

IN THE SUPREME COURT OF MISSOURI

Saxony Lutheran High School, Inc.,)	
)	
Plaintiff-Respondent,)	Circuit Court No. 11CG-CC00272
)	Court of Appeals No. ED99038
vs.)	Supreme Court No. _____
)	Court of Appeals, Eastern District
Strack Excavating, LLC, and Missouri Land Reclamation Commission))	Cape Girardeau County Circuit Court
)	
Defendants-Appellants.)	

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion ___ or after opinion <u> X </u>	
The date the record on appeal was filed	October 31, 2012
The date the Court of Appeals opinion was filed	May 14, 2013
The date the motion for rehearing was filed	May 28, 2013
and ruled on	June 26, 2013
The date the application for transfer was	
filed in the Court of Appeals	May 28, 2013
and ruled on	June 26, 2013

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g., Appellant or Respondent), and indicate the name and address of the attorney of record for each party. List first the parties applying for transfer and place a check mark in the space following to indicate each party applying for transfer.

Party	Attorney
Saxony Lutheran High School, Inc. <u> X </u> (Plaintiff-Respondent)	Stephen G. Jeffery 20 S. Central Avenue, Suite 306 Clayton, Missouri 63105-1715
Strack Excavating, LLC (Defendant-Appellant)	Brian McGovern 400 S. Woods Mill Road, Suite 250 Chesterfield, Missouri 63017
Missouri Land Reclamation Commission (Defendant-Appellant)	Timothy P. Duggan P.O. Box 899 Jefferson City, Missouri 65102

Question of General Interest and Importance

1. Whether a State agency may lawfully exercise a power that is not expressly conferred by the General Assembly or fairly inferred from the existing statutory authority conferred by the General Assembly. In particular, whether the General Assembly granted to the Land Reclamation Commission, an agency domiciled in the Department of Natural Resources, the authority to impose a condition in a permit issued in accordance with § 444.773, RSMo., where the General Assembly did not expressly confer that authority anywhere in the Land Reclamation Commission's enabling statutes, but has consistently granted that express authority to impose conditions in environmental permits in all of the other enabling statutes for other regulatory agencies domiciled in the Department of Natural Resources.

Existing Law that Requires Reexamination

Saxony Lutheran High School v. Missouri Department of Natural Resources,
No. ED99038 (Mo. App. E.D. May 14, 2013).

Opinions of the Appellate Courts of this State That Are Contrary to the Opinion of the Court of Appeals Sought to be Reviewed

None. The question of general interest and importance set forth above is a question of first impression.

STATEMENT OF FACTS

On November 4, 2010, Strack Excavating, LLC (“Strack”) submitted to the Missouri Land Reclamation Commission (“the Commission”) an application pursuant to Chapter 444, R.S. Mo., for a limestone quarry to be located east of Highway 61 and along County Road 601, just south of Fruitland, Missouri. Saxony Lutheran High School, Inc., an accredited, private Lutheran high school at 2004 Saxony Lane along County Road 601 in Jackson, Missouri (“Saxony”), is located adjacent, and to the south, of the proposed Strack quarry. Saxony has operated an accredited school there since November, 2004.

On January 11, 2011, Mike Larsen, Staff Director of the Land Reclamation Program, made his “formal recommendation to the commission regarding the issuance or denial of [the] applicant’s permit” as required by section 444.773.3 of the Land Reclamation Act. It was his “recommendation to the commission to issue the new site permit expansion for 76 acres at the Site #2 Quarry in Cape Girardeau County sought after by Strack Excavating L.L.C.” He “recommended approval of the pending mining permit application . . .”

On February 7, 2011, the Commission granted the request of Saxony for a Formal Public Hearing. Pursuant to § 444.773.3, R.S. Mo., a formal public hearing on Strack’s mining permit application was held over four days on July 5, 6, 7 and 12, 2011. Throughout the formal hearing, Strack’s mine plan boundary was 55’ north of Saxony’s property.¹ In the midst of the hearing, on July 11, 2011, the Governor signed House Bill

¹ The term “mine plan boundary” means the geographic footprint of the area where mining

89, which contained an emergency clause, into law. House Bill 89, *inter alia*, enacted § 444.771, R. S. Mo., which provides:

Notwithstanding any other provision of law to the contrary, the commission and the department shall not issue any permits under this chapter or under chapters 643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property where an accredited school has been located for at least five years prior to such application for permits made under these provisions, except that the provisions of this section shall not apply to any request for an expansion to an existing mine or to any underground mining operation.

Without delay, Saxony asked the Hearing Officer to take official notice of House Bill 89, and moved for accelerated determination on the ground that the newly enacted legislation prevented the Commission from issuing the permit because Strack's mine plan boundary was only 55 feet from Saxony's property. On July 12, 2011, the Hearing Officer denied Saxony's motion for accelerated determination. In light of the newly enacted legislation, Saxony rested its case. At that point, Strack moved for a directed verdict, which the hearing officer granted on July 18, 2011.

On August 24, 2011, the Hearing Officer issued a recommended order. The recommended order discusses at length House Bill 89 and, in particular, whether the Commission has the statutory authority to impose a special condition in a mining permit

can occur.

that moves a mine plan boundary. The Hearing Officer's order recommended that the Commission approve the Strack permit application with the mine plan boundary to be located one thousand feet from the Saxony - Strack property line. As of August 24, 2011, Strack's applied-for mine plan boundary still was located 55 feet from the School.

On September 22, 2011, the Commission decided Saxony's appeal against Saxony and entered its Final Order, fully adopting the Hearing Officer's recommended order. The Final Order states:

Hearing Officer, W. B. Tichenor issued his Recommended Order on August 24, 2011, that: the Application for Expansion of Permit #0832 be approved, with the mine plan boundary (exclusive of underground mining) to be located one thousand feet from the Strack - Saxony property line, in compliance with and as required by section 444.731 R. S. Mo.

Saxony sought judicial review of the Commission's decision in the Circuit Court of Cape Girardeau County. The Honorable William L. Syler ruled in favor of Saxony and reversed the decision of the Commission. On appeal, the Eastern District reversed. After the Eastern District denied rehearing or transfer, this application for transfer followed.

LEGAL BASIS FOR SEEKING TRANSFER

1. Whether the General Assembly granted to the Land Reclamation Commission, an agency domiciled in the Department of Natural Resources, the authority to impose a condition in a permit which has the effect of moving an applicant's mine plan boundary, where the General Assembly expressly did not confer that authority in the Land Reclamation Commission's enabling statutes, but has consistently granted that express authority in all of the other enabling statutes for other regulatory agencies domiciled in the Department of Natural Resources.

The Department of Natural Resources (“DNR”), along with its assigned commissions, administers and regulates environmental concerns in Missouri. There are several commissions housed within DNR, including the Missouri Air Conservation Commission, which issues air construction permits in accordance with § 643.075, R. S. Mo., to new sources of air pollutants; the Missouri Clean Water Commission, which issues discharge permits under § 644.051, R. S. Mo., to facilities that discharge contaminants into waters of the State; the Missouri Hazardous Waste Commission, which issues permits under § 260.395, R. S. Mo., to persons who transport hazardous waste in Missouri; and the DNR, which issues permits under § 260.205, R. S. Mo., for the operation of solid waste disposal facilities in Missouri.

With respect to each of the foregoing environmental permits, the enabling statute expressly confers statutory authority on the issuing agency or commission to impose appropriate conditions in the permit. *See* § 260.205.5(7), R. S. Mo., (solid waste) (“When

the review reveals that the facility or area does conform with the provisions of sections 260.200 to 260.345 and the rules and regulations adopted pursuant to sections 260.200 to 260.345, the department shall approve the application and shall issue a permit for the construction of each solid waste processing facility or solid waste disposal area as set forth in the application and ***with any permit terms and conditions which the department deems appropriate....***”); § 260.395.2, R. S. Mo., (hazardous waste) (“ If the department determines the application conforms to the provisions of any federal hazardous waste management act and sections 260.350 to 260.430 and the standards, rules and regulations adopted pursuant to sections 260.350 to 260.430, it shall issue the hazardous waste transporter license ***with such terms and conditions as it deems necessary*** to protect the health of humans and the environment ...”); § 643.075.2, R. S. Mo., (air) (“Every source required to obtain a construction permit shall make application therefor to the department and shall submit therewith such plans and specifications as prescribed by rule. The director shall promptly investigate each application and if he determines that the source meets and will meet the requirements of sections 643.010 to 643.190 and the rules promulgated pursuant thereto, he shall issue a construction permit ***with such conditions as he deems necessary*** to ensure that the source will meet the requirements of sections 643.010 to 643.190 and the rules”); and § 644.051.3, R. S. Mo., (water) (“If the director determines that the source meets or will meet the requirements of sections 644.006 to 644.141 and the regulations promulgated pursuant thereto, the director shall issue a permit ***with such conditions as he or she deems necessary*** to ensure that the source will meet the requirements of sections 644.006 to 644.141 and any federal water pollution control act as

it applies to sources in this state...”) (emphases supplied).

No provision of the Land Reclamation Act authorizes the Land Reclamation Commission to impose a condition in a permit, particularly which has the effect of moving the applicant’s mine plan boundary. If the General Assembly had intended to confer authority on the Land Reclamation Commission to impose a condition in a permit, then it would have expressly done so by using language similar to that used when it expressly conferred such authority on the Missouri Air Conservation Commission, the Missouri Clean Water Commission, the Missouri Hazardous Waste Management Commission and the Missouri Department of Natural Resources.

2. Whether the language “pass on” as used in section 444.767.3, RSMo., confers the power to the Land Reclamation Commission to impose conditions in a permit in connection with a recommendation that has been submitted to it by the Director.

Section 444.767.3, RSMo., states the Land Reclamation Commission may “Examine and pass on all applications and plans and specifications submitted by the operator for the method of operation and for the reclamation and conservation of the area of land affected by the operation.” The Eastern District’s opinion concludes that the phrase “pass on” authorizes the Commission to place conditions in a permit. In this context, the opinion states (p. 11) “The plain meaning of ‘pass,’ in this context, is ‘[t]o pronounce or render an opinion, ruling, sentence, or judgment.’ Black’s Law Dictionary 1233 (9th ed. 2009). This definition suggests the Commission is empowered to consider the evidence in front of it and render its decision.” However, as the opinion previously noted, the

application has already been fully considered and reviewed by the Director. *See*, opinion at pp. 5-6. (“Before the application reaches the Commission, however, the Director initially receives the application and reviews it. Once the Director deems the application complete, there is a period of public notice and comment, followed by a recommendation by the Director for issuance or denial of the application. Sections 444.772.10; 444.773.1”).

In this context, both the Eastern and Western District Courts of Appeals have held it is the Director who reviews and investigates permit applications. *See Lincoln County Stone Company v. Koenig*, 21 S.W.3d 142, 145 (Mo. App. E.D. 2000) (“The director shall promptly investigate the application and make a recommendation to the commission as to whether the permit should be issued or denied”); and *Saxony Lutheran High School, Inc. v. Missouri Land Reclamation Commission*, 392 S.W.3d 52, 56 (Mo. App. W.D. 2013) (“In Missouri, section 444.773 governs the statutory procedure for the application for, and objections to, the issuance of land reclamation permits. Section 444.773.1 requires that all permit applications be filed with, and investigated by, the Director”).

Accordingly, because the procedure established by statute and the Commission’s own regulations requires the Director to first consider, investigate and review a permit application, and then to submit a recommendation to the Commission, the Commission’s ability to “pass on” an application is limited to making a decision on what is before the Commission - the recommendation submitted by the Director.

3. Whether, when considering a recommendation submitted by the Director, the Commission is limited to a decision either to issue or deny the permit.

The Eastern District’s opinion (p. 11) concludes “Saxony’s argument would limit the Commission’s ability to balance and resolve concerns to simply approving or denying an application, yet the plain meaning of ‘pass on’ does not suggest the Commission’s role is limited essentially to just checking one of two boxes on a form.”

In accordance with its own regulations, the Commission expressly limits the Director to submitting a recommendation to the Commission either for the issuance or denial of the permit. *See* 10 CSR 40-10.040(2) (“The recommendation will be to either issue or deny”). This limitation either to issue or deny is entirely consistent with section 444.773.1, RSMo. (“All applications for a permit shall be filed with the director, who shall promptly investigate the application and make a recommendation to the commission within four weeks after the public notice period provided in section 444.772 expires as to whether the permit should be issued or denied”). Significantly, there is no statutory provision for a third option for the Commission to issue a permit with conditions.

Thus, when the Commission “examines and passes on” the Director’s recommendation, its decision must be limited to the contents of the recommendation – either issue or deny the permit. This conclusion (that the Commission is limited to an “issue or deny” decision and cannot include conditions to remedy an otherwise deficient application) is reinforced by the Commission’s own regulations which provide that if an application is shown to present an undue impact to health, safety or livelihood, the

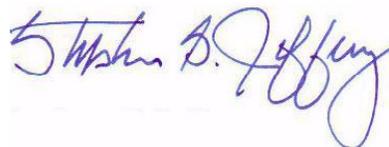
Commission must deny it. *See* 10 CSR 40-10.080(3)(D). Significantly, it is reasonable to conclude that in enacting section 444.771, the General Assembly concluded that a quarry located within 1,000' of an accredited school presents an undue impact to health, safety or livelihood.² Consequently, the underlying statutory scheme does not authorize

² In 2013, the General Assembly enacted SB 342, an omnibus agriculture bill, that contained a provision that would exempt Cape Girardeau County from the 1,000 foot buffer zone requirement in § 444.771, RSMo. However, on July 2, 2013, the Governor vetoed SB 342 stating, *inter alia*, “Conference Committee Substitute for House Committee Substitute for Senate Bill No. 342 contains several worthwhile provisions that have been approved as part of other legislation; however, the bill would also exempt business entities in Cape Girardeau County from a statewide standard aimed at protecting the health and safety of school children. Existing law protects school children by prohibiting the Land Reclamation Commission and the Department of Natural Resources from permitting mining operations within 1,000 feet of any property on which an accredited school has been located for at least five years (Sec. 444.771, RSMo). Conference Committee Substitute for House Committee Substitute for Senate Bill No. 342 would eliminate this protection for school children in Cape Girardeau County and nowhere else. It is generally objectionable to excuse a select industry or company from an existing standard to which all other like entities are held. It is even more offensive to suggest that school children in Cape Girardeau County should receive any less protection than children in all other parts of the state.”

the Commission to place conditions on permit applications.

For the foregoing reasons, the Court should grant the application for transfer.

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Certificate of Notice and of Service

The undersigned certifies that notice of the foregoing document was given to the clerk of the Court of Appeals on the 10th day of July, 2013, that a true copy of the foregoing document was served via electronic mail on the persons set forth below on the 10th day of July, 2013, and that the foregoing document is being electronically filed, and that service will be provided through the electronic filing system upon:

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