

IN THE CIRCUIT COURT OF COLE COUNTY

SAXONY LUTHERAN HIGH SCHOOL,)
INC.)
)
SAVE OUR CHILDREN'S HEALTH,)
INC.,)
)
Petitioners)
v.) Case No. 11 AC-00133
)
MISSOURI LAND RECLAMATION)
COMMISSION,)
)
Respondent.)

RESPONDENT'S MOTION TO AMEND JUDGMENT

Pursuant to Missouri Rules of Civil Procedure 73.01(d) and 78.04, Respondent Missouri Land Reclamation Commission ("Commission") moves the Court to amend its judgment because the Court committed prejudicial error as a matter of law by 1) failing to apply the statutory standard of standing for a public hearing in § 444.773.3, RSMo; 2) construing the word "may" as it is used in § 444.773.3, RSMo, as "shall" and thereby denying the Commission any discretion to deny a hearing request; and 3) failing to apply the correct standard of review in § 536.150, RSMo.

In support of its *Motion to Amend Judgment*, Plaintiff states as follows:

Facts

On October 4, 2010, Heartland Materials, LLC submitted an application to the Commission for a proposed 161-acre limestone quarry to be located just south of Fruitland, Cape Girardeau County, Missouri. Saxony Lutheran High School, Inc. and Save Our Children's Health, Inc. petitioned the Commission for a public hearing on the Heartland Materials permit application under § 444.773.3, RSMo, of the Missouri Land Reclamation Act. That statute states:

If the recommendation of the director [of the Land Reclamation Commission] is for the 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 hearing may be held. If a public meeting is requested pursuant to this chapter and the application agrees, the director shall, within thirty days after the time for such request has passed, order that a public meeting be held. The meeting shall be held in a reasonably convenient location for all interested parties. The applicant shall cooperate with the director in making all necessary arrangements for the public meeting. Within thirty days after the close of the public meeting, the director shall recommend to the commission approval or denial of the permit. If the public meeting does not resolve the concerns expressed by the public, ***any person whose health, safety or livelihood will be unduly impaired by the issuance of such permit may make a written request to the land reclamation commission for a formal public hearing. The land reclamation commission may grant a public hearing to formally resolve concerns of the public. Any public hearing before the commission shall address one or more of the factors set forth in this section.*** [Emphasis added.]

The Commission's regulations governing hearing requests, 10 CSR 40-10.080(2)(A), requires that for "a formal public hearing to be granted by the Land Reclamation Commission, the petitioner must first establish standing." The next

section, 10 CSR 40-10.080(2)(B), goes on to specifically define “standing” as used in this context:

(B) The petitioner is said to have standing to be granted a formal public hearing ***if the petitioner provides good faith evidence of how their health, safety, or livelihood will be unduly impaired by the issuance of the permit. The impact to the petitioner’s health, safety, and livelihood must be within the authority of any environmental law or regulation administered by the Missouri Department of Natural Resources.*** [emphasis added.]

On January 27, 2011, the Commission afforded the Petitioners the opportunity to show they have “standing” for a hearing on whether the Heartland permit should be issued. On February 7, 2011, the Commission decided that the Petitioners had not presented good faith evidence of how their health, safety or livelihood will be unduly impaired by the issuance of the permit. On March 7, 2011, Petitioners filed a Petition for Judicial Review and Declaratory Judgment.

Petitioners and Intervenor Heartland Materials filed cross motions for summary judgment. On November 4, 2011, the Court issued its *Findings of Fact, Conclusions of Law and Judgment and Order* (the “*Judgment*”). The Court found that “§ 444.773.3, RSMo and 10 CSR 40-10.080(2) do not impose an elevated or heightened requirement for a party to establish standing. In order to establish standing under the statute and rule, a party must allege facts showing that its health, safety or livelihood would be affected in some specific way by activities that could result from granting the surface mining permit.” *Judgment* at 10. The Court found that the Petitioners “have alleged

threatened injuries, however attenuated, remote or slight such alleged injuries may be, to their health, safety and livelihood as a result of the issuance of a surface mining permit to Heartland Materials. As a result, Petitioners have met the traditional test for standing in accordance with *Lujan v. Defenders of Wildlife, supra; Ste. Genevieve Sch. Dist. R. II v. Board of Aldermen, supra; and Eastern Missouri Laborers Dist. Council v. St. Louis County, supra.*” *Judgment* at 9.

With respect to the Commission’s authority to grant a hearing request, the Court found that the Commission has a mandatory obligation to grant a hearing request if a party establishes standing. Specifically, the Court ruled: “Although § 444.773.3 states, in part, “The land reclamation commission may grant a public hearing to formally resolve concerns of the public,” the Court construes the word “may” in such a way as to impose a mandatory obligation upon the Land Reclamation Commission to conduct a formal public hearing in the event a party first establishes standing. In this context, the Missouri Supreme Court has held that the word “may” can be construed to mean “shall” and to impose a mandatory obligation.” *Judgment* at 11.

Standard of Review

Pursuant to Missouri Rules of Civil Procedure 73.01(d) and 78.01, the Court may amend its judgment in a court-tried case upon good cause shown. While courts have broad discretion to grant a motion to amend judgment as to questions of fact, there is no discretion in the law of a case. *Rodman v. Schrimpf*, 18 S.W.3d 570, 573

(Mo. App. W.D. 2000); *Lashmet v. McQueary*, 954 S.W.2d 546, 549 (Mo.App. S.D. 1997).

Law and Argument

A. The Court erred as a matter of law when it did not apply the controlling statutory language for standing.

The Missouri Supreme Court has held that when a statute provides for standing, the plain language of the statute controls. *Mo. Bankers Ass'n v. Director of the Mo. Div. of Credit Unions*, 126 S.W.3d 360, 363 (Mo. banc 2003) (applying plain language to determining standing to challenge expansion of a credit union). *See also Continental Coal, Inc. v. Mo. Land Reclamation Comm'n*, 150 S.W.3d 371, 380-81 (Mo. App. 2004). The plain language of the statute under which the Petitioners sought a hearing from the Missouri Land Reclamation Commission allows that ***“any person whose health, safety or livelihood will be unduly impaired by the issuance of such permit may make a written request to the land reclamation commission for a formal public hearing.”*** § 444.773.3, RSMo [emphasis added]. This statutory requirement for standing is further interpreted by 10 CSR 40-10.080(2)(B), which requires a petitioner to provide “good faith evidence” that their health, safety or livelihood will be unduly impaired by the issuance of permit.

In its *Judgment*, the Court ignored the plain language of the applicable statute and regulation. The Court found that in order “to establish standing under the statute and rule, a party must allege facts showing that its health, safety or

livelihood would be affected in some specific way by activities that could result from granting the surface mining permit.” *Judgment* at 10. The Court did not require allegations of “undue impairment,” nor did the Court require good faith evidence. Instead, the Court relied upon allegations of beliefs and concerns that Petitioners would be harmed, without any allegations or evidence pertaining to the validity of the belief or concerns, the context in which they arose, or the regulatory restrictions application to limestone quarries in numerous environmental and mining regulatory schemes. *See Judgment, Findings of Fact*, ¶¶ A-O, p. 4-6. The Court conferred standing based solely upon Petitioners’ “alleged threatened injuries, however attenuated, remote or slight such alleged injuries may be, to their health, safety and livelihood as a result of the issuance of a surface mining permit to Heartland Materials.” *Judgment* at 9.

The Court’s conclusions of law with respect to standing are in stark contrast to the statutory standing requirement in § 444.773.3, RSMo, which requires, at a bare minimum, allegations of undue impairment, and more likely, a showing of undue impairment on behalf of the Petitioners. It directly conflicts with 10 CSR 40-10.080(2)(A), which requires Petitioners to establish undue impairment by good faith evidence.

Contrary to Petitioners’ briefing, Respondents do not interpret § 444.773.3 as requiring Petitioners to prove their “ultimate case” (i.e. that they will in fact be unduly impaired). Respondents have consistently argued that Petitioners are

simply required to produce more than beliefs or concerns. They are required to produce good faith evidence that will support or validate their beliefs or concerns.

As a matter of law, this error should be corrected and the Court's *Findings of Facts and Conclusions of Law* should be reevaluated in reference to the statutory standard for standing. If it is not, then all persons who claim any injury to health, safety or livelihood, no matter how "attenuated, remote or slight," and without any consideration of validity or context, will be entitled to a hearing. For example, persons living miles away from a quarry without being subject to any possible harm could obtain a hearing merely by alleging belief or concern that they will be harmed, regardless of how slight the harm. This result is inconsistent with the plain language of § 444.773.3, RSMo, and is in direct conflict with the Missouri Supreme Court's decision in *Mo. Bankers Ass'n v. Director of the Mo. Div. of Credit Unions*, 150 S.W.3d at 380-81.

B. The Court erred as a matter of law in finding that the statutory term "may" means "shall" in § 444.773.3, with respect to the Land Reclamation Commission's discretion to hold a public hearing.

Section 444.773.3, RSMo, contains the following sentence with respect to hearing requests:

The land reclamation commission may grant a public hearing to formally resolve concerns of the public.

Despite the extraordinary plainness of this sentence, the Court ruled that the Missouri Legislature actually did not mean "may" in this sentence; it really meant "shall." *Judgment*, at ¶ 23, p. 11. This conclusion of law eliminates all

discretion on the part of the Land Reclamation Commission with respect to hearings.

The primary rule of statutory construction “is to ascertain the intent of lawmakers by construing words used the statute in their plain and ordinary meaning.” *Hyde Park Hous. P’ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc. 1993). “Where the language is clear and unambiguous, there is no room for construction; it is presumed that the legislature intended every word, clause, sentence and provision of a statute have effect.” *State ex rel. Outcome, Inc. v. City of Peculiar*, 350 S.W.3d 57, 63 (Mo.App. W.D. 2011). The use of the term “may” in a statute implies that the “conferee of the power has discretion in the exercise of the power.” *State ex rel. Nixon v. Boone*, 927 S.W.2d 892, 897 (Mo.App. W.D. 1996).

In its Judgment, the Court cites to one Missouri case where the court interpreted “may” to mean “shall,” however, the circumstances warranting the exception to the primary rule of statutory construction discussed in that case does not apply here. *City of Moline Acres v. Heidbreder*, 367 S.W.2d 568, 572 (Mo. 1963). In *City of Moline*, the Missouri Supreme Court interpreted a number of zoning statutes together to find that a statute stating that a city “may” divide a municipality into zoning districts actually imposed a mandatory duty on the city to divide into more than one district, where the

city had established single family dwelling as the only zoning district for the entire city. 367 S.W.2d at 572. The Supreme Court was trying to avoid an absurd result.

There would be no absurd result from the interpretation of the plain language of § 444.773.3, RSMo. The only result from interpreting “may” as permissive in § 444.773.3, RSMo, is that the Land Reclamation Commission would have the discretion to deny a hearing request. Contrary to Court’s finding that this result is “inconsistent with the spirit and intent of 10 CSR 40-10.080(2)(A)”, this is not an unreasonable result, even if a petitioner alleges sufficient facts or presents sufficient evidence to establish standing. The Commission is the entity that will consider all of the information presented by petitioners, assess the credibility of the petitioners, evaluate the information in the context of the applicable regulatory scheme, and consider any information provided by the mining company and Commission staff. It is also charged administering the broad policy considerations of the Land Reclamation Act, such as “striking a balance between surface mining of minerals and reclamation of land subjected to surface mining.” § 444.762, RSMo.

In recent Supreme Court cases, the court has diligently looked to the plain and ordinary meaning of statutory language. *See Turner, et al. v.*

School District of Clayton, et al., 318 S.W.3d 660 (Mo. banc 2010)(“this Court does not apply the canons of interpretation or seek aids to interpret a statute when a statute is easily read and understood”); *Ins. Co. of State of PA v. Dir. of Revenue and Dir. of Ins.* 269 S.W.3d 32, 34, n.5 (Mo. banc 2008) (there is no need to resort to statutory interpretation when a statute is unambiguous). The Legislature could have given the petitioners an automatic right to a hearing. Instead, it chose plain language that would rest final discretion in the Commission. The Court’s refusal to apply the plain language is an error of law, which must be corrected.

C. Because the Court erred in concluding that the Commission did not have discretion to grant a hearing, it failed to apply the correct standard of review in § 536.150, RSMo.

The present case is an appeal of a noncontested administrative agency decision under § 536.150, RSMo. Section 536.150.1, RSMo, establishes a procedure whereby persons may obtain review of administrative agency decisions that are “noncontested,” or not otherwise subject to any provision for judicial inquiry or review of such decision. Of most importance to the present case is the last directive of § 536.150.1, RSMo, which reads in pertinent part: **“the court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative**

officer or body, such discretion lawfully exercised shall not be disturbed.” [emphasis added.]

The issue before the Court was whether the Petitioners should have been granted the privilege of having a formal public hearing conducted on Heartland Materials, LLC’s surface mining permit application. As discussed above, this is certainly a situation where the granting or withholding of a privilege is committed by law to the sole discretion of the Land Reclamation Commission. Consequently, it falls under that portion of § 536.150, RSMo, which requires the Court to uphold the decision unless finds that the Commission acted unlawfully.

The Court found that the Commission did not have discretion in granting a hearing, so it did not apply the standard of review required by § 536.150.1, RSMo. *Judgment*, p. 12-13. While the *Judgment* states that decision was “unlawful,” there is no finding that the Commission violated any law. Instead, the Court finds that the Commission’s interpretation of § 444.773.1, RSMo, was “unreasonable” and it abused its discretion in denying the petitioners a hearing. Essentially, the Court disagrees with the Commission’s decision, and is substituting its discretion for that of the Commission. The Court’s conclusion is in direct contradiction to § 536.150, RSMo, and constitutes an error of law.

Conclusion

Because the Court committed the above-described errors of law in its *Judgment*, Respondent respectfully requests that the Court amend its *Judgment* 1) to apply the statutory standard for standing in § 444.773.3, 2) to apply the plain language of § 444.773.3 to find that the Commission's decision of whether to grant a hearing is discretionary; and 3) to apply the correct standard of review required by § 536.150 for discretionary acts by administrative agencies in the granting or withholding of a privilege. If these three errors of law are corrected, the Respondent believes that the Court must uphold the Commission's decision as a lawful exercise of discretion.

Respectfully submitted,

CHRIS KOSTER
ATTORNEY GENERAL



Jennifer S. Frazier
Deputy Chief Counsel
Agriculture & Environment Division
Missouri Bar No. 39127
P.O. Box 899
Jefferson City, MO 65102-0899
Telephone: (573) 751-3460
Fax: (573) 751-8796
jenny.frazier@ago.mo.gov

ATTORNEYS FOR THE STATE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent via first class mail, postage prepaid, and sent via electronic mail this 2nd day of December, 2011.

Mr. Stephen Jeffery
231 S. Bemiston Avenue, Suite 800
Clayton, MO 63105
sjeffery@jefferylawgroup.com

Mr. Robert Hess
235 East High Street, Suite 200
P.O. Box 1251
Jefferson City, MO 65101
Robert.hess@huschblackwell.com



Jennifer S. Frazier
Deputy Chief Counsel
Agriculture & Environment