

No. SC93549

IN THE
MISSOURI SUPREME COURT
EASTERN DISTRICT

SAXONY LUTHERAN HIGH SCHOOL, INC.,

Respondent,

v.

MISSOURI LAND RECLAMATION COMMISSION and
STRACK EXCAVATING, LLC,

Appellants.

Appeal from the Cape Girardeau County Circuit Court
The Honorable William L. Syler, Presiding Judge

SUGGESTIONS OF APPELLANT MISSOURI LAND RECLAMATION
COMMISSION IN OPPOSITION TO RESPONDENT'S
APPLICATION FOR TRANSFER

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This case purportedly presents an unusual—perhaps even unique—question. A state adjudicatory board was presented with a permit application written to conform to the law as it stood at the time of the application. During the hearing, the law changed so as to restrict the scope of the permit. Can the adjudicatory board proceed to grant the permit, not as requested in the application, but as the application would be modified with the applicant’s consent, to conform to current law?

The logical answer would be “yes.” And that is the answer the Court of Appeals, Eastern District, gave. Respondent, Saxony Lutheran High School, asks this Court to take up the case, hoping for a different answer. But is this the appropriate case for this Court to consider even the broader issue?

The Land Reclamation Commission granted Saxony’s request for a hearing pursuant to § 444.773.¹ The Commission eventually adopted the hearing officer’s conclusion that issuance of a permit for the limestone quarry would not unduly impair anyone’s health, safety or livelihood, notwithstanding that the proposed mining area would be fifty-five feet from the school property.

¹ Individual statutory references will be to the RSMo Supp. 2012, unless otherwise noted.

Before the hearing closed, the general assembly enacted House Bill 89, which prohibits the Commission from issuing any permit to an applicant who proposes to mine within 1,000 feet of an accredited school that has existed in the same location for five years (a new § 444.771). By virtue of an emergency effective date, this provision became law when the governor approved the bill. The permit applicant immediately filed with the Commission's hearing officer a motion agreeing to accept a revised mine plan boundary to be consistent with the new law. The new boundary reduces the area to be mined from approximately 76 to 53 acres.

In issuing the permit, the Commission applied the 1,000-foot buffer as required by the new statute. The Commission rejected Saxony's contention that the Commission could only consider the original application, deny it as not conforming to the new law, and thereby force the applicant to file a new application, subject to a new public notice. The Commission was not persuaded that repeating the entire application review process was required to ensure that the permit conformed to the law. And having found that the mine area poses no threat to any person's health, safety or livelihood at a distance of fifty-five feet from the school property, the Commission concluded that another hearing would not be required to determine that a mine that is thirty percent smaller poses no threat from 1,000 feet away.

The Eastern District's opinion construes provisions of the Land Reclamation Act to determine that the Commission acted within its authority. Saxony does not identify any on-point precedent of either this Court or the Court of Appeals that is contrary to the Eastern District's decision. Nor does Saxony provide any basis for believing that the question commonly arises. But at least as important as those omissions is a third.

Saxony does not address the logical result of the rule that it will ask this Court to adopt on the broader question. But the result seems obvious: each time an adjudicatory board concludes that a permit would violate a change in the law that was adopted after the permit application was filed, the board must deny the application. The applicant must then start the process over again, with a new application that may be identical to the prior one, except for the change mandated by the law. That will, of course, mean having the applicant and the board incur all the expenses of a new application and review, including a new hearing. But the result will likely often be — perhaps even always — the same as the result allowed by the Eastern District's analysis.

The Eastern District's analysis, which considers the authority of the Land Reclamation Commission under statutes specific to it, is legally correct. And it is also practically efficient. Even as to the potentially broader question, if the Eastern District's opinion is read to apply only to a change-of-

law situation of the sort that arose here, it may have very limited future application. That makes this case an inappropriate candidate for transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via electronic filing on this 22nd day of July 2013 to the following attorneys of record:

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