



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**SAXONY LUTHERAN HIGH SCHOOL,
INC., and SAVE OUR CHILDREN'S
HEALTH, INC.,**

Respondents,

v.

**MISSOURI LAND RECLAMATION
COMMISSION and HEARTLAND
MATERIALS, LLC,**

Appellants.

**WD74994
(Consolidated with WD75017)**

**ORDER FILED:
January 15, 2013**

ORDER

On January 27, 2011, Appellant Missouri Land Reclamation Commission (“the Commission”) heard evidence regarding whether Respondents Saxony Lutheran High School, Inc. (“Saxony”) and Save Our Children’s Health, Inc. (“SOCH”) had standing to be entitled to a formal public hearing pursuant to section 444.773.3 RSMo and the accompanying regulations to oppose a quarry mining permit in favor of Appellant Heartland Materials, LLC (“Heartland”). On February 7, 2011, the Commission concluded that Saxony and SOCH had failed to present good faith evidence that they had standing to challenge the Heartland permit at a formal public hearing, and the Commission therefore refused to grant such a hearing.

On March 7, 2011, Saxony and SOCH filed a petition for judicial review and declaratory judgment in the Circuit Court of Cole County (“trial court”). On November 4, 2011, the trial court issued a summary judgment declaring that Saxony and SOCH had established standing, and therefore, they were entitled to a formal public hearing pursuant to section 444.773.3. The trial court’s judgment also concluded that the Commission’s position that Saxony and SOCH lacked standing was not substantially justified. In our ruling today on Heartland and the Commission’s appeal, we expressed our agreement with the trial court that Saxony and SOCH possess standing and, likewise, we agree that the Commission’s position was not substantially justified. Likewise, we are aware of no special circumstances that would make an award of reasonable fees and expenses unjust.

Section 536.087.1 states,

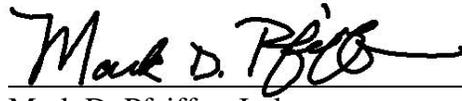
A party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action . . . unless the court . . . finds that the position of the state was substantially justified or that special circumstances make an award unjust.

When a party prevails in an action for judicial review, such as was the case here, that party may also recover fees and expenses incurred during the agency proceeding. § 536.087.2. “This section requires the party claiming fees and expenses to submit its application to the [tribunal] before which it first prevailed, within thirty days of the ruling, even if the State appeals.” *Mo. Comm’n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 172 (Mo. App. W.D. 1999). “Even if the underlying case is appealed, the tribunal before which the fee application was properly brought will retain jurisdiction over that fee application, and the action will be held in abeyance until the adversary proceeding becomes final.” *Davis v. Angoff*, 957 S.W.2d 340, 344 (Mo. App. W.D. 1997). Saxony and SOCH, as prevailing parties in the trial court, filed a

timely motion for attorneys' fees and expenses with the trial court and renewed their motion before this court. However, the trial court retains jurisdiction over Saxony and SOCH's motion for fees and expenses.

Therefore, we decline to rule upon Saxony and SOCH's motion for fees and expenses and, instead, remand to the trial court for ruling thereon at such time as this adversary proceeding becomes final.

Dated this 15th day of January, 2013.

A handwritten signature in black ink, appearing to read "Mark D. Pfeiffer", written over a horizontal line.

Mark D. Pfeiffer, Judge