

ORDINANCE NO. 63-2013

AN ORDINANCE CREATING ARTICLE XIII OF CHAPTER 16 OF THE CODE OF ORDINANCES TO IMPLEMENT A SANITARY SEWER CAPACITY ASSURANCE PROGRAM (CAP) TO ASSURE THAT THE SANITARY SEWER SYSTEM ("SYSTEM") IS ADEQUATE FOR FUTURE CONNECTIONS; DEFINING TERMS; REQUIRING THAT A SANITARY SEWER CAPACITY PERMIT ("PERMIT") MUST BE OBTAINED PRIOR TO ANY FUTURE CONNECTION TO THE SYSTEM AND PROVIDING THAT PERMITS SHALL BE GRANTED FOR PROPERTIES WITH A SEWER USE OF RECORD, PROPERTIES WITH CERTAIN APPROVED PLANS OR PLATS, AND PROPERTIES IN EXPANSION AREA 2; PROVIDING THAT REMODELING PROJECTS SHALL NOT REQUIRE A PERMIT; PROVIDING FOR STAGED CAPACITY ALLOCATION FOR PROPERTIES WITH CERTAIN APPROVED PLANS WITH A MAXIMUM ANNUAL THRESHOLD AS DETERMINED BY A NEGOTIATED AGREEMENT; PROVIDING THAT AN ESSENTIAL SERVICE PROJECT MAY BE GRANTED A PERMIT WITHOUT ADEQUATE CAPACITY UPON A FINDING THAT SUCH ACTION IS JUSTIFIED AND WILL NOT DETRIMENTALLY IMPACT THE CAP; PROVIDING THAT A PROJECT WITH A SIGNIFICANT ECONOMIC IMPACT MAY QUALIFY FOR AN ADMINISTRATIVE CAPACITY APPROVAL IF SUCH ACTION WILL NOT DELAY REMEDIAL MEASURE PLAN PROJECTS; PROVIDING THAT ALL APPLICATIONS AND REQUESTS SHALL BE MADE BY THE PROPERTY OWNER OR DULY AUTHORIZED REPRESENTATIVE; PROVIDING THAT A NON-REFUNDABLE ADMINISTRATIVE FEE OF \$450 SHALL BE PAID TO REQUEST A CAPACITY ALLOCATION, CAPACITY PERMIT, OR CAPACITY RESERVATION; PROVIDING THAT SEWER CAPACITY MAY BE RESERVED UPON PAYMENT OF A DEPOSIT TO BE CREDITED TO TAP-ON FEES OR EXACTION FEES; PROVIDING THAT RESERVATIONS OF CAPACITY WILL EXPIRE IN ONE (1) YEAR UNLESS EXTENDED AND PROVIDING THAT A NON-REFUNDABLE ADMINISTRATIVE FEE OF \$225 SHALL BE PAID FOR AN EXTENSION; PROVIDING THAT A RESERVATION SHALL BECOME A PERMANENT ALLOCATION UPON CERTIFICATION OF CERTAIN PLANS OR AMENDMENTS; PROVIDING THAT ALL FEES SHALL BE ADJUSTABLE BASED ON THE CONSUMER PRICE INDEX; PROVIDING EXCEPTIONS FOR PAYMENT OF ADMINISTRATIVE FEES FOR CERTAIN PROPERTIES; PROVIDING THAT DETERMINATIONS ON APPLICATIONS AND REQUESTS SHALL BE MADE WITHIN TEN (10) DAYS IF POSSIBLE; PROVIDING AN APPEAL PROCESS FOR APPLICANTS WHO DISAGREE WITH DETERMINATIONS; PROVIDING THAT ALL ACTIONS AND REQUIREMENTS UNDER ARTICLE XIII ARE SUBJECT TO THE PROVISIONS OF THE CONSENT DECREE AND APPROVED CAP; AND PROVIDING THAT A FORMAL REVIEW AND AUDIT OF THE CAP AND COLLECTED FEES SHALL BE PERFORMED EVERY TWO (2) YEARS; AND AMENDING SECTION 5-30 OF THE CODE ORDINANCES TO REQUIRE THAT ADEQUATE SANITARY SEWER CAPACITY EXISTS PRIOR TO ISSUANCE OF ANY BUILDING PERMIT FOR A PROPERTY THAT WILL CONNECT TO THE SANITARY SEWER SYSTEM.

WHEREAS, the mission of the sanitary sewer system of the Urban County Government includes safely and efficiently collecting and conveying sanitary sewage to enhance public health and safety, protect lives and property, and minimize the discharge of sanitary sewage onto private property or into the environment in compliance with applicable federal and state laws; and

WHEREAS, the Urban County Government, the United States Environmental Protection Agency, and the Commonwealth of Kentucky have entered into a Consent Decree in a case styled *United States, et al. v. Lexington-Fayette Urban County Government*, United States District Court for the Eastern District of Kentucky, Case No. 5:06-CV-00386, that requires LFUCG to implement a sanitary sewer system Capacity Assurance Program (CAP) to assure that no connections are allowed to the sanitary sewer system unless adequate capacity exists in the system to convey the One Hour Peak Flow, as defined below in Section 1; and

WHEREAS, a Task Force, including councilmembers and LFUCG officials was created in April 2012 to assist the Division of Water Quality in developing the CAP; and

WHEREAS, the Task Force held numerous public meetings on the issues related to the CAP which allowed substantial participation by both non-LFUCG stakeholders, including developers, major sanitary sewer users, interested non-development related parties, the general public, and LFUCG stakeholders as the Task Force formulated its recommendations for the CAP; and

WHEREAS, the Urban County Council reviewed the report prepared by the Task Force and the Task Force recommendations and by Resolution No. 722-2012 accepted the Task Force report and approved the recommendations contained therein; and

WHEREAS, Resolution No. 722-2012 provided guidance related to allocation of capacity in the Urban County Government's sanitary sewer system during the interim period before full implementation of the Capacity Assurance Program but also provided that further ordinances were needed to implement the CAP; and

WHEREAS, the Urban County Council has determined that the following amendments to the Code of Ordinances are appropriate to implement the CAP;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT:

Section 1 – That Article XIII of the Code of Ordinances and Sections 16-301 through 16-306 are hereby created to read as follows:

Section 16-301. – Purpose and Intent.

The intent of this Article is to implement a sanitary sewer system Capacity Assurance Program (CAP) to assure that the sanitary sewer system is adequate for future connections.

Section 16-302. – Definitions.

- (a) "Active" in regard to preliminary subdivision plans, preliminary development plan, final development plans, and/or amended final development plans shall mean a plan that has been approved by the Planning Commission and has not expired because activity related to the plan has occurred within the appropriate time period in compliance with the Zoning Ordinance and Land Subdivision Regulations.
- (b) "Adequate Capacity" shall mean Adequate Treatment Capacity, Adequate Transmission Capacity, and Adequate Collection Capacity.
- (c) "Adequate Collection Capacity" shall mean that each Gravity Sewer Line, through which a proposed additional flow from new or existing connections would pass, has the capacity to carry the existing One-Hour Peak Flow passing through the Gravity Sewer Line, plus the addition to the existing One-Hour Peak Flow from the proposed connection, plus the addition to the existing One-Hour Peak Flow predicted to occur from all other authorized sewer service connections which have not begun to discharge into the Sanitary Sewer System without causing a Surge Condition.
- (d) "Adequate Transmission Capacity" shall mean that each Pumping Station through which a proposed additional flow from new or existing sewer service connections would pass to the WWTP receiving such flow, has the capacity to transmit the existing One-Hour Peak Flow passing through the Pumping Station, plus the addition to the existing One-Hour Peak Flow predicted to occur from the proposed connection, plus the addition to the existing One-Hour Peak Flow predicted to occur from all other authorized sewer service connections which have not begun to discharge into the Sanitary Sewer System.
- (e) "Adequate Treatment Capacity" shall mean that at the time the WWTP receives the flow from a proposed sewer service connection(s) or increased flow from an existing sewer service connection(s), when combined with the flow predicted to occur from all other authorized sewer service connections (including those which have not begun to discharge into the Sanitary Sewer System), the WWTP will not be in "noncompliance" for quarterly reporting as defined in 40 C.F.R Part 123.45, Appendix A and that the new or increased flow to the WWTP will not result in Unpermitted Bypasses or diversions prohibited by the KPDES Permits due to lack of treatment capacity.
- (f) "Administrative Capacity Approval" shall mean a waiver of administrative requirements for a Sanitary Sewer Capacity Permit or Sewer Capacity Reservation available to a new business or industry, or an expansion of an existing business or industry, under certain circumstances.
- (g) "Capacity Assurance Program" or "CAP" shall mean the System Capacity Assurance Program as defined in Section VII Paragraph 16.B. of the Consent Decree and accepted by the Urban County Council in Resolution No. 722-2012, passed December 11, 2012 and otherwise described in Sections 16-301, *et seq.* in the Code of Ordinances.

- (h) "Capacity Request" shall mean written submission of a Sewer Capacity Application to the Division of Water Quality (DWQ) for a Permanent Allocation or Sewer Capacity Reservation.
- (i) "Consent Decree" shall mean the Decree and all attachments lodged on March 14, 2008 between the United States of America and the Commonwealth of Kentucky (Plaintiffs) v. Lexington-Fayette Urban County Government (Defendant), Civil Action No. 5:06-cv-386, with an effective date of January 3, 2011.
- (j) "Credit" shall mean a unit of flow equivalent to one gallon per day (1 gpd).
- (k) "Essential Services" shall mean public schools as defined herein, health care facilities licensed by the Kentucky Cabinet for Health and Family Services and meeting the definition of "health facility" in KRS 216B.015, or a building or facility that is contiguous to or connected to a licensed hospital and which serves as a medical office building, site for delivery of outpatient health services or is otherwise integral to hospital operations or which building or facility is required to have a Certificate of Need under KRS 216B.010, et seq.
- (l) "One Hour Peak Flow" shall mean the greatest flow in a sewer averaged over a sixty (60) minute period at a specific location expected to occur as a result of a representative 2-year 24-hour storm event.
- (m) "Permanent Allocation" shall mean the assignment of sewer capacity/credits to a property and is not subject to expiration.
- (n) "Planning Commission" shall mean the Lexington-Fayette Urban County Planning Commission.
- (o) "Public School" shall mean a school which is operated by the state, a political subdivision of the state, a governmental agency within the state, or by a non-profit corporation which has IRS Section 501(c)(3) tax exempt status.
- (p) "Remodeling Project" shall mean a project for the remodeling or expansion of an existing residential structure which does not increase the number of dwelling units.
- (q) "Sanitary Sewer Capacity Permit" shall mean a document provided by the Division of Water Quality approving a Sewer Capacity Application under Article XIII of Code of Ordinances Chapter 16.
- (r) "Sanitary Sewer System" shall mean the WCTS owned or operated by LFUCG designed to collect and convey municipal sewage (domestic, commercial and industrial) to a WWTP.
- (s) "Sewer Capacity Application" shall mean the application form completed and filed with the Division of Water Quality to request a Permanent Allocation and/or a Sewer Capacity Reservation.
- (t) "Sewer Capacity Reservation" shall mean the temporary assignment of sewer capacity to a property until a "Sanitary Sewer Capacity Permit" is issued upon approval of a Capacity Request.
- (u) "Staged Capacity Allocation" shall mean an assignment of sewer capacity with certain conditions to a property based on its development status.
- (v) "Tap-on Permit" shall mean a permit to connect to the public sanitary sewer system as provided in Section 16-40 of the Code of Ordinances.
- (w) "Use of Record" shall mean the existing or previous wastewater flow from a property that is represented in a baseline condition of the sanitary sewer system hydraulic model plus any future Permanent Allocations assigned to the property by the Division of Water Quality.

Section 16-303. – Sanitary Sewer Capacity Permit/Sewer Capacity Reservation.

- (a) A Sanitary Sewer Capacity Permit ("permit") must be obtained prior to any future connection to the sanitary sewer system that will result in additional sanitary sewer flow. An applicant may apply for a single Permit which shall apply to all lots or buildings, as appropriate, on an approved preliminary subdivision plat, final subdivision plat, final development plan or authorized plan amendment.
- (b) A permit shall be granted by the Division of Water Quality upon request, after verification by the division of all relevant facts, for any property that has a use of record in an amount not to exceed the maximum previous wastewater flow from the property.
- (c) A permit shall be granted by the Division of Water Quality upon request, after verification by the division of all relevant facts, for any single family residential,

townhouse, or duplex lot for which a building permit has not been previously issued if the lot was created by a final subdivision plat or final development plan recorded or certified, as appropriate, prior to July 3, 2013.

- (d) A permit shall be granted by the Division of Water Quality upon request, after verification by the division of all relevant facts, for any property for which an active preliminary subdivision plan, final development plan, final plat, or authorized plan amendment was submitted to the Planning Commission prior to December 11, 2012 provided the plan is approved and certified by the Urban County Planning Commission not later than July 3, 2013.
- (e) A permit shall be granted by the Division of Water Quality upon request, after verification by the division of all relevant facts, for any property located in Expansion Area 2A, 2B or 2C in Fayette County.
- (f) A Remodeling Project shall not require a permit and the Division of Water Quality shall provide written notice of such waiver to the Division of Building Inspection.
- (g) A Staged Capacity Allocation shall be granted by the Division of Water Quality upon request, after verification by the division of all relevant facts, for any residential development property for which an active preliminary subdivision plan, final development plan, or authorized amendments to such plans was not submitted to the Planning Commission prior to December 11, 2012 if the relevant plan or amendment is certified as approved by the Urban County Planning Commission Secretary not later than July 3, 2013. The amount of the Staged Capacity Allocation, up to a maximum annual threshold, shall be determined by a negotiated agreement between the applicant and the urban county government by and through the Division of Water Quality based on the nature and timing of the development.
- (h) A Staged Capacity Allocation shall be granted by the Division of Water Quality upon request, after verification by the division of all relevant facts, for any non-residential development property for which an active preliminary subdivision plan, final development plan, or authorized amendments to such plans was not submitted to the Planning Commission prior to December 11, 2012 if the relevant plan is approved and certified by the Urban County Planning Commission not later than July 3, 2013 and all tap-on fees for the property are paid by July 3, 2014. The amount of the Staged Capacity Allocation up to a maximum annual threshold shall be determined by a negotiated agreement between the applicant and the urban county government by and through the Division of Water Quality based on the nature and timing of the development. Any amount of the reserved sewer capacity that has not been used by July 3, 2014 shall expire.
- (i) Within ten (10) calendar days after receipt of a Sewer Capacity Application, the division shall notify the applicant, in writing, of its determination to grant or deny the request. If a determination cannot be made within ten (10) calendar days the division will notify the applicant and provide response status updates not less than every ten (10) days until a final determination is made. No application shall be approved without a written determination.
- (j)
 - (1) A project for an Essential Service may be granted a Sanitary Sewer Capacity Permit even though adequate capacity does not exist upon a finding by the Commissioner of Public Works and Commissioner of Planning, Preservation and Development that such action is justified and will not have an unduly detrimental impact on the Capacity Assurance Program.
 - (2) A project for a new business or industry, or the expansion of an existing business or industry, may qualify for Administrative Capacity Approval of a Sanitary Sewer Capacity Permit only upon a finding by the Commissioner of Finance and Commissioner of Planning, Preservation and Development that the project will have a significant economic impact. Such action shall not result in delay of other planned neighborhood sewer improvements or Remedial Measures Plan (RMP) projects. The Commissioners shall report any Administrative Capacity Approval to the Environmental Quality Committee within thirty (30) days of taking such action.
 - (3) Any project that is approved pursuant to subsection (a) or (b) must still file all otherwise required applications or forms and pay all applicable fees and

deposits, unless such fee or deposit is waived as provided elsewhere in this Article.

- (k) All applications or requests made pursuant to this section shall be made by the owner of the subject property or by the owner's duly authorized representative. Written verification of representative status will be required prior to acceptance of any application or request.

Section 16-304. – Capacity Requests/Sewer Capacity Reservations.

- (a) A sewer Capacity Request may be made for any development property that has an approved preliminary subdivision plan, final development plan, authorized plan amendment, or a final subdivision plat which has been certified as approved by the Planning Commission Secretary.
- (b) A Sewer Capacity Reservation request may be made for any development property for which a preliminary development plan, preliminary subdivision plan, final development plan, or authorized plan amendment, has been submitted to the Planning Commission.
- (c) To formally request a Staged Capacity Allocation, a Sanitary Sewer Capacity Permit or a Sewer Capacity Reservation for any development property, including Administrative Capacity Approval or Essential Services eligible properties, a Sewer Capacity Application shall be completed and filed with the division of Water Quality and a non-refundable administrative fee of \$450 shall be paid, except as provided in subsection (g) of this section. An applicant may file a Sewer Capacity Application which applies to all lots or buildings, as appropriate, on a preliminary subdivision plat, final subdivision plat, final development plan or authorized plan amendment.
- (d) If a Sewer Capacity Reservation is granted, the reservation will be effective upon payment of a reservation deposit in an amount equal to twenty-five percent (25%) of the estimated tap-on fee associated with the reservation. If a Sewer Capacity Reservation is granted for properties in Expansion Area 1 or 3, the reservation shall be in effective upon payment of a reservation deposit in an amount equal to twenty-five percent (25%) of the estimated sanitary sewer capacity exactions in the subject area or in such other amount determined by a development agreement between the applicant and the urban county government pursuant to Article 23C-7(d) of the Zoning Ordinance based on the applicant's participation in system improvement construction within the subject development. The amount of the reservation deposit shall be credited in full toward the payment of the final tap-on fee or exaction fee as appropriate. The length of the reservation period shall not exceed one (1) year after which the reservation shall expire unless extended as provided herein. Prior to expiration of the reservation, an extension shall be granted upon payment of an additional non-refundable administrative fee of \$225. The extension shall not exceed an additional one (1) year unless a longer extension is justified based on the timing of the applicant's construction of system improvements under a development agreement pursuant to Article 23C-7(d) of the Zoning Ordinance. If a Sewer Capacity Reservation expires one-half (1/2) of the reservation deposit shall be refunded. For developments requesting capacity where a reservation has expired, a new Sewer Capacity Application form must be completed and filed with the Division of Water Quality and a new non-refundable administrative application fee and reservation deposit, if applicable, shall be due for the subject property.
- (e) A Sewer Capacity Reservation shall become a Permanent Allocation upon certification by the Urban County Planning Commission Secretary of the approval of the preliminary subdivision plan or final development plan, or authorized amendments thereto as may be applicable for the subject property or issuance by the urban county government of a tap-on permit, for the subject property, whichever occurs first.
- (f) All rates and fees set forth in this section shall be adjustable each July 1 beginning on July 1, 2014 by an amount based upon the Consumer Price Index for All Urban Consumers, the U.S. City Average ("CPI-u") published monthly by the Bureau of Labor Statistics. These rates shall be adjusted up if so indicated by a factor determined by averaging the monthly CPI-u published for the 12-month period ending, and including, April of the year before the July 1 adjustment.

- (g) No administrative fee for Sewer Capacity Applications or deposit for Sewer Capacity Reservations shall be due for the following:
 - 1) Any Remodeling Project;
 - 2) Any construction project that will result in less than 45 gallons per day (gpd) increase in sanitary sewer usage;
 - 3) Any property that qualifies for Sanitary Sewer Capacity Permit or a Sewer Capacity Reservation pursuant to subsections 16-303(b), (c), (d), or (e);
 - 4) Any property that is currently paying a sewer user fee that is directed by the Fayette County Health Department to connect to the sewer system to eliminate an illicit connection.
- (h) The Sewer Capacity Reservation deposit for any development property that qualifies for a Administrative Capacity Approval under Section 16-303(i)(2) may be waived at the discretion of the urban county government.
- (i) All applications or requests made pursuant to this section shall be made by the owner of the subject property or by the owner's duly authorized representative. Written verification of representative status will be required prior to acceptance of any application or request.
- (j) Within ten (10) calendar days after receipt of a Capacity Request or an application for a Staged Capacity Allocation, a Sanitary Sewer Capacity Permit or a Sewer Capacity Reservation, the division shall notify the applicant, in writing, of its determination to grant or deny the requested action. If a determination cannot be made within ten (10) calendar days the division will notify the requestor and provide response status updates not less than every ten (10) days until a final determination is made. No request or application shall be approved without a written determination.

Section 16-305. Appeals.

Any applicant who disagrees with a sewer capacity/reservation/allocation/waiver determination on its application made under this Article may appeal to the Commissioner of Environmental Quality and Public Works. Such appeal shall be made in writing and shall state the grounds for the appeal. Any technical data which supports the appeal shall be provided with the appeal. The Commissioner shall render his decision within thirty (30) days from receipt of the appeal and supporting documents.

Section 16-306. Compliance with Consent Decree

All actions and requirements under this Article shall be subject to the provisions of the Consent Decree and the urban county government's Capacity Assurance Plan as approved by the United States of America pursuant to the Consent Decree. Where any conflict exists between this Article and the Consent Decree or approved Capacity Assurance Plan, the Consent Decree or Capacity Assurance Plan shall control.

Section 16-307. Review; Audit

An independent formal review and audit of the Capacity Assurance Program and collected fees shall be performed on or before July 3, 2015 and every two (2) years thereafter and the audit reports shall be sent to the urban county council.

Section 2 – That Section 5-30 of the Code of Ordinances be and hereby is amended to read as follows:

- (a) Prior to the issuance of any building permit for the construction or expansion of an apartment building or any commercial or industrial building or related blacktopping, or for any residential building where no previous building permit has been issued in the subdivision unit in which said residential lot is located from the date of the enactment of this section, the Director, Division of Building Inspection shall:

- (1) Obtain a certificate from the urban county engineer that such construction, including related blacktopping shall not materially cause stormwater damage. In areas where stormwater problems are known to exist, including but not limited to floodplains, areas of alluvial soils, and environmentally sensitive areas, the urban county engineer may require a stormwater study. Based on that study, additional stormwater management features may be required. The stormwater study shall be prepared in conformance with the Division of Water Quality Stormwater Technical Manual by a professional engineer licensed in the State of Kentucky.

(2) If deemed necessary, certify upon consultation with the director, Division of traffic engineering, that curb cut regulations have been complied with, and that the construction and related property use will not unreasonably interfere with traffic flow.

(b) No building permit for the construction of any structure that will require connection to the urban county government sanitary sewer system or the remodeling or expansion of any existing structure that will result in an increase in sanitary sewer usage shall be issued unless the Division of Building Inspection can verify via the urban county government's database or evidence provided by the applicant that a Sanitary Sewer Capacity Permit as defined in Section 16-302(q) has been issued for the subject property or a waiver has been granted because the project is a Remodeling Project as defined in Section 16-302(p).

Section 3 – That this Ordinance shall become effective on the date of its passage.

PASSED URBAN COUNTY COUNCIL: June 6, 2013

/s/Jim Gray
MAYOR

ATTEST:

/s/ Susan Lamb

CLERK OF THE URBAN COUNTY COUNCIL

PUBLISHED: June 13, 2013