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Inter-Departmental Memorandum

Date: May 18, 2004

To: Chief Council
Roy Tipton

From: Roadway Design Division Engineer
John B. Pickering J. B. P.

Subject: Hydraulics for Downstream
SR 25 near Old Fannin Road
Rankin County

Attached is a permit request for adding two (2) pipes at two (2) different locations under Lakeland Drive near Old Fannin Road. A development named Lakeland Commons Retail Center is being constructed in the northwest quadrant of the intersection, which changes the runoff factor, thus causing water to runoff faster; therefore, the crossdrains need to be increased in size.

On a normal MDOT project, the MDOT is responsible for passing water from one side of the roadway to the other, and we are not responsible for the downstream structures off of MDOT right of way.

If we approve the attached permit, could this mean MDOT may be responsible for the downstream water? The third paragraph of the last page of the permit may be enough to satisfy this potential problem. What are your thoughts?

If there are any questions or if additional information is needed, please advise.

Attachments

pc: Roadway Design Hydraulic Section ✓
File

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STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

Received
MAY 27 2004
Roadway Design

MEMORANDUM

TO: John Pickering

FROM: James H. Isonhood

DATE: May 26, 2004

RE: ***Lakeland Commons, LP***
Permit for Drainage

Per your request, I have reviewed the law regarding water drainage and the rights and duties of adjoining property owners. The issues the confront us are as follows:

1. Whether MDOT can aid an upstream landowner in dumping additional runoff onto the property of a downstream landowner;

2. Whether MDOT could be held accountable for aiding in this effort.

The drainage of surface waters is controlled by three (3) different schools of thought: Common Enemy Doctrine; Civil Law Rule; and the Reasonable Use Rule. The Common Enemy Rule requires each landowner to deal with his own water and leaves the efforts that may be made to deal with said water to the imagination of the landowner. The Civil Law Rule takes the opposite tack by requiring each landowner to accept the runoff from the adjacent landowner. Initially, these two doctrines were recognized as the only two legal theories dealing with this problem. The State of Mississippi adopted the Civil Law Rule. The Supreme Court stated the General Rule in *Newton Coca-Cola Bottling Company v. Murphree* as follows:

> The servitude which the owner of the higher adjoining land has upon the lower land for the discharge of surface water naturally flowing on the lower land from the dominant estate ordinarily extends only to surface water arising from natural causes, such as rain and snow, and cannot be augmented

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> or made more burdensome by the acts or industry of man, and it is the generally recognized rule, both of the Civil and Common Law, subject to certain qualifications and exceptions hereinafter noted, that a landowner cannot collect surface water into an artificial channel or volume, or precipitate it in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter. This is true although no more water is collected then would naturally have flowed upon the property in a diffused condition.

Newton Coca-Cola Bottling Co. v. Murphree, 212 Miss. 823, 831-832, 55 So.2d 485, 488 (Miss. 1951).

The major problem with the Civil Law Rule involves the prohibition against "higher than natural" runoff. Where property is developed commercially, the natural result will include increased runoff. If, under the Civil Rule increased runoff is not allowed, development can not occur. This lead to the development nationally of the Reasonable Use Rule. Although the Mississippi Supreme Court had been straying somewhat from the Civil Law Rule for some period, the Court formally acknowledged its acceptance of the Reasonable Use Rule in *Hall v. Wood*, 433 So.2d 834 (Miss. 1983). Justice Robinson summarized the new rule as follows:

> Applying these principles, we hold that upper landowners such as Hall are entitled to make reasonable use of their land. Where there is a reasonable likelihood of damage to the property of lower landowners, however, upper landowners are required to do whatever is reasonable to minimize the damage. The fact that some damage nevertheless occurs to the lower landowners does not render the upper landowner liable. On the other hand, where the upper landowner has done nothing in an effort to ameliorate the adverse effect on lower landowners and where the damage is in fact substantial, and further where the development activities of the upper landowners are a major proximate cause of that damage the lower landowners are entitled to damages and/or injunctive relief as may be appropriate.

Hall, 433 So.2d at 840.

The facts in *Hall* are similar to the circumstances existing at this proposed development area. Mr. Hall had completely denuded the forest on his twenty acres which was uphill from a lake surrounded by residential development. The increased runoff caused siltation problems that damaged the lake severely. In upholding the lower

Court's grant of damages against the Defendant, the Court said that Hall "reasonably should have known his actions would result in erosion which in turn would result in substantial silting, sediment, and general pollution of Lake Catherine." *Hall* 433 So.2d at 840.

Three years later, the Supreme Court spoke again in a case involving the Mississippi Highway Commission. *Mississippi State Hwy Comm. v. Wood*, 487 So.2d 798 (Miss. 1986). After reviewing the law to date, Justice Robinson stated "Therefore, it is apparent that the Highway Department could increase the flow of water by, among other things, substituting culverts for dry ramps, if in fact this was a reasonable step in improving and/or reconstructing Highway 63." *Mississippi State Hwy. Comm. y Commission*, 482 So.2d at 803.

Having stated the law, the next question that we must investigate involves what is reasonable. Unfortunately, this question cannot be readily answered. There have been few cases decided by the Supreme Court since 1986 that address upstream landowners in the issue of reasonable use of their property. Obviously, in *Hall* the clearing of said land increasing runoff, etc., was not a reasonable use. *Hall*, 433 So.2d 834.

In *Mississippi State Hwy. Comm. v. Wood*, the issue involved deepening of a ditch by the adjacent landowner instead of damages to the land. *Mississippi State Hwy. Comm.*, 487 So.2d 98. The increased drainage from the highway was deemed reasonable. The most recent case involved an automobile accident and the reasonable use of an uphill landowner. *Martin v. Flanagan*, 818 So.2d 1124 (Miss. 2002). In *Martin*, the Supreme Court held that allowing drainage down a field road that contributed to pooling of water was not unreasonable. *Id.*

The situation at hand involves land that has been completely cleared of all vegetation similar to *Hall*. The subject property is relatively flat and much smaller than the property in *Hall*. I can only guess as to whether the Court would hold this landowner responsible for increased drainage on the downhill landowner. I can say with little reservation that the suit would probably proceed to trial before a decision could be made. If we authorize the pass-through of these waters onto the land of another, I have to believe that we would stand to be held liable along with the upstream owner. Possible theories of liability would include: suits similar to those addressed herein where downhill landowners file suit to recover damages from an uphill landowner; a negligence suit under the Tort Claims Act; or an inverse condemnation suit.

Conclusion and Recommendations:

Although I cannot answer with any certainty whether we would be ultimately held liable, I can say without reservation that the downhill landowner would have an action against the Commission that would most likely proceed to trial and would not be

dismissed through summary judgment. I would recommend three possible solutions as follows:

1. Require the applicant to provide us with an engineering survey stating that the construction will not cause increased water runoff to the downhill landowner. There are problems with this suggestion in that I don't believe that we could reasonably rely on any report that may be given since we have drainage installed at this time and they are asking to increase our drainage three-fold. A suit for damages would probably not allow us to rely on this report as a defense.

2. Require the applicant to enter into a contract indemnifying us and giving the Transportation Commission a bond in a substantial amount extending out a significant period of time. This suggestion may be impractical because I don't know that they could obtain a bond of the duration necessary (20 or 30 years) to adequately address the potential problems.

3. Require the applicant to obtain a drainage easement from the landowner on the so uth side of Lakeland Drive. This solution seems to have the best possibilities. If the drainage easement was obtained, applicant would merely be moving water from his property to his property. This will make MDOT property merely a conduit for the drainage and would mostly likely absolve us of any liability. The only disadvantage would involve whether the applicant could obtain this drainage easement. The property to the south shows indications of development. If the property on the south side is being developed the owner may be reluctant to grant a drainage easement.

Of the recommendations that I have made, it would be prudent to obtain all three. However, I highly recommend that we deny this permit unless the applicant can at least comply with my third recommendation.

pc: R. M. Tipton
John Vance
William R. May

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