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May 2, 2008

***Original via U.S. Mail***

Georgia Department of Natural Resources  
Environmental Protection Division  
Watershed Protection Branch

Attn: Carol Couch, Director of EPD  
Bert Langley, Mountain District Manager *via e-mail*  
Jim Sommerville, Branch Manager  
Kappitola Williams, Environmental Specialist for DeKalb County  
Renee Walker GORA Secretary

2 MLK Jr. Dr. SE, Suite. 1452E  
Atlanta, GA 30334

RE: Consent Order regarding PATH/DeKalb County Violations on South Peachtree Creek Trail Project, 18<sup>th</sup> Land District, Land Lots 102, 103, DeKalb County, Georgia

Dear Mr. Langley, Ms. Williams and Ms. Walker:

As you know, this Firm represents Three Forks Heritage Alliance, Inc., Fern Garber, Maurice Lecroy and Bill Gowen with respect to their ongoing efforts to secure compliance with state law and DeKalb County Code. As an issuing authority, DeKalb County is *charged* with complying with the laws it enacted pursuant to the State delegation found in O.C.G.A. § 12-7-1 et seq. Specifically, Section 12-7-8(a)(3) *requires* that “any land-disturbing activities by a local issuing authority shall be subject to the same requirements of the ordinances such local issuing authority adopted pursuant to this chapter as are applied to private persons.” The Environmental Protection Division is the enforcing agency of this requirement.

I am writing to request that my clients be allowed to intervene in the process of considering PATH’s violations and that my clients be heard and allowed to present evidence of the intentional nature of PATH/DeKalb County’s violations. I am further requesting that this letter and the evidence to be tendered by my clients be made part of the record in the matter.

For your convenience, I am including a brief summary of events leading up to the “stop work” with PATH and EPD as well as pointing you to relevant portions of the DeKalb County Code which the Division is required to enforce, not simply “trust” that DeKalb County will comply.

## BRIEF HISTORY

On or about February 20, 2008, DeKalb County issued a Land Development Permit NO. 144-14 and a County Stream Buffer Variance No. 144-15 for the SPCT project. Though these purportedly were issued on the 20<sup>th</sup>, the County refused to acknowledge to my clients, despite daily phone calls regarding same, that the permits were issued until February 29<sup>th</sup>, when I secured copies after camping-out in the Development Department.

On March 3, 2008, on behalf of my clients, I filed an administrative appeal to the DeKalb County Zoning Board of Appeals appealing the issuance of these permits. Pursuant to DeKalb County Code Section 14-34, the ZBOA acts as the appellate body to review all land-development and stream buffer permits issued by the Development Department. Pursuant to Section 14-34(d)(4), the appeal should have stayed all action pending adjudication by the ZBOA. To be certain that PATH could not claim ignorance of the pendency of the appeal, I caused MLQ Attorney Services to serve a copy of the Appeal on PATH, which was accomplished on March 4<sup>th</sup>. PATH’s response was to show up on site the following morning at 7 a.m. and begin clearing without having installed silt fences or tree save fences, *in direct violation of both the issued permits and DeKalb County Code*, deliberately to remove the trees so that there would be nothing to “appeal.”

I met with law enforcement officers from DeKalb County and a Mr. Rawls of DeKalb County Public Works who informed all present that he “was the County” and that they did not have to stop work or comply with DeKalb County Code. We left the site and immediately filed suit in DeKalb Superior Court to seek injunctive relief, which Judge Adams granted later that day. On March 13, 2008, Judge Adams heard the County’s arguments and refused to dissolve the TRO.

After Judge Adams refused to dissolve the TRO, the County attempted to “moot” the appeal by “voiding the permits.” This was accomplished on March 20, 2008. On March 28, 2008 I filed a second appeal to the ZBOA challenging the decision to go forward on the project without complying with DeKalb County Code and O.C.G.A. § 12-7-8. On April 2, 2008, Judge Adams refused to extend injunctive relief and the PATH immediately began its clearing efforts again.

On April 9, 2008, I appeared before the ZBOA and acknowledged that while the substantive issue of the permits was “decided” by the County’s voiding of the permits, I was raising my procedural objections to the determination of the Development Department that an appeal does not stay action pending adjudication by the ZBOA. The ZBOA reversed the Development Department’s decision that an appeal does not stay all action pending adjudication of the appeal. Bob Lundsten, the ZBOA member who made the motion, stated after the 4-2 vote to stay activity, “All construction must Stop pending the appeal (scheduled to be heard on May 14, 2008). **THAT PRESENTLY IS THE LAW OF DEKALB COUNTY.** This is the law that EPD should be enforcing. All development was to stop pending adjudication by the ZBOA of the second appeal on May 14, 2008.

PATH/DeKalb County's "interests" and "motives" are clear from the comments of Sr. Assistant County Attorney who crowed cheerfully to the Court that "the trees they are trying to protect already have been cut." Indeed, the contractor, Lewallen, acknowledged to my clients on March 5<sup>th</sup> that he was trying to remove the trees *because* of the appeal. This conduct was intentional.

## VIOLATIONS OF LAW

PATH/DeKalb County purportedly are operating under Statewide Permit No. 100002 for road-projects in excess of 1 acre. If this is their authority, they clearly are in violation of Section 14-42 of the DeKalb County ordinance which authorizes encroachments into the County Buffer for multi-purpose trails—not road projects. The fact that the DeKalb County Code includes in the Development Code both road projects *and* multi-purpose trails and then lists road projects under one type of review while placing multi-purpose trails under another type of review *must be construed as being meaningful*. In construing statutes, Courts follow the principle, "Expressio unius est exclusion alterius" ("The express mention of one thing implies the exclusion of another"). Where certain actions are listed in a statute which then treats the separate actions differently, the statute is presumed intentionally to exclude those actions not specifically listed. "The omission of [additional actions] from [the statute] is regarded by the courts as deliberate." Allen v. Wright, 282 Ga. 9, 644 (2007).

Since a road is not allowed to encroach in a linear fashion into the County Buffer, the project should never have come close to the state buffer. Indeed, the "incursion" into the *state* stream buffer is miniscule compared to the violation of the County Stream Buffer which EPD also is charged with enforcing against DeKalb County. No permit has been approved (nor is linear encroachment permitted) for a *road* project.

If, however, this is *not* a road project but a "multi-purpose trail" project, then operation under the State-Wide Permit is not authorized as this is not a "road." Then a full land-development permit, including erosion and sediment control, should have been reviewed and approved by the County. Regardless of *what* kind of project this is, Chapter 14 does not exempt either type of project from review under the rest of the Development Code. Section 14-38(b)(3) (which subsection includes the exemption language found in state code) states that: "This section 14-38 shall apply to any land-disturbing activity undertaken by any person on any land except for the following:" It is thus clear that the exemption covers *only* a erosion and sedimentation control plan (which would either be beneath the threshold of monitored activity or under the state-wide permit. However, Chapter 14 contains *many other* requirements for land development activities. Indeed, EPD need look no further than 14-29(a) which states: "The provisions of this article (i.e. Article II, Chapter 14) shall apply to all development activity within the county." Chapter 14 governs a Land Development permit while Section 14-38 governs only land-*disturbing* activity. Section 14-29(d)(1) requires compliance with the following areas of the Development Code: site plan (Section 14-35); a grading and drainage plan (Section 14-37) ; a utility plan (if applicable); a soil erosion and sedimentation

control plan (Section 14-38), a landscape plan and a tree survey (Section 14-39). Thus the exemption in Section 14-38 *expressly* does not exempt the project from the other review required.

Indeed, it fairly may be argued that O.C.G.A. § 12-7-8(a)(3) *pre-empts* the County from excluding *itself* from review even for erosion and sedimentation control if they require same of private persons (which clearly they do). In any case, the state-exemption language does *not* exempt PATH. The language states a “road construction project undertaken by the county.” This is not the case. As EPD correctly has noted, PATH is not the County. This project may have been undertaken *for* the County but it is clear that the County is not out there on the project. This distinction is critical because while it may be silly to hope that a county would cite its own employees for violating best management practices it certainly is capable of citing a private contractor who has an incentive to cut corners.

Finally Section 14-42 governing authorized encroachments into the County Stream Buffer nevertheless require the Development Department to review *alternative* trail designs and, only after concluding *that there is no feasible alternative*, may encroachment be authorized. Repeated ORA requests to the County have failed to identify a single “alternative plan” which the Development Department reviewed.

## ARGUMENTS

It has been opined that because PATH is a non-profit organization, there is no “purpose” in fining them any large amount. PATH is operating on a \$1.7 *Million* contract to build this section of the trail. Their overall plan with the County exceeds almost \$60 *Million* dollars with a \$14 *Million* dollar “endowment” to maintain these trails. Whether the “company” is making a profit or not, there is no question they have created a long-term job opportunity for their principals worth tens of millions of dollars for themselves. Not-for-profit does not mean not-for-salary. The principals of PATH do not operate gratuitously. There are plenty of other for-profit trail companies who would have loved to bid on this project and would be completely accountable. If PATH’s purported not-for-profit status is to be used to excuse compliance with the statutes and codes, it is time to get a “for-profit” company who can comply.

This entire process has been an ongoing violation of my client’s due process rights. They properly appealed the administrative decisions of the County and PATH and the County conspired to intentionally thwart my client’s due process rights by rushing forward to cut the trees and moot the appeals. They were so intent on rushing forward to get the trees cleared that they failed to erect silt fences and cut more than 200 linear feet into the *state* stream buffer. This requires a variance which is a public process (including the right of public review and public comment). I request that EPD continue the stop work status until all of the review processes can be completed. I further request that any Order resulting from this require, *prior to* re-commencement of work, the preparation and approval (after public input) of a re-vegetation plan which includes significant trees replacing the hundreds of trees which have been removed by PATH in its intentional efforts to circumvent the law.

Thank you for your consideration and review of these matters. I am available to discuss this at your convenience and would like to request that a public hearing be held by EPD before work is allowed to resume. If you determine *not* to allow my clients to appear and present evidence, please note this in the record and notify me of same. When an Order is entered into, please consider this letter a request for records under Georgia's Open Records Act. I am prepared to pay all reasonable costs in securing copies of same.

Sincerely,  
ROBERTS & DAUGHDRILL, P.C.

*Brian E. Daughdrill*  
Brian E. Daughdrill

cc: Client