

William R. "Bill" Minor  
Northern District Commissioner

Dick Hall  
Central District Commissioner

Gene H. Brown  
Southern District Commissioner



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Deputy Executive Director/  
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## *Inter-Departmental Memorandum*

**Date:** August 4, 2004

**To:** Asst. Roadway Design Division Engineer (Purvis)  
Roadway Design Section Engineers  
Roadway Design Hydraulic Section

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

**Subject:** Permits for Crossdrains on Existing Roadways

I recently received a permit for adding additional pipe openings under a state highway due to a large development. I requested Legal Division's opinion on this matter due to MDOT granting a permit for additional runoff onto the property of a downstream landowner, and whether MDOT could be held accountable for aiding in this effort.

Attached is a letter from Legal Division representative, James (Jimmy) Isonhood dated May 26, 2004, addressing my request. Jimmy's last page contains three possible solutions; however, I will summarize what action the MDOT required of the permit applicant as follows:

1. The applicant was required to show proof he actually owned the property on both sides of the roadway, or show proof he owned a drainage easement on the downstream side of the roadway. Right of Way Division will need to be consulted for their concurrence regarding the proof of ownership.
2. The applicant was required to post a bond in a substantial amount extending out a significant period of time. The District will do this.

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

Attachment

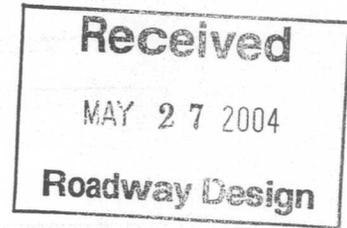
pc: Asst. Chief Engineer - Preconstruction  
File



STATE OF MISSISSIPPI



JIM HOOD  
ATTORNEY GENERAL



**MEMORANDUM**

TO: John Pickering  
FROM: James H. Isonhood   
DATE: May 26, 2004  
RE: ***Lakeland Commons, LP***  
***Permit for Drainage***

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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

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 south 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