

CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

SAXONY LUTHERAN HIGH SCHOOL, INC.,)
)
 Petitioner)
)
 v.)
)
 MISSOURI DEPARTMENT OF)
 NATURAL RESOURCES and)
 MISSOURI LAND RECLAMATION)
 COMMISSION,)
)
 Respondents)
)
 STRACK EXCAVATING, LLC,)
)
 Intervener)

Case No. 11CG-CC00272

FILED
 SEP 12 2012
 PATTI WIBBENMEYER
 CIRCUIT CLERK

JUDGMENT AND ORDER

Based on the Administrative Record, having read the pleadings and briefs submitted by the parties, and being fully advised in these premises, the Court enters this Judgment in favor of Petitioner and against the Respondents Missouri Department of Natural Resources and Missouri Land Reclamation Commission and Intervener Strack Excavating, LLC in accordance with the following Findings of Fact and Conclusions of Law:

Findings of Fact

Based on the contents of the Administrative Record, the Court makes the following Findings of Fact:

1. Saxony Lutheran High School, Inc. ("Saxony") is Missouri not-for-profit corporation in good standing which operates an accredited, private Lutheran high school, located at 2004 Saxony Lane, along County Road 601 in Jackson, Missouri.
2. The Missouri Department of Natural Resources ("DNR") is a state agency created

by Article IV, § 47 of the Missouri Constitution and supervises the Missouri Land Reclamation Commission pursuant to § 640.010(6), RSMo.

3. The Missouri Land Reclamation Commission (“Commission”) is a state agency created by § 444.520, RSMo., and is domiciled within the DNR.

4. On November 4, 2010, Strack Excavating, LLC (“Strack”) submitted a permit application to the Commission to operate a limestone quarry in Cape Girardeau County, Missouri east of U.S. Highway 61 and along County Road 601 on property adjacent to Saxony’s property.

5. The site map included with the Strack permit application shows the “approximate limits of mining” to be located within 55’ of the northern property line of Saxony’s property. As testified by Mike Larsen, the Commission’s staff director, the “approximate limits of mining” referred to on the site map is known as the “mine plan boundary.”

6. Pursuant to § 444.772.10, R. S. Mo., and 10 CSR 40-10.020(2)(H), on November 22, 2010, the DNR advised Strack of the requirement to advertise and mail notice of its intent to operate a surface mine. Strack then published and mailed notice of its proposal for a 76 acre quarry.

7. The Commission conducted a 45-day public comment period on the Strack permit application and received over 2,500 letters and comments opposing the proposed quarry.

8. The Commission asked Strack to conduct a public meeting in accordance with § 444.773.3, RSMo., regarding its permit application to allow the public the opportunity to ask questions and make comments, but Strack declined.

9. On January 11, 2011, Mike Larsen, staff director of the Commission 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.” Thus, he “recommended approval of the pending mining permit application . . .” The Commission subsequently scheduled a public hearing on the proposed quarry on its January, 2011 agenda.

10. On January 27, 2011, the Commission conducted a public hearing pursuant to § 444.773, RSMo to afford parties the opportunity to show they have “standing” to request the Commission to conduct a full evidentiary hearing on whether the Strack permit should be issued.

11. “Standing” is defined in § 444.773, RSMo., such that persons opposed to the proposed permit must “present good faith evidence that their health, safety or livelihood would be unduly impaired by the issuance of the mining permit.”

12. On February 7, 2011, the Commission determined that Saxony had presented good faith evidence that the proposed Strack quarry would unduly impair their health and livelihood and ordered an evidentiary hearing pursuant to § 444.773, RSMo.

13. The evidentiary hearing was conducted in Jefferson City on July 5, 6, 7 and 12, 2011 in Jefferson City.

14. On July 11, 2011, the Governor signed House Bill 89 into law. Because of its emergency clause, House Bill 89 went into effect upon signature by the Governor.

15. House Bill 89, *inter alia*, enacted § 444.771, RSMo, which states:

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.

16. On July 11, 2011, Saxony filed a Motion for Accelerated Determination with the Hearing Officer. The basis for the motion was because Strack's mine plan boundary was located within 55' of Saxony's property, the Commission was prohibited by § 444.771 from issuing a mining permit to Strack.

17. On July 12, 2011, the Hearing Officer denied Saxony's motion stating:

It has been established by the evidence presented in the formal public hearing on July, 5, 6 and 7, that Saxony Lutheran High School (Saxony) is an accredited school that has been located on the real property adjoining the Applicant's real property on the School's northern property boundary line since December 2004. It has also been established that the Applicant's mine plan boundary as proposed in the application would be within 55 feet of the north property line of Saxony.

...

The statute [§ 444.771, RSMo] does not prohibit the Commission from issuing a mining permit to the Applicant upon the condition that the mine plan boundary is beyond one thousand feet of the Saxony property. The tract of land on which the proposed Strack Quarry # 2 would be located is of such a size and configuration that the quarry could be outside the one thousand foot barrier established by the legislature. The Commission may still act on the pending application and satisfy the mandate of §444.771.

18. On July 13, 2011, Saxony filed a Motion for Reconsideration with the Hearing

Officer. Saxony's motion asserted that the Commission lacks express statutory authority to impose a condition in a mining permit and, therefore, there was no basis for the Hearing Officer to deny Saxony's Motion for Accelerated Determination.

19. The Hearing Officer denied Saxony's Motion for Reconsideration.

20. On August 24, 2011, the Hearing Officer submitted a proposed Order to the Commission recommending, *inter alia*, 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 RSMo."

21. On September 22, 2011, the Commission entered a Final Order which states, in part,

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 RSMo (emphasis added).

22. As of the September 22, 2011 Commission meeting, Strack had not submitted any amendment or revision to its original permit application changing the location of its 55' mine plan boundary.

Conclusions of Law

23. The Court has subject matter jurisdiction pursuant to § 527.010, § 536.100-140, RSMo., and Supreme Court Rule 100.01.

24. Venue is appropriate in this Court under § 536.110.3, RSMo because: (a) the real

property where the Strack quarry is to be located is in Cape Girardeau County, Missouri, and (b) Saxony's address and principal place of business is located in Cape Girardeau County, Missouri.

25. Saxony has exhausted its administrative remedies and has a right to judicial review of the Commission's September 22, 2011 Final Order in this Court under § 527.010 *et seq.*, and § 536.100 *et seq.*, RSMo.

26. Section 444.773.3, RSMo., states, *inter alia*, "The land reclamation commission may grant a public hearing to formally resolve concerns of the public."

27. Section 444.789.3, RSMo., states, "The hearing shall be before the commission or the chairman of the commission may designate one commission member as hearing officer, or may appoint a member in good standing of the Missouri Bar as hearing officer to hold the hearing and make recommendations to the commission, but the commission shall make the final decision thereon and any member participating in the decision shall review the record before making the decision."

28. Sections 444.773.3 and 444.789.3 are the legal basis for the public hearing conducted by the Commission.

29. While § 444.789.3 authorizes a hearing officer to make "recommendations to the commission," the statute presumes that a hearing officer will make lawful recommendations.

30. The basis for the Hearing Officer's denial of Saxony's Motion for Accelerated Determination and Motion for Reconsideration was the purported authority of the Commission to place a condition in the mining permit to relocate Strack's mine plan boundary north in order for Strack to comply with the 1,000' buffer zone enacted by § 444.771.

31. The basis for the Final Order approved by the Commission on September 22, 2011 was the purported authority of the Commission to place a condition in the mining permit to

relocate Strack's mine plan boundary north in order for Strack to comply with the 1,000' buffer zone enacted by § 444.771.

32. The DNR and the Commission possess no more authority than that expressly granted to them by statute. *See Mueller v. Missouri Hazardous Waste Management Commission*, 904 S.W.2d 552, 557 (Mo. App. S.D., 1995).

33. The Land Reclamation Act, §§ 444.760 - 444.789, RSMo does not expressly confer statutory authority on the Commission to impose a special condition in the approval of Strack's permit application.

34. In § 260.225.7 of the Missouri Solid Waste Management Law, in § 260.395.2 of the Missouri Hazardous Waste Management Law, in § 643.075.2 of the Missouri Clean Air Law, and in § 644.051.3 of the Missouri Clean Water Law, the General Assembly expressly conferred statutory authority on the DNR to impose special conditions in the approval of permit applications by using language such as: "... 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... (emphasis added); "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...(emphasis added);" "... 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 (emphasis added);" and "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...(emphasis added)."

35. As compared to the foregoing environmental permitting statutes, the General Assembly did not enact any statutory language in the Land Reclamation Act which authorizes the Commission to impose any “terms” or “conditions” that it “considers necessary” or “appropriate” in connection with the issuance of a permit.

36. If the General Assembly had intended to confer statutory authority on the Commission to be able to impose conditions in a permit, then it would have expressly done so by using language similar to that used when it expressly conferred such authority in the Missouri Air Conservation Law, the Missouri Clean Water Law, the Missouri Hazardous Waste Management Law and the Missouri Solid Waste Management Law. *See Mueller*, 904 S.W. 2d at 558 (“Moreover, where a legislative body ‘[h]as consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power’”).

37. Contrary to the Commission’s and Strack’s positions, the language in § 444.773.3 which states “The land reclamation commission may grant a public hearing to formally resolve concerns of the public,” does not confer statutory authority to the Commission to impose conditions in a permit.

38. Contrary to the Commission’s and Strack’s positions, *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Department of Natural Resources*, 326 S.W.3d 38 (Mo. App. W.D. 2010) does not stand for the proposition that the Commission has statutory authority to impose conditions in a mining permit. In this regard, none of the legal issues in *Lake Ozark* concerned whether the Commission has the statutory authority to impose a special condition in a mining permit.

39. Because the Commission lacks express statutory authority to unilaterally impose a special condition relocating Strack’s mine plan boundary,

A. there was no lawful basis for the Hearing Officer to deny Saxony's Motion for Accelerated Determination and Motion for Reconsideration;

B. there was no lawful basis for the Hearing Officer's recommendation for the Commission to include a condition in the permit; and

C. there was no lawful basis for the Commission to include such a condition in the September 22, 2011 Final Order.

40. The "new" mine plan boundary resulting from the Commission's Final Order and the resulting "new" amount of acres that will be affected by the Strack quarry have not been the subject of any Notice of Intent published in any newspaper as required by 10 CSR 40-10.020(H).

41. Because the requirements in 10 CSR 40-10.020(H) were not followed, the Commission's unilateral action in the Final Order violates procedural Due Process in Article I, § 10 of the Missouri Constitution in that potentially affected members of the public have not been made aware of the "new" mine plan and "new" acreage.

42. Further, the Commission's Final Order fails to comply with the express mandate in § 444.771 that the Commission is prohibited from issuing a permit to Strack because Strack's mine plan boundary was located within 1,000' of Saxony's property. In this context, the language used in § 444.771 is clear and unambiguous and - contrary to the Hearing Officer's statement - does not authorize the Commission to place a condition in the permit to relocate the mine plan boundary.

43. Because the Land Reclamation Act, §§ 444.760 - 444.789, RSMo, does not expressly confer statutory authority on the Commission to impose a special condition in the approval of a permit application,

A. The Hearing Officer's denial of Saxony's Motion for Accelerated

Determination and Motion for Reconsideration was unlawful, unreasonable and not substantially justified;

B. The Hearing Officer's recommendation for the Commission to include a condition in Strack's permit to unilaterally relocate Strack's mine plan boundary was unlawful, unreasonable and not substantially justified;

C. The Commission's September 22, 2011 Final Order imposing a special condition in Strack's permit to unilaterally relocate Strack's mine plan boundary was unlawful, unreasonable and not substantially justified; and

D. The Commission's position that the language in § 444.773.3 - "The land reclamation commission may grant a public hearing to formally resolve concerns of the public" - and the *Lake Ozark* decision confer statutory authority to the Commission to impose a special condition in Strack's permit is not substantially justified.

JUDGMENT AND ORDER

Based on the foregoing, the Court enters JUDGMENT in favor of Petitioner and against Respondents and Intervener on the Petition for Judicial Review.

The Final Order entered by the Commission on September 22, 2011 issuing a permit to Strack Excavating, LLC is hereby REVERSED, the permit is hereby VACATED, and this matter is REMANDED to the Commission with the direction to comply with the provisions in § 444.771, RSMo.

So Ordered.

Wm. L. Suter
Circuit Judge

Date: Sept. 12, 2012

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PATTI WIBBENMEYER
CIRCUIT CLERK