Missouri Clean Water Commission
Truman Hotel and Conference Center
1510 Jefferson Street
Jefferson City, Missouri 65109

September 5, 2012

Administrative Hearing Commission's Recommended Decision Regarding Doua Vang, Great Lion Farm, Construction Permit 00076 Appeal Number 12-1088-CWC

Issue: The Administrative Hearing Commission (AHC) heard an appeal made by Brad Taylor of Newton County, Missouri on the legality of the Department's having issued a construction permit for a proposed concentrated animal feeding operation in Newton County for Doua Vang of Great Lion Farm.

Background: The Department issued a construction permit to Doua Vang on May 16, 2012 for a broiler operation with four broiler houses to house 184,000 birds and a stackshed/composter. Regulations require that buffer distances are met between proposed facilities and nearby non-owned occupied residences. The petitioner claimed that a house within the prescribed 1000' buffer was occupied for the minimum time to designate it as occupied. Proof was given by the Department that the house was not inhabitable and did not meet the requirements for an occupied house within the time period described in 10 CSR 20-6.300.

All requirements in 10 CSR 20-6.300 were satisfactorily addressed and submitted with the construction permit application reviewed by the Department prior to issuance. A hearing was held with the AHC on July 18, 2012. The AHC recommended that the Clean Water Commission deny the appeal filed by Brad Taylor and affirm the decision of the Missouri Department of Natural Resources in granting a construction permit for a concentrated animal feeding operation to Doua Vang.

Recommended Action: Staff recommends the Commission adopt the Administrative Hearing Commission's recommended decision denying the appeal, and affirming the permit was lawfully issued. The Commission may 1) adopt the Administrative Hearing Commission's recommendation, 2) change findings of fact or conclusions of law or 3) vacate or modify the recommended decision. If the Commission either changes findings of fact or conclusions of law or vacates or modifies the recommended decision, it must state the specific reason(s) in writing for the change(s).

Suggested Motion Language: "I move that the Commission adopt the Administrative Hearing Commission's Recommended Decision."

List of Attachments:

- Administrative Hearing Commission's Recommended Decision

Before the
Administrative Hearing Commission
State of Missouri

In re: DOUA VANG, GREAT LION FARM, CONSTRUCTION PERMIT 00076) No. 12-1088 CWC

RECOMMENDED DECISION

We recommend that the Clean Water Commission ("CWC") deny the appeal filed by Brad Taylor and affirm the decision of the Missouri Department of Natural Resources ("DNR") granting a construction permit for a concentrated animal feeding operation ("CAFO") to Doua Vang.

Procedure

On May 31, 2012, Taylor filed this appeal. On June 29, 2012, Vang filed documents that he characterized as a response to the complaint, and which we characterized as a motion to intervene. We granted the motion to intervene by order dated July 5, 2012.

On July 18, 2012, we held a hearing. Taylor and Vang appeared *pro se*. Assistant Attorneys General Mary Mulhearn and Timothy P. Duggan appeared for DNR. The matter became ready for our recommended decision on July 26, 2012, when DNR filed its response to Taylor's filing of a notarized statement from New-Mac Electric Cooperative, Inc., concerning electrical service provided to certain property.

Findings of Fact

1. At all relevant times, Taylor was a resident of Newton County, Missouri, residing at 21343 Skylark Drive, Stella, Missouri.

2. Starting in December 2011, Vang became interested in purchasing certain real property in Newton County, Missouri, located at 21414 Skylark Drive, Stella, Missouri (the 21414 Skylark property"), with the intention of operating a business to raise broiler chickens for slaughter on that property.

3. Vang's plans included constructing four broiler houses on the 21414 Skylark property, to house 184,000 chickens. The plans also included a mortality composter and a stacking shed.[1]

4. After learning that there was a Missouri regulation governing how close a Class 1C CAFO could be to an occupied residence, Vang determined that a dwelling place located at 21627 Skylark Drive, Stella, Missouri (the "21627 Skylark property") was 725 feet from one of the broiler houses he proposed to build as part of his business.

5. After Vang learned that Linda Neven[2] was an owner or co-owner of the 21627 Skylark property, Vang sent a letter to Neven on February 2, 2012, to learn about the 21627 Skylark property.

6. In response to that letter, Glenn Gold,[3] Neven's brother, called Vang on February 8, 2012. In that conversation, Gold told Vang that he did not want Vang to construct a CAFO operation on the 21414 Skylark property because it would lower the value of the 21627 Skylark property, create a bad odor, and negatively affect the water quality in the area. However, Gold also admitted in the conversation that the house at the 21627 Skylark property was not livable and no one lived there.

7. On February 14, 2012, Vang bought the 21414 Skylark property.

---

[1]Vang determined, correctly, that his proposed operation would be a Class 1C CAFO. We discuss the classification in our Conclusions of Law below, under "Permit Process in General."

[2]At all relevant times, Neven lived in Las Vegas, Nevada.

[3]At all relevant times, Gold lived in Aurora, Colorado.

8. On February 16, 2012, Vang moved onto the 21414 Skylark property.

9. On February 23, 2012, Vang notified, by certified mail, all adjoining owners of property located within 1,500 feet of the nearest proposed animal confinement building of the proposed property use for the 21414 Skylark property.[4] Taylor, Gold, and Neven were among those adjoining owners. Vang's notice informed the adjoining owners that they could file written complaints with DNR about his proposed use.

10. During February and March 2012, several such property owners, including Taylor, Gold, and Neven, filed written complaints with DNR. The letter from Gold and Neven also stated that they had leased the 21627 Skylark property to Colleen Tarpy.[5]

11. On March 14, 2012, Vang filed an application for a permit for construction of a CAFO on the 21414 Skylark property. The application identified the operation as "Great Lion Farm."

12. On or before April 2, 2012, Taylor asked New-Mac Electric Cooperative – a utility company providing electric service to the area – to provide electric service to the 21627 Skylark property. The account for such electrical service was in Taylor's name. On April 2, 2012, New-Mac started providing service to that property.

13. New-Mac's electrical service records for the 21627 Skylark property show that at times prior to April 2, 2012, eight listed customers obtained electrical service for that property. However, the records do not disclose when that service was provided. Also, none of the customers listed in New-Mac's records is named Colleen Tarpy.

---

[4]These are referred to as "neighbor notice" letters. *See* 10 CSR 20-6.300(3)(C). All regulatory citations are to Mo. Admin. Code 2011. 10 CSR 20-6.300 was amended by DNR in a filing found at 36 Mo. Register 1909 dated July 14, 2011, said amendment being made effective April 30, 2012 (a date subsequent to the events of this case).

[5]Gold and Neven sent two letters to DNR, one dated March 17, 2012 and another dated July 14, 2012. The first letter is included in the documents Vang submitted that we consider to be his answer, while the second was submitted by Taylor at the hearing and was marked as Petitioner's Exhibit A. Both letters reference a lease of the property to Tarpy. We discuss the second letter under "Evidentiary Issues" below.

14. On April 10, 2012, Vang entered the 21627 Skylark property to inspect it and take pictures. As a result of his inspection of the property, Vang noted that:

- no one lived at the property;
- there was a truck with no license plate parked on the property;
- the floor inside the house was peeling;
- there was trash in and around the property;
- there were several broken windows covered with various items (plastic, a paper bag, and what he called "cupboard"[6]); and
- there were several cut or broken tree limbs scattered around the property near the house.

He submitted copies of those pictures to Diane Reinhardt, a DNR environmental engineer charged with processing his CAFO application.

15. On May 11, 2012, DNR issued its construction permit to Vang for construction of four broiler houses and a stackshed/composter on the 21414 Skylark property, as set out in Vang's application.

16. On July 3, 2012, Vang again entered the 21627 Skylark property to inspect it and to take more pictures. In the inspection, Vang noted:

- as before, no one lived there;
- there was no vehicle on the property;
- the frame of the garage had deteriorated from his prior inspection;
- the floor inside the house was in worse shape than before, as the floor was now "all peeled off" and there was a hole in the floor;
- there was trash in and around the property, as before;
- the tree limbs scattered around the property were still there;
- the broken windows were still covered with "cupboard" and plastic; and
- there was no sign of improvement that would render the house suitable for habitation.

The pictures Vang took of the property also show significant vegetative overgrowth.

17. On July 23, 2012, Taylor filed a notarized statement dated July 23, 2012 executed by Vickie Stuart, billing supervisor for New-Mac. The affidavit states:

[6]We believe Vang meant "cardboard."

The service at 21627 Skylark Drive, Stella MO was active during the following time periods:

- [various dates between 2000 and 2007, which are not relevant to this case.]
- 6/1/2010 to 12/15/2011
- 4/2/2012 to present.

18. The 21627 Skylark property was not in use at a time reasonably prior to February 23, 2012.

Conclusions of Law

We have jurisdiction to hear this appeal and to render a recommended decision.[7] The authority to render final decisions after hearing on appeals heard by us shall remain with DNR.[8] DNR has the burden of proof to show that the permit was lawfully issued.[9] However, as to the affirmative matters Taylor raises against approval of the CAFO construction permit, Taylor bears the burden of proof.[10]

Evidentiary Issues

Taylor sought to admit a copy of a letter to DNR from Gold and Neven dated July 14, 2012, while Vang sought to admit the contents of a phone conversation he had with Gold and the notes he took of that conversation.[11] DNR objected to the letter on hearsay grounds, while Taylor objected to the contents of the conversation on hearsay grounds as well. We admitted both subject to the hearsay objections and discuss them here.

Gold's and Neven's July 14, 2012 Letter to DNR

This letter states that the 21627 Skylark property "has been almost continuously rented and occupied since [Gold and Neven] inherited the property in 1995," and sets out the rental

[7]Sections 621.250.1 ad 640.013. Statutory citations are to RSMo Supp. 2011 unless otherwise noted.
[8]Section 621.250.1
[9]Section 640.012.
[10]***Warren v. Paragon Tech. Group, Inc.***, 950 S.W.2d 844, 846 (Mo. banc 1997).
[11]Those notes are part of Respondent's Exhibit 14, which also includes photographs Vang took of the 21627 Skylark property on June 29, 2012.

history. It then reiterates the assertion Gold and Neven made in their March 17, 2012 letter to DNR that the CAFO would be detrimental to their ability to keep the house rented. We overrule the objection to the letter, but give little weight to its contents because Neven and Gold, as owners of the property closest to one of the proposed CAFO buildings, appear to have had the most to lose by the CAFO being built, and knew more than any party about the property, yet they failed to participate in this proceeding as a party or a witness. Further, as we set out below, the decisive issue in this case is not whether the property was leased, but whether the property was in use reasonably prior to February 23, 2012, and while neither letter addresses that issue, Gold did address it in his conversation with Vang, which we consider next.

Vang's February 8, 2012 Conversation with Gold

Vang testified that in his February 8, 2012 conversation with Gold, Gold reiterated his opposition to the CAFO construction permit, but also admitted that the 21627 Skylark property was not livable and no one lived there. We overrule the objection to the conversation because Gold's admissions constitute statements against interest and are exceptions to the hearsay rule.[12]

Copies of Utility Records Taylor Asked to File After the Hearing

Taylor also asked us to hold the record open so he could file copies of utility records that, he said, could prove that the 21627 Skylark property was in use at certain times. We agreed to hold the record open for 10 days from the date of the hearing, or July 28, 2012. On July 23, 2012, Taylor filed a notarized statement from Vickie Stewart, billing supervisor for New-Mac Electric Cooperative, Inc. DNR filed a response on July 26, 2012. We discuss the New-Mac statement in our Conclusions of Law below under "Occupied Residence Within the Buffer Zone."

---

[12] ***United Missouri Bank v. City of Grandview***, 179 S.W.3d 362, 371 (Mo. App., W.D. 2005).

Constitutional Issues

Taylor's complaint alleges that his constitutional rights were violated by the issuance of the construction permit. CWC, like any other executive-branch agency, has no authority to decide constitutional issues.[13] Further, Taylor did not argue the constitutional issue at the hearing, so he may have waived it. However, to the extent he may have properly raised the issue, he may argue it on appeal if necessary.[14]

Permit Process in General

DNR's authority to promulgate rules regarding CAFOs derives from § 640.710.1,[15] which provides in relevant part as follows:

> The department [of natural resources] shall promulgate rules regulating the establishment, permitting, design, construction, operation and management of class I facilities. The department shall have the authority and jurisdiction to regulate the establishment, permitting, design, construction, operation and management of any class I facility.... Such rules and regulations shall be designed to afford a prudent degree of environmental protection while accommodating modern agricultural practices.

In this case, Vang sought a CAFO construction permit from DNR. At all relevant times, 10 CSR 20-6.300(2)(A) provided in relevant part as follows:

> All persons who build, erect, alter, replace, operate, use, or maintain operations for generation, storage, treatment, use, or disposal of manure, litter, or process wastewater from concentrated animal feeding operations shall obtain permits as follows:
>
> 1. Class I concentrated animal feeding operations[.]

Because it was designed to house 184,000 broiler chickens, Vang's proposed operation was a Class 1C CAFO.

---

[13] ***Cocktail Fortune v. Supervisor of Liquor Control***, 994 S.W.2d 955, 957 (Mo. banc. 1999).
[14] ***Tadrus v. Missouri Bd. of Pharmacy***, 849 S.W.2d 222 (Mo. App., W.D. 1993).
[15] RSMo 2000.

As a condition of receiving the construction permit, Vang had to give written notice to all adjoining owners of property located within one and one-half times the buffer distance specified in 10 CSR 20-6.300(3)(B)1A. We discuss the buffer distance below. Taylor was one of those property owners, as were Gold and Neven. All three received the notices and filed protests of the proposed permit with DNR. Taylor, however, was the only owner to appeal DNR's decision to grant the CAFO construction permit.

Occupied Residence Within the Buffer Zone

At all relevant times, 10 CSR 20-6.300(3)(B)1A provided in relevant part as follows:

> All Class I concentrated animal feeding operations shall maintain a buffer distance between the nearest animal containment building...and any existing public building or occupied residence. The...occupied residence will be considered existing if it is being used prior to the start of the neighbor notice requirements of subsection (B) of this section or thirty (30) days prior to construction permit application, whichever is later. Buffer distances shall be...one thousand feet (1000') for concentrated animal feeding operations between 1,000 and 2,999 animal units (Class IC operations)[.]

"Occupied residence" was at all relevant times defined as "[a] dwelling place for people which is inhabited at least fifty percent (50%) of the year[.]"[16] DNR, however, made no attempt to prove what percentage of the year – any year – 21627 Skylark was inhabited. Instead, DNR focused on the portion of 10 CSR 20-6.300(3)(B)1 that applied the buffer zone only to an *existing* occupied residence. It interpreted the regulation to require that the house be, not *used*, but *inhabited* prior to either when the neighbor notification letters were sent out, or 30 days prior to the submission of the construction permit application, whichever was later.

[16]10 CSR 20-6.300(1)(B)18. The regulation was amended by 36 Mo. Register 1909, 1912 and renumbered 10 CSR 20-6.300(1)(B)16.

Taylor countered that DNR's interpretation required "used" to mean the same thing as "inhabited," and that such an interpretation is erroneous. We agree with Taylor. Regulations are interpreted under the same principles of construction as statutes.[17] As with a statute, we construe words in a regulation according to their plain and ordinary meaning unless the language is ambiguous or would lead to an absurd or illogical result.[18] Where a word is not defined in a statute, we give it its common sense, dictionary meaning.[19] "Inhabit" is defined in relevant part as "to occupy as a place of residence or habitat."[20] "Use" is more broadly defined as "to put into action or service."[21] We also presume that just as the legislature intends that every word or a statute have effect,[22] so too did DNR intend the same thing by using two different verbs. Therefore, the factual inquiry here is whether the property was *used* prior to February 23, 2012, the date when Vang sent the neighbor notice letters.

But the regulation does not ask whether the property was being used *on* a particular date, but being used *prior to* such date. The question of how far back in time "prior to" extends is not one we can readily answer by using the plain language of the regulation. To resolve this issue, we first look to the legislature's instructions to DNR regarding the enactment of CAFO regulations. Section 640.710.1 mandates that "[s]uch rules and regulations shall be designed to afford a prudent degree of environmental protection while accommodating modern agricultural practices." In short, the regulation must strike a balance between competing interests.

In this case, such a balance is struck by interpreting the "being used prior to" the latter of the two dates to mean "being used *reasonably* prior to" such date. Vang would be unduly

---

[17] ***Beverly Enters.-Missouri, Inc. v. Dep't of Soc. Servs.***, 349 S.W.3d 337, 352 (Mo. App., W.D. 2008).
[18] ***See Akins v. Director of Revenue***, 303 S.W.3d 563, 565 (Mo. banc 2010).
[19] ***State v. Trotter***, 5 S.W.3d 188, 193 (Mo. App., W.D. 1999).
[20] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 643 (11th ed. 2004).
[21] *Id.* 1378.
[22] ***State ex rel. Outcom, Inc. v. City of Peculiar***, 350 S.W.3d 57, 63 (Mo. App., W.D. 2011).

prejudiced if the regulation forced him to look back months or years before the date to find a lack of use of the property in order to secure a permit, while Taylor would be unduly prejudiced if we accepted DNR's interpretation of the regulation – that the property had to be not just used, but inhabited, *on* such date. Our interpretation contemplates the real-life situation where a residence is not being used on a particular date but has been used in the recent past, and its occupancy history indicates that it will be used in the near future. We believe that a CAFO structure should not be built too closely to such a property.

The 21627 Skylark property is not such a property. The only relevant testimony about the condition of the property was Vang's. First, he talked to Gold, who stated in the February 8, 2012 telephone conversation that no one lived on the property and that the house was no longer livable. Then Vang inspected the property on April 10 and July 3, 2012, finding the property to be vacant and unclean, with broken windows, overgrown vegetation, and downed tree limbs. Vang's testimony, supported by pictures he took on those two dates, demonstrates not only that the property was not being used, but was deteriorating. That evidence, on its own, supports our finding that the property was not in use reasonably prior to February 23, 2012.

At the hearing, Taylor advanced two assertions supporting his claim that 21627 Skylark was in use – the statement in the July 14, 2012 letter to DNR that Tarpy had rented the property, and his stated belief that a vehicle was stored in the basement of the house on the property. However, Vang saw no sign of Tarpy, or any other occupant, in the property on his two inspections of it, and Taylor offered no more than his belief regarding the stored vehicle.

However, he also asked for leave to submit electrical service records showing the dates when such service was provided to the 21627 Skylark property. We granted such leave, and he filed a notarized affidavit from New-Mac's billing supervisor on July 23, 2012. Because we are

only interested in events occurring reasonably prior to February 23, 2012, we spent no time considering the electrical service history prior to June 1, 2010.

That new information does not change our decision that there was no use of the property reasonably prior to February 23, 2012. The fact that electrical service was provided to the property for a recent time prior to December 15, 2011 no more proves that the dwelling was rented than the fact that such service was provided after April 2, 2012 proves that fact for that time period. As Vang's testimony and photographs show, no one lived on the property on April 10 or July 3, 2012, the property was not suitable for habitation, and there is no evidence that the property was used at all.

For the reasons stated above, we see no relevance in the use, occupancy, or electrical use history of the 21627 Skylark property that was not recent. But the new information Stuart's affidavit presents is that New-Mac supplied electrical service to the property from June 1, 2010 until December 15, 2011.

Our Interpretation of 10 CSR 20-6.300 Versus that of the Parties

We realize that our interpretation of 10 CSR 20-6.300 varies from that of both DNR and Taylor. As was made clear by its July 26, 2012 response to Taylor's July 23, 2012 filing of the electrical records, DNR looked to a date 30 days prior to the date the construction permit application was filed to see whether the 21627 Skylark property was being used on that date. In other words, if the property was not being used on that date, the 1,000 foot buffer requirement does not apply. We do not think DNR's interpretation of 10 CSR 20-6.300(3)(B)1A satisfies the legislative purpose expressed in § 640.710.1 if it is interpreted to require the property to be used

on a particular date. In fact, such an interpretation fails a simple grammar test because 10 CSR 20-6.300(3)(B)1A requires such use to be *prior to* the date, not *on* the date.[23]

Taylor focuses on what we interpret as two related aspects of a single theme – the requirement of 10 CSR 20-6.300(1)(B)18 that the 21627 Skylark property was in use for 50% or more of the year, and how the property's rental history proves or disproves the matter. We first noted Taylor's extensive cross-examination[24] of Diane Reinhardt on the 50% habitation issue – testimony that, in our interpretation, yields no tangible evidence on the matter. Taylor then testified as to his position that the residence was indeed occupied for 50% of the year,[25] but offered no proof in support of that assertion. And he made the argument that "[f]or someone to sneak in, file an application when it was uninhabited is not in the spirit of the law."[26] Finally, in the cover letter accompanying Vickie Stuart's notarized statement regarding billing records for 21627 Skylark, Taylor states, "We believe this provides conclusive evidence that this dwelling has been rented and continues to be an available rental residence."

There are some problems with this assertion, however. First, as we set out above, the fact that electrical service was provided to the property up to December 15, 2011 does not prove that the dwelling was inhabited, nevermind used, for that time period.

Second, assuming that someone rented the property until December 15, 2011 (which we do not assume), this does not justify a finding that the property was used reasonably prior to February 23, 2012. True, there was a less than two-month gap between the date electrical service was cut off (December 15, 2011) and when Vang talked to Gold about the property

[23]We also believe that DNR overlooks the "whichever is later" clause of the sentence in question.
[24]Tr. 29-35.
[25]Tr. 69.
[26]Tr. 83.

(February 8, 2012). But according to Vang, Gold stated in that conversation that the property was not livable and no one lived there.

Missouri follows the long-held common-law rule that a lease conveys exclusive possession of property for a determinate period.[27] But the conveyance of possession, while it conveys a right of use,[28] does not constitute proof that the property was used, and proof of *use* is what the regulation requires. In any case, the evidence of the property being leased is scant (an unsworn, hearsay assertion by Gold that he had leased the property to Tarpy) and unsupported. And, while the provision of electric service to a dwelling would, in ordinary circumstances, at least strongly suggest that someone in the dwelling was using the electricity, such a presumption does not apply in this case because, as Taylor has proven by his own actions, providing electricity to a vacant, dilapidated house proves neither that the house is occupied nor that it is used.

Finally, we note that two of the three witnesses testifying at the hearing were neighbors of the 21627 Skylark property, but neither of them brought forward any evidence that the property was used, much less occupied. One witness (Vang) testified that the property was vacant, unused, and in poor condition, while the other witness (Taylor) said nothing about who lived there when or what other use, if any, to which the property was put, except for speculation that a vehicle may have been stored in the basement.

Returning to what we see as Taylor's overarching argument – that the 21627 Skylark property was used, occupied, or rented for 50% or more of the year – we first reiterate our query from above: to what year does 10 CSR 20-6.300(1)(B)18 refer? The parties offer no suggestions on this matter, and we have none.

---

[27] ***Kimack v. Adams***, 930 S.W.2d 505, 507 (Mo. App., E.D. 1996).

[28] *See* ***Speedie Food Mart, inc. v. Taylor***, 809 S.W.2d 126, 129-30 (Mo. App., E.D. 1991) (use of land for specific purpose set out in lease).

But our second inquiry proves dispositive of the matter. Even if the property was inhabited for at least 50% of the year as required by 10 CSR 20-6.300(1)(B)18, that fact only clears the first hurdle of 10 CSR 20-6.300(3)(B)1, by establishing that it is an "occupied residence." From there, it must be shown that the property was being used (reasonably) prior to February 23, 2012. As we set out above, no such showing was made.

Summary

Based on the foregoing, we conclude that the 1,000-foot buffer zone requirement of 10 CSR 20-6.300(3)(B)1A was not violated because the broiler house in question only had to be 1,000 feet from an occupied residence that was in use reasonably prior to the start of the neighbor notices, and the 21627 Skylark property was not such a property. As a result, we conclude that the construction permit was lawfully issued.

We recommend that the CWC affirm DNR's decision to grant a CAFO construction permit to Doua Vang.

SO RECOMMENDED on July 30, 2012.

NIMROD T. CHAPEL, JR.
Commissioner