

IN THE CIRCUIT COURT
CAPE GIRARDEAU COUNTY, MISSOURI

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MISSOURI
ATTORNEY GENERAL

SAXONY LUTHERAN HIGH SCHOOL, INC.,)
)
Petitioner,)
)
v)
)
MISSOURI DEPARTMENT OF)
NATURAL RESOURCES, et al.,)
)
Respondents.)

Case No. 11CG-CC00272

Div. 1

PETITIONERS' OPENING BRIEF

Statement of Facts

On November 4, 2010, Strack Excavating, LLC ("Strack") submitted to the Missouri Land Reclamation Commission ("the Commission") an application for a limestone quarry to be located east of Highway 61 and along County Road 601, just south of Fruitland, Missouri. *Pet. Ex. B (Res. Ex. 1), Permit Application for Industrial Mines.*¹ Saxony Lutheran High School, Inc., an accredited, private Lutheran high school located at 2004 Saxony Lane along County Road 601 in Jackson, Missouri ("Saxony"), is located immediately south of the proposed Strack quarry. *Transcript of Proceedings*, pp. 267-68.

Strack's permit application identifies the acreage of the quarry as 76 acres in size. *Pet. Ex. B (Res. Ex. 1), Permit Application for Industrial Mines, 4th page; Pet. Ex. B, 5th page (Mine Plan)*. Concerning the Mine Plan Boundary the application states there is to be no excavation within "50 feet of a property line." *Pet. Ex. B, 6th page*. Detail Map #1 of the permit application shows the 76 acre Long-Term Area as well as the Mine Plan Boundary approximately abutting Saxony's property immediately south of the proposed quarry. *Pet. Ex. B,*

¹ Citations to the record are in *italics*.

11th page. A Location Map, attached to the permit application, shows the “Approximate Limits of Mining” as being “55’ from property line,” including the Saxony property immediately to the South. *Pet. Ex. B, 13th page.* To date Strack has not submitted an application, mine plan, or any other document to the Commission which identifies the mine’s boundary as being any further away than 55 feet from Saxony’s property as shown on page 13 of the Strack permit application. *Pet. Ex. B, p. 13.*

Pursuant to § 444.772.10, R. S. Mo., and 10 CSR 40-10.020(2)(H), on November 22, 2010, the Department of Natural Resources (“DNR”) advised J.W. Strack of the requirement to advertise and mail notice of his intent to operate a surface mine. *Res. Ex. 2, November 22, 2010, letter from DNR to J.W. Strack.* Strack next published and mailed notice of its proposal for a 76 acre quarry. *Res. Ex. 3, Public Notice of Surface Mining Application.*

Following the prescribed notice, the Commission conducted a 45-day public comment period on the permit application and received approximately 2,600 letters and comments opposing the proposed quarry. *Res. Ex. 4, Memorandum from Mike Larsen to Land Reclamation Commission, Attachment 1, page 1.* The Commission asked Strack to conduct a public meeting regarding its permit application, but Strack declined. *Pet. Ex. C, January 13, 2011, Letter from DNR to All Petitioners, p. 1.*

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. *Res. Ex. 4, Memorandum from Mike Larsen to Land Reclamation Commission, page 1.* 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 . . .” *Res. Ex. 4, p. 1.* The Commission subsequently scheduled a public hearing on the proposed quarry on its January, 2011, agenda. *Id.*

On January 27, 2011, the Commission conducted the 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. *Pet. Ex. C., p. 1.* “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.”

On February 7, 2011, the Commission granted the request of Saxony for a Formal Public Hearing, assigning W.B. Tichenor as Hearing Officer. See *Order Upon Assignment of Matter to Hearing Officer, 3-11-11.* The Formal Public Hearing was held over four days on July 5, 6, 7 and 12, 2011. *Transcript of Proceedings.* In the midst of the hearing, on July 11, 2011, the Governor signed House Bill 89 into law. House Bill 89, *inter alia*, enacted § 444.771, RSMo, 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.

After House Bill 89 became effective on July 11, 2011, Saxony rested its case, on July 12, 2011.

Transcript of Proceedings, p. 696.

On August 24, 2011, the Hearing Officer issued his recommended order. *Hearing Officer's Recommended Order, 8-24-11*. 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 that moves a mine plan boundary. *Id., p. 21*. 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. *Id. at 25*. This, in the Hearing Officer's estimation, would effectively alter the project from a 76 acre to a 53 acre mine. *Hearing Officer's Recommended Order, 8-24-11, p. 24*. Still, as of August 24, 2011, Strack's applied-for Mine Plan Boundary was located 55 feet from the School. *Pet. Ex. B, p. 13*.

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. *Final Order of Land Reclamation Commission, 9-22-11*. 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 RSMo.

Id. (italics in original).

Saxony's petition to this Court for judicial review and declaratory judgment followed.

Argument

The Commission's approval of the Strack permit application is unlawful, because the Commission had no authority to impose a special condition in its Final Order unilaterally changing the mine plan boundary

The Department of Natural Resources ("DNR"), along with its assigned commissions, administers and regulates environmental concerns in Missouri. The Missouri Air Conservation Commission issues air construction permits in accordance with § 643.075, RSMo to new sources of air pollutants; the Missouri Clean Water Commission issues discharge permits under § 644.051, RSMo to facilities that discharge contaminants into waters of the State; the Missouri Hazardous Waste Commission issues permits under § 260.395, RSMo to persons who transport hazardous waste in Missouri; and the DNR issues permits under § 260.225, RSMo 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 to impose appropriate conditions in the permit. See § 260.225.5(7), RSMo (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, RSMo (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, RSMo (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, RSMo (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).

When compared to each of the foregoing grants of statutory authority, however, the relevant statutes in the Land Reclamation Act do not contain any similar language. The relevant statute that is applicable to the subject hearing - § 444.773.3, RSMo - states, “If the recommendation of the director is for issuance of the permit, the director shall issue the permit without a public meeting or a hearing except that upon petition, received prior to the date of the notice of recommendation, from any person whose health, safety or livelihood will be unduly impaired by the issuance of this permit, a public meeting or a hearing may be held....”

When employing principles of statutory construction, the primary rule is to ascertain the intent of the legislature from the language used, by considering the plain and ordinary meaning of the words used in the statute. *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009); *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. banc 2008) (stating that in the absence of guiding case or other authority, the language of the statute itself provides the best guide to determine the legislature's intent). Each word, clause, sentence, and section of a statute should be given meaning. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993); *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638, 643 (Mo. App. 1994). "Where the language of a statute is unambiguous and clear, this Court will give effect to the language as written, and will not engage in statutory construction." *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo. App. E.D. 2007) (citing *Maxwell v. Daviess County*, 190 S.W.3d 606, 610-11 (Mo. App. W.D. 2006)). A court will look beyond the plain meaning of the statute only when the language is ambiguous or will lead to an absurd or illogical result. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998).

Based on their plain language, neither § 444.771, § 444.773, or any other provision of the Land Reclamation Act authorizes the Land Reclamation Commission to impose a condition in a permit that has the effect of moving the mine plan boundary. If the General Assembly had intended to confer statutory authority on the Land Reclamation 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 on the Missouri Air Conservation Commission, the Missouri Clean Water Commission,

the Missouri Hazardous Waste Management Commission and the DNR. Further, if the General Assembly had intended to confer statutory authority on the Land Reclamation Commission to be able to alter, modify or revise provisions in a permit application, then it would have expressly provided for such authority in the Land Reclamation Commission's enabling statutes.

Significantly, there is not one provision in §§ 444.760 - 444.789, RSMo that confers any statutory authority on the Land Reclamation Commission to alter, modify or otherwise revise any provision in a permit application. Moreover, there is not one provision that confers any statutory authority for the Land Reclamation Commission to impose any conditions of any kind in an industrial minerals mining permit.

An administrative agency possesses no more authority than that granted to it by statute. *AT & T Information Systems, Inc. v. Wallemann*, 827 S.W.2d 217, 221 (Mo. App. W.D. 1992); *Mueller v. Missouri Hazardous Waste Management Com'n*, 904 S.W.2d 552, 557 (Mo. App. S.D. 1995); and *Brooks v. Pool-Leffler*, 636 S.W.2d 113, 119 (Mo. App. E.D. 1982.) In *Mueller*, one of the issues on appeal was whether the Missouri Hazardous Waste Commission had either express or implicit statutory authority to modify the terms of a hazardous waste permit issued by DNR. The Court said, “[t]he dispositive issue concerns the scope of the Commission’s adjudicative authority under the Act when reviewing newly issued hazardous waste disposal facility permits, specifically, whether it has authority to modify such permits without remand to the DNR?” *Id.*, 904 S.W.2d at 554. The Court explained:

In their first point, Appellants contend that the Commission, in reviewing DNR’s actions, acted in excess of its statutory authority when it “unilaterally” modified the permit. They insist that the Commission lacked authority to make any

modifications in the permit; that it could only affirm, reverse, or reverse and remand DNR's decision regarding the permit; and that the modification procedure followed by the Commission violated statutory and regulatory requirements designed to insure public scrutiny of the permitting process. Thus, Appellants directly call into question the scope of the Commission's adjudicative authority when reviewing on appeal an original permit application.

Id., 904 S.W.2d at 555.

The issue before the Court in *Mueller* is the same as the instant issue - whether the agency has implicit authority to unilaterally modify a permit in an adjudicative proceeding. In analyzing this question, the Court compared the permitting statutes with other environmental permitting statutes. When it did so the Court determined that while other DNR agencies had the express statutory power to impose conditions, the Hazardous Waste Commission did not.

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.” *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1114 (8th Cir.), 27 A.L.R.Fed. 183 (1973) (quoting *Alcoa Steamship Co. v. Federal Maritime Commission*, 121 App.D.C. 144, 348 F.2d 756, 758 (1965)). As stated before, there is no reference to the power to modify a permit or a DNR decision in § 260.370.3(5) although such authority is expressly conferred both in § 260.410.3 (pertaining to violations of the Act) and in other environmental laws. See § 644.026(13) (authority of the Clean Water Commission) and § 643.060(4), RSMo1986 1986 (repealed) (authority of the executive secretary of the Air Conservation Commission). We conclude from

such enactments that when the legislature wishes to confer adjudicative authority that includes power to modify, it says so. *See Alaska Airlines, Inc. v. Civil Aeronautics Board*, 103 App.D.C. 225, 257 F.2d 229, 230 (1958).

Mueller, 904 S.W.2d at 558.

The recommendation made by Director Mike Larsen to the Land Reclamation Commission was to issue the permit based on the contents of the permit application, which included a mine of a specified acreage having a specified mine plan boundary. In addition, Mr. Larsen did not propose any alterations, modifications, revisions, or conditions for the proposed permit. Rather, Mr. Larsen “recommended approval of the pending mining permit application . . .” *Res. Ex. 4, p. 1.*² Because there is no grant of statutory authority, the Land Reclamation Commission lacks authority to unilaterally alter, modify or revise the location of the mine plan boundary or the acreage of the mine.

For the foregoing reasons, the Commission’s approval of the permit application was illegal.

² To this date Strack has not submitted an application, mine plan, or any other document to the Commission which identifies the mine’s boundary as being any further away than 55 feet from Saxony’s property as shown on page 13 of the Strack permit application. *Pet. Ex. B, p. 13*

The Commission's approval of the Strack permit application was unlawful, because the Land Reclamation Act requires notice which specifies the acreage of the mine and there has been no notice of a mine having the acreage the Commission purported to approve in its Final Order

The Land Reclamation Act specifies the contents of the notice the permit applicant is to give:

At the time that a permit application is deemed complete . . . , the operator shall publish a notice of intent to operate a surface mine . . . The notices shall include . . . the number of acres . . .

§ 444.772.10, R.S. Mo.

The Commission's rule is consistent with the statute:

At the time the application is deemed complete by the director, the applicant shall publish a notice of intent to operate a surface mine . . . The notice must contain the following: . . . The number of acres involved . . .

10 CSR 40-10.020(2)(H).

After DNR advised Strack of the requirement to give notice of its intent to operate a surface mine, Strack gave notice of a 76 acre quarry. *Res. Ex. 3, Public notice of Surface Mine Application*. Approximately ten months after Strack gave the prescribed notice, the Commission unilaterally moved the mine plan boundary, changing the project's acreage from a 76 acre quarry to a quarry estimated by the Hearing Officer to be approximately 53 acres. *Hearing Officer's Recommended Order, 8-24-11, p. 24*. The "new" mine plan boundary and the resulting "new" acreage have not been the subject of any Public Notice as required by § 444.772.10, R.S. Mo., and 10 CSR 40-10.020(H).

The issue of adequate notice under the Land Reclamation Act was before the Court in *Lake Ozark/Osage Beach Joint Sewer Bd. v. Missouri Dept. of Natural Res.*, 326

S.W.3d 38, 42 (Mo. App. W.D. 2010). There, neighboring landowners asserted that the permit applicant's failure to file with DNR a particular map rendered the public notice required defective. The Court of Appeals disagreed, holding that the notice supplied by the permit applicant was adequate because the information contained on the missing map was not part of the notice required by the statute. The Court explained,

we fail to see how the Director's deeming the application complete before [the applicant] filed the map showing the utility easements rendered the subsequent public notice defective. Regulation 10 CSR 40-10.020(2)(H) prescribes the contents of the public notice. The map showing the utility easements is not part of this notice. The information contained on the map is not part of this notice. The public notice is unaffected by the inclusion or exclusion of the map in the application packet.

326 S.W.2d at 42.

In contrast to the missing map information at issue in *Lake Ozark/Osage Beach Joint Sewer Bd.*, the Land Reclamation Act's notice provision prescribes that the project's acreage be set out in the notice:

At the time that a permit application is deemed complete . . . , the operator shall publish a notice of intent to operate a surface mine . . . The notices shall include . . . the number of acres involved . . .

§ 444.772.10, R.S. Mo. The Commission unilaterally changed the project's acreage approximately ten months after Strack gave public notice of a 76 acre quarry. There has been no other notice which would comply with the public notice requirements of the statute.

For this reason also, the action of the Commission approving the permit was

illegal.

Conclusion

The Commission had no authority to impose a special condition in its Final Order unilaterally changing the quarry's mine plan boundary. To this date Strack has not submitted any document to the Commission which identifies the mine's boundary as being any further away than 55 feet from Saxony's property. In addition, the Land Reclamation Act requires notice which specifies the acreage of the mine and there has been no notice of a mine having the acreage the Commission purported to approve in its Final Order. Accordingly, the Court should declare that the Commission's Final Order is unlawful, vacate the Commission's issuance of the mining permit to Strack, remand this matter to the DNR and to the Commission with direction to deny the permit application, and award such further relief the Court deems just and appropriate.

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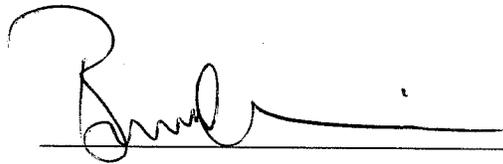
ATTORNEYS FOR PETITIONER

Certificate of Service

The undersigned certifies that a true copy of the foregoing document was served by facsimile transmission and by First Class U.S. Mail, postage prepaid, on this 11th day of April, 2012 to the following:

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A handwritten signature in black ink, appearing to read "Brian McGovern", is written over a horizontal line.