

COPY

IN THE CIRCUIT COURT OF MILLER COUNTY, MISSOURI

LAKE OZARK/ OSAGE BEACH JOINT )  
SEWER BOARD, et al. )

**Petitioner,** )

v. )

MISSOURI DEPARTMENT OF NATURAL )  
RESOURCES, LAND RECLAMATION )  
COMMISSION, and MAGRUDER )  
LIMESTONE CO., INC. )

**Respondents.** )

Case No. 08ML-CC00106  
Division No. 1

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**APR 06 2009**

**MO. ATTORNEY GENERAL**

**ORDER AND JUDGMENT**

This Court by its order granted Petitioners until December 22, 2008, to file Brief on their Petition for Review. Thereafter, Respondents Briefs were to be filed by January 5, 2009. Petitioners Reply Brief was to be filed by January 16, 2009. It appears from the record that these briefs were properly filed. No part of the Scheduling Order, authorized the filing of Sur-Reply Brief and no Order was sought from this Court. However, a Sur-Reply Brief was filed together with Petitioners Joint Motion to Strike Sur-Reply Brief or in the Alternative Joint Opposition to the Sur-Reply Brief of Respondentt/ Magruder Limestone Company. This Court has considered both the Sur-Reply Brief and the Petitioners' Joint Motion To Strike Sur-Reply Brief Or In the Alternative Joint Response In Opposition To The Sur-Reply Brief Of Respondent/Magruder Limestone Company.

Judicial review of a contested case is governed by Sec. 536.100-140, R.S. Mo, Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 165 (Mo. banc 2006). The court may not disturb the factual findings if they are supported by competent and substantial evidence upon the whole record, viewing the evidence in the light most favorable to the findings, including all reasonable inferences that support them. Hermel, Inc. v. State Tax Com'n, 564 S.W.2d 888, 894 (Mo. 1978).

This court takes up Petition to Review, after reviewing the transcripts of these proceedings, the Findings and Order of Hearing Officer and Findings and Order of Land Reclamation Commission, and makes the following findings:

1. The Hearing Officer and the Land Reclamation Commission made a misapplication of the burden of proof, by placing same on the Petitioners. The first sentence of R.S. Mo Sec. 444.773.4 states that "the burden of proof shall be on the applicant for a permit." Nothing could be clearer, and yet repeatedly throughout the findings and decision of the Hearing Officer, he states "that Petitioners failed to meet their burden of proof." Hearing Officer's Order at p. 47, 48, 49, 50, 56 and 60. At a meeting of the Land Reclamation Commission on July 23 & 24 the Land Reclamation Commission questioned the Hearing Officer in this regard, and the Hearing Officer stated "that he's read the Statute and the regulations regarding this issue and he reads that the burden of proof is upon the persons bringing the action. The Hearing Officer stated further that "the applicant does not have to prove the negative." However, this is exactly what Missouri law requires.

Petitioners must establish an issue of fact and then Applicant is required to prove that quarry operations will not impact health, safety and livelihood.

2. The Order and Hearing Officer's Order contain evidence that is not in the Record and is Unscientific. Under the Land Reclamation Act, the Land Reclamation Commission must rely on substantial, scientific evidence on the record when making decisions to grant or deny a permit. RSMo Sec.444.773,4. In the hearing record is there is no reference to "Wikipedia". In the Hearing Officer's Recommended Order, at page 22, the Hearing Officer makes reference to "Wikipedia" for a description of both "ductile iron" and "polyvinyl chloride." The references in question state as follows:

*Ductile iron*, also called ductile, cast iron, is a type of cast iron invented in 1943 by Keith Millis. While most varieties of cast iron **are brittle, ductile iron is much more ductile (easily molded, pliant)**, due to its nodular graphite inclusions. Much of the annual production of ductile iron is in the form of ductile cast iron pipe, used for water and sewer lines. **Ductile iron pipe is stronger and easier to tap, requires less support and provides greater flow area compared to pipe made from other materials. In difficult terrain it can be a better choice than PVC, concrete, polyethylene or steel pipe.** *Wikipedia-Ductile iron. (emphasis added).*

*Polyvinyl chloride* commonly abbreviated PVC, is a widely used thermoplastic polymer. It is used in a variety of applications. As a hard

plastic, it is used as....pipe, plumbing and conduit fixtures. The material is often used in Plastic Pressure Pipe Systems for pipelines in the water and sewer industries because of its inexpensive nature and **flexibility. Its light weight, high strength, and low reactivity make it particularly well-suited to water distribution and sanitary sewer pipe applications.** *Wikipedia—Polyvinyl chloride. (emphasis added).*

The boldface material emphasizes that material from Wikipedia that may well have assisted the Hearing Officer in his determination of this matter. One of the principal questions in this administrative hearing was whether Respondent/Magruder could safely operate a quarry in close proximity to sewer lines. Testimony regarding blasting, quarrying and the impact on the sewer plant and sewer lines was critical in making that determination. The Petitioner Sewer Board presented evidence on these issues through Richard C. King and Donald E. Dressler, P.E. These witnesses testified that a quarry could not operate at this site, without damaging the sewer plant and sewer lines. Richard C. King testified about breaks in the sewer lines in 1995 and 1999. Mr. Dressler testified as to vibration, settling of bedding, fatigue fracture, and concluded that the Magruder blast plan was unrealistic and that it was his professional opinion that both ductile iron and PVC pipe which cross the Magruder property have zero tolerance standards for vibration. A reading of the Hearing Officers findings does not indicate that Respondent/Applicant introduced evidence as to ductile iron pipe or PVC pipes ability to

withstand quarry operations. In fact, Respondent/Applicant expert witnesses testified that they were not experts as to pipe capabilities.

The Hearing Officer went outside the record and cited Wikipedia on an issue which was critical to this matter, and Land Reclamation Commission adopted in full, the Hearing Officer's findings. A case that deals with the inappropriate citation of Wikipedia by an administrative agency, is *Badesa v. Mubaskey*, 540 F.3d 909,909 (8<sup>th</sup> Cir.2008) This court cannot determine under the facts presented whether Land Reclamation Commission would have reached the same conclusion without the Wikipedia reference.

3. The application filed by Magruder on April 18, 2007 was incomplete as filed, in that it did not contain the "name of all persons with any interest in the land to be mined" and was not accompanied by "a map in scale and form specified by the Land Reclamation Commission." The application needs to be complete in order to publish notice. R.S. Mo. Sec. 444.722.10. It was not until February 5, 2008, that Respondent/Magruder filed an application that complied with Missouri law. Subsequent to the improper publication additional people sought to join petitioners and to participate in this matter. They were denied to do so because they made application after the original improper publication notice. Potential petitioners were thus denied a chance to be heard and to participate in the administrative hearing. This interpretation

defeats the very purpose of the Land Reclamation application and  
and notification process. Fairness dictates otherwise.

WHEREFORE, it is the Order and Judgment of this Court, that the Land Reclamation  
Order of July 24, 2008, granting Respondent/Magruder Limestone Company, a quarry  
permit is reversed and a new hearing by the Land Reclamation Commission shall be held.

Done in chambers this 31<sup>st</sup> day of April, 2009.

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Frank Conley, Senior Judge