

## IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

ROADS, INC. OF NWF,

Plaintiff,

vs.

Case No.:

Division:

ESCAMBIA COUNTY, FLORIDA, a  
political subdivision of the State of FloridaDefendant.  

---

**COMPLAINT**

COMES NOW the Plaintiff, Roads, Inc. ("Roads"), by and through its undersigned attorneys and sues Escambia County, a political subdivision of the State of Florida (the "County"), and alleges:

**FACTS COMMON TO ALL COUNTS**

1. Roads sought to construct a pond on its property in Escambia County, Florida, near Hillock Drive, in the Cantonment area. Roads was informed by the County that the only procedure for approving pond construction was to apply for a Stormwater Management Permit.
2. Roads applied for the Permit on March 7, 2006. In its application, it fully disclosed that it intended to construct a "pond" on the site and use the excavated materials "elsewhere." The application contained a map showing the approximate size of

the pond in relation to the subject property, and that map was made an attachment to the permit.<sup>1</sup>

3. The County approved the application and issued a permit (Permit #06031846) on March 14, 2006 ("the Permit"). A true and correct copy of the Permit is attached as Exhibit "A."

4. Although the County could have established a time deadline for completion of the project, it elected not to do so. The Permit specified that an expiration date was "not applicable." Further, the County placed no restriction on the size of the pond and ~~specified no conditions for issuing the Permit.~~

5. In reliance upon the Permit, Roads started the project, and is currently in the final stages of completion. The pond is being excavated precisely where it was planned, and as fully disclosed to the County in the application. This work has been performed at substantial expense to the Plaintiff, is being performed in compliance with the Permit issued, and in reliance on the authority granted by that Permit.

6. On May 18, 2006, the subject of the pond and the Permit came before the County's Board of County Commissioners because of written complaints made by neighbors regarding the project. Specifically, the neighbors complained to the County that:

- a. "This pond is 30 feet deep. It's ten acres wide...Catfish ponds are not normally 30 feet deep."

---

<sup>1</sup> The application and the subsequently approved Stormwater Management Permit are the same document. Once the application is approved by the County Engineer, the application becomes the applicant's permit.

- b. Roads has "exceeded its storm water permit."
- c. The project has no set timeline, it could "potentially" take "[t]hree-and-a-half years."
- d. The project is really "a borrow pit."
- e. There are or will be "30 to 40 trucks per day" entering and exiting the site.<sup>2</sup>

7. After hearing the citizen complaints and discussing whether Roads was conducting legal or illegal operations on its property pursuant to the Permit and county ordinances, the County considered what action should be taken and elected to refer the ~~issue to department for code enforcement for investigation and for ultimate resolution by~~ the Special Magistrate at a quasi-judicial hearing.

8. On May 19, 2006, a Notice of Violation was served on Roads alleging Roads to be conducting illegal borrow pit activities on the site. On May 22, 2006, the County petitioned its Special Magistrate for hearing on this matter.

9. On June 6, 2006, a quasi-judicial trial was held before the Special Magistrate of Escambia County, Case No. CE06-02-0069, to hear the County's arguments and evidence that Roads was conducting illegal activities, to wit, Roads was conducting illegal borrow pit operations and not constructing a pond as Roads alleged in the Application. The parties before the Special Magistrate *were identical* to the parties now before this Court, duly were notified in advance of the date and time of the hearing and appeared and argued their respective positions.

---

<sup>2</sup> These quotations are taken from the transcript of the May 18, 2006 proceedings before the Board of County Commissioners which was *accepted into evidence* by the Special Magistrate.

10. At that hearing, Roads argued it was conducting activities as authorized by the Permit. Roads further argued that Escambia County, while not having expressly revoked the permit, was essentially seeking to revoke the permit by declaring Roads' activities illegal and the County should be equitably estopped from a *de facto* revocation.

11. At the hearing, Roads presented an engineer's drawing demonstrating the size and location of the pond. A true and accurate copy of that drawing is attached hereto as Exhibit "B".

12. The County argued the permitted project was, in fact, a borrow pit and not a pond.<sup>3</sup> The County presented testimony from code enforcement officers as well as from the Director of Planning and Zoning alleging the nature of the project had been misrepresented by Roads in the Application. The argument that a misrepresentation had occurred was based, in part, on the maximum time represented to construct the pond (up to 3 ½ years), the acreage of the pond (approximately 10 acres), and the depth of the pond (approximately 30 feet during excavation). Therefore, the County argued it was not estopped from essentially revoking the Permit because the Permit was issued "in violation of the law or based on a mistaken representation." See the County's "Proposed Findings of Fact and Factual and Legal Argument," a true and correct copy of which is attached hereto and incorporated herein as Exhibit "C."

---

<sup>3</sup> Specifically, the County argued in its opening statement "they [Roads] obtained a stormwater management permit -- it's the fault of the County that the permit was issued erroneously because it was based on a representation that what was being built was a catfish pond." June 6, 2006, Transcript of Proceedings.

13. The Special Magistrate, after hearing the arguments of counsel and considering the live testimony and other evidence, issued his final order, a true and correct copy of which is attached hereto as Exhibit "D" (the "Special Magistrate Order"). The Special Magistrate Order makes the following findings relevant to the present proceeding:

- a. The activity that Roads is conducting on its property is "set forth in and authorized by the Permit."
- b. Off-site disposal of materials excavated from the site was "fully revealed" on the Application.
- ~~c. Removal of the excavated materials from the site is a necessary consequence of constructing the pond and "not the primary purpose for which the excavation was conducted."~~
- d. "The County has apparently taken a second look at the correctness of issuing the...Stormwater Management Permit...due to the pressure of the surrounding property owners."
- e. "Although there has been no official 'revocation' of the Permit by the County, the practical effect of this code enforcement action is to render the Permit void...."
- f. "[T]he County would have [Roads] cease all activities until it has obtained a borrow [pit] permit before proceeding; however, it was obvious from the evidence presented at the hearing that such an application would constitute an effort in futility."
- g. "The subject Permit was represented by the County to [Roads] as the Permit needed to engage in the subject activity. Roads reasonably relied on the Permit in the absence of any directly contravening ordinance or instruction from the County."
- h. "It would be highly inequitable and unjust to now allow the County to *essentially revoke the Permit.*" (emphasis supplied)
- i. "[T]he County is equitably estopped from prohibiting the activities which it has lawfully permitted on the subject property, to wit, construction of a

private recreational pond and the use of the excavated materials elsewhere.”

Accordingly, the Special Magistrate, a court of competent jurisdiction, found Roads’ activities to be legal and in compliance with the Permit, and that the County should not be allowed to essentially void the lawfully issued Permit.

14. The arguments and issues regarding the nature, scope and duration<sup>4</sup> of the project have not substantially changed since the Special Magistrate issued his final order.

15. The County exercised its right to appeal a portion of the Special Magistrate Order to the jurisdiction of this honorable Court. (Case No. 2006 CA 00148)<sup>5</sup>

---

16. The County has taken no action on its appeal since November 3, 2006. Thus, the Special Magistrate Order remains final and undisturbed.

17. Unhappy with the ruling of its Special Magistrate and having essentially abandoned pursuit of appellate relief from this Court, the County has now sought to circumvent its own administrative procedures and the jurisdiction of this Court in that on or about February 21, 2008, the County’s Board of County Commissioners voted to revoke the Permit. The revocation requires that “[a]ll work, including but not limited to

---

<sup>4</sup> Notably, the Special Magistrate had before him evidence that the project could last as long as three and a half years as well as the Permit stating that an expiration date was not applicable, yet his order was not conditioned on any timeline for completion.

<sup>5</sup> The purpose of the County’s appeal was to question the Special Magistrate’s authority to make findings regarding equitable estoppel and the vagueness of County statutes. Notably, the County never argued before the Magistrate that he did not have the authority to find compliance by Roads based on a theory of equitable estoppel. Further, the County admitted to this Court in the appellate proceeding that “even if the County’s appeal is granted, *Roads will nonetheless be able to continue its operations at the property in question without a borrow pit permit*”. (emphasis supplied).

hauling of dirt, fill or similar materials related to the permit must cease and desist immediately..." A true and accurate copy of the letter revoking the Permit is attached hereto as Exhibit "E".

18. The County's stated reasons for the revocation are that "[t]he nature, scope and duration of the project exceeds the terms of [the Permit]." At a February 21, 2008, public hearing, members of the Board of County Commissioners stated they would revoke the Permit because the activity being conducted had been misrepresented as a pond.

---

~~19. The identical issue of whether the nature, scope and duration of project was misrepresented to the County was actually litigated and decided against the County by the Special Magistrate in Case No. CE06-02-0069.~~

20. The issue of whether the activities being conducted by Roads complied with the Permit was essential to the Magistrate's ruling.<sup>6</sup> It was not for the County to overrule the Special Magistrate or circumvent the jurisdiction of this Court by administrative fiat in a manner that shows contempt for the judicial branch of government, including its own quasi-judicial administrative proceedings.

21. The County's *original* elected remedy in this matter was not to act to revoke the Permit under the procedures set forth in its Land Development Code. Rather, it chose to argue in a quasi-judicial proceeding before the Special Magistrate that the project was

---

<sup>6</sup> The Special Magistrate's conclusions of law were all based on the *fact* that "The activity that Respondent is *conducting* is set forth in and *authorized* by the Permit". Exhibit "D", Pg. 2, Par. 7. (emphasis added). In other words, the Magistrate found that Plaintiff was, in fact, conducting the activities (construction of a pond) that it said it was conducting.

a borrow pit and not a pond as represented and that, therefore, the permit should be, in essence, revoked and Roads fined for operating an illegal borrow pit. The County made that argument and lost. Now, unhappy with the results it seeks to take another "bite at the apple" by revoking the permit.<sup>7</sup>

22. In doing so, it has not only caused and is causing harm to Roads, but it has improperly exercised jurisdiction over a matter which it previously appealed to this Court and which remains pending before this Court.

23. Roads' administrative remedies with respect to legal and factual issues ~~regarding validity of the Permit were exhausted in Case No.: CE06-02-0069 before the~~ Special Magistrate of Escambia County and appealed by the County to this Court in Case No. 2006 CA 00148.<sup>8</sup> The County may not "re-litigate" or otherwise re-decide the issue in a separate administrative action simply because it did not get the result it desired in the quasi-judicial administrative procedure it elected.

### COUNT I - DECLARATORY JUDGMENT

24. This is an action for a declaratory judgment pursuant to Chapter 86 of the Florida Statutes.

---

<sup>7</sup> Notably, the County is still not following the provisions set forth in its ordinances for revocation.

<sup>8</sup> In the alternative, Roads cannot get the requested relief via the administrative process. In the alternative, pursuit of further administrative remedies would be futile. In the alternative, the County has acted illegally and outside the authority of statute and ordinance by violating its own administrative procedures as well as the jurisdiction of this Court and, therefore, Roads is not required to exhaust administrative remedies prior to asking the Court to enjoin the County from these actions.



25. Roads realleges and incorporates the allegations contained in paragraphs 1 through 23.

26. There is a present and bonafide dispute between the parties as to the Defendant's right to revoke the Permit.

27. More specifically, the Defendant may not revoke a permit which it has already sought, unsuccessfully, to have voided by its own Special Magistrate. Defendant's remedy, if any, was to have properly appealed the matter to this Court and sought to have the order of the Special Magistrate reversed. Defendant cannot make an ~~“end run” around its own quasi-judicial administrative process and the jurisdiction of this~~ Court by simply calling its actions by another name and pursuing a different administrative action in the hopes that it will yield a more favorable or politically popular result.<sup>9</sup>

28. Because of the acts of the County alleged herein, Roads is presently in doubt as to its rights in regard to the Permit and is entitled to have such doubts resolved through this action.

WHEREFORE, Plaintiff respectfully requests this Court enter a judgment for the Plaintiff declaring the following or any of the following:

1. The County's revocation of the Permit is void in that it improperly exercised jurisdiction over this matter with full knowledge that rights and obligations associated with the permit were before this Court on appeal.

---

<sup>9</sup> As found by the Special Magistrate, “The County has apparently taken a second look at the correctness of issuing...the Stormwater Management Permit and asked...Code Enforcement to undertake an evaluation of the activities of [Roads] in its construction of a pond on the subject property due to the pressure of the surrounding property owners.” See Exhibit “D”

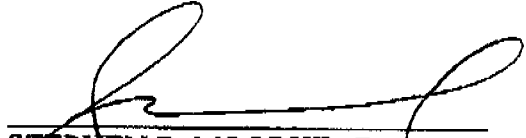
34. The injury caused by the County's actions is ongoing and continuous in that everyday that Roads cannot complete the project is a day that it is deprived of the use and enjoyment of its property.

35. There is a substantial likelihood that Roads will prevail on the merits of this action in that Roads was granted a valid and legal permit to perform the subject activities as has been determined by the County's Special Magistrate. The facts, circumstances and conditions upon which the Special Magistrate based his decision have not materially changed.

~~36. The public interest and safety would be served by enjoining the County from~~  
revoking the permit in that it is in the public's best interest for the project to be completed and not left as a liability to the owner and the public. Furthermore, it is in the public's interest to have predictability and stability in the administrative actions of its government.

37. Plaintiff has no adequate remedy at law in that monetary relief is not available or cannot provide the relief requested.

WHEREFORE, Plaintiff respectfully request the Court enter judgment enjoining Escambia County from revoking Permit # 06031846 and from taking any further action in contravention of Plaintiff's rights under Permit # 06031846. Plaintiff further prays for an award of its costs incurred in bringing this action.



---

STEPHEN R. MOORHEAD  
Florida Bar No. 613339



---

R. TODD HARRIS  
Florida Bar No. 651931

McDonald Fleming Moorhead  
25 W. Government Street  
Pensacola, Florida 32502  
(850) 477-0660  
Attorneys for Plaintiff

---

ESCAMBIA COUNTY ENGINEERING  
1190 W. Leonard St.  
Pensacola, FL 32501-1129 (850-595-3434)

Handwritten: *John Blackmon, PE*  
2006-051 06031846

2  
P  
A  
G  
E  
S

# STORMWATER MANAGEMENT PERMIT

**Activities Covered Under Permit:** Activities such as converting agricultural land to non-agricultural uses; changing the use of land causing a change in natural flow patterns of predevelopment conditions; altering any ditches, dikes, terraces, berms, swales, or other stormwater management facility; filling, excavating, grading, and changing the natural topography are covered under this permit, provided such stormwater management activities do not result in adverse impacts to adjoining properties, waterbodies, watercourses, wetlands, adjacent roadways or drainage systems, etc. Construction of infrastructure or addition of impervious area is not covered under this permit.

PERMIT # 06031846 DATE ISSUED: 3/14/06 PERMIT EXPIRES: N/A  
(1-year expiration unless specified)

- DRAINAGE ALTERATION
- POND MODIFICATION
- MAINTENANCE REHABILITATION
- SPECIAL CONDITION

OWNER/APPLICANT: Roads Inc of NWF DATE: 3/7/06  
 OWNER'S ADDRESS: 106 Stone Blvd PHONE #: 908-0991  
 ENGINEER OF RECORD: Howard G. Hammond, JR PHONE #: 434-2605  
 PROJECT NAME: Catfish Pond OTHER PERMITS#: \_\_\_\_\_  
 SITE ADDRESS: Hillock Drive ACREAGE: 60.860  
(if applicable)  
 SITE PROPERTY REFERENCE #: Section 04 Township 14 Range 31 Subd 2101 Lot 200 Block 000  
 Provide:  Site Plan  Vicinity Map  Stormwater Management Plan  Narrative

DESCRIBE ACTIVITIES PROPOSED (for land shown on attached site plan):  
DIGGING CATFISH POND - USING TAPE MATERIAL ELSEWHERE

REVIEW FEES: \$150.00 INSPECTION FEES: (office use only) \_\_\_\_\_  
 APPROVED  DENIED [Signature] DATE: 3/14/06  
 APPROVED  DENIED [Signature] DATE: 3/14/06  
Richard Duane, P.E.; County Engineer  
 Permit Condition:  Reason for Denial: \_\_\_\_\_

**Responsibility of Owner/Applicant:** As necessary the owner/applicant shall incorporate measures to prevent erosion, sedimentation, and/or flooding which may result from stormwater management activities. Silt fences, temporary sediment traps, temporary holding ponds, stabilization of disturbed areas with grass may be required to control erosion, sedimentation and/or flooding. The undersigned is fully aware of these responsibilities and will comply with these requirements.

SIGNATURE OF OWNER/APPLICANT: [Signature] DATE: 3/13/06

**Disclaimer:** Escambia County shall not be held responsible for any losses or damages in the event that activities covered under this permit negatively impact adjacent properties, waterbodies, watercourses, wetlands, adjacent roadways or drainage system.













## EXHIBIT "A"

Russell 431 2650

Printed Map from Current View



Legend

-  Highway Feature
-  State Contourline
-  Contour
-  Parish
-  Drainage
-  Escambia County Boundary
-  CITY OF ZENADORA
-  POINT OF CENTURY
-  ALBANY
-  ESCAMBIA COUNTY
-  SPITALBUSH COUNTY
-  WARE



Escambia County GIS/Mapping Map, 7, 2008

The data on this site is provided as a public service and no guarantees or certifications, expressed or implied, are provided regarding accuracy of information herein, its use, or its interpretation.

PLEASE MARK POUD LOCATION

ESCAMBIA COUNTY - \* LIVE \*

Item 1 of 1

PERMIT RECEIPT

OPERATOR: labuchin  
COPY # : 1

Sec:04 Twp:1N Rng:31 Sub:041N312101 B1k:000 Lot:000  
PARCEL ID .....: 041N312101000000

DATE ISSUED.....: 03/15/2006  
RECEIPT #.....: 306125  
REFERENCE ID # ...: 06031846

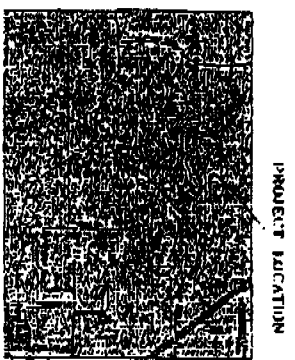
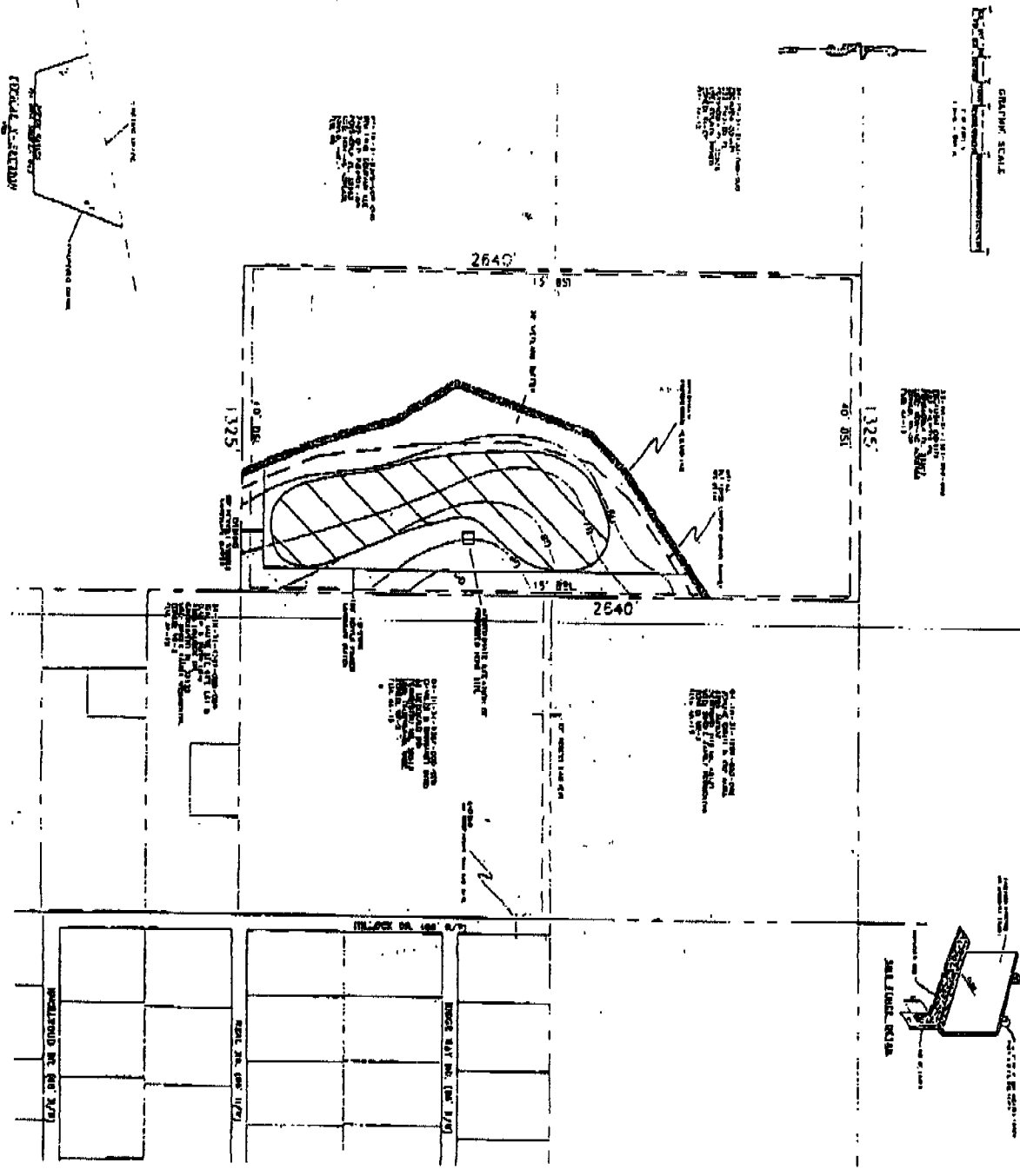
SITE ADDRESS .....: HILLOCK DR  
SUBDIVISION .....:  
CITY .....:  
IMPACT AREA .....

OWNER .....: ROAD INC OF NWF  
ADDRESS .....: 106 STONE BLVD  
CITY/STATE/ZIP ...: CANTONMENT, FL 32533

RECEIVED FROM ....: HAMMOND ENGINEERING  
CONTRACTOR .....: LIC #  
COMPANY .....:  
ADDRESS .....:  
CITY/STATE/ZIP ...: .  
TELEPHONE .....

FEE ID	UNIT	QUANTITY	AMOUNT	PD-TO-OT	THIS REC	NEW BAL
WSPEXEMPT	FLAT RATE	1.00	150.00	0.00	150.00	0.00
TOTAL PERMIT :			150.00	0.00	150.00	0.00

METHOD OF PAYMENT	AMOUNT	NUMBER
CHECK	150.00	150.00
TOTAL RECEIPT :	150.00	



- NOTES:**
- TOTAL VOLUME OF SITE PARCELS: 60 AC
  - PROPOSED LAKE AREA: 43,000 SF - (13.13 AC)
  - AFTER ENCAVATION LAKE IS TO BE LINED WITH CLAY OR BENTONITE
  - EXISTING: CONDUITS BUILT ON GRID 200'
  - FORMING OF THE EXCAVATION WATERPANEL SHALL BE IN ACCORDANCE WITH THE FLORIDA STATE LAKE LAKE SLOPE, BODIES SITE, REGULATION, ETC.

**HILLOCK DRIVE LANE**  
 PROJECT NO. 08-00000  
 PREPARED BY: HAMMOND ENGINEERING, INC.  
 DATE: 08-20-08  
 SCALE: AS SHOWN  
 SHEET NO. 1 OF 1  
 PROJECT LOCATION: HILLOCK DRIVE LANE, ESCAMBIA COUNTY, FLORIDA

HILLOCK DR. LAKE	
SITE PLAN	
DATE: 08-20-08	SCALE: AS SHOWN
COUNT	

**HAMMOND ENGINEERING, INC.**  
 AUTHORIZATION NO. 9130  
 3800 NORTH W STREET  
 ESCAMBIA, FLORIDA 92555  
 850 454-2422  
 FAX 850 454-2447

# EXHIBIT "B"

SPECIAL MAGISTRATE  
IN AND FOR ESCAMBIA COUNTY, FLORIDA

JUN 12 2008

Escambia County, Florida,

Plaintiff,

v.

Case No.: CE 06-02-0069  
Location: Hillock Road

Roads Inc. of NWF  
c/o Cody Rawson  
106 Stone Blvd.  
Cantonment, FL 32533

Neal Road, LLC  
c/o Russell Weaver  
2755 Fenwick Road  
Pensacola, FL 32526

Defendants.

**PROPOSED FINDINGS OF FACT AND  
FACTUAL AND LEGAL ARGUMENT**

Escambia County, through its undersigned counsel, files these proposed findings of fact and factual and legal argument in support of its argument that Roads, Inc.'s use of its property on Hillock Drive constitutes a borrow pit that is subject to the County's Code of Ordinances and Land Development Code, and that the County's issuance of a storm water management permit does not constitute an estoppel against the County from proceeding against Roads, Inc. for its violations of the Code of Ordinances and the Land Development Code.

**FINDINGS OF FACT**

1. In January 2006, Roads, Inc. (Roads), a corporation owned by Cody Rawson, began excavating property located on Hillock Drive in Escambia County, Florida. Roads removed the excavated material from its Hillock Drive property and transported the excavated material to various Roads projects throughout Escambia County.

**EXHIBIT "C"**





2. During February 2006, neighbors to the property reported seeing numerous dump trucks enter the property empty and leave the property filled with excavated soils.
3. On March 3, 2006, Escambia County Code Enforcement Officer Steven Littlejohn responded to a complaint regarding the dump truck activity. When he arrived at the property, he observed the following: a large depression where material was being excavated; heavy machinery, including track hoes; and piles of soils segregated according to the type of soil. Based on his experience as a code enforcement officer, Officer Littlejohn believed that the property was being used as a borrow pit as defined by Escambia County Code of Ordinances (COO) § 42-322. He posted a cease-and-desist order on the property. He subsequently faxed a copy of the cease-and-desist order to Roads alleging violations of COO § 42-323, Escambia County Land Development Code (LDC) § 7.07.07, and LDC § 4.06.01.
4. After receiving the cease-and-desist order, Roads contacted Escambia County officials and stated that it was building a catfish pond on the property. Roads was directed to apply for a storm water management permit with the Escambia County Engineering Department.
5. Roads employed engineer Thomas Harmond to prepare the permit application. He worked at the direction of Russell Weaver, the supervisor and superintendent of the excavation occurring on the property. On the permit, Roads listed that the purpose of the project was "digging catfish pond - using the material elsewhere." On neither the permit nor an attached site plan did Roads specifically identify that a house would be constructed on the property.
6. On March 14, 2006, the Escambia County Engineering Department approved the storm water management permit. Due to the issuance of the permit, Officer Littlejohn elected not to pursue the March 3 cease-and-desist order any further.

7. Jacqueline Rogers and Bill Dodson, two neighbors of the Hillock Drive property, subsequently observed a resumption of activity at the property. During March and April, they witnessed heavy traffic entering and exiting the property. The dump trucks accessed the property by traveling through a residential neighborhood where families lived and children played. At some points, as many as six to eight trucks would enter and exit over the course of an hour.

8. Due to their concerns regarding the dump truck activities, a group of neighbors held a community meeting of April 13, 2006. Rogers and Dodson were in attendance. Cody Rawson appeared on behalf of Roads. Rawson stated that he was building a catfish pond. When asked how long the project would continue, Rawson could not provide a definite timeframe. Instead, he stated that the excavated material was being used on Roads projects throughout Escambia County, and the project's duration would depend on the material needs of the various Roads projects.

9. The neighbors brought their complaints regarding the property before the Escambia County Board of County Commissioners on May 18, 2006. The Board agreed to refer the matter back to Escambia County Code Enforcement for another review. Officer Littlejohn subsequently returned to the property on May 19. He observed that the same conditions existed on the property as existed on March 3, except that the depression was much larger. The depression was much larger than any recreational catfish pond that he had visited in his personal life and was consistent with the dimensions of other borrow pits he had observed as a code enforcement officer.

10. Escambia County Planning and Zoning Director Peter Alutto accompanied Officer Littlejohn. Consistent with his experience, he believed that the property was being used as a

borrow pit as defined by COO § 42-322. He noted that the depression was approximately 25 to 30 feet deep.

11. On May 19, Officer Littlejohn issued a second cease-and-desist order to Roads based on unpermitted borrow pit operations. He alleged the same violations as were listed on the March 3 cease-and-desist order.

12. As of June 6, 2006, Roads had not signed any contracts for filling the depression with water, instead indicating its intention to rely on rainfall. Roads had also not signed any contracts to supply a pond or lake with fish. Additionally, Roads had not begun design of any houses or pulled any permits for home construction on the property.

---

### **FACTUAL AND LEGAL ARGUMENT**

#### **A. *ROADS OPERATED A BORROW PIT.***

1. Roads is using the Hillock Drive property as a borrow pit as defined by the plain language of COO § 42-322. COO § 42-322 defines "borrow pit" as "[a] site or parcel of property where soils, clays, gravel or similar materials are removed, or have been removed for use elsewhere. May also be referred to as a mineral, mineral resource excavation and/or extraction site." Under the plain language of this definition, the Hillock Drive property is a borrow pit as contemplated by the definition. First, Roads is excavating soils, clays or similar material from a portion of its Hillock Drive property. Second, by its own admission, Roads is using the materials elsewhere at other Roads projects throughout Escambia County. Therefore, the Hillock Drive property qualifies as a borrow pit pursuant to the Escambia County Code of Ordinances and the Escambia County Land Development Code.

2. Roads is using the Hillock Drive property as a borrow pit according to the administrative agency charged with enforcing the County's borrow pit regulations. A

reviewing tribunal must afford great weight to the administrative construction of a land development code by the officials charged with its administration unless the officials make an unreasonable interpretation or a clearly erroneous interpretation. Vanderbilt Shores Condominium Assoc., Inc. v. Collier County, 891 So. 2d 583, 585 (Fla. 2d DCA 2004). But, “[i]f the agency’s interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous and should be affirmed.” Sullivan v. Fla. Dep’t of Environmental Protection, 890 So. 2d 417, 420 (Fla. 1<sup>st</sup> DCA 2004) (quoting Fla. Dep’t of Educ v. Cooper, 858 So. 2d 394, 396 (Fla. 1<sup>st</sup> DCA 2003)).

The Escambia County Code of Ordinances charges Escambia County code enforcement officers with the duty to enforce its borrow pit ordinance. COO § 42-325(3) states: “Violations of any portion of this article will be enforced by the environmental code enforcement division pursuant to chapter 30 of the Escambia County Code of Ordinances, the county code enforcement system.” Officer Littlejohn, an Escambia County code enforcement officer, visited the Hillock Drive site on two occasions, March 3 and May 19. Based on his experience in enforcing the borrow pit ordinance, he testified that the Hillock Drive was being operated consistent with the borrow pit definition.<sup>1</sup> He based his reasoning on the pit’s size and depth, the segregation of soils according to type, the presence of heavy machinery, and the dump truck activity. Since Roads had not sought a permit to operate a borrow pit on the Hillock Drive property, Officer Littlejohn cited Roads for violating the borrow pit ordinance and similar Land Development Code regulations.

Officer Littlejohn’s classification of the property as a borrow pit was well within the range of possible and reasonable interpretations of the borrow pit definition. Roads was

---

<sup>1</sup>Indeed, this conclusion was seconded by Peter Alutto, Escambia County’s Director of Planning and Zoning, based on his own observations and experience.

excavating material in significant amounts and transporting the material offsite for use in other projects. Had Roads elected to stockpile the excavated property *within* the Hillock Drive property, then Officer Littlejohn's classification would likely have been clearly erroneous. Or, if Roads was building a swimming pool which required a minimal amount of excavation and limited use of dump trucks over a one- or two-day period, then the classification would arguably meet the clearly erroneous standard. However, in the instant case, Roads has been digging a hole over twenty feet in depth and spread out over at least twelve acres, has been segregating sediments for use in different offsite projects, has been using multiple dump trucks arriving and leaving in a continuous flow over several months, cannot precisely say when the project will be complete, and has not taken any steps, other than securing a storm water management permit, to use the property for any purpose *other than* a borrow pit. Accordingly, this Court should find that based on the testimony of Officer Littlejohn, an agent charged with enforcing the borrow pit ordinance, the Hillock Drive property is a borrow pit pursuant to COO § 42-322.

3. **The interpretation of COO § 42-322 proposed by Roads would undermine the purpose of the borrow pit ordinance.** Roads asks this Court to disregard the administrative interpretation given by Officer Littlejohn, and instead argues that the use of excavated materials elsewhere is merely secondary to the intended purpose of constructing either a catfish pond or a bass and bream lake or a lake to adjoin a residence for the Rawson's son.<sup>2</sup> In making this argument, Roads relies on a definition of "for" and states that the Board of County Commissioners could used have used another word if it intended to regulate other, non-primary uses of excavated property. Roads is therefore asking this Court to adopt a "primary use" test to determine whether a property may be classified as a borrow pit.

---

<sup>2</sup>The testimony given by witnesses for Roads was inconsistent and the witnesses used these terms somewhat interchangeably.

As a fundamental rule of statutory construction, courts should not interpret one portion of an ordinance in a manner that is inconsistent with the overall purpose of the ordinance.

American Home Assurance Co. v. Plaza Materials Corp., 908 So. 2d 360, 367-68 (Fla. 2005).

Courts should also avoid readings that would render portions of an ordinance meaningless. State v. Goode, 830 So. 2d 817, 824 (Fla. 2002). Additionally, although Roads asks this Court to incorporate a primary use test solely on a literal reading of the word "for," "the supreme court has stated that 'consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute's enactment.'" Southwest Fla. Water Mgt. Dist. V. Charlotte County, 774 So. 2d 903, 916

(Fla. 2d DCA 2001) (quoting Florida Birth-Related Neurological Injury Compensation Ass'n v. Division of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997)).

Reading a primary use test into the definition of borrow pit would be contrary to the intent of the borrow pit ordinance. COO § 42-321 states that the purpose of the borrow pit ordinance is to set forth "the requirements for borrow pits and reclamation of mined-out lands in Escambia County, Florida, for the safety and protection of the public." In pursuing this goal, the ordinance contemplates public hearings during the permitting process. COO § 42-323(1). The problem with the proposed primary use test is that it would allow virtually any property owner to bypass the public hearing process, and thereby bypass public input and the concerns of neighboring residents, merely by declaring its intent to construct a "pond" or "lake" after an indefinite period. Meanwhile, during the process of digging the pond or lake, the property owner would be allowed to reap the benefits of the unpermitted "secondary use" of excavating materials by using them elsewhere or even selling them for profit. This activity could continue unabated simply because a property owner preemptively declared its intention to someday fill the mined-

out pit with water. Accordingly, because a primary use test would be inconsistent with the purpose of the borrow pit ordinance and would render the public hearing process meaningless, this Court should reject Roads' interpretation of the borrow pit definition.

4. **The definition of borrow pit is not impermissibly vague.** Roads also argues that the definition of borrow pit is vague, despite also arguing that the plain meaning of the borrow pit definition incorporates a primary use test through the word "for." Roads claims that a person of ordinary intelligence would not know what activities are regulated under the borrow pit ordinance. But an ordinance will not be void for vagueness simply because it is subject to multiple interpretations. City of Daytona Beach v. Del Percio, 476 So. 2d 197, 200 (Fla. 1985).

---

Instead, the borrow pit definition spells out precisely the types of activities that constitute borrow pits under the ordinance: "A site or parcel of property where soils, clays, gravel or similar materials are removed, or have been removed for use elsewhere." Significantly, this sentence is further clarified by the following sentence: "May also be referred to as a mining, mineral, resource excavation and/or extraction site."

The borrow pit ordinance regulates mining and excavation activities. "In statutes regulating business activities, the use of special or technical words or expressions well enough known to those who will need to use them . . . is generally immune to a charge of vagueness." Loxahatchee River Ery. Control Dist. v. School Bd. of Palm Beach County, 496 So. 2d 930, 936 (Fla. 4th DCA 1986). Furthermore, as discussed *supra*, deference should be given if an administrative agency would know what the challenged language refers to. Id. The borrow pit definition clearly equivocates excavation "for use elsewhere" with "mining, mineral, resource excavation and/or excavation site." The code enforcement office, charged with enforcing the statute, would therefore know that this definition excludes a simple, limited activity such as

planting a tree or digging a swimming pool. Thus, this Court should not find that the borrow pit definition established by COO § 42-322 is void for vagueness.

**B. ROADS VIOLATED THE COO AND THE LDC.**

1. Roads violated COO § 42-323. COO § 42-323 states, *inter alia*: "It shall be unlawful to conduct mining, borrow pit, and/or reclamation activities thereof in Escambia County without first obtaining all applicable required permits, including those from state regulatory agencies and Escambia County." COO § 42-323(1) states, *inter alia*: "Public hearings . . . may be required depending on the location of a proposed mine, borrow pit, excavation site, or expansion/reclamation thereof." This subsection then mandates public hearings whenever the proposed borrow pit use conflicts with "the future land use designation, zoning, permitted uses, and/or performance standards of this Code for the site location." Such public hearing could be held before the Board of Adjustments (BOA). The ordinance additionally requires a development order by the development review committee (DRC) in certain cases. COO § 42-323(7).

In the instant case, Roads only sought (and obtained) a storm water management permit. Roads did not take any other steps to secure the applicable permits or development orders to operate a borrow pit. Escambia County Planning and Zoning Director Peter Alutto testified that in order to legally operate the borrow pit, Roads would have to apply for a conditional use permit from the BOA since the Hillock Drive property is not zoned for borrow pit operation. Furthermore, Roads would need to obtain an order from the DRC. Although Roads began the DRC process, it later abandoned the process. Therefore, because Roads made no effort to bring its borrow pit into compliance with COO § 42-323, this Court should find that it violated COO § 42-323.



2. Roads violated LDC § 7.07.07. LDC § 7.07.07 establishes performance standards for borrow pits in Escambia County. Roads did not meet performance standards contained within this section of the LDC. For instance, Roads violated LDC § 7.07.07.D. by failing to limit access to a route having a minimal impact on residential neighborhoods. Additionally, Roads violated LDC § 7.07.07.E. by failing to obtain any permits required by COO § 42-323. For these reasons, this Court should find that Roads violated LDC § 7.07.07.

3. Roads violated LDC § 4.06.00. LDC § 4.06.00 regulates site plans submitted to the DRC. Mr. Alutto testified that in order to operate the borrow pit, Roads would need to complete the DRC process. Roads initiated the DRC process but withdrew on the date of the DRC hearing. To date, Roads has not renewed its participation in the process. Accordingly, this Court should find that Roads violated LDC § 4.06.00.

**C. *ESCAMBIA COUNTY IS NOT ESTOPPED FROM ENFORCING ITS OWN ORDINANCES.***

Roads violated the borrow pit ordinance and related provisions of the LDC. Roads argues that even if Roads was operating a borrow pit, its storm water management permit, issued without a public hearing, estops the County from enforcing its own laws. In order to establish equitable estoppel, Roads must show: 1) good faith reliance; 2) on some act or omission of the government; and 3) a substantial change in position or the incurring of excessive obligations and expenses so that it would be highly inequitable and unjust to destroy the right it acquired. Equity Resources, Inc. v. County of Leon, 643 So. 2d 1112, 1117 (Fla. 1st DCA 1994). However, a claim of equitable estoppel may not lie when a governmental entity issues a permit in violation of the law or based on a mistaken representation. Town of Lauderdale-By-the-Sea v. Meretsky, 773 So. 2d 1245, 1247 (Fla. 4th DCA 2001) (quoting Godson v. Town of Surfside, 8 So. 2d 497, 498 (Fla. 1942)).

In Meretsky, the court reviewed an analogous set of facts to the instant case. A town commission approved a property owner's variance request for the construction of a wall and issued a building permit. The property owner built the wall on a public right-of-way, believing the construction was allowed by the building permit. The town commission later directed the town administration to take action to stop further construction of the wall. At that point, the property owner had spent over \$39,000.00 on the wall (and over \$74,000.00 on the entire project). The property owner filed a suit for a declaratory judgment that the permit was valid. The town argued that the granting of the permit was contrary to a town ordinance and the granting of the permit was not equivalent to an ordinance.

The Meretsky court agreed with the town and found that the permit was *ultra vires* and void. The court stated: "The issuance of a building permit will not estop the government authority from enforcing its ordinances and revoking a permit which has been obtained in violation of its ordinance." Id. at 1247. The court then noted that a town ordinance prohibited construction of the wall in a public right-of-way. The court observed that if the town did not have authority to grant the permit, then it should not be estopped from revoking the permit. Accordingly, the court found that "[t]he (property owners) were on constructive notice of the contents of the ordinance and are presumed to have constructive knowledge of the nature and extent of the powers of governmental agents who issue permits. (Citation omitted). Therefore, the Town is not estopped from requiring that the wall be removed." Id. at 1249. See also Dade County v. Gayer, 388 So. 2d 1292, 1294 (Fla. 3d DCA 1980) ("While at first blush it seems that the application of the rule may be harsh, it would be inconceivable that public officials could issue a permit, either inadvertently, through error, or intentionally, by design, which would sanction a violation of an ordinance adopted by the legislative branch of the government. Only

the duly constituted members of the (county commission) enjoy that prerogative and then only in accordance with established procedure.”)

In the instant case, the Escambia County Engineering Department approved Roads' storm water management permit. On the permit, Roads stated that the purpose of the project was to dig a catfish pond and “use the material elsewhere.” The County's borrow pit ordinance governs the excavation project because Roads was excavating material and using it elsewhere. Roads was required to obtain DRC approval and a permissive use variance from the BOA. The Engineering Department did not have the authority to permit or sanction the borrow pit activity simply through the issuance of the storm water management permit. Furthermore, like the property owner in Meretsky, Roads had constructive notice of the borrow pit ordinance and could not assume that the permit superseded the requirements of the ordinance. Accordingly, the storm water permit does not prevent the County from enforcing the borrow pit ordinance.

**D. CONCLUSION.**

Based on the foregoing, this Court should recognize that Roads' use of the Hillock Drive property is a borrow pit that is subject to the COO and the LDC. As such, the County respectfully requests that this Court (1) find Roads in violation of the COO and the LDC, enter an order precluding Roads from operating the borrow pit until such time as it has submitted its development for review and obtained any approval that may be required, (2) issue an appropriate administrative fine to ensure compliance, and (3) award to the County its costs in bringing this action.

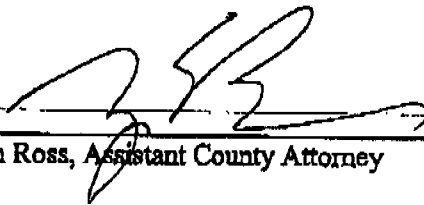
Respectfully submitted,  
Ryan Ross, Assistant County Attorney  
14 W. Government Street, Rm. 411  
Pensacola, Florida 32502  
(850) 595-4970



Ryan Ross, Assistant County Attorney  
Florida Bar No. 182893  
Attorney for Escambia County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Todd Harris,  
Esq., McDonald, Fleming, Moorhead, 25 West Government Street, Pensacola, Florida 32502 by  
U.S. Mail on this 9<sup>th</sup> day of June, 2006.



Ryan Ross, Assistant County Attorney