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

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GENERALLY

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

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

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

Two of the principal questions this treatment will consider are:

- Will such civil monetary penalties pass legal muster?

- What are the legal rules governing administrative hearings?

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

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

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

Civil Penalties

- *Tennessee Code Annotated*, § 69-3-115(a)(1) authorizes the *commissioner* to impose *civil penalties* of up to $10,000 per day for various violations contained in that statute. The same statute contains a list of things the *commissioner* must consider in determining the amount of a civil penalty, and provides that the penalty is clearly collected through the courts as a civil judgment.
- **Tennessee Code Annotated, § 69-3-125** authorizes the “local administrative officer” to impose civil penalties of up to $10,000 per day for various violations contained in that statute. The same statute also contains a list of things the local administrative officer must consider in determining the amount of the civil penalty, and likewise clearly provides that the penalty is collected through the courts as a civil judgment.

### Criminal Penalties

- **Tennessee Code Annotated, § 69-3-115(b)** provides for certain criminal penalties for pretreatment violations. It declares that “Any person polluting the waters of this state or violating or failing, neglecting, or refusing to comply with any of the provisions of this part, commits a Class C Misdemeanor. Each day upon which such violation occurs constitutes a separate offense.

**Tennessee Code Annotated, § 69-3-115(c)** provides that, “Any person who willfully and knowingly falsifies any records [etc.] required by the board or the commissioner or who willfully and knowingly pollutes the waters of the state, or who willfully fails, neglects or refuses to comply with any of the provisions of this part commits a Class E Felony and shall be punished by a fine of not more than twenty-five thousand dollars ($25,000) or incarceration or both.” However, **Tennessee Code Annotated, § 69-3-115(d)** says that “No warrant or indictment under this part shall be issued except upon application by the board or the commissioner or upon such application authorized in writing by either of them.” Those criminal violations are obviously charged in a court, and the criminal penalties imposed for those violations, are imposed by a court.

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

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

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

### The Problem of Article VI, § 14 of The Tennessee Constitution on “Fines” in Municipal Ordinance Violation Cases

**Generally**

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

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

**City of Chattanooga v. Davis**

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

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

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

[The constitutionality of that statute under Article VI, § 14, of the *Tennessee Constitution* was not an issue in Barrett; indeed, it was not even mentioned except in a footnote in connection with Davis.]

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

- Is the language of the pertinent ordinances punitive or remedial?
- Is the “actual purpose and effect” of the ordinances punitive or remedial?

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

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

Article 6, § 14 does not apply to administrative penalties

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

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

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

The recent unreported case of Barrett v. Tennessee Occupational and Health Review Commission, 2007 WL 4562889 (Tenn. Ct. App.) is consistent with Dickson v. State. There, a TOSHA employee inspected Barrett’s construction site, and cited him for several violations. After a hearing before the Tennessee Occupational Safety and Health Review Commission, Barrett was fined $950. Barrett appealed, arguing that the fine violated the $50 fine limit of Article 6, § 14, of the Tennessee Constitution. The Court rejected that argument, concluding that Dickson had been correctly decided, “unless the Supreme court instructs us otherwise.” [At 3] With respect to Barrett’s argument that the $950 fine was “punitive” under City of Chattanooga v. Davis, the Court declared that “Dickson tells us that regardless of the punitive nature of a fine, Article VI, § 14 does apply to a state agency. Dickson, 1216 S.W.3d 740.” [At 3-4]

In Footnote 3 of that case, the Court also pointed out that:

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

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

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

- Whether the civil penalty imposed will be a substantial economic deterrent to the illegal activity;
- Damages to the pretreatment agency, including compensation for the damage or destruction of the facilities of the publically owned treatment works, and also including any penalties, costs and attorneys’ fees incurred by the pretreatment agency as the result of the illegal activity, as well as the expenses involved in enforcing this section and the costs involved in rectifying any damages;
- Cause of the discharge or violation;
- Severity of the discharge and its effect upon the facilities of the publically owned treatment works and upon the quality of the receiving waters;
- Effectiveness of action taken by the violator to cease the violation;
- The technical and economic reasonableness of reducing or eliminating the discharge; and
- The economic benefit gained by the violator.

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

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

Stormwater ordinances

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

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

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

- Impose a penalty of not less than $50 nor more than $5,000 per day for the violation of
  any stormwater ordinance or resolution. The amount of the penalty is to be calculated based on
  seven (7) factors:
    (1) The harm done to the public health or environment;
    (2) Whether the city penalty imposed will be a substantial economic deterrent;
    (3) The economic benefit gained by the violator;
    (4) The amount of effort put forth by the violator to remedy the violation;
    (5) Any unusual or extraordinary enforcement costs incurred by the municipality;
    (6) The amount of penalty established by ordinance or resolution for specific categories of
      violations; and
    (7) Any equities of the situation which outweigh the benefit of imposing any penalty or
      damage assessment.

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

Proof in Pretreatment and Stormwater Cases Resolved Administratively

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

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

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

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

...we find that the trial court exceeded its authority by weighing the evidence. Because we have determined that the record contains material evidence to support the Authority’s decision, we reverse the trial court’s conclusion that the record does not contain sufficient evidence to support the Authority’s conclusion that the wastewater discharge from Leonard Plating’s plant caused the damage to the sewer lines. [At 903]

The court said this about the scope of review of administrative decisions:

The scope of review afforded by a common-law writ of certiorari is extremely limited. [Citations omitted by me.] Reviewing courts may grant relief only when the board or agency whose decision is being
reviewed has exceeded its jurisdiction or has acted illegally, arbitrarily, or fraudulently. Tenn. Code Ann. § 27-8-101 (2000). [Other citations omitted by me.]

Review under a common-law writ of certiorari does not extend to a redetermination of the facts found by the board or agency whose decision is being reviewed. [Citations omitted by me.] The courts may not (1) inquire into the intrinsic correctness of the decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the board of agency. However, they may review the record solely to determine whether it contains any material evidence to support the decisions because a decision without evidentiary support is an arbitrary one. [Citations omitted by me.]

Ascertainment whether the record contains material evidence to support the board’s or agency’s decision is a question of law. [Citation omitted.] For the purpose of this inquiry, “material evidence” is relevant evidence that a reasonable person would accept as adequate to support a rational conclusion. [Citations omitted by me.] The amount of material evidence required to support a board’s or agency’s decision must exceed a scintilla of evidence but may be less than a preponderance of the evidence. [Citation omitted by me.] [At 903-04]

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

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

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

“...acid is not very friendly to concrete pipe” and that discharges with level of acidity similar to the one involved in this case could damage concrete pipes in “a matter of a few months.” He also testified that he had observed damaged sewer pipe “strikingly similar” to the damaged pipe involved in this case at other plating
The trial court characterized Mr. Wingo’s testimony as “equivocal and inconclusive,” then turned its attention to the evidence presented by Leonard Plating, stating, declaring that:

Detracting from the claim that the petitioner’s discharge corroded the pipe was the testimony of Mr. Kisselvoich, a consultant with an environmental firm of PSI. He testified that the activity of the former occupant of the building, a barbeque restaurant known as Coursey’s, had deposited food in the pipe, and that he could not say that the pH level of the petitioner had caused the pipe to wear out.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The ordinances of the city were facially unconstitutional.

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

Common law certiorari, as provided in T.C.A. § 27-8-101 (Supp.
1997), is available for judicial review of a decision of an administrative body acting in a judicial-or quasi-judicial capacity. Davidson v. Carr, 659 S.W.2d 361, 363 (Tenn. 1983). The Supreme Court has stated that...administrative decisions are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges that action. McCallen v. City of Memphis, 786 S.W.2d 633, 641 (Tenn. 1990). Generally speaking, review of an administrative decision by way of the common law writ is confined to the question of whether the inferior board or tribunal has exceeded its jurisdiction or acted illegally, arbitrarily, capriciously, or fraudulently. T.C.A. § 27-8-101 (Supp. 1997). [Remaining citation omitted] This question typically involves a determination of whether the record contains material evidence to support the decision below. [Citations omitted].... If a reviewing court determines that there is no material evidence to support an administrative decision, it must conclude that the administrative body acted illegally. [Citation omitted.] An administrative decision may be found to be illegal, arbitrary or fraudulent in other circumstances as well: for example where the standards of due process have not been met, where a constitutional or statutory provision has been violated, or where some unlawful procedure has been followed. [Citations omitted].... The reviewing court does not inquire into the correctness of the inferior tribunal’s finding of fact [Citations omitted]; nor is it permitted to weigh the evidence. [Citations omitted] Moreover, the reviewing court “should refrain from substituting its judgment for the broad discretionary authority of the local government body.” [Citation omitted.]

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

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

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

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

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

**Necessity for adequate proof in administrative hearings**

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

The plaintiff in *Boyd v. Forbes*, 2003 Tenn. App. LEXIS 760, raised the issue of whether the administrative officer made the value/cost of repair findings as required by the City of Jackson’s ordinance adopted under Tennessee Code Annotated, § 13-21-101 et seq. That ordinance provided that “if the repair, alteration or improvement cost exceeds seventy-five (75) percent of the taxable value of the property, the director may order the structure to be removed or demolished.”

[At 5] The Court, concluding that the ordinance had not been followed, reasoned that:

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

**Violations of Stormwater Ordinances Can Also Be Made**

**Municipal Ordinance Violations Subject to Trial in Municipal Court**

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