

**AN ORDINANCE ADDING SECTION 5.19 TO THE CHAPEL HILL LAND USE MANAGEMENT ORDINANCE REGARDING JORDAN WATERSHED STORMWATER MANAGEMENT REQUIREMENTS FOR NEW DEVELOPMENT (2012-10-24/O-4)**

WHEREAS, the Council of the Town of Chapel Hill has considered the proposed text amendments to the Land Use Management Ordinance regarding stormwater management for new development and finds that the amendments are warranted in order to achieve the purposes of the Comprehensive Plan and are necessary to meet the newly mandated requirements for the protection of the Jordan Lake watershed established by the North Carolina Environmental Management Commission;

NOW, THEREFORE, BE IT ORDAINED by the Council of the Town of Chapel Hill as follows:

**Section 1.** Article 5 of the Chapel Hill Land Use Management Ordinance, Design and Development Standards, is hereby revised to add a new section, Section 5.19, to read as follows:

**”5.19 Jordan Watershed Stormwater Management for New Development**

***5.19.1 Authority***

This Section is adopted pursuant to the authority vested in the Town of Chapel Hill by the Session Laws and the General Statutes of North Carolina, particularly Session Law 2009-216, Session Law 2009-484, and the authority referenced in Section 1.2 of this Ordinance.

***5.19.2 Purpose***

The purpose of this Section is to control the adverse effects of nitrogen and phosphorus in stormwater runoff and nonpoint and point source pollution associated with new development and redevelopment as generally described in 15A North Carolina Administrative Code 2B.0265. This Section will establish provisions for the long-term responsibility for, and maintenance of, structural and nonstructural stormwater Best Management Practices (BMPs) to ensure that they continue to function as designed, are maintained appropriately, and pose no threat to public safety. Additionally this Section will help protect the water supply uses of Jordan Lake.

***5.19.3 Definitions***

The definitions in Appendix A of the Chapel Hill Land Use Management Ordinance shall apply to this Section except as modified herein:

- (a) ‘Approved accounting tool’ means the accounting tool for nutrient loading approved by the North Carolina Environmental Management Commission for the relevant geography and development type under review.
- (b) ‘Built-upon area’ (BUA) means that portion of a development project that is covered by impervious or partially impervious surface including, but not limited to, buildings; pavement and gravel areas such as roads, parking lots, and paths; and recreation facilities such as tennis courts.
- (c) ‘Commission’ means the North Carolina Environmental Management Commission.
- (d) ‘Department’ means the North Carolina Department of Environment and Natural Resources.
- (e) ‘Director’ means the Director of the North Carolina Department of Natural Resources’ Division of Water Quality.
- (f) ‘Division’ means the North Carolina Department of Natural Resources’ Division of Water Quality or its successor.

- (g) ‘Existing development’ means development not otherwise exempted by this ordinance that meets one of the following criteria:
- (1) It either is built or has established a statutory or common-law vested right as of the effective date of this ordinance; or
  - (2) It occurs after the effective date of this ordinance, but does not result in a net increase in built-upon area and does not decrease the infiltration of precipitation into the soil.
- (h) ‘Larger common plan of development or sale’ means any area where multiple separate and distinct construction or land-disturbing activities will occur under one plan. A plan is any announcement or piece of documentation including, but not limited to, a sign, public notice or hearing, advertisement, loan application, drawing, permit application, zoning request, or computer design; or physical demarcation including, but not limited to, boundary signs, lot stakes, or surveyor markings indicating that construction activities may occur on a specific plot.
- (i) ‘Outfall’ means a point at which stormwater enters surface water or exits the property of a particular owner.
- (j) ‘Owner’ means the legal or beneficial owner of land, including but not limited to a mortgagee or vendee in possession, receiver, executor, trustee, or long-term or commercial lessee, or any other person or entity holding proprietary rights in the property or having legal power of management and control of the property. “Owner” shall include long-term commercial tenants; management entities, such as those charged with or engaged in the management of properties for profit; and every person or entity having joint ownership of the property. A secured lender not in possession of the property does not constitute an owner, unless the secured lender is included within the meaning of “owner” under another description in this definition, such as a management entity.
- (k) ‘Person’ means, without limitation, individuals, firms, partnerships, associations, institutions, corporations, municipalities and other political subdivisions, and governmental agencies.
- (l) ‘Redevelopment’ means any development on previously-developed land. Redevelopment of structures or improvements that (i) existed prior to December 2001, (ii) would not result in an increase in built-upon area, and (iii) provides stormwater control at least equal to the previous development is not required to meet the nutrient loading targets of this Section.
- (m) ‘Stormwater system’ means all engineered stormwater controls owned or controlled by a person that drain to the same outfall, along with the conveyances between those controls. A system may be made up of one or more stormwater controls.
- (n) ‘Structural Best Management Practice’ or ‘stormwater management facility’ means a physical structure designed to trap, settle out, or filter pollutants from stormwater runoff; to alter or reduce stormwater runoff velocity, amount, timing, or other characteristics; to approximate the pre-development hydrology on a developed site; or to achieve any combination of these goals.
- (o) ‘Substantial progress’ for the purposes of determining whether sufficient progress has been made on an approved plan, means one or more of the following construction activities toward the completion of a site or subdivision plan shall occur:
- (1) Obtaining a grading permit and conducting grading activity on a continuous basis and not discontinued for more than thirty (30) days; or
  - (2) Installation and approval of on-site infrastructure; or
  - (3) Obtaining a building permit for the construction and approval of a building foundation.

Substantial progress for purposes of determining whether an approved plan is null and void is not necessarily the same as “substantial expenditures” used for determining vested rights pursuant to applicable law

- (p) ‘Variance’ means any variation in the design, operation, or maintenance requirements of a wet detention pond or other approved stormwater management facility.

#### ***5.19.4 Applicability***

- (a) This Section shall apply to all new development and redevelopment projects for which a zoning compliance permit is required except as exempted by 5.19.4(b).
- (b) The following new development and redevelopment projects are exempt from this Section:
  - (1) Single-family residential, single-family residential with accessory apartment, duplex residential, or recreational facility development and redevelopment that disturb less than one acre of land, including cumulative disturbance, provided they are not part of a larger common plan of development or sale; and,
  - (2) Commercial, industrial, institutional, or multi-family development that disturbs less than one-half acre of land, including cumulative disturbance, provided they are not part of a larger common plan of development or sale.
- (c) No development or redevelopment for which a zoning compliance permit approval is required pursuant to this Section shall occur except in compliance with the provisions, conditions, and limitations of the permit.

#### ***5.19.5 Design Manuals and Standard Details***

The Town shall use the policy, criteria, and information, including technical specifications and standards in the Town’s “Design Manual and Standard Details” and the July 2007 publication of the “Stormwater Best Management Practices Manual,” as amended, published by the North Carolina Department of Environment and Natural Resources’ Division of Water Quality, as the basis for stormwater review decisions and for determining the proper design, implementation and performance of engineered stormwater controls and other practices for compliance with this Section.

If the specifications or guidelines of either design manual are more restrictive or apply a higher standard than the other, or other laws or regulations, that fact shall not prevent application of the more restrictive specifications or guidelines.

Whenever an applicant proposes to utilize a practice or practices not designed and constructed in accordance with the criteria and specifications in the design manuals, the applicant shall have the burden of demonstrating that the practice(s) will satisfy the minimum water quality performance standards of this Section. The Town Manager shall require the applicant to provide the documentation, calculations, and examples necessary for the Town Manager to determine whether such an affirmative showing is made.

#### ***5.19.6 Application Requirements***

Unless otherwise exempted by this Section, every permit application for development and redevelopment must be accompanied by a stormwater management report and stormwater management plan, in order for the permit application to be considered. The report and plan must be signed and sealed by a North Carolina-registered Professional Engineer.

The Town Manager shall prescribe the form(s) and information that shall be submitted to determine compliance with this Section, with sufficient copies for necessary referrals and records.

#### ***5.19.7 Design and Performance Standards for Stormwater Management***

- (a) Nitrogen and Phosphorus Loading

- (1) Stormwater systems shall be designed to control and treat the runoff generated from all surfaces by one inch of rainfall. The treatment volume shall be drawn down pursuant to standards specific to each practice as provided in the State Design Manual.
  - (2) The nitrogen load contributed by the proposed development shall not exceed 2.2 pounds per acre per year.
  - (3) The phosphorus load contributed by the proposed development shall not exceed 0.82 pound per acre per year.
  - (4) Notwithstanding 15A NCAC 2B.104(q), redevelopment subject to this Section that would replace or expand existing structures or improvements and would result in a net increase in built-upon area shall have the option of either meeting the loading standards identified in subsections 5.19.7(a)(2) and (3) above, or achieve 35 percent and 5 percent reduction for nitrogen and phosphorus, respectively, compared to the existing development.
  - (5) The applicant shall determine the need for and shall design structural best management practices to meet these loading rate targets by using the approved accounting tool.
- (b) Nitrogen and Phosphorus Standards are Supplemental
- The nitrogen and phosphorus loading standards in this Section are supplemental to, not replacements for, stormwater standards otherwise required by Section 5.4 of the town's Land Use Management Ordinance.
- (c) Partial Offset of Nutrient Control Requirements
- Before using offsite offset options, a development subject to this Section shall attain a maximum nitrogen loading rate onsite of six pounds per acre per year for single-family, single-family with accessory apartment, and duplex residential development and ten pounds per acre per year for other development, including multi-family residential, commercial and industrial and shall meet all requirements for structural best management practices otherwise imposed by this Section. A person subject to this Section may achieve the additional reductions in nitrogen and phosphorus loadings by making offset payments to the North Carolina Ecosystem Enhancement Program (Program) contingent upon acceptance of payments by that Program. An applicant may propose other offset measures, including providing his or her own offsite offset or utilizing a private seller. All offset measures permitted by this ordinance shall meet the requirements of 15A NCAC 02B .0273 (2) through (4) and 15A NCAC 02B.0240.
- (d) Structural best management practices that are designed, constructed, and maintained in accordance with the criteria and specifications in the design manuals and the approved accounting tool will be presumed to meet the minimum water quality performance standards of this Section.

#### **5.19.8 Inspection, Operation and Maintenance Plan**

- (a) The owner or owners of a development must sign and record an Inspection, Operation, and Maintenance Plan that shall be binding on all subsequent owners of the site, portions of the site, and lots or parcels served by the stormwater management facility. Until the transference of all property, sites, or lots served by the engineered stormwater controls and practices, the original owner or owners, shall have primary responsibility for carrying out the provisions of the maintenance agreement.

The Inspection, Operation, and Maintenance Plan shall require the owner or owners, to maintain, repair and, if necessary, reconstruct the stormwater management facility and shall state the terms, conditions, and schedule of maintenance for the stormwater management facility. In addition, it shall grant to the Town of Chapel Hill the right of entry in the event that the Town Manager has reason to believe it has become necessary to inspect, monitor, maintain, repair, or reconstruct the

stormwater management facility; however, in no case shall the right of entry, of itself, confer an obligation on the Town to assume responsibility for the stormwater management facility.

The Inspection, Operation, and Maintenance Plan must be approved by the Town Manager prior to permit approval and shall be recorded with the County Register of Deeds prior to issuance of a Certificate of Occupancy.

(b) Annual Inspection

An original inspection report shall be provided to the Town beginning one year from the date of the recorded inspection, operation, and maintenance plan and each year thereafter on or before that date of recordation. The owner shall provide evidence of the renewal of the maintenance bond or surety or a certified statement of the escrow account.

(c) Maintenance Bond or Surety

Prior to issuance of a Certificate of Occupancy, the owner shall post a maintenance bond or other surety instrument satisfactory to the Town Manager, in an amount equal to one hundred twenty-five (125) percent of the construction cost of each stormwater management facility to assure maintenance, repair, or reconstruction necessary for adequate performance of the stormwater management facility, or establish a stormwater maintenance (sinking fund) budget and escrow account as described in 5.19.8 (d)(2) and (3) below.

(d) Special Requirement for Homeowners' and Other Associations

For all stormwater management facilities required pursuant to this Section and that are to be or are owned and maintained by a homeowners' association, property owners' association, or similar entity, the required Inspection, Operation, and Maintenance Plan shall include all of the following provisions:

- (1) Acknowledgment that the association shall continuously operate and maintain the stormwater management facilities.
- (2) A stormwater maintenance (sinking fund) budget that includes the following items:
  - i. A list of all stormwater management facilities and drainage conveyance system components and their annual maintenance and replacement costs, and
  - ii. Establishment of an escrow account, which can be spent solely for sediment removal, structural, biological or vegetative replacement, major repair, or reconstruction of the stormwater management facility. If stormwater management facilities are not performing adequately or as intended or are not properly maintained, the Town, in its sole discretion, may remedy the situation, and in such instances the Town shall be fully reimbursed from the escrow account.
- (3) Both developer contribution and annual sinking funds shall fund the escrow account. Prior to plat recordation or issuance of construction permits, whichever shall first occur, the developer shall pay into the escrow account an amount equal to twenty-five (25) percent of the initial construction cost of the engineered stormwater management facilities. Two-thirds (2/3) of the total amount of sinking fund budget shall be deposited into the escrow account within the first five (5) years and the full amount shall be deposited within ten (10) years following initial construction of the stormwater management facilities. Funds shall be deposited each year into the escrow account. A portion of the annual assessments of the association shall include an allocation into the escrow account until it is fully funded. Any funds drawn down from the escrow account shall be replaced in accordance with the schedule of anticipated work used to create the sinking fund budget.

- (4) The percent of developer contribution and lengths of time to fund the escrow account may be varied by the Town depending on the design and materials of the stormwater management facility.
- (5) Granting to the Town a right of entry to inspect, monitor, maintain, repair, and reconstruct stormwater management facility, as needed.
- (6) Allowing the Town to recover from the association and its members, any and all costs the Town expends to maintain or repair the stormwater management facility or to correct any operational deficiencies. Failure to pay the Town all of its expended costs, after forty-five days written notice, shall constitute a violation of this ordinance. In case of a deficiency, the Town shall thereafter be entitled to bring an action against the association and its members, as permitted by law, to pay, or foreclose upon the lien hereby authorized by the agreement against the property, or both. Interest, collection costs, and attorney fees shall be added to the recovery.
- (7) A statement that this plan shall not obligate the Town to maintain or repair any stormwater management facilities, and the Town shall not be liable to any person for the condition or operation of stormwater management facilities.
- (8) A statement that this plan shall not in any way diminish, limit, or restrict the right of the Town to enforce any of its ordinances as authorized by law.
- (9) A provision indemnifying and holding harmless the Town for any costs and injuries arising from or related to the stormwater management facility, unless the Town has agreed in writing to assume the maintenance responsibility for the structural BMP and has accepted dedication of any and all rights necessary to carry out that maintenance.

#### ***5.19.9 Post-Construction Requirements***

- (a) Upon completion of a project and before a certificate of occupancy shall be granted, all of the documents enumerated below must be submitted to the Town Manager and a final stormwater management inspection must be scheduled. After performing the final inspection and reviewing and approving the documents, the Town Manager will issue an Approval Notification to the Town's Inspections Division.
  - (1) A copy of the recorded Stormwater Facility and Maintenance Easement, signed and sealed by a registered North Carolina professional land surveyor and recorded by the County Register of Deeds, showing the "Stormwater Management Facility and Maintenance Easement(s)", the stormwater management facility(ies), and the maintenance access locations. For purposes of maintenance, the maintenance access must be shown on the exhibit and extend from the "Stormwater Facility Easement" to the nearest public right-of-way (ROW). The following notes must be included on the recorded final plat or easement exhibit.
    - A. All engineered stormwater management control, treatment, and conveyance structures located on or below the ground shall be wholly contained within an easement entitled: "Reserved Stormwater Facility Easement Hereby Dedicated" and shall be reserved from any development which would obstruct or constrict the effective management, control, and conveyance of stormwater from or across the property, other than the approved design and operation functions.
    - B. The Reserved Stormwater Facility and Maintenance Easement(s) and the facilities it/they protect are considered to be private, with the sole responsibility of the owner to provide for all required maintenance and operations as approved by the Town Manager.

- C. The Reserved Stormwater Facility and Maintenance Easement(s) and the Inspections, Operations, and Maintenance Plan are binding on the owner, heirs, successors, and assigns.
- (2) A copy of the recorded Inspection, Operation, and Maintenance Plan signed by the owner and recorded by the County Register of Deeds, for the stormwater management facility(ies). The Inspection, Operations, and Maintenance Plan must include a description and details of the device or structure, an inspections checklist, and operating and maintenance procedures. The plan should identify contact information, who will perform the inspections, frequency of inspections, inspections and maintenance logs, any specific equipment needs or certifications (e.g., confined space certification), action levels or thresholds (e.g., remove sediment after depth exceeds one foot), and disposal methods. The person responsible for the maintenance of stormwater management facilities shall submit an annual inspection report to the Town.
  - (3) Certified as-built plans signed and sealed by qualified registered North Carolina professional engineer, showing final design specifications for all stormwater management facilities and practices and the field location, size, depth, and planted vegetation of all measures, controls, and devices, as installed.
  - (4) Certified final survey signed and sealed by a registered North Carolina professional land surveyor, showing building footprints, driveways, all other impervious surfaces, stormwater drainage/conveyance piping, and stormwater management structures. The survey should be in DXF binary format using State plane coordinates and NAVD 88.
  - (5) Certification, signed and sealed by a qualified registered North Carolina professional engineer, that the stormwater management facility(ies) was/were constructed in accordance with the approved plans and specifications.
  - (6) The maintenance bond or surety or a certified statement of the escrow account.

#### **5.19.10 Variances**

(a) Requirements for Variances

The procedures for requesting a variance, as defined for this Section, from the requirements of this Section shall be as follows:

- (1) For a variance request, the Town Board of Adjustment shall make a finding of fact as to whether there are practical difficulties or unnecessary hardships that prevent compliance with the design, operation, or maintenance requirements of a wet detention pond or other approved stormwater management facility. A finding of practical difficulties or unnecessary hardships shall require that the following conditions are met:
  - A. If the applicant complies with the provisions of this Section, he or she can secure no reasonable return from, nor make reasonable use of, his or her property. Merely proving that the variance would permit a greater profit from the property shall not be considered adequate justification for a variance. Moreover, the Town Board of Adjustment shall consider whether the variance is the minimum possible deviation from the terms of this Section that shall make reasonable use of the property possible;
  - B. The hardship results from application of this Section to the property rather than from other factors such as deed restrictions or other hardship;
  - C. The hardship is due to the physical nature of the applicant's property, such as its size, shape, or topography, such that compliance with provisions of this Section would not allow reasonable use of the property;

- D. The applicant did not cause the hardship by knowingly or unknowingly violating this Section;
  - E. The applicant did not purchase the property after the effective date of this Section, and then request a variance; and
  - F. The hardship is rare or unique to the applicant's property.
- (2) The variance is in harmony with the general purpose and intent of the State's stormwater management requirements and this Section and preserves its spirit; and
  - (3) In granting the variance, the public safety and welfare have been assured, water quality has been protected, and substantial justice has been done.
- (b) If the Town Board of Adjustment has determined that a variance request meets the requirements in Subsections 5.19.11(a)(1) through 5.19.11(a)(3), then it shall prepare a preliminary finding and submit it to the North Carolina Environmental Management Commission in care of the Director of the Division. Within ninety (90) days after receipt, the Environmental Management Commission is required to review preliminary findings on variance requests and take one of the following actions: approve, approve with conditions and stipulations, or deny the request. Appeals from a Commission decision on a variance request are subject to review as provided in North Carolina General Statute Chapter 150B, Articles 3 and 4.

#### ***5.19.11 Compliance and Enforcement***

- (a) Site Inspections
- (1) Agents, officials, or other qualified persons authorized by the Town Manager may periodically inspect stormwater management facilities to ensure compliance with this Section.
  - (2) Notice of the right to inspect shall be included in the zoning compliance permit.
  - (3) Authorized agents, officials or other qualified persons shall have the authority, upon presentation of proper credentials, to enter and inspect at reasonable times any property, public or private, for the purpose of investigating and inspecting the stormwater management facility. No person shall willfully resist, delay, or obstruct an authorized representative, employee, or agent of the Town, while that person is inspecting, or attempting to inspect, a stormwater management facility nor shall any person obstruct, hamper or interfere with any such representative while in the process of carrying out their official duties. The Town shall have the power to conduct such investigations as deemed reasonably necessary to carry out the duties as prescribed in this Section.
- (b) Notice of Violation
- (1) If it is determined that a person has failed to comply with the requirements of this Section, or rules, or orders adopted or issued pursuant to this Section, a notice of violation shall be served upon that person. The notice may be served by personal service or by certified mail, return receipt requested.
  - (2) The notice shall specify the violation and inform the person of the actions that need to be taken to comply with this Section, or rules or orders adopted pursuant to this Section. The notice shall direct the person to correct the violation within a specified reasonable time. The notice shall inform the person that any person who violates or fails to act in accordance with any of the provisions of this Section or rules or orders adopted or issued pursuant to this Section is subject to the civil and criminal penalties and other enforcement actions as provided in this Section.



(c) Power to Require Statements

The Town shall also have the power to require written statements, or the filing of reports under oath, with respect to pertinent questions relating to land-disturbing activities.

(d) Civil Penalties

(1) Assessment of Penalties

Any person who violates or fails to act in accordance with any of the provisions of this Section or rules or orders adopted or issued pursuant to this Section shall be subject to a civil penalty. A civil penalty for a violation may be assessed in an amount not to exceed ten thousand dollars (\$10,000) per day. If any violation for which a penalty may be assessed is continuous, a civil penalty may be assessed for each day of the violation in an amount not to exceed twenty-five thousand dollars (\$25,000) per day for as long as the violation occurs. Each day of a continuing violation shall constitute a separate violation under this Subsection.

(2) Notice of Civil Penalty Assessment

The Town Manager shall provide written notice of the civil penalty amount and the basis for the assessment to the person assessed. The notice of civil penalty assessment shall be served by any means authorized under G.S. 1A-1, Rule 4 including personal service or by certified mail, return receipt requested, and shall direct the violator to either pay the assessment or contest the assessment, within thirty (30) days after receipt of the notice of assessment by written demand for a hearing.

(3) Hearing

Any decision imposing a civil penalty may be appealed to the Town Board of Adjustment. The Board shall hold a hearing in accordance with Sections 4.10 through 4.13.

(4) Appeal of Final Decision.

Appeal of the final decision of the Town Board of Adjustment shall be to the Superior Court of Orange County. Such appeal shall be in the nature of a certiorari and must be filed with thirty (30) days of receipt of the final decision. A copy of the appeal must be served on the Town Manager by any means authorized under G.S. 1A-1, Rule 4.

(5) Demand for Payment of Penalty

An assessment that is not contested is due when the violator is served with a notice of assessment. The civil penalty must be paid within thirty (30) days of the assessment, if not appealed, or within thirty (30) days after the conclusion of the administrative or judicial review of the assessment. If payment is not received within thirty (30) days after demand for payment is made, the Town may institute a civil action to recover the amount of the assessment. The civil action may be brought in the Orange County Superior Court or in the Judicial District where the violator's residence or principal place of business is located. Such civil actions must be filed within three (3) years of the date the assessment was due.

(e) Criminal Penalties

Any violation of any provision of this Section shall constitute a misdemeanor and shall subject the violator to a penalty of five hundred dollars (\$500.00) or imprisonment for not more than thirty (30) days. Each day of a continuing violation shall constitute a separate violation under this Subsection. Failure to comply with the requirements of 15A NCAC 02B.0265, as amended by SL 2009-216 and SL 2009-484, may result in imposition of enforcement measures as authorized by G.S. 143-215.6B.

(f) Injunctive Relief

(1) Civil Action in Superior Court

Whenever the Town Manager has reasonable cause to believe that any person is violating or threatening to violate this Section or any rule or order adopted or issued pursuant to this Section, the Town Manager may, either before or after the institution of any other action or proceeding authorized by this Section, institute a civil action in the name of the Town for injunctive relief to restrain the violation or threatened violation. The action shall be brought in the Superior Court of Orange County.

(2) Order to Cease Violation

Upon determination by a court that an alleged violation is occurring or is threatened, the court shall enter any order or judgment that is necessary to abate the violation, to ensure that restoration is performed, or to prevent the threatened violation. The institution of an action for injunctive relief under this Section shall not relieve any party to the proceedings from any civil or criminal penalty prescribed for violations of this Section.

(g) Compliance with Requirements

Any person engaged in new uses or activities as defined by this Section who fails to meet the requirements of this Section shall be deemed in violation of this Section.”

**Section 2.** If any one or more Sections or portions thereof of this Section are held to be invalid or unenforceable, all other Sections and portions thereof shall nevertheless continue in full force and effect.

**Section 3.** That this Ordinance shall become effective December 1, 2012.

This the 24th day of October, 2012.