

**IN THE SUPREME COURT OF MISSOURI**

Saxony Lutheran High School, Inc.,	)	
	)	
Plaintiff - Respondent,	)	Case No. SC93549
	)	
v.	)	Court of Appeals No. ED99038
	)	Eastern District Court of Appeals
Strack Excavating, LLC et al.	)	
	)	Circuit Court No. 11CG-CC-00272
Defendants-Appellants.	)	Circuit Court of Cape Girardeau County

**STRACK EXCAVATING, LLC’S SUGGESTIONS  
IN OPPOSITION TO APPLICATION FOR TRANSFER**

COMES NOW Strack Excavating, LLC (“Strack”) pursuant to Rule 83.06 and this Court’s Order dated July 12, 2013, and for its Suggestions in Opposition to Respondent Saxony Lutheran High School’s (“Saxony”) Application for Transfer states as follows:

The unique factual circumstances presented are not adequately set forth in Saxony’s Application. Saxony was afforded a full evidentiary hearing before the Missouri Land Reclamation Commission (“LRC”) on Strack’s permit application. After four days of testimony, the LRC found that Saxony failed to meet its required burden to establish by competent and substantial scientific evidence on the record that the proposed quarry would unduly impact Saxony’s health, safety or livelihood. However, on the last day before the completion of the hearing §444.771 R.S.Mo. was enacted by House Bill 89. Section 444.771 created an entirely new limitation for mining permits, specifically directing that no permit should issue for any mine plan boundary within 1,000 feet of an accredited school. House Bill 89 contained an emergency clause making its enactment immediate upon being signed by the governor on July 11, 2012, the third day of the four-day

evidentiary hearing on Strack's permit. Prior to the enactment of §444.771 Strack's permit application was deemed complete, was compliant with the law, and was over eight months through the statutory approval process. But for the last minute enactment of §444.771 Strack would have been granted the permit given Saxony's failure to establish grounds for denial of the permit at the evidentiary hearing before the LRC. Saxony failed to point out that upon enactment of §444.771, Strack immediately agreed to a revised boundary 1,000 feet from Saxony in order to comply with the statute. As the Court of Appeals aptly noted:

The fact that Section 444.771 came into effect the day before the final day of the formal public hearing in front of the Commission meant that the first opportunity for Strack to comply with this new section was when the application was in front of the Commission. Rather than opposing a condition requiring such compliance, Strack immediately filed a memorandum consenting to change its boundary line . . . . [T]he Commission's modification to Strack's permit did not undermine the public process, it fulfilled it. *Op.* at 14.

In short, Saxony had a full evidentiary hearing on its claims and failed to establish any grounds for denial of the permit. Saxony also received the benefit of the newly enacted provisions of §444.771 by virtue of the LRC's imposition of the required 1,000 foot buffer from Saxony's property. Saxony has not been aggrieved. Saxony argues that the LRC lacked authority to accept Strack's revision of its mine boundary and condition approval of the permit to comply with the newly enacted §444.771. Instead, Saxony contends that the LRC should have compelled the entire permitting process to start over from the beginning, despite the resulting additional and unnecessary delay, expense and detriment to both Strack

and the LRC. Such arguments were properly rejected by the LRC and the Court of Appeals. Analysis of the statutory scheme, the statute's language and existing case law provides clear support for the Court of Appeals' ruling. Transfer to this Court is not warranted.

Saxony's position does not account for the comprehensive statutory scheme that the legislature established for the LRC. Authority can properly be implied if it necessarily follows from the language of the statute, and remedial legislation such as the LRC powers at issue, should be broadly and liberally construed to effect its plain purpose. *Scheble v. Mo. Clean Water Comm'n*, 734 S.W.2d 541, 556 (Mo. App. E.D. 1987). The LRC is expressly granted broad authority to regulate the mining industry. See §444.760 et seq.; *State ex. rel Mo. Land Reclamation Comm'n v. Calhoun*, 34 S.W.3d 219, 220-21 (Mo. App. E.D. 2000). It is statutorily charged with striking a balance between surface mining and protecting the health, safety and general welfare of the states' residents. §444.762.

The language used by the legislature for the LRC also involves a differing permitting process, and uses broader language, than other agency statutory schemes (solid and hazardous waste, air and water) cited by Saxony. Notably, in those statutory schemes agency modification of the permit occurs only as part of an appeal process *after* the permit has been approved and issued. The statutory scheme for the LRC is entirely different. The LRC is granted the power to examine and pass on all applications submitted. §444.767.3. First, the public can request a meeting and the applicant can resolve any concerns raised. Further, members of the public are allowed to petition for a hearing *prior* to the issuance of the permit in order to "resolve" the public's concerns, and the appointed Hearing Officer is charged with making *recommendations* in response to concerns raised by the public during

that hearing process. Accordingly, LRC modification is anticipated and occurs during the permitting process, before the permit is issued, not after the permit has issued. As the Court of Appeals noted, this distinction is important. If the LRC modifies a permit, no danger of undermining the process exists because unlike the other statutory schemes, a public hearing is actually part of the deliberative process before the LRC renders its decision. *Op.* at 8.

Not only is the statutory scheme for the LRC different from other agencies, the statute's language reflects a far greater role and authority of the LRC beyond simply issuing or denying the permit. Specifically, the LRC is granted the power to "examine and pass on all applications." §444.767.3. The LRC is authorized to "grant a public hearing to formally *resolve* concerns of the public." §444.773.3 (emphasis added). If a hearing is granted, the hearing officer is directed to "hold the hearing and make *recommendations* to the commission." §444.789 (emphasis added). Further, the statutory scheme authorizes enforcement actions by the LRC if mining operations are "being conducted contrary to or in violation of . . . *any condition imposed on the permit.*" §444.787.2 (emphasis added).

Such language reflects the legislature's clear intent to allow the LRC to impose conditions on the permit. It simply makes no sense to include language allowing the LRC to enforce "conditions imposed on the permit" if the legislature's intent was that the LRC, the permit issuing authority, was not authorized to impose conditions on the permit. Charging the Hearing Officer and LRC with the obligation to "pass on" and "formally resolve concerns of the public" has no meaning if no means, such as modifying or conditioning the permit, exist to accomplish this statutory directive. It also defies logic to suggest that the legislature created a comprehensive scheme and unique hearing process

to allow the LRC to balance the needs of the public and applicant, and to address and “resolve” issues raised during the permitting process, but denied the LRC any authority to effectuate those objectives through modification or conditioning of the permit. Further, the plural word “recommendations” was used by the legislature. Accordingly, something more than a singular recommendation of either “approval” or “disapproval” is contemplated by such language. Saxony’s position that the LRC is limited to ruling on whether the permit should issue exactly as submitted, is counter to basic principles of statutory construction that each word of a statute should be given meaning. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993). If not express, statutory authority is certainly implied from the scheme and language used, especially given that such authority should be broadly and liberally construed to effect the statute’s plain purpose. *Scheble*, 734 S.W.2d at 556.

Saxony’s position is also counter to the principles established by *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources*, 326 S.W.3d 38 (Mo. App. W.D. 2010). In *Lake Ozark* an application for an expansion permit was approved after the application was revised during the permitting process. Further, the approval in *Lake Ozark* was conditioned upon a much smaller mine size than the original application and numerous additional special conditions were imposed. *Id* at 39-41, f.n. 4. Similar to Saxony here, parties opposing the permit argued that any change to the permit required the applicant to start the process over from the beginning. The *Lake Ozark* court rejected such arguments holding that where all information was before the LRC prior to issuance of the permit (as here) and where no prejudice results from any changes (as here, detailed *infra*), issuance of the permit by the LRC with conditions or changes was not improper or illegal. *Id.* at 41-42.

In the present matter, modification of Strack's mine plan is far less problematic. Unlike *Lake Ozark*, Strack's modification was not to correct errors or omissions in the application. Strack's original mine plan was fully compliant with the law that existed at the time it was submitted. Strack's modification was simply an effort to bring the permit into compliance with an unexpected and last minute change to the law. If modification to correct errors midway through the permit process is allowable, as in *Lake Ozark*, it defies logic to suggest that a permit application, which was originally accurate and compliant with the law, cannot be modified to conform to changes in the law during the permitting process.

Additionally, under *Lake Ozark*, changes to the permit during the permitting process do not serve as a basis to overturn the LRC's decision unless prejudice is shown. 326 S.W.3d at 42-43. No such prejudice exists here. The requirement imposed by the LRC and modification of the mine plan reduced the proposed mineable acreage by moving the boundary 1,000 feet away from the school. It did not revise any other boundary, did not expand any other mining locations, and did not change anything of substance within the mine plan. Saxony had a full evidentiary hearing on its concerns regarding the original proposed mine plan. If no impact was shown during the evidentiary hearing for the original mine plan, it is beyond cavil that no impact exists to Saxony for the mine plan that the LRC approved, i.e. a mine plan which reduced the mineable acreage due to the imposed 1,000 foot setback. Absolutely no prejudice to Saxony exists in this matter.

In conclusion, analysis of the statutory scheme, the language used by the legislature, and existing case law provides clear support for the Court of Appeals' ruling. Accordingly, transfer to this Court is not warranted.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 22<sup>nd</sup> day of July, 2013, the foregoing was electronically filed and that service will be provided through the electronic filing system upon all counsel of record.

/s/ Brian E. McGovern