

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 CTY 00237

<p>IN THE MATTER OF THE APPEAL OF: RIVER LANDING CENTER, LLC, and MOORMAN, KIZER & REITZEL INC., Petitioners,</p> <p>v.</p> <p>FROM THE CITY ENGINEER'S ISSUANCE OF CIVIL PENALTIES FOR VIOLATION OF THE CITY'S STORMWATER ORDINANCE on SEPTEMBER 13, 2018 NO2018-AP-1, Respondent.</p>	<p>FINAL DECISION</p>
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This quasi-judicial hearing was heard before J. Randall May, Administrative Law Judge, acting by and for the City Council of the City of Fayetteville, on August 19-22, 2019, in Fayetteville, North Carolina.

APPEARANCES

Petitioner River Landing Center, LLC was represented by George M. Oliver, The Law Offices of Oliver & Cheek PLLC.

Petitioner Moorman, Kizer & Reitzel, Inc. was represented by David P. Ferrell and George T. Smith, III, Nexsen Pruet PLLC.

Respondent Fayetteville City Engineer was represented by Keith H. Johnson and Nicolas E. Tosco, Poyner Spruill LLP; and Alicia L. Young, Office of the City Attorney.

ISSUE

Whether the City Engineer's assessment of civil penalties to each Petitioner should be reversed or affirmed, whether wholly or partly; or should be modified.

PROCEDURAL BACKGROUND

This matter is before the undersigned administrative law judge (the "undersigned ALJ") on Petitioners' appeals of civil penalties assessed to them by Respondent on September 13, 2018, for violations of the City's Stormwater Management Ordinance (the "Stormwater Ordinance" or "Ordinance"). Respondent assessed civil penalties to Petitioner River Landing Center, LLC

(“River Landing”) in the amount of \$316,000.00; and to Petitioner Moorman, Kizer & Reitzel, Inc. (“MKR”) in the amount of \$1,264,000.00. Each Petitioner timely appealed the civil penalty assessments pursuant to Section 23-45 of the Ordinance and Petitioners’ appeals were consolidated for hearing by the City Council.

Petitioners’ Motion for the City Council to Request the Appointment of an Administrative Law Judge from the Office of Administrative Hearings to hear all aspects of Petitioners’ appeal, was granted. Mayor Mitch Colvin, pursuant to N.C. Gen. Stat. § 7A-758, issued an Order (NO. 2018-AP-1) on January 7, 2019, requesting that the Chief Administrative Law Judge appoint an Administrative Law Judge from the Office of Administrative Hearings to hear all remaining aspects of Petitioners’ appeal and render a written decision within a reasonable time thereafter, consistent with N.C. Gen. Stat. § 160A-398.

Petitioners filed a Petition with the OAH on January 10, 2019, enumerated as 19 CTY 00237, and the undersigned ALJ was assigned the case on January 11, 2019. This matter remains a quasi-judicial appeal conducted pursuant to Section 23-45 of the Ordinance and N.C. Gen. Stat. § 160A-398.

On April 18, 2019, the undersigned ALJ entered an Order granting Respondent’s Motion to Determine Issues on Appeal (the “Jurisdiction Order”). In the Jurisdiction Order, the undersigned ALJ ruled there was no subject matter jurisdiction to hear any appeal of the Notice of Violation/Code Enforcement Order (“NOV/Order”) issued to Petitioners on November 1, 2016, since Petitioners failed to timely appeal that NOV/Order to the City Council. Therefore, the only enforcement action of Respondent this tribunal has subject matter jurisdiction to review is the assessments of the civil penalties. The undersigned ALJ has accordingly limited this review to Respondent’s civil penalty assessments to Petitioners.

After a discovery period, and ruling on several other pre-hearing motions, the quasi-judicial hearing on the merits of the appeal was held from August 19-22, 2019, in Fayetteville City Hall.

Based upon the testimony and evidence accepted during that hearing, this Decision is entered pursuant to N.C. Gen. Stat. § 160A-388(e2)(1), setting forth the following Findings of Fact and Conclusions of Law supporting the undersigned ALJ’s decision on Petitioners’ appeals of the civil penalty assessments. For the reasons set forth herein, the amount of civil penalties assessed to each Petitioner is hereby MODIFIED, based upon a 13 day reduction in the civil penalty period computed by Respondent and otherwise as ordered. In support of this Decision, the undersigned ALJ makes the following Findings of Fact and Conclusions of Law:

EXHIBITS CONSTITUTING THE RECORD

Respondent submitted exhibits stipulated to constitute Respondent’s record pursuant to N.C. Gen. Stat. § 160A-388(b1)(5). Petitioners submitted exhibits that are also part of the record. These exhibits, in addition to the electronic transcript, comprise the entire record of this quasi-judicial hearing.

THE PARTICIPANTS

A. The Parties.

1. Petitioner, Moorman, Kizer & Reitzel, Inc. (“MKR”), is an engineering firm located in Fayetteville, North Carolina.
2. Petitioner, River Landing, LLC (“River Landing”), is a North Carolina limited liability company located in Fayetteville, North Carolina.
3. Respondent, Fayetteville City Engineer (“City Engineer”), is an official within the department of the City of Fayetteville, North Carolina, that is responsible for enforcing the City of Fayetteville’s Stormwater Management Ordinance (“Ordinance”).
4. The parties are properly before J. Randall May, Administrative Law Judge, sitting in place of the City Council of the City of Fayetteville, pursuant to N.C. Gen. Stat. § 7A-758 and the January 7, 2019 Order of Mayor Mitch Colvin.

B. The Witnesses.

5. Giselle Rodriguez was the City Engineer for the City of Fayetteville at all relevant times.
6. Jimmy Kizer is a civil engineer and principal at Moorman, Kizer & Reitzel, Inc.
7. Larry Walsh is a member of River Landing, LLC, which is the successor-by-merger to the entity that developed the Liberty Hills subdivision.
8. Andrew P. Moriarty, P.E., is a civil engineer and principal at Bohler Engineering, Inc. in Raleigh, North Carolina. Mr. Moriarty is the Manager for Bohler Engineering’s operations in North Carolina, and he specializes in site feasibility analyses; zoning and subdivision/land development ordinance review/interpretation; and grading and stormwater management system design.
9. Jeffrey W. Meador is an engineer with Rummel, Klepper & Kahl Engineers (“RK&K”) in Raleigh, North Carolina. Mr. Meador is a manager in RK&K’s water resources group.
10. Bryon Reeves is a staff engineer for the City of Fayetteville City Engineer’s office.
11. Douglas Cooper, although not called to testify, was the engineer of record for the design of the storm water management system for the Liberty Hills project, a professional engineer employed at the time by Petitioner, MKR. (R Exh.’s 18, 20).

FINDINGS OF FACT

C. City Engineer's Assessment of Civil Penalties.

1. This appeal involves a stormwater system in the Liberty Hills subdivision in Fayetteville, North Carolina.

2. River Landing is the successor-by-merger to the entity that developed the subdivision, and MKR is the engineer that designed the stormwater system for River Landing.

3. Prior to any flooding or stormwater drainage concerns, the City Engineer reviewed and approved the initial design as submitted and the modified design of the stormwater system submitted by MKR.

4. Following the City Engineer's approval of the initial design and modified design, River Landing installed the stormwater system in the Liberty Hills subdivision by and through River Landing's subcontractor Hoke Sand and Gravel. The stormwater system was installed within the streets and related right-of-way of the Liberty Hills Subdivision.

B. Stormwater Drainage Issues in Liberty Hills.

5. The plans for Liberty Hills, which included stormwater management plans, were submitted by Mr. Cooper to City engineering staff in 2012 and were approved by the City engineering staff after several changes were made to those plans. (R Exh.'s 18, 20).

6. During this plan submittal process, MKR replaced a single 90 degree turn in the stormwater drainage pipe at the low end of Liberty Lane with three 90 degree turns in its third and final stormwater facilities plan submittal. (T p. 400, l. 15- p. 403, l. 22; R Exh. 18 - page on stormwater plans). This was a critical design flaw, and although contested, there was no evidence in the record to indicate modeling was conducted and submitted to City engineering staff to determine whether, with those two additional 90 degree turns, the stormwater facilities (as designed) had sufficient hydraulic capacity to meet the standards of the Ordinance and avoid overflows of stormwater. Mr. Kizer was not able to verify that this occurred, and there is no documentation it occurred; nor was the City able to do so. (T p. 404, l. 15-25).

7. Liberty Hills was subsequently developed by River Landing. As-built drawings for the infrastructure in Liberty Hills, including the stormwater facilities, which were sealed by MKR, were submitted to the City engineering staff in August 2013 for the City's acceptance and approval. (R Exh. 3, p. 3).

8. In early October 2015, City engineering staff first learned from a Liberty Hills resident that there was a stormwater drainage issue on Liberty Lane in Liberty Hills. Mr. Mauro Bazan, whose family resided at 1035 Liberty Lane, which is referenced as lot 249 on the plans for Liberty Hills (the "Bazan Property"), called the City to report that water was overflowing onto his property from stormwater catch basins on Liberty Lane just upgradient of his property. Mr. Bazan told Respondent he was experiencing flooding; that water was bubbling out of an inlet; and that

he was concerned about his daughters being able to walk to the bus stop because there was so much water coming over the sidewalk. (T p. 79, l. 4-20).

9. The Bazan Property is at the lower terminus of Liberty Lane, and at a low point in the subdivision. In describing the topography there, Mr. James Kizer of MKR testified it was almost like a bowl. (T p. 390, l. 19 – p. 400, l. 14). According to the testimony of Jeffrey Meador, a professional engineer with RK&K, and Mr. Kizer, the lower end of Liberty Lane is the point where an overflow of water would likely first occur if there was an issue with the stormwater drainage system. (T p. 400, l. 6-14; p. 667, l. 24 – p. 668, l. 10). However, MKR accepted the project with this topographical knowledge.

10. The evidence in the record includes illustrative evidence in the form of a picture taken of Liberty Lane from the Bazan Property in early October 2015. (R. Exh. 9, T p. 710, l. 6-23). It shows what Mr. Bazan reported – that water was surcharging or overflowing from a catch basin on the opposite side of Liberty Lane from the Bazan Property. It also shows flooding occurring on Liberty Lane, and across that street onto the Bazan Property. No exact date was included for the picture.

11. The evidence in the record also includes an email exchange between Petitioners' representatives in late September 2015 that indicates that Petitioners were aware of an issue at that time involving water drainage concerns and water in the street in Liberty Hills. (*See* Kizer – Praschan Sept. 28-29, 2015 email, KIZER-0226, in P 7).

12. No one with either Petitioner reported or otherwise initiated any communication with City representatives in the fall of 2015 about the drainage issues or the water in the streets. (Kizer – T p. 417, l. 18-21; Walsh – T p. 497, l. 13-20).

C. City's Investigation and Communications in 2016.

13. This was the City Engineer's first penalty case of this magnitude. The City engineering staff checked the stormwater drainage pipes in the vicinity of the Bazan Property to see if there was any blockage or subterranean occlusion that was causing the surcharge or overflow of water from the catch basins in the street. No such impediment was detected. (R Exh. 3, p. 4; T p. 247, l. 16-24).

14. City engineering staff reviewed the plans MKR originally submitted for the stormwater facilities in 2012, as well the as-built drawings MKR submitted in August 2013. City engineering staff identified discrepancies in the hydraulic modeling calculations submitted in 2012, and the as-built layout of the stormwater pipe infrastructure. **The calculations that were modeled and submitted by MKR to the City in 2012 did not support the layout of the stormwater pipe that was approved by the City, because the calculations submitted in 2012 were not revised to support the stormwater pipe layout designed by MKR.** Emphasis added. (R Exh. 3, p. 4).

15. City engineering staff used a hydraulic model, based upon the as-built drawings, to determine if the Liberty Hills stormwater facilities (as-built) had adequate load capacity to meet the standards under the Stormwater Ordinance. That analysis showed that the drainage components of the stormwater facilities in the low point along Liberty Lane, where the Bazan property is located, were insufficient to meet the capacity standards of the Ordinance. The modeling results supported what Mr. Bazan had reported – that several catch basins along Liberty Lane just above the Bazan Property would “surcharge” or overflow during certain storm events. (R Exh. 3, p. 4).

16. City engineering staff communicated with MKR about the drainage complaint at the Bazan Property and referenced the three catch basins in front of the Bazan Property; the sharp turns in the stormwater pipes there; and that two of the catch basins in front of the Bazan Property routinely surcharged and overflowed. City engineering staff noted the following: (1) the plans originally submitted by MKR in 2012 show a different design layout than what was ultimately shown on the as-builts submitted by MKR in 2013 for Liberty Hills; and (2) there was an additional stormwater pipe bend that MKR did not take into consideration. City engineering staff also shared the results of a hydraulic model using the as-built drawings that predicted what had been reported – catch basins at the low end of Liberty Lane, in front of the Bazan Property, will surcharge or overflow stormwater. Finally, City engineering staff asked to meet with MKR to discuss this recurring issue. (Reeves April 27, 2016 email to Kizer, KIZER-0578, p. 1 in P 5).

17. The next day, on April 28, 2016, Mr. Kizer forwarded City engineering staff’s April 27, 2016 email to Kenneth Praschan with River Landing. (Kizer April 28, 2016 email, p. 1 in P 7). That **most perplexing** email indicates Petitioners had known there was a stormwater drainage issue in Liberty Hills for some time before being notified by the City. (Emphasis added) Mr. Kizer stated:

It appears the City has finally figured out the issue associated with the drainage problem at Liberty Hills. The lengthy email below basically covers what I had told you I thought might be the problem a while back. . . . (P Exh. 7 p.1).

Mr. Kizer indicated in this email that he assumed the City would look to River Landing or its contractor to help address the stormwater drainage issue; and thus, it would be worthwhile for a representative of River Landing to be involved in any meeting on the issue. *At this point the “hot potato” had landed, for in the undersigned’s opinion this email was very revealing, which showed that time and money were being wasted on the hope that MKR would escape detection of the problems.* Although this may not amount to willfulness, it does not mitigate their liability.

18. No one with either Petitioner communicated to the City staff about the situation before the April 27, 2016 email from the City engineering staff. (*See id.*) Such a situation as this should have been communicated at the earliest discovery.

19. From May through September 2016, City engineering staff and MKR continued to meet and communicate about the stormwater drainage issue and possible solutions, and some possible cost-sharing arrangements. River Landing was less involved during this period, and Mr.

Kizer reported to City engineering staff that River Landing was non-committal to participating in any solution as of May 2016. (See Kizer May 26, 2016 email, KIZER-0016, in P 5).

20. On May 11, 2016, Mr. Kizer sent an email to representatives of River Landing to report on a meeting he had with Respondent to review the stormwater drainage issue near the Bazan Property. (R Exh. 22). Mr. Kizer noted in that email that Mr. Bazan had been complaining over a year by that point; and that the City had run an analysis of the stormwater facilities “and came to the same conclusion we did when we first looked at the issue last year.” Specifically, Mr. Kizer indicated in the email that: (1) the issue appeared to be due to the stormwater pipe in front of the Bazan Property being flatter than what the plans called for; (2) the modeling appeared to confirm the flatness was enough to create a hydraulic jump in the catch basin similar to what was shown on the video and pictures of that area; and (3) the hydraulic jump is compounded by the 90 degree turn in the stormwater drainage pipes near the Bazan Property. (*Id.*)

21. In that May 11, 2016 email, Mr. Kizer also described the impacts from the stormwater drainage issue:

The water coming out of the boxes floods the street and then floods the yard on lot 249 [the Bazan Property]. While luckily there has been no significant damage that the City has been made aware of, the flooding has created problems for the homeowner with water under his house, flooding of his yard, washing out of yard and landscaping, water coming close to going into the garage, gulleys forming in the yard, inability of mail to be delivered at times, and the school bus having to go another way due to the water in the road . . . (*Id.*)

22. Mr. Bazan reported rain events where water surcharged or overflowed from the catch basins in the street in front of his property, causing flooding on the street and on his property; including a rain event on August 2, 2016, that caused Mr. Bazan and his family to be evacuated from their home by the fire department. (R Exh. 3, p. 4, T p. 712, l. 10-25).

23. Due to the flooding caused by the inadequate stormwater facilities, and at the City’s expense, sandbags were placed in the front yard of the Bazan Property as a temporary measure to divert stormwater and to protect the crawlspace vents and garage from flooding. (T p. 253, l. 15-22).

24. Finally, as a result of a site visit in early August 2016, Respondent observed conditions indicating the deficiencies in the stormwater facilities for Liberty Hills were not limited to the low point on Liberty Lane in front of the Bazan Property. There were other areas in Liberty Hills where stormwater was not being collected and conveyed in a manner consistent with the standards of the Stormwater Ordinance. (R Exh. 3, p. 4).

25. Respondent documented those conditions in an email she sent to Mr. Kizer on August 11, 2016. (R Exh. 23, p. 1). In her testimony, Respondent explained the relationship between those conditions observed in August 2016 to the scope of work the City would later fund in Liberty Hills. She testified that all the areas where the City later funded work were identified in that August 2016 email. (T p. 734, l. 19 – p. 735, l. 9).

26. In the August 11, 2016 email, Respondent also indicated her expectation that Mr. Kizer would complete an evaluation of the stormwater facilities and provide detailed alternatives. (R Exh. 23).

27. On September 13, 2016, Mr. Kizer submitted a letter report to Respondent regarding the drainage concerns and potential improvements for Liberty Hills. (R Exh. 16). In identifying historical issues and potential contributing factors, Mr. Kizer first referenced that the original design was changed and that the design of the storm drainage system was realigned. (*Id.*, p. 1). That realignment was, in part, the change from one 90 degree bend at the lower end of Liberty Lane to three such bends. Mr. Kizer acknowledged it did not appear that the hydraulic modeling was updated to reflect that change. (*Id.*, p. 1). Mr. Kizer then identified other contributing factors in his opinion to the storm drainage conditions and outlined possible remedial options.

28. While MKR had re-surveyed within the street rights-of-way in Liberty Hills before this report was submitted, it was not based upon a comprehensive new survey or drainage map of the subdivision, which both Mr. Kizer and Respondent knew was needed to get an accurate representation of the drainage conditions in the subdivision. (T p. 374, l-25 – p. 375, l. 5).

D. November 2016 NOV/Order.

29. On November 1, 2016, Respondent initiated enforcement action by issuing the NOV/Order to Petitioners and Caviness & Cates, which constructed the house on the Bazan Property (collectively, the “Recipients”)(R Exh. 17).¹

30. Respondent issued the NOV/Order, 13 months after the first report of flooding, because there was no material plan of action by then with a schedule and financial arrangement to bring the stormwater facilities into compliance with the Ordinance. (T pp. 714-15).

31. In the NOV/Order, Respondent stated that during their investigation, the City staff had reviewed evidence that the stormwater design plans for Liberty Hills had not been effective in preventing frequent flooding and resulting damage to the Bazan Property. While Mr. Bazan’s complaint was referenced, the NOV/Order clearly states the determination that the stormwater facilities as designed for Liberty Hills were inadequate. (R Exh. 17, p. 2).

32. The Recipients were directed in the NOV/Order to take all actions necessary to abate currently existing drainage concerns and violations, at their expense; including, but not limited to, all corrective and remedial measures required to bring the inadequate stormwater facilities into Code compliance; and to alleviate flooding conditions currently experienced in Liberty Hills, as necessary to address the various causational and contributing factors outlined in MKR’s September 13, 2016 letter report. (R Exh. 17, p. 3).

¹ The NOV/Order was amended on August 3, 2018 to specifically name River Landing as a responsible party since the original NOV/Order named River Landing’s predecessor-in-interest, Cornerstone Development LLC, as a responsible party.

33. The Recipients were informed in the NOV/Order that, if they failed to take the actions necessary to bring the inadequate stormwater facilities into compliance with the Ordinance and alleviate the flooding, they would be subject to further enforcement action, including the assessment of civil penalties. (R Exh. 17, pp. 2-3).

E. Post-NOV/Order Meeting and Correspondence Between the Parties.

34. City engineering staff met with representatives of Recipients on November 17, 2016. One subject raised at that meeting was the need for access to individual lots in Liberty Hills to acquire new survey information. Respondent told those present that the City would facilitate this by issuing notifications to the lot owners of the need to access their property. Respondent noted the City routinely issues such notices. (T p. 717, l. 25 - p. 719, l. 7; p. 723, l. 13-20).

35. Respondent testified that, based on the November 17, 2016 meeting, she expected the Recipients to submit a plan of action identifying what was going to be done to repair or replace the inadequate stormwater facilities; a schedule for doing so; and how the project would be financed. (T p. 718, l. 8-13).

36. In a follow up letter dated November 23, 2016, Alicia Young, Assistant City Attorney, documented Respondent's expectation that the Recipients engage in a collective effort to address the inadequate stormwater facilities in Liberty Hills by taking certain identified measures at a minimum. Ms. Young indicated that the City would extend the deadline for correcting the violation for 20 days, to December 21, 2016, but a written status report outlining a corrective action plan would have to be submitted by then. Ms. Young re-stated what had been stated in the NOV/Order, that if the Recipients failed to comply with the NOV/Order, they would be subject to further enforcement action, including possible civil penalties. (R Exh. 12).

37. Evidence shows that MKR understood that Respondent was expecting a comprehensive plan and schedule for bringing the stormwater facilities in Liberty Hills into compliance with Stormwater Ordinance standards. On December 19, 2016, Mr. Kizer had an email exchange with Scott Flowers, who represented the builder, Caviness & Cates. Mr. Flowers advised Mr. Kizer to note in the report that he planned to submit to the City that it was being submitted in furtherance of on-going discussions; but, that by submitting the report, MKR was not accepting responsibility for the work or agreeing that any violation had occurred. In response Mr. Kizer wrote:

My interpretation of the [November 17, 2016] meeting was that we were supposed to turn in the information supporting our suggested repair along with the plan to implement such repair. The information in the report is basically the same information they already have, with the only difference now being that we have actual contractor pricing for the option. I am more than happy giving them a report, ***but I think they really want a course of action on how the issue is going to be resolved.*** (KIZER-0819, in P Exh. 8, emphasis added).

38. On December 20, 2016, MKR made an additional submission to Respondent, referencing the November 17, 2016 meeting and Ms. Young's November 23, 2016 letter. The only new information in the December 20, 2016 submittal, not previously included in MKR's September 13, 2016 submittal, was an estimate from a contractor on the cost to complete what had been identified as a minimum scope of work. (R Exh. 13).

39. Respondent testified that the December 20, 2016 submittal did not meet her expectations. It was not a "complete plan of action;" no party was assuming any responsibility; and the issue of the need for new survey data was not addressed. (T p. 719, l. 19 – p. 720, l. 7).

40. Instead, the December 20, 2016 submittal vaguely stated the information "is being submitted as a furtherance to the ongoing discussions among the parties listed" in the NOV/Order and the City; and that the City would need to concur with the work since much of it would be done in City street rights-of-way and drainage easements. (R Exh. 13, p. 1).

41. The December 20, 2016 submittal also included the following disclaimer of responsibility: "With the submittal of this information, [MKR] is not accepting responsibility for the identified work reflected on the enclosed plans or agreeing that any violation of the Stormwater Ordinance has occurred." (R Exh. 13, p. 1).

42. River Landing did not make any separate submittal to Respondent or the City in response to the NOV/Order at any time.

43. While MKR denied responsibility for violations of the Stormwater Ordinance, or that any violation had taken place in that December 20, 2016 submittal, neither Petitioner requested an appeal of the NOV/Order during that period, as prescribed in the Appeals section of the Ordinance, Section 23-45.

44. On January 20, 2017, Respondent replied to MKR's December 20, 2016 submittal via counsel. In that letter, Ms. Young indicated it was unclear from MKR's December 20, 2016 submittal whether it was based on an updated drainage area map or survey; and if not, the Recipients needed to resubmit a plan based upon such a map or survey. She also requested information on how the Recipients planned to finance the project. (R Exh. 14).

45. On January 30, 2017, Mr. Kizer wrote in response to the January 20, 2017 letter, but according to Respondent, failed to address Ms. Young's requests. Specifically, Mr. Kizer failed to explain how Recipients intended to finance a corrective action; questioned the value of getting updated drainage area data; and speculated about possible problems obtaining permission to survey private property (individual lots). Mr. Kizer also re-stated verbatim the disclaimer language from his December 20, 2016 submittal. (R Exh. 15).

F. Subsequent Events in Spring of 2017.

46. The parties entered into a Tolling Agreement on February 24, 2017, which tolled all applicable statutes of limitations; statutes of repose; and other time-based defenses. The parties

agreed that they “will not initiate a lawsuit or any other legal proceeding, including without limitation any action to enforce any alleged violation of the City storm water ordinance, against any other Party during the Tolling Period.” (P Exh. 16).

47. The NOV/Order was never withdrawn or suspended. (T p. 692, l. 14-22). In all post-NOV/Order correspondence, the City’s counsel reminded the Recipients that failure to comply with the NOV/Order would subject them the remedies under Section 23-46, the Enforcement provision of the Ordinance, specifically civil penalties. (R Exh.’s 12, 14).

48. The Ordinance provides that each day of a continuing violation is a separate violation. *See* Sec. 23-46.b.2b of Ordinance. The Agreement indicating that the accrual of civil penalties for continuing violations of the Ordinance, in addition to time-related defenses, was suspended. (P Exh. 16). There was no language in the Agreement that either Petitioner requested that the accrual of civil penalties for continuing violations of the Ordinance be suspended, pursuant to that Agreement or otherwise; and Respondent testified no such request was made. (T p. 799, l. 7-10).

49. The initial Tolling Period was 30 days from the effective date of the Tolling Agreement. (P Exh. 16). It was subsequently extended to October 22, 2017. (P Exh. 17).

50. The City did not initiate a lawsuit or other legal proceeding against either Petitioner during that Tolling Period.

51. After the parties engaged in an unsuccessful mediation in late April 2017, MKR’s counsel sent an email to Respondent’s counsel on May 18, 2017.² MKR’s counsel made clear in that email that MKR’s position was that it considered the non-compliant stormwater facilities in Liberty Hills to be the City’s issue. MKR’s counsel stated that while MKR was not responsible for the issues “the City is experiencing with their system,” MKR would provide \$20,000.00 more in professional services to the \$45,000.00 it had already performed, to assist in resolving “*the City’s issue,*” in exchange for indemnity and a hold harmless release. (Ferrell May 18, 2017 email no bates no., in P Exh. 5, emphasis added).

52. Respondent testified that this offer was not satisfactory since it “would not have taken us very far” toward a solution. (T p. 727, l. 14-17).

G. Public-Funded Project Initiated in 2017 to Bring the Stormwater Facilities into Compliance with the Ordinance.

53. In May of 2017, Respondent, upon consultation with the City Manager and legal counsel, determined she had to take action to bring the stormwater facilities into compliance with the Ordinance. Repeatedly she had to tell Mr. Bazan there was no resolution plan. (T pp. 727, l.

² While it was identified for settlement purposes only, MKR submitted the May 18, 2017 email as an exhibit in this proceeding.

21- p. 728, l. 13).

54. This had been an on-going crisis for Mr. Bazan since early October 2015.

55. Respondent issued a request for proposals for the engineering services needed to obtain updated drainage data; identify remedial alternatives; select a scope of work based upon the remedial alternatives; and prepare construction drawings. After review of the responses, RK&K was selected, and their contract terms were negotiated. On October 27, 2017, RK&K submitted a revised scope of services and fee schedule. (R Exh. 6, Exhibit A).

56. Consistent with the RK&K proposal on November 17, 2017, the City Council voted to approve a budget amendment to appropriate \$233,855.00 from the City's stormwater management fund for that study and design. (P Exh. 21).

57. On December 19, 2017, RK&K's work authorization was signed by the City Manager. (R Exh. 6). RK&K's revised scope of work included:

- (i) completing a drainage study or survey of Liberty Hills using a combination of Light Detection and Ranging (LIDAR) technology and field investigation;
- (ii) analyzing and recommending improvement alternatives at locations that do not meet design standards, quantifying hydrologic and hydraulic benefits of the project, and preparing cost estimates associated with each improvement option;
- (iii) preparing a report summarizing the findings of the drainage study including exhibits for the preliminary improvement options;
- (iv) meeting with City staff to summarize the findings of the drainage study and discuss the improvement options; and
- (v) preparing construction drawings based upon the improvement options selected.

(R Exh. 6, Exhibit A).

58. As a follow-up with what Respondent had previously told Petitioners she was prepared to do, City staff issued notices to lot owners in Liberty Hills to facilitate RK&K's access to private property for purposes of completing the drainage study. The necessary access to private lots to get a complete understanding of drainage conditions in the subdivision was thereby obtained. (T p. 594, l. 17 – p. 595, l. 4).

59. RK&K presented its report dated February 28, 2018 to the City. Based upon the terrain and stormwater system elevations, RK&K identified stormwater pipes in Liberty Hills that were under-capacity in relation to the 10 year storm standards applied under the Stormwater Ordinance. RK&K then identified and prioritized five potential improvement options. (R Exh. 4).

60. Respondent and her staff then met with RK&K to discuss the improvement options identified and to select which ones to incorporate into construction drawings. (T p. 609, l. 9-17). Two options, and part of another option, were selected. Those were:

- (i) Option 1 – to directly improve drainage at the low point on Liberty Lane (in front of the Bazan Property);
- (ii) Part of Option 2 – to address the flow of water off Northgate Drive to the low point on Liberty Lane; and,
- (iii) Option 5 – to repair and supplement drainage features on the back side of the Bazan Property and adjoining lots on Liberty Lane. (T p. 609, l. 18 - p. 610, l. 1).

61. As Mr. Meador testified, these options were selected because they would collectively achieve the primary goal of relieving the flooding at the low point on Liberty Lane. (T p. 610, l. 14-21).

62. Each of the improvement options selected addressed areas of concern that Respondent had identified to Mr. Kizer in her August 11, 2016 email, sent prior to when the NOV/Order was issued. (R Exh. 23).

63. Two other remedial options identified by RK&K, which involved improvements in more upgradient sections of Liberty Hills, were not selected because they were not deemed essential to alleviating flood risks at the low end of Liberty Lane. (T p. 610, l. 2-13).

64. RK&K subsequently prepared the construction drawings and the City put the construction out for bid. The bid documents reflected anticipated construction costs of \$450,422.00. (R Exh. 7).

65. On August 13, 2018, before construction began, Respondent sought and obtained authorization from the City Manager to correct the violations of the Stormwater Ordinance in Liberty Hills, pursuant to Section 23-46.b.1.d of the Ordinance. (R Exh. 5).

66. The public-financed project to repair the stormwater facilities was completed as of June 17, 2019, when on-site inspections by the City confirmed that construction activities were completed. (T p. 821, l. 24 – p. 822, l. 2).

H. Respondent's Assessment of Civil Penalties in September 2019.

67. After consulting with the City Manager and legal counsel, but prior to the completion of the public-financed repairs to the stormwater facilities, Respondent assessed the civil penalties that are the subject of these appeals, on September 13, 2018. (R Exh. 1-3; T p. 785, l. 21 – p. 786, l. 2).

68. Respondent did not assess any civil penalties or take any further enforcement action against Caviness & Cates (a non-party), the company that built the home on the Bazan Property. (R Exh. 3, p. 5).

69. Respondent testified she assessed the civil penalties at that time since the study and design work by RK&K had been completed; since she had projected construction costs from the bid documents; and because it was time to move the enforcement action toward closure. (T p. 735, l. 20 – p. 736, l. 9).

70. Because of their differing roles regarding the development, Respondent decided to assess separate civil penalties to each Petitioner (rather than joint and several assessment of the civil penalties). Since MKR was the engineer of record for the development, she considered MKR to have primary responsibility for the fact that the drainage components of the stormwater facilities were not properly designed; were undersized; and surcharged during certain rain events. (R Exh. 3, p. 8).

71. Respondent prepared a 10-page memorandum to explain her reasoning for assessing civil penalties to Petitioners (the “Penalty Basis Memo”) and provided a copy of it to Petitioners along with the civil penalty assessments. (R Exh. 3). The Ordinance requires Respondent to notify the recipients of the amount of the civil penalty and the reasons for assessing the penalty. *See* Sec. 23-46.b.2.c of Ordinance. Respondent testified she met that requirement by preparing the Penalty Basis Memo, which included all the information listed on the penalty worksheet form in the City’s Administrative Manual (the “Administrative Manual”). (T p. 701, l. 19 – p. 702, l. 11).

72. Respondent stated in the Penalty Basis Memo that, in assessing the civil penalties, she placed “significant emphasis on the past and anticipated future costs to the City to rectify the damage and facilities to bring them into compliance with the standards under the Ordinance.” And, that one of the objectives of the civil penalties, while not the sole objective, was to recover the past and anticipated future costs to the City to fix the stormwater facilities, although no substantial evidence was given as to what the anticipated and contingency costs would be. (R Exh. 3, p. 8).

73. After setting forth the relevant events and circumstances, Respondent listed and then addressed in the Penalty Basis Memo each of the mitigating and aggravating factors enumerated in Section 23-46.b.2.b of the Ordinance that must be considered in assessing civil penalties (*Id.*, pp. 7-9), which are further addressed in Section II below.

74. Respondent used a customary formula for computing civil penalties: a daily civil penalty multiplied by the period of non-compliance. That produced a collective amount of civil penalties. (*Id.*, p. 9).

75. Regarding the period of non-compliance, noting that each day of a continuing violation constitutes a separate violation under Sec. 23-46.b.2.b of the Ordinance, Respondent decided the fair approach would be to begin the penalty period May 1, 2017, six months after the NOV/Order was issued. (*Id.*). This “grace period” was provided to Petitioners since that would

have been ample time for Petitioners to respond to the NOV/Order by submitting a plan and schedule for bringing the stormwater facilities into compliance with the Ordinance. (T p. 694, l. 19 – p. 695, l. 2). Respondent identified June 30, 2019, as the end of the period of non-compliance, which was the projection of when the public-financed project to fix the stormwater facilities would be completed. (R Exh. 9, p. 9).

76. The public-financed project to modify the stormwater facilities was completed as of June 17, 2019, when on-site construction activities were completed. (T p. 821, l. 24 –p. 822, l. 2).

77. Petitioner posits that the competent, material, and substantial evidence establishes that there are no off-site impacts documented regarding the ordinance violation. The City Engineer did not dispute this. The site is the Liberty Hills subdivision. Liberty Lane and the Bazan Property are all within the site. The City Engineer identified the engineering drawing showing the site. (P Exh. Tab 4, 12th page). MKR’s uncontroverted testimony is that the subdivision, Liberty Lane, and the Bazan house are all within the site. Since there were no off-site impacts documented, the penalty amount should be \$1,000 per day. (Administrative Manual, p. 151).

78. Regarding the collective daily penalty amount, Respondent determined in her discretion to set the civil penalties at \$2,000.00 per day. Although she prepared a spreadsheet showing the amount at \$3,000.00 per day (R Exh. 10, p. 3), Respondent reduced the penalty amount to \$2,000.00 per day because she determined she could approximately make the City whole for its costs, if the civil penalties were set at that daily amount over the continuous penalty period. (T p. 738, l. 17 – p. 739, l. 5).

79. Respondent testified that her goal was to assess civil penalties in an amount that would make the City whole for its costs to bring the stormwater facilities into compliance with the Ordinance and recover the City’s enforcement costs. (*Id.*, and T p. 739, l. 21 – p. 740, l. 13; T p. 741, l. 9-16). In approximating that figure, she considered: (i) the City’s costs to date with RK&K; (ii) the City’s anticipated construction costs and costs to obtain additional stormwater easements; and (iii) the City’s past and anticipated legal costs, including attorney’s fees, to enforce the Ordinance. ((R Exh. 3, p. 6 and R Exh. 10, pp. 1-2). No statutory authority was given for the collection of this expense.

I. Assessment of Penalty Factors

80. In the Liberty Hills Drainage Improvements analysis document, the City Engineer also included “Contingency/Administrative” fees amounting to \$394,446.49, related to staff time that was allegedly spent working on the flooding concerns in the Liberty Hills subdivision by members of the City of Fayetteville municipal government. The record lacks competent, material, and substantial evidence of any contingent or administrative cost actually incurred by the City. Although some of these fees are certainly required, more information is necessary to sustain their collection.

81. The record lacks competent, material, and substantial evidence of the amount of any attorney’s fees billed or paid by the City in the prosecution of this proceeding and to whom.

The summary chart provided indicates this amount of \$384,411.58 is not competent evidence on this subject. Additionally, no statutory authority is cited for collection of these fees or to whom they were to be paid.

82. The City Engineer introduced evidence that the estimate for engineering and surveying services was \$233,855.00, and the estimate for inspection services was \$85,889.45. The City Engineer's office has inspectors on staff and these inspection services could have been handled by the City Engineer's staff but apparently were not in this matter. The record does not include competent, material, and substantial evidence as to what was spent on engineering, surveying, and inspection services; and whether all the items on the estimates were in fact incurred. RK&K testified that some items on the initial estimate were not needed; RK&K could not confirm certain other amounts; and overall, RK&K and the City Engineer did not introduce competent, material, and substantial evidence on the amount expended on engineering, surveying, and inspection services.

83. RK&K subcontracted with CH Engineering for part of RK&K's scope of work. CH Engineering's estimate was \$41,000.00; Jeffrey W. Meador of RK&K testified that this estimate would be the amount to be paid "regardless of the actual time or effort it took."

84. Despite budgeting an amount in the estimate for 30 hours for a "City Council Presentation and Preparation," RK&K never made a presentation to the City Council.

85. The City Engineer advocates for collecting "contingencies" that were not actually incurred or spent. In the Liberty Hills Drainage Improvements analysis document behind Petitioners' Tab 24, the City included fees that it labeled "Contingencies". The first contingency of \$45,042.20 was allegedly intended to account for any potential issues with the improvements bidding processes. The City Engineer did not provide competent, material, and substantial evidence of whether any of this amount was incurred. The second contingency of twenty percent (20%) was intended to cover any contingencies outside of the inspection; material testing; or any other that may occur along the way of delivering the project itself. The City Engineer admitted that these contingency fees were ultimately not needed or expended by the City.

86. After asserting that both the alleged actual costs for the Liberty Hills subdivision improvements and attorneys' fees amounted to \$1,182,111.58, Ms. Rodriguez testified that this amount was "not far" from the ultimate assessment of \$1,588,000.00 that Petitioners received in the CPO. The difference between the alleged actual costs plus attorneys' fees versus the ultimate assessment in the CPO amounted to \$397,888.42. That the City Engineer thinks a \$400,000.00 difference is "not far" off illustrates the arbitrary nature of her civil penalty assessment; and further confirms that her assessment is not supported by the competent, material, and substantial evidence in the record.

J. Findings Specific to Penalty Factors.

86. Section 23-46.b.2.b of the Ordinance addresses the amount of civil penalties and provides that in determining the amount of penalties, Respondent shall consider any relevant mitigating and aggravating factors, including eight specific factors. The findings of fact made

below address those specific factors, based upon the competent, material, and substantial evidence in the record.

a. The Effect, if any, of the Violation; and the Degree and Extent of Harm Caused by the Violation.

87. The impacts of the flooding at the lower end of Liberty Lane are well-documented. In addition to the picture taken in early October 2015 (R Exh. 9, p. 1), there is the direct report from Mr. Bazan to Respondent of what was occurring at that time (T p. 709, l. 8-24); and Mr. Kizer's documentation of what was occurring in reporting to his contact with River Landing (R Exh. 22). On one occasion the Bazans had to be evacuated by the fire department from their home (T p. 712, l. 10-25); and the City put sandbags in their front yard as a temporary measure. (T p. 253, l. 15-22).

88. While Petitioners point to the fact that only one private property was impacted by the flooding to that degree, a public street was also impacted; this was not a situation that Respondent, charged with administering and enforcing the Ordinance, could allow to remain unabated. A solution, to bring the subdivision into compliance with the Ordinance, had to be pursued.

89. The flood impacts cannot be attributed to the results of surficial construction and development in Liberty Hills. As Mr. Meador from RK&K testified, what is shown in the picture at Liberty Lane (R Exh. 9), which Bazan reported to Respondent, was water coming out of an inlet (or catch basin), indicating the water could not flow freely through the drainage pipes; and the hydraulic grade line was coming out of the ground. Water was coming out of the drainage system itself. (T p. 680, l. 14-17, p. 681, l. 8-15).

b. The Cost of Rectifying the Damage.

90. The costs incurred by the City to obtain updated drainage information; to bring the stormwater facilities and Liberty Hills into compliance with the Ordinance; and to abate the flood risk, totaled approximately \$842,742.00. (R Exh. 10, p. 1; T p. 242, l. 21-23).

91. Respondent reasonably determined that any re-design or repair of the stormwater facilities for Liberty Hills had to be based upon current, post-development drainage conditions, as opposed to relying on the pre-development assumptions upon which the original 2012 stormwater facilities plan prepared by MKR was based. (Meador – T p. 594, l. 5-13; Moriarty – T p. 564, l. 17 – p. 565, l. 4; Kizer – T p. 374, l. 17 – p. 375, l. 13).

92. Respondent selected a scope of remedial options that were generally reasonable and prudent although as noted, in certain instances, insufficient substantial and material evidence was excluded. Of the five remedial options identified by RK&K, Respondent, with input from RK&K, selected and implemented 2.5 of those options. The options selected were reasonably necessary to abate the flood risk at the low end of Liberty Lane, which because of its relatively lower elevation was the point where stormwater was discharging or overflowing from the stormwater facilities and other flood problems manifested. (T p. 610, l. 14-21).

c. Whether the Violator Saved Money through Non-Compliance.

93. The cost of the design and construction of the stormwater facilities were incurred by River Landing. There is competent, material, and substantial evidence in the record indicating those stormwater facilities as originally designed left little room for error in terms of the system's hydraulic capacity in relation to the standards of the Ordinance. (T p. 320, l. 13-22). The fact that the City incurred costs to fix those stormwater facilities to bring them into compliance with those standards in the Ordinance indicates that River Landing would have incurred more expense up front if the stormwater facilities, as originally constructed, met the standards of the Ordinance in terms of hydraulic capacity. This should have been noticed.

d. Whether the Violator Took Reasonable Measures to Comply with the Ordinance.

There was some disagreement on whether this factor is meant to apply to the period before or after the NOV/Order was issued. Both are accounted for below.

94. Regarding River Landing:

- (i) River Landing retained MKR to design the stormwater infrastructure for Liberty Hills and obtain the necessary development permits, and reasonably relied upon MKR to do so. After the issue of water in the street arose in 2015, while River Landing had representatives attend some meetings, and stayed in communication with MKR, there is little evidence that River Landing took any concrete measures to contribute to any plan or solution to the problem. Mr. Kizer reported to City engineering staff in May 2016 that River Landing was non-committal in participating in any solution. (Kizer May 26, 2016 email, KIZER-0016, in P 5). After the NOV/Order was issued, River Landing could have submitted its own plan of action but did not do so. When asked if he investigated the company's exposure to civil penalties as indicated in the NOV/Order, Mr. Walsh of River Landing said he did not, and assumed some resolution would be reached. (T p. 507, l. 7 – p. 508, l. 10). River Landing never made any offer to contribute to a solution prior to June 2017, when Respondent decided she must use public funds to affect a solution to the flood risk. (T p. 727, l. 18-20).

95. Regarding MKR:

- (i) As for whether MKR took reasonable measures to comply with the Ordinance, the relevant period begins with the stormwater plan submittals in 2012. Three versions of the plans were submitted to City staff for review. Between the second and third submittal, one change pertained to the stormwater drainage pipe layout along Liberty Lane. Where before there was one 90 degree turn in the pipe layout at the low end of Liberty Lane, in the third submittal there were three such turns. (R Exh. 18, T p. 400, l. 15-21). MKR failed to do two things in light of that change. First, in

submitting those revised plans (the third submittal), which were not redlined to show the changes, MKR failed to communicate to the City reviewer that a change had been made, leaving it to the reviewer to find the changes. (R Exh. 20, 18). Secondly, there is no evidence that MKR re-ran the relevant model to assess the capacity of the system with the three 90 degree turns (as opposed to one such 90 degree turn), much less submitted the results of such a test to the City reviewer. (R Exh. 16, pp. 1-2; T p. 404, l. 20-25). As a result, no updated analysis of the capacity of the revised stormwater facilities was submitted by MKR to the City staff, which had confirmed the hydraulic capacity of the system was sufficient to meet the standards based upon the prior version of the plans (without the three 90 degree turns on Liberty Lane). (T p. 185, l. 3-7, T p. 404, l. 8-19).

- (ii) Once City staff engaged with MKR in April 2017 about the recurring flood events, the record indicates MKR invested time and resources into identifying various potential contributing factors to the flood conditions. MKR communicated with City staff and River Landing; attended relevant meetings; and produced the written evaluation report submitted on September 13, 2016. (R Exh. 16). However, the events occurring after the NOV/Order was issued indicate MKR's willingness to participate in abating the violations of the Ordinance was very limited. In response to the NOV/Order, MKR submitted a report "in furtherance of discussions" that Mr. Kizer knew was short of a real plan of action expected by Respondent in response to a NOV/Order. (KIZER-0819 in P Exh. 8). While not appealing the NOV/Order, MKR in multiple communications denied any responsibility or that a violation of the Ordinance had even occurred. (R Exh. 13, 15). Mr. Kizer testified he viewed himself as merely a middleman, between the City on the one hand, and the developer (River Landing) and contractor (Hoke County Sand) on the other hand. (T p. 363, l. 10-14). After the unsuccessful mediation in April 2017, MKR offered the City \$20,000.00 more in services to assist with what MRK viewed as the "City's issue" of inadequate stormwater facilities. (Ferrell May 18, 2017 email no bates no., in P Exh. 5).

e. Whether the Violation was Committed Willfully.

96. As noted in Respondent's Penalty Basis Memo, there is no evidence to indicate any flaw in the design of the stormwater facilities, which led to the violations of the Ordinance, was committed willfully. However, the omission of information from MKR's third and final plan submittal in 2012 was a significant failure of the responsibilities of the engineer of record for the project. (R Exh. 3, pp. 8-9).

f. Whether the Violator Reported the Violation to the City Engineer.

97. The competent, material, and substantial evidence in the record indicates as early as September 2015, that Petitioners were aware of an issue with water in the street in Liberty Hills

(Kizer-Praschan Sept. 28-29 email, KIZER-0226, in P Exh. 7); yet neither Petitioner reported the events, nor initiated a discussion with City engineering staff about the issue. City engineering staff learned of the issue in early October 2015 from Mr. Bazan. (T p. 708, l. 16 – p. 709, l. 20). After City engineering staff initiated a discussion with Mr. Kizer about the issue in April 2017, Mr. Kizer reported to River Landing the City staff had **“finally figured out the issue associated with the drainage problem at Liberty Hills,”** and then eluded to prior communications between Petitioners in which Mr. Kizer had indicated what he thought the problem might be. (Kizer April 28, 2016 email, p. 1 in P Exh. 7) (Emphasis added).

g. **The Prior Record of the Violator in Complying or Failing to Comply with the Ordinance.**

98. As noted in Respondent’s Penalty Basis Memo, neither Petitioner had any record of prior violations of failing to comply with the Ordinance or any other post-construction or law.

BASED ON the foregoing findings of fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Issues of fact contained in these Conclusions of Law are incorporated by reference into the Findings of Fact section of this decision.

2. The Administrative Law Judge has jurisdiction over all the parties and the subject matter jurisdiction of this action pursuant to N.C. Gen. Stat. § 7A-758 and § 160A-388(e2)(1).

3. Pursuant to N.C. Gen. Stat. § 160A-388(e2)(1): “[e]very quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record. Each quasi-judicial decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards.”

4. N.C. Gen. Stat. § 160A-388(b1)(8) provides that the undersigned can reverse or affirm, wholly or partly, or may modify the civil penalty assessment, and shall make any order, requirement, decision or determination that ought to be made. The undersigned has all the powers of the official who made the decision.

5. The Respondent has previously argued, and the undersigned has previously agreed, that the standard of review provisions of N.C. Gen. Stat. § 160A-393(k) do not apply to the undersigned’s review of the City Engineer’s CPO and the decisions made therein.

6. The North Carolina Supreme Court has determined that the General Assembly may transfer “adjudicative and rule-making powers to administrative bodies [are not constitutionally precluded] provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.” [Emphasis supplied]. *Matter of Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 382, 379 S.E.2d

30, 35 (1989) (citing *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978)).

7. The General Assembly delegated the power to assess civil penalties for violations of storm water ordinances to municipalities. N.C. Gen. Stat. § 143-215.6A(j) (“Local governments . . . may assess civil penalties for violations of their [Stormwater Management Ordinance] . . .”).

8. The City’s guiding standards and required procedures for administering civil penalties for violations of the Ordinance are set forth in the Ordinance and the City’s “Administrative Manual for Implementation of the Stormwater Control Ordinance.”

9. The Administrative Manual’s purpose is to give guidance to both the public and the City as to implementation and administration of the Storm Control Ordinance for non-exempt activities. *See*: Administrative Manual Section 1.1. These provisions, however, are subject to the Stormwater Control Ordinance itself.

10. The Administrative Manual states that: “the Administrative Manual describes how the Ordinance shall be administered for the City of Fayetteville.” [Emphasis supplied]. Administrative Manual Section 1.2, at 1.

11. However, although the word “shall” is used numerous times in describing the obligations of the City Engineer in the Administrative Manual, it is very clear in stating that these provisions apply in establishing the civil penalty “once **compliance** with the ordinance has been achieved.” *See* Administrative Manual, p. 32 (P Exh. 26). *Emphasis added*. Clearly, this stage was never achieved.

12. Section 23-46 of the Ordinance provides that a civil penalty may be assessed from the date the violation occurs (Sec. 23-46.b.2.a); and each day of a continuing violation shall constitute a separate violation (Sec. 23-46.b.2.b). Therefore, by law, civil penalties may continue to accrue daily until the violation is abated and compliance with the Ordinance is achieved.

13. As set forth in Section 23-46.b.2.b of the Ordinance and re-stated in the City Administrative Manual (P Exh. 26, p. 30), the civil penalty for each violation may be up to the maximum amount allowed by law. Since each day of a continuing violation is a separate violation, the maximum penalties are per diem for a continuing violation until compliance is achieved. While the specific per diem maximum amount is not specified in the Ordinance, just indicating it is the amount allowed by law, the record includes a City Fee Schedule. (P Exh. 27). Under the stormwater provisions of that Fee Schedule, these violations fall under the “other violations” category, for which civil penalties may be assessed up to \$5,000.00 per day. (*Id.*, p. 21). Although penalty assessments start at \$1,000.00 per day, Respondent’s assessment of penalties of \$2,000.00 per day did not exceed the applicable maximum daily limit and was well within her discretion in determining the aggregate amount of daily civil penalties.

14. As to Respondent’s determination of the period of non-compliance for which daily penalties were applied, the competent, material and substantial evidence supports her determination, with one exception. It was reasonable for Respondent to treat the first six months after the NOV/Order was issued as a grace period and to begin the civil penalty period on May 1, 2017. This was obviously to Petitioners’ benefit. An adjustment is necessary regarding when the

penalty period ended, however. Based upon the competent, material, and substantial evidence, the period of non-compliance ended as of June 17, 2019 (T p. 821, l. 24- p. 822, l. 2), when the public-funded project to supplement the stormwater facilities was completed. That is 13 days sooner than the projected point of compliance Respondent used in calculating the period of non-compliance. To avoid any civil penalties being assessed to Petitioners after Liberty Hills was brought into compliance with the Ordinance by the City, the evidence supports terminating the civil penalty period as of June 17, 2019. The result is the civil penalty period will be reduced by 13 days from what Respondent calculated and applied, from 790 days to 777 days.

15. Respondent set the civil penalties at an amount that would approximately make the City whole, accounting for both its costs to abate the violations and the flood risks, as well as the City's enforcement costs. The competent, material, and substantial evidence shows that Respondent started with a daily penalty at \$3,000.00; but then reduced it to \$2,000.00 per day after determining that doing so would be sufficient to achieve the objective of making the City whole. (R. Exh. 10, p. 3; T p. 738, l. 17 – p. 739, l. 5.)

16. The undersigned has the authority under the January 7, 2019 Order of Mayor Mitch Colvin and pursuant to N.C. Gen. Stat. § 160A-398 to determine the penalty; and because of the factors heretofore discussed, which are incorporated herein by reference, will reduce the per diem assessment to \$1,251.00.

17. Based upon the above Findings of Fact regarding the civil penalty factors, and other competent, material, and substantial evidence, besides the 13 day reduction in the penalty period referenced above should be modified as indicated below.

18. Respondent's decision to allocate 80% of the civil penalties to MKR, and 20% to River Landing, rather than making the civil penalty obligation joint and several, was reasonable and not in error or arbitrary or capricious. Petitioners have not met their burden to show competent, material, and substantial evidence to the contrary.

ACCORDINGLY, based on the foregoing Findings of Fact and Conclusions of Law, and the competent, material, and substantial evidence in the record, the penalty period (*i.e.*, the period of non-compliance) is hereby MODIFIED and reduced by 13 days. Respondent's computation of the aggregate in civil penalties, and allocation of those penalties are modified by removing the assessment of legal fees and by giving additional credit to Petitioners for their prior history of dealing with the City.

FINAL DECISION

BASED ON the modification stated above, the undersigned Administrative Law Judge hereby enters this quasi-judicial decision pursuant to N.C. Gen. Stat. § 160A-388. The aggregate civil penalties assessed to Petitioners is MODIFIED to \$972,027.00 (777 days x \$1,251.00 per day). The civil penalties to each Petitioner, based upon the 80/20 allocation, are MODIFIED as follows: \$ 777,621.00 to Petitioner MKR; and \$194,405.00 to Petitioner River Landing.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 14th day of February, 2020.



J. Randall May
Administrative Law Judge
Presiding pursuant to N.C. Gen. Stat. § 7A-758
In lieu of the Fayetteville City Council

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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(also included, copy of *Order Granting Respondent's Motion to Determine Issues on Appeal*)

This the 14th day of February, 2020.



Betty Owens, Paralegal
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