been identified as follows:

1. Time and cost to developers and property owner associations for contract and legal document preparation under the current Escrow Fund system.
2. Higher annual amount due into the sinking fund for property owner associations by retaining the full amount term of 10 years.
3. Time and cost to the City for securing Escrow Fund reimbursement for remedying a failed stormwater facility.
4. Those land uses currently excluded from compliance with the City's Stormwater Control Regulations would continue to have exempt status.

Impacts Summary

Adoption of Proposed Text Change

Adoption of TC-5-10 would allow the City to assess property owners for the maintenance or replacement of private stormwater devices in lieu of the current replacement (escrow) account annual payments. As an alternative, this text change requires the establishment of a general replacement fund with the developer paying twenty-four percent of the replacement cost of the facility and the creation of a privately-maintained sinking fund with the full amount deposit being collected over the useful life of the facility. In addition, this text change proposes to eliminate the current stormwater management exemption extended to some government agencies and land uses.

Impacts associated with the proposed text change would decrease the financial contribution required of a developer from the current twenty-six percent initial cost required of the developer to the proposed twenty-four percent contribution and eliminate the exemption provided to several government agencies and land uses.

No action

Under the "no action" alternative, the time and cost associated with contract and legal document preparation under the current Escrow Fund system would be retained as would be the higher annual amount due into the sinking fund for property owner associations. Also, the time and cost to the City for securing Escrow Fund reimbursement would be retained as would the exemption for some government agencies and land uses.

Not eliminating the current stormwater management exemption extended to some government agencies and land uses could result in fines or suspension of the City's NPDES permit by the State Division of Water Quality.

**ORDINANCE NO. 2010 – 791 TC 337
TC-5-10**

**AN ORDINANCE TO AMEND PART 10,
CHAPTER 9 AS A RESULT OF NEW STATE LAWS**

WHEREAS, Sessions Laws 2006- 246, codified as G.S160A-459, allows the City of Raleigh to implement construction site stormwater runoff controls and post-construction site stormwater runoff controls through ordinances and other regulatory mechanisms applicable to federal, State, and local governments, and

WHEREAS, G.S.160A 459(d) permits the City of Raleigh to require

- (i) deed restrictions and protective covenants to ensure that each project, including the stormwater management system, will be maintained so as to protect water quality and control water quantity and
- (ii) financial arrangements to ensure that adequate funds are available for the maintenance and replacement cost of the projects, and

WHEREAS, a 2010 financial analysis of both shared-lot stormwater control facilities and single-lot facilities conducted by Camp Dresser & McKee (CDM), shows that an upfront contribution of twenty-four percent (24%) of initial construction cost would be sufficient to sustain a long-term maintenance, a replacement fund, as well as the costs to repair or replace stormwater control facilities in the event of a significant storm damage, and

WHEREAS, Session Laws 2009-293 authorizes the City of Raleigh to assess property owners for private stormwater control facilities for repairs to damaged or failed controls that were required to be constructed by G.S160A-459.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA that:

Section 1. Amend Raleigh City Code Section 10-3017(b (28) to replace the third word, “measure,” with the word facilities, to add a hyphen before the word including and before the final semicolon and to insert before the final semicolon the following language: “together with showing the means of transporting stormwater runoff to and from any nitrogen reduction and stormwater runoff control measures or facilities.”

Section 2. Amend Raleigh City Code Section 10-3051(c) to remove from the second paragraph the language, “a maintenance agreement which complies with §10-5007(c) and §10-5006(b)(11)d” and in lieu thereof insert the language: “ a maintenance covenant which complies §10-5006(a)(11) d and §10-9027(b)”.

Section 3. Replace the intended paragraph which follows the second paragraph of Raleigh City Code Section 10-3051(c) with the following:

“The stormwater control facilities, which serve more than one (1) lot, that are not accepted for maintenance by a governmental agency are required by the Raleigh City Code to be owned and maintained by a property owners association for which all lot owners shall be a member.”

Section 4. Amend the last paragraph of Raleigh City Code section 10-3051(c) to delete from the first sentence the words “Soil Conservation Division of the *City*” and in lieu thereof, substitute the following words: “Stormwater Utility Division of the Public Works Department”. Said paragraph is further amended to delete the last two sentences and substitute in their place the following language:

“In addition to the required maintenance covenant, any *person* who installs stormwater control facilities which serve more than one lot shall execute and record the City form declaration required by §10-3073(b) containing provisions for developments with common elements and common expenses as well as a subsequent recorded property owners association declaration conforming to either G.S. 47C or 47F or any successor statute.”

Section 5. Amend Raleigh City Code Section 10-3051(e) to insert between the words “any” and “stormwater” the following word “above-ground”.

Section 6. Amend Raleigh City Code section 10-3073(b)(3) to delete the following language: “payments owed to the *City* pursuant to any stormwater agreement required by §10-9027(c) - except for payment in such stormwater agreement owed to the *City* by the *developer*,”.

Section 7. Amend the first sentence of the last paragraph of Raleigh City Code section 10-3073(b) to insert before the language “by §10-9027” the following language: “in the Reservoir Watershed or Urban Water Supply Watershed Protection Area Overlay Districts or required”.

Section 8. Amend the first paragraph of Section 10- 5006(a)(11)d to replace the language “ maintenance agreement which complies with §10-5007(c)” with “maintenance covenant which complies with §10-9027(b)”. The intended quoted note in said paragraph is repealed, re-enacted and rewritten to read as follows:

“The stormwater control facilities, which serve more than one (1) lot, that are not accepted for maintenance by a governmental agency are required by the Raleigh City Code to be owned and maintained by a property owners association for which all lot owners shall be a member.”

Section 9. Repeal the third paragraph of section 10-5006(a)(11)d and in lieu thereof substitute the following:

“In addition to the required maintenance covenant, any *person* who installs stormwater control facilities which serve more than one lot shall execute and record the City form declaration required by §10-3073(b) containing provisions for developments with common elements and common expenses as well as a subsequent recorded property owners association declaration conforming to either G.S. 47C or 47F or any successor statute.” .

Section 10. Repeal in their entirety subsections 5006(a)(11)d 1 through 6. The cross reference following 10-5006(a)(11)d.6 shall remain unchanged.

Section 11. Amend the first paragraph of Section 10- 5006(a)(12)d to delete the language “maintenance agreement which complies with §10-5007(c)” and replace it with “maintenance covenant which complies with §10-9027(b)”. The intended quoted note in said paragraph is repealed, re-enacted and rewritten to read as follows:

“The *stormwater control facilities*, which serve more than one (1) lot, that are not accepted for maintenance by a governmental agency are required by the Raleigh City Code to be owned and maintained by a property owners association for which all lot owners shall be a member.”

Section 12. Repeal the third paragraph of section 10-5006(a)(12)d and in lieu thereof substitute the following:

“In addition to the required maintenance covenant, any *person* who installs stormwater control facilities which serve more than one lot shall execute and record the City form declaration required by §10-3073(b) containing provisions for developments with common elements and common expenses as well as a subsequent recorded property owners association declaration conforming to either G.S. 47C or 47F or any successor statute.”.

Section 13. Repeal, re-enact, and rewrite the first two paragraphs of Section 10-5007(c) to read as follows:

“Whenever stormwater control facilities serve more than one (1) lot that are not accepted for maintenance by a governmental agency, prior to recording any lot served by the facility a maintenance covenant conforming with §10-9027(b) *shall* be recorded with the local county register of deeds office.”

Section 14. Repeal in their entirety subsections 5007(c) 1 through 7.

Section 15. Amend the definitions of off-site stormwater control facilities and on-site stormwater control facilities as they appear in Raleigh City Code section 10-9002 to insert between the language “ditches,” and filters the language “level spreaders,” and to insert before the words “and ponds” the following language: sand filters, detention basins, wetlands,”.

Section 16. Amend Raleigh City Code section 9003 to delete subsection (b) in its entirety and to remove the reference “(a)”.

Section 17. The words “Central Engineering Department” appearing in Raleigh City Code sections 10-9006(a)(1), second sentence, 10-9006(a)(2), first sentence, 10-9028, top paragraph, and 10-9028, last paragraph, are replaced with the words “Stormwater Utility Division of the Public Works Department”.

Section 18. Amend Raleigh City Code section 10-9025(b) to insert in the first sentence between the words “a” and “maintenance” the words “stormwater operations” and to delete the word “proposed”. Said Code section is further amended to insert a new sentence, after the amended first sentence, which shall read: “Prior to either grading any portion of the *development* or submitting construction drawing plans of any applicable *stormwater control facility* to the *City*, whichever event first occurs, a stormwater operations maintenance and budget *shall* be submitted to the Stormwater Utility Division of the Public Works Department. The last sentence of section 10-9025(b) is repealed, re-enacted and rewritten to read: “The maintenance manual must contain a statement about the expected life of each *stormwater control facility*, and a replacement schedule derived by dividing the initial construction cost of each *stormwater control facility* by the expected life of that *stormwater control facility*. The budget *shall* include annual costs - such as routine maintenance, repair, periodic sediment removal and replenishment of rip-rap, insurance premiums associated with the *stormwater control facilities*, taxes levied against the *stormwater control facilities*, mowing and reseeding, required inspections.”

Section 19. Raleigh City Code section 10-9026(e) is amended to delete the last two words, “City Engineer”, and in lieu thereof, substitute “Public Works Director”.

Section 20. Repeal Section 10-9027 (a) in its entirety; said Code provision is re-enacted and rewritten to read as follows:

(a) General.

The land *owner* or *person* in possession or control of the land *shall maintain* all on-site *stormwater control facilities* and all *open space areas* required by the approved *stormwater control plan* unless those facilities and *open space areas* are accepted for *maintenance* by a governmental agency. The land *owner* entitled to the exclusive

use an off-site drainage easement for one or more stormwater control facilities not accepted for *maintenance* by a governmental agency *shall maintain* said *stormwater control facilities*.

Section 21. Repeal Section 10-9027(b) in its entirety; said Code provision is re-enacted and rewritten to read as follows:

(b) Maintenance covenant.

For off-site *stormwater control facilities* and for all other *stormwater control facilities* which serve more than one (1) lot that are not accepted for *maintenance* by a governmental agency, the developer *shall* execute and record with the local county register of deeds office a maintenance covenant with the following contents:

(1) Location of Stormwater Control Facilities and Drainage Easements.

A description of portions of *property* where *stormwater control facilities* are located as well as a description of the location of all private drainage easements conveying stormwater to and from the *development* to the facilities. The maintenance covenant *shall* establish a process for relocating private drainage easements. But no relocation of a private drainage easement *shall* be valid without the prior approval of the *City*.

(2) Easement Rights of Lot Owners.

A statement that owners and tenants of *properties* which will be served by the stormwater control facilities are granted perpetual, irrevocable and non-exclusive easement rights and privileges to use, construct, install, inspect, replace, reconstruct, repair and *maintain* those stormwater control facilities - including the right to access those stormwater control facilities, private drainage easements and other portions of the *development* as reasonably necessary to perform the granted easement rights. And, the granting of perpetual, irrevocable and non-exclusive easement rights and privileges to transport, store, and discharge stormwater to and from the *stormwater control facilities*.

(3) City Easement/Right of Entry/No City Responsibility

Developer, the association if any, and the lot *owners* hereby grant the *City* a permanent nonexclusive irrevocable easement over the lots, stormwater control facilities and private drainage easements for inspection, maintenance, repair, construction, installation, re-construction, replacement and other work on in, and over the *stormwater control facilities*. The developer, the association if any, and the lot *owners* also grant the *City* a permanent irrevocable nonexclusive right of ingress, egress, and regress over and across all public or private easements on the *property*, including but not limited to private roads, for inspection, maintenance, repair construction, installation, re-construction, replacement and other work on the stormwater control facilities. The term *City* as used in this provision, includes employees, agents, and contractors of the *City*. The grant of these rights does not obligate the City to exercise them or to take any other action.

(4) Stormwater Operations and Maintenance Manual and Budget

A stormwater operations and maintenance manual and budget conforming to §10-9025(b) *shall* be attached to and incorporated into the maintenance covenant as an exhibit.

(5) Insurance

As part of the routine costs and expenses of maintaining any stormwater control facility, the owner of the stormwater control facility (or the association or commercial lot owner responsible for maintenance, as either may be applicable) must procure and maintain in full force and effect liability insurance in an amount of not less than one million dollars (\$1,000,000.00) of coverage.

(6) Standards of Maintenance for Stormwater Control Facilities

A statement that *stormwater control facilities shall be maintained* in accordance with the attached stormwater operations and maintenance manual and budget, and at all times, the *stormwater control facilities shall* comply with all applicable laws, ordinances, regulations, rules and directives of governmental authorities, and that the *stormwater control facilities shall* perform as designed.

(8) Responsibility for Stormwater Control Maintenance

A statement that the homeowners' association, *property owners' association*, or designated commercial lot *owner shall* be responsible continually for all *stormwater control facilities* in accordance with the attached stormwater operations and maintenance manual and budget. That failure to *maintain any stormwater control facility* as set forth herein and in the *Code* is a violation of the *Raleigh City Code* potentially subjecting each lot *owner* subject to this legal document to significant daily civil penalties and other enforcement actions.

(9) Stormwater Control Facilities Maintained by an Association

If an association is delegated *maintenance* responsibilities, for the *stormwater control facilities*, then membership into the association *shall* be mandatory for each parcel served by the facility and any successive owner of the parcel, membership being appurtenant to the parcel and running with ownership of the parcel. The association *shall* have the power to levy assessments for operation and maintenance of the *stormwater control facilities* and that all unpaid assessments levied by the association *shall* become a lien on the individual parcel. Calculation of the assessment charge *shall* be set forth in a subsequent recorded document. All associations responsible for *maintenance* of *stormwater control facilities shall* be established in accordance with Chapters 47C or 47F of the North Carolina General Statutes or successor statutes, and the property owners association declaration *shall* conform to §10-3073(b), that *shall* be set forth in forms approved by the City which *may* be supplemented by subsequent documents recorded thereafter. Common expenses of the Association include, without limitation, costs and expenses for operation and *maintenance* of *stormwater control facilities*, all costs for insurance premiums and other costs listed in the stormwater operations maintenance manual and budget.

(10) Stormwater Control Facilities Maintained by a Commercial Lot Owner

If a commercial lot owner is responsible for *maintenance* of the stormwater control facilities, said owner is responsible for making all repairs, replacements of the stormwater control facilities in accordance with the construction drawings approved by the *City*. Each parcel served by the stormwater control facility and any successive owner of the parcel *shall* be subject to an assessment charge levied by the designated responsible lot owner. The assessment charge *shall* include, without limitation, the actual costs for repairing and maintaining the stormwater control facility, all costs for insurance premiums associated with the stormwater control facility, costs of required inspections of the stormwater facility, and other costs listed in the stormwater operations maintenance manual and budget. Calculation of the assessment charge *shall* be set forth in a subsequent recorded document. Any assessment charge levied against a lot and remaining unpaid for a period of thirty (30) days or longer after the payment due date shall be delinquent and shall constitute a default of this covenant entitling the lot owner responsible for maintenance of the stormwater control facilities to bring an action at law against the defaulting party plus interest charges, together with all cost and expenses of collection incurred, such as without limitation, court costs and reasonable attorney fees actually incurred. Each parcel owner served by the *stormwater control facility shall* have the right to maintain, repair and replace the facility if after 45 days written notice the commercial lot owner responsible for maintenance repair and replacement fails to faithfully discharge its responsibility. The parcel owner doing the work *shall* have the same right as the designated commercial lot owner has to assess the other lots served by the stormwater control facility. At any time the commercial lot owner responsible for the maintenance of stormwater control facilities may assign its responsibilities and rights to a property owners association established in accordance with Chapters 47C or 47F of the North Carolina General Statutes or successor statutes; in such instance, the owners of the parcels served by the stormwater control facility *shall* be members of the created property owners association.

(11) City Right to Maintain and Repair Stormwater Control Facilities and City's Right of Reimbursement

If *stormwater control facilities* are not performing adequately or as intended or are not properly *maintained* or replaced the

City, in its sole discretion, *may*, after written notice sent to the lot owners and any association, enter the development and perform such construction, installation, repair, reconstruction, replacement and maintenance of the *stormwater control facilities* as is necessary to remedy the situation. In such instances, the *City shall* be fully reimbursed for its costs of inspecting, monitoring, designing, constructing, repairing, reconstructing, replacing and installing the *stormwater control facility* of facilities. Such costs include the costs of administration, overhead, contracting and public advertising. In addition to any other rights the *City* has to be reimbursed for its costs, the *City may* levy an assessment against each lot served by the noncompliant stormwater control facility. No assessment will be levied by the *City* without prior notice to affected lot owners. Any unpaid assessment levied by the *City shall* be, as allowed by law, a lien against the delinquent lot.

(12) City's Right To Private Assessments

In addition to all of the remedies set forth herein, if the *City* has not been fully repaid for the work the *City* performed on any *stormwater control facility* owned, in fee or easement, by either an association, or a commercial lot owner with the power to assess lot owners for maintenance of the stormwater control facility, the association and the private commercial lot owner hereby assign to the *City* its right to receive common expense assessments, including stormwater assessments. The association and private commercial lot owner hereby designate and appoint the *City* as attorney in fact for the expressed and limited purpose of assessing and pursuing collection of such unpaid paid reimbursement owed to the *City*. No assignment of assessment rights *shall* become effective without sixty (60) days prior written notice to the applicable private commercial lot owner, association and its members.

(13) Action for Specific Performance

Recognizing the consequences to the *City* of non-compliance with the obligations of this maintenance covenant, the *City shall* have the right to seek, in any court of appropriate jurisdiction, judicial action for specific performance of any of the obligations, and remedies established in this maintenance covenant. This right of the

City shall not limit any other remedies or enforcement options available to the *City* under this covenant, the *City Code* or State law.

(14) No Public Adoption

The *City's* exercise of its rights under this maintenance covenant, or its abatement of public nuisance, or its repair of unsafe structures does not constitute adoption of any *stormwater control facility* by the *City*. The legal authority of the *City* is not intended to impede or prohibit the association or lot *owners* from taking all necessary actions to inspect, maintain, repair, replace, and reconstruct *stormwater control facilities* so that they function safely and perform the function for which they were created.

(15) *City's* Right of Non-Action

A statement that this maintenance covenant *shall* not obligate the *City* to monitor, *maintain*, repair, reconstruct, install, replace, any *stormwater control facility* or measure, and that the *City shall* not be liable to any *person* for the condition or operation of *stormwater control facilities*.

(16) Governmental Functions; Superseding Regulations

A statement that nothing contained in this maintenance covenant *shall* be deemed or construed to in any way stop, diminish, limit, or impair the *City* from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions. In addition, this maintenance covenant does not restrict or prevent the application of later adopted ordinances or other enactments which may Supplement or supersede the provisions of this covenant.

(17) Joint and Several Liability

A statement that each lot *owner* served by one or more *stormwater control facilities* is jointly or severally responsible for repairs, replacement and *maintenance* of the *stormwater control facilities*, including payment of any unpaid ad valorem taxes, public assessments for improvements, and unsafe building and public nuisance abatement liens charged against the *stormwater control facility* and/or the lots served

by the facility -- including all interest charges thereon, together with all cost and expenses of collection incurred, such as without limitation, court costs and reasonable attorney fees actually incurred. The maintenance covenant *shall* establish against all other *owners* whose portions of *real property* are served by the same stormwater control facility a right of contribution in favor of each *owner* who pays more than the *owner's* pro rata share of costs and expenses. Pro-rata sharing being determined either by maintenance assessment provisions for *stormwater control facilities* in subsequently recorded documents or by dividing the acreage of such *owner's* portion of the *real property* served by the *stormwater control facilities* by the total acreage of the portion of the *development* served by the same *stormwater control facility* when no maintenance assessment covenants apply to the *property*. That failure to maintain *stormwater control facilities* is a violation of the *City Code* potentially subjecting each lot *owner* subject to this legal document to significant daily civil penalties and other enforcement actions.

(18) Permanently Protected Undisturbed Open Space Areas

A statement that within permanently protected undisturbed *open space areas* and permanently preserved undisturbed open space areas no land-disturbing activity, no tree disturbing activity as defined in the Raleigh Zoning Code, placement of impervious surface, removal of vegetation, encroachment, construction or erection of any structure *shall* occur except in accordance with a watercourse buffer permit first being issued by the *City* of Raleigh.

(19) Severability

That the sections, paragraphs, sentences, clauses and phrase of this maintenance covenant are severable, and if any phrase, clause, sentence, paragraph or section of this covenant is declared invalid by the valid judgment, order or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this covenant

(20) Subordination

To protect the interests of the City and the public at large, any existing deed of trust mortgage or lien encumbering the property, other than tax liens for the current tax year or governmental improvement assessments, must be subordinated to this maintenance covenant.

Prior to recording the maintenance covenant, the attorney who prepared the maintenance covenant *shall* certify in *writing* to the *City* that the maintenance covenant was prepared on a *City* form that contains all the contents required by Raleigh *City Code* §10-9027(b). Certifications *shall* be on forms approved by the *City* and *shall* include a *City* form maintenance covenant.

The maintenance covenant *shall* be recorded with the local county register of deeds office prior to the recording of any new lot served by the stormwater control facility or prior to the issuance of any *development* permit for any existing lot except for improvements made pursuant to Part 10, Chapter 3 of this *Code*. The maintenance covenant *shall* be binding on all subsequent *owners* of land served by the *stormwater control facilities*. A recorded copy of the maintenance covenant *shall* be given to the Stormwater Utility Division of the Public Works Department of the *City* within fourteen (14) days *following* the recordation of the maintenance covenant, but no building permit *shall* be issued for the *property* until a recorded copy of the maintenance covenant is provided to the Department of Inspections.

Section 22. Repeal in its entirety, re-enact and rewrite Section 10-9027(c) to read as follows:

(c) Payment to Stormwater Facility Replacement Fund

At the time of either of recording a subdivision plat or issuance of a building permit for a lot not established by subdivision, whichever event first occurs, the developer *shall* pay to the *City* a stormwater facility replacement fund payment, which payment *shall* equal twenty-four percent (24%) of the estimated cost of constructing all *stormwater control facilities* shown on applicable development plans. The purpose of the stormwater replacement fund is to ensure that adequate funds are available for the maintenance, repair replacement and reconstruction of *stormwater control facilities* required by this *Code*. To that end, funds expended from the stormwater facility replacement fund *shall* be made for no other purpose other than for repair, maintenance, reconstruction and replacement of *stormwater control facilities* together with the cost of the *City* to bid the work and redesign the facilities. No funds from the stormwater facility replacement fund *shall* be used for administration of this fee program. Monies collected from the stormwater replacement fund can be spent for maintenance, repair, reconstruction and replacement of any stormwater

control facility required by this Code located anywhere in the City limits and its extra-territorial jurisdiction

Payments collected by the City pursuant to this Code section shall be kept separate from other revenue of the City. Any funds on deposit not immediately necessary for expenditure shall be invested as allowed in G.S. 159-30; all income derived shall be deposited in the separate account and can only be used for repair, maintenance, reconstruction, and replacement of stormwater control facilities together with the cost of the City to bid the work and redesign the facilities. Monies, expended from the stormwater facility replacement fund together with interest may be recouped by the City from lot owners served by stormwater water control facilities maintained, repaired, reconstructed and replaced by the City or its contractors. All recouped monies and interest shall be returned to the stormwater facility replacement fund.

The payment of stormwater facility replacement fees is not intended as a substitute for security that ensures the construction of the facilities, which security may be required at such point in the development process as specified in City ordinances and policies.”.

Section 23. All laws and clauses of laws in conflict herewith are hereby repealed to the extent of said conflict.

Section 24. If this ordinance or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given separate effect and to the end the provisions of this ordinance are declared to be severable.

Section 25. This ordinance has been adopted following a duly advertised joint public hearing of the Raleigh City Council and the City Planning Commission following a recommendation of the Planning Commission.

Section 26. This ordinance has been provided to the North Carolina Capital Commission as required by law.

Section 27. This ordinance shall be enforced by law as provided in N.C.G.S. 160A-175 or as provided in the Raleigh City Code. All criminal sanctions shall be the maximum allowed by law notwithstanding the fifty dollar limit in G.S. 14-4(a) or similar limitations.

Section 28. This ordinance shall become effective December 1, 2010.

ADOPTED: October 5, 2010
EFFECTIVE: December 1, 2010
DISTRIBUTION: Planning – Silver, Hallam, Brandon
Stormwater Management – Bowden, Brown
Inspections – Strickland
City Attorney – Hargrove
Transcription Svcs – Taylor

This ordinance was prepared by the City Attorney's Office