

Notice to Appellant's Attorney

Local rules may require supplemental documents to be filed. Please refer to the applicable rule for the district in which the appeal is being filed and forward supplements as required.

Certificate of Service

I certify that on 12/9/14 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.

Stephen Jeffery and Bruce Morrison, 300 Ozark Trail Drive, Ste. 216, Ellisville, MO 63011-2156 (via US Mail)

Brian E. McGovern, 825 Maryville Centre Dr., Ste. 300, Town & Country, MO 63017-5946 (via US Mail)

Lowell D. Pearson, P.O. Box 1251, Jefferson City, MO 65101 (via US Mail)

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/s/ Timothy P. Duggan

Appellant or Attorney for Appellant

Directions to Clerk

Serve a copy of the notice of appeal in a manner as prescribed by Rule 43.01 on the attorneys of record of all parties to the judgment other than those taking the appeal and on all other parties who do not have an attorney. (A copy of the notice of appeal is to be sent to the Attorney General when the appeal involves a felony.) Transmit a copy of the notice of appeal to the clerk of the Supreme Court/Court of Appeals. If a party does not have an attorney, mail the notice to the party at his/her last known address. Clerk shall then fill in the memorandum below. (See Rules 81.08(d) and 30.01 (h) and (i).) Forward the docket fee to the Department of Revenue as required by statute.

Memorandum of the Clerk

I have this day served a copy of this notice by regular mail registered mail certified mail facsimile transmission to each of the following persons at the address stated below. If served by facsimile, include the time and date of transmission and the telephone number to which the document was transmitted.

I have also transmitted a copy of the notice of appeal to the clerk of the

Supreme Court Court of Appeals, _____ District

Docket fee in the amount of \$ _____ has been received by this clerk which will be disbursed as required by statute.

A copy of an order granting leave to appeal as indigent.

Date

Clerk

Additional Sheet to Notice of Appeal

Saxony Lutheran High School, Inc., et al. v. Missouri Land Reclamation Commission, et al.
Case No. 11AC-CC00133
Cole County, Missouri

Respondents' Attorney:

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Respondent's Name:

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Save Our Children's Health, Inc.
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Phone: 314-561-8503

Intervenor's Attorney:

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Intervenor:

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Heartland Materials, LLC
P.O. Box 558
Benton, MO 63730

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FORM 1. CIVIL CASE INFORMATION FORM SUPPLEMENT

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD _____

[Please type or neatly print the information requested. This form must be filed with the Notice of Appeal (form 8-A) with the Circuit Clerk.]

Saxony Lutheran High School, Inc.
Save Our Children's Health, Inc.
Plaintiff

Stephen Jeffery
Bruce Morrison
Attorney's Name
300 Ozark Trail Dr., Ste. 216
Street Address
Ellisville, MO 63011
City Zip Code

vs.

Missouri Land Reclamation Commission
Defendant

Chris Koster, Attorney General by
Timothy P. Duggan
Attorney's Name
P.O. Box 899
Street Address
Jefferson City, MO 65102
City Zip Code

Strack Excavating, LLC
Intervenor

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City Zip Code

Heartland Materials, LLC
Intervenor

Lowell D. Pearson
Attorney's Name
P.O. Box 1251
Street Address
Jefferson City, MO 65101
City Zip Code

Date Notice filed in Circuit Court _____

The Record on Appeal will consist of a:

_____ Legal File Only or Transcript and Legal File. (This will include records filed pursuant to Rules 81.13 and 81.16)

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FACTUAL BACKGROUND: (Events Giving Rise to Cause of Action)

This is an appeal from the Cole County Circuit Court's judgment awarding Respondents/Plaintiffs attorneys' fees and expenses pursuant to § 536.087 RSMo. In the underlying action, Plaintiffs obtained a declaratory judgment under § 536.150 RSMo that they were entitled to a hearing before Appellant Land Reclamation Commission on their claim that issuance of a limestone quarry permit to Heartland Materials, LLC, would unduly impair their health, safety or livelihood. The Commission had denied the hearing request and granted Heartland Materials a permit, but the Circuit Court held that Plaintiffs had made a good faith showing for a hearing. The Circuit Court did not stay or vacate permit, however. The Commission appealed the Circuit Court's judgment and this Court affirmed.

When the underlying judicial action became final, the Commission appointed a hearing officer to conduct the hearing and report a recommended decision to the Commission. But the hearing never occurred because Plaintiffs entered a settlement agreement with Heartland Materials. The agreement provided certain benefits to Plaintiffs, in exchange for which they withdrew their request for a hearing and their challenge to the permit.

ISSUE(S):

(Anticipated to be Presented by the Appeal; Appellant is Not Bound by this Designation)

1. Whether the award should be reversed because it arose from a non-contested case under § 536.150, and the Circuit Court case was therefore not an "agency proceeding" as defined in § 536.085, for purposes of § 536.087?
2. Whether the award should be reversed because the Commission was acting as a tribunal, not an advocate for either Plaintiffs or Heartland Materials regarding the merits of the permit, when the Commission denied the hearing request?
3. Whether the award should be reversed because the Commission was reversed for an error on an interlocutory, procedural question, not on a final decision in a contested case?
4. Whether the award should be reversed because a contested case hearing on the merits of Plaintiffs' claims never occurred, in that

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- Plaintiffs withdrew their hearing request and waived their challenge to the permit issued by the Commission?
5. Whether the award should be reversed because Plaintiffs, by entering an agreement with Heartland Materials, did not “prevail” against the Commission, in that the settlement does not affect the Commission’s decision to issue the permit or the permit itself, the Commission was not a party to the settlement, the Commission was not required to make any concession to achieve the settlement, and the Commission was not required to approve the settlement?
 6. Whether the award, if not reversed, should be modified because the evidence was insufficient to support a special factor to justify exceeding the hourly-rate cap imposed on attorneys’ fees by § 536.087?
 7. Whether the award, if not reversed, should be modified to exclude the attorneys’ hours related to Plaintiffs’ hearing request during the Commission’s regular business meeting because the presentation was not an “agency proceeding” and was preliminary to the establishment of any “agency proceeding.”
 8. Whether the award, if not reversed, should be modified to exclude the attorneys’ hours related to settlement negotiations between Plaintiffs and Heartland Materials after the Circuit Court and this Court ordered an administrative hearing because the negotiations, to which the Commission was not a party, were not part of an “agency proceeding” and the settlement rendered an “agency proceeding” unnecessary and moot.

[Two (2) typewritten pages maximum]

(Added June 25, 1987, effective Dec. 1, 1987. Amended effective June 23, 1988)

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IN THE CIRCUIT COURT
COLE COUNTY, MISSOURI

SAXONY LUTHERAN HIGH SCHOOL, INC.,)
et al.,)
)
Petitioners,)
)
v)
)
MISSOURI LAND RECLAMATION)
COMMISSION, et al.,)
)
Respondents.)

Case No. 11AC-CC00133

**FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT ON
PETITIONERS' APPLICATION FOR AWARD OF ATTORNEYS' FEES**

Having reviewed the stipulation, exhibits, testimony, briefs, and proposed findings of fact and conclusions of law submitted by the parties, and being fully advised in the premises, the Court enters this order and judgment in favor of Petitioners and against the Respondent Missouri Land Reclamation Commission in accordance with the following findings of fact and conclusions of law.

Findings of Fact

1. In October 2010, Saxony Lutheran High School ("Saxony") became aware that two limestone quarries were proposed to be located next to Saxony's property.¹ One was proposed by Strack Excavating, LLC ("Strack") to be located immediately north of Saxony's property and the other was proposed by Heartland Materials, LLC ("Heartland") to be located immediately south of Saxony's property. Both proposed quarries had submitted applications to the Missouri Land Reclamation Commission ("Commission"). ¶ 20 of Joint Exhibit 1, Joint

¹The statute which led to the current controversy, § 444.773, R.S. Mo., has been revised substantially, effective August 28, 2014.

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Stipulation between Petitioners and the Missouri Land Reclamation Commission Regarding Petitioners' Application for Attorneys' Fees and Expenses Related to the Underlying Cause of Action (hereinafter, "Joint Exhibit 1"); Saxony Exhibit 4, ¶ 2.

2. Saxony contacted local attorneys in the Cape Girardeau area to assist Saxony in opposing the proposed quarries before the Commission, but determined that none were available to represent Saxony because of their lack of experience in Missouri administrative and environmental laws concerning mining permits. ¶ 20 of Joint Exhibit 1; Saxony Exhibit 4, ¶ 3; Testimony of Steven Fritzler.

3. Initially, Saxony, together with Save Our Children's Health, Inc., were represented by Lathrop & Gage in Jefferson City, with David Shorr as lead counsel. Mr. Shorr was a former director of the Missouri Department of Natural Resources and practiced environmental law. Lathrop and Gage's engagement letter provided that the firm's billing rates for this matter, as of November 3, 2010, would range from \$195 to \$560 per hour for lawyers and \$145 to \$195 per hour for paralegals. Mr. Shorr's rate was \$365 per hour. However, in December 2010, Lathrop and Gage withdrew as petitioners' counsel after the firm learned of a potential conflict. ¶ 20 of Joint Exhibit 1; Saxony Exhibit 4, ¶ 4.

4. When Lathrop and Gage withdrew as Saxony's counsel, Saxony interviewed other counsel with experience in Missouri administrative and environmental laws concerning mining permits. In December 2010, Saxony retained Stephen G. Jeffery with Thompson Coburn LLP to represent Saxony. Mr. Jeffery was a former General Counsel at the Missouri Department of Natural Resources and has substantial experience in this area of law. Mr. Jeffery was not available at an hourly rate of \$75.00. ¶ 20 of Joint Exhibit 1; Saxony Exhibit 4, ¶ 5; Testimony of Steven Fritzler.

5. In March 2011, Mr. Jeffery formed his own law firm and Saxony requested that Mr. Jeffery continue to represent Saxony. At Mr. Jeffery's request, in April 2011, Saxony asked Bruce A. Morrison also to represent Saxony. Mr. Morrison has significant experience in this area of law. ¶ 20 of *Joint Exhibit 1; Saxony Exhibit 4*, ¶ 6; *Testimony of Steven Fritzler*.

6. Neither Mr. Jeffery nor Mr. Morrison was available at an hourly rate of \$75.00. However, Mr. Jeffery reduced his regular hourly rate to \$195.00 and Mr. Morrison reduced his hourly rate to \$165.00. ¶ 20 of *Joint Exhibit 1; Saxony Exhibit 4*, ¶ 7.

7. The proceedings before the Commission on the proposed limestone quarries were conducted in accordance with § 444.773, RSMo, which set forth a multistep process for the issuance of a mining permit. Step one of the process consists of the permit application. Step two consists of the Department's review, determination of completeness, and public notice. Step three is public comment. Step four consists of the opportunity for the operator to provide a public meeting. Step five consists of the Commission's response to public comment and a fifteen - days period within which to request a formal public hearing. Step six consists of a hearing and opportunity to express concerns. Step seven consists of a vote by the Commission on whether objectors are entitled to an evidentiary hearing. Step eight consists of the Commission's determination to approve the permit, deny the permit, or conduct an evidentiary hearing.

Testimony of Bill Zeaman; § 444.773, R. S. Mo.

8. On January 27, 2011, the Commission's staff director, pursuant to § 444.773.3 RSMo and 10 CSR 40-10.080, presented requests by Petitioners for formal hearings to challenge separate applications filed by Heartland and Strack for permits to mine limestone, under §§ 444.760 through 444.789 RSMo, on properties adjacent to Saxony Lutheran High School. Petitioners presented their concerns and both Strack Excavating and Heartland Materials

provided comments in response to those concerns. *Joint Stipulation*, ¶ 1. Jennifer Frazier, an Assistant Attorney General assigned to assist the Commission, was present at this meeting. *State's Ex. C, p. 1; Testimony of Bill Zeaman.*

9. On February 7, 2011, the Commission determined that no standing had been established by Petitioners on the issue whether issuance of the permit to Heartland would unduly impair anyone's health, safety or livelihood. The Commission determined that Petitioners did establish standing for a formal hearing to challenge the permit application submitted by Strack. *Joint Stipulation*, ¶ 2. Jennifer Frazier, an Assistant Attorney General assigned to assist the Commission, was present at the February 7, 2011 proceeding. *State's Ex. D, p. 1 of 3; Testimony of Bill Zeaman.*

10. On February 7, 2011, the Commission issued a permit to Heartland. *Joint Stipulation*, ¶ 3.

11. The Commission does not dispute that it has authority to regulate the distance between Heartland's mine pit and the property line. *Testimony of Bill Zeaman.* The Commission, however, elected not to place such a condition in Heartland's permit because Heartland told the Commission it was willing to maintain a distance of 1,100 feet between the mine pit and Saxony's property line. *Testimony of Bill Zeaman.*

12. The Commission disputes its authority to impose conditions in a permit other than a condition which regulates the distance between the mine pit and the property line in the absence of agreement from the permit holder. *Testimony of Bill Zeaman.*

13. On March 7, 2011, Petitioners filed the petition in the underlying case, seeking judicial review of the Commission's determination that no standing had been established for a formal hearing to contest Heartland's permit application. *Joint Stipulation*, ¶ 4. Jennifer Frazier

was the assigned counsel to represent the Commission. *Testimony of Bill Zeaman*. The Court takes judicial notice of its file and finds that the Commission has been represented by the Attorney General throughout these proceedings.

14. In Count I of their petition, petitioners prayed for a declaration that the permit issued to Heartland provided no buffer distance protective of the health, safety and livelihood of Saxony and that the Commission's issuance of the mining permit to Heartland was arbitrary and capricious. In Count IV of their petition, petitioners prayed for a declaration that they had showed their health, safety and livelihood would be impaired by the issuance of a mining permit to Heartland, and, as a result, Petitioners established standing under § 444.773, R. S. Mo. *Petition for Judicial Review and Declaratory Judgment*.

15. The Court takes judicial notice of its file and finds that, throughout these proceedings, the Commission has advocated for the position that the Commission's issuance of the mining permit to Heartland was not arbitrary and capricious, and has advocated for the position that petitioners failed to show that their health, safety and livelihood would be impaired by the issuance of a mining permit to Heartland, and, as a result, Petitioners failed to establish standing under § 444.773, R. S. Mo.

16. On November 4, 2011, this Court entered its Findings of Fact, Conclusions of Law, Judgment and Order in the underlying case. This Court found that Petitioners had established standing for purposes of its request for a formal hearing before the Commission. This Court made no findings related to the merits of the dispute concerning the permit issued to Heartland and did not enjoin Heartland from engaging in activities authorized by the permit. This Court found the Commission's February 7, 2011 decision that Petitioners did not establish standing was not substantially justified. *Joint Stipulation*, ¶ 5.

17. Petitioners filed an application for attorneys' fees and expenses in relation to the Commission's meetings on January 27 and February 7, 2011, and the proceedings before this Court. *Joint Stipulation*, ¶ 6.

18. The Commission appealed this Court's judgment in the underlying cause to the Missouri Court of Appeals, which affirmed. *Joint Stipulation*, ¶ 7. In its opinion, the Court of Appeals noted that the inconsistency of the Commission's February 7, 2011 rulings on Saxony's standing "begs the question of its arbitrariness," and agreed that "the Commission's position was not substantially justified." ¶ 20 of *Joint Exhibit 1; Saxony Exhibit 9*. In a subsequent order, the Court of Appeals noted that it was "aware of no special circumstances that would make an award of reasonable fees and expenses unjust." ¶ 20 of *Joint Exhibit 1; Saxony Exhibit 10*.

19. Petitioners filed an application for attorneys' fees and expenses in relation to proceedings before the Court of Appeals, which determined that the application should be determined by this Court. *Joint Stipulation*, ¶ 8.

20. Following the decision by the Court of Appeals, the Commission hired a hearing officer to conduct a hearing on the merits of Petitioners' challenge to the permit application submitted by Heartland, on grounds that issuance of the permit will unduly impair any person's health, safety or livelihood. *Joint Stipulation*, ¶ 10.

21. Before any evidence was presented to the hearing officer, Petitioners and Heartland entered into a settlement agreement. *Joint Stipulation*, ¶ 10. The settlement agreement confers several significant benefits upon Saxony over and above any benefits conferred by the permit the Commission issued to Heartland. ¶ 20 of *Joint Exhibit 1; Saxony Exhibit 2; Testimony of Steven Fritzler*. These benefits include the following conditions which petitioners may enforce against the permit holder: The mine pit area shall not be located closer than 1,000 feet to the northern property boundary; Except for fill or ground leveling purposes, the

overburden disposal areas shall not be located closer than 1,000 feet to the northern property line; The primary crusher shall be located inside the mine pit; The secondary crushers and surge piles shall not be located closer than 600 feet to the northern property line; The permit holder shall plant and maintain a vegetation barrier; Limitations and notifications of blasting times; and Performance of a pre-blast survey. ¶ 20 of *Joint Exhibit 1; Saxony Exhibit 2*.

22. As required by the settlement agreement, Petitioners withdrew the hearing request and waived any further challenge to the permit issued to Heartland. Petitioners and Heartland first filed a joint motion to dismiss the matter, but the hearing officer recommended that the motion be denied. Petitioners and Heartland then jointly filed with the Commission a Stipulation for Dismissal of the matter. The Commission acknowledged the dismissal by letter. *Joint Stipulation, ¶ 11; Saxony Exhibit 7*.

23. The settlement agreement between Petitioners and Heartland does not modify the permit issued to Heartland Materials. *Joint Stipulation, ¶ 12*.

24. Petitioners have filed with this Court an amended claim for attorneys' fees and expenses to include all fees and expenses incurred up to and including their Stipulation for Dismissal of their request for a hearing to challenge the Heartland Materials permit and proceedings on the amended claim. *Joint Stipulation, ¶ 13*.

25. Counsel for petitioners has conferred with the Commission's counsel regarding the billed attorneys' fees and expenses. The parties have stipulated that in lieu of introducing paper copies of individual invoices, Saxony Exhibit 3 is a true and accurate summary of the hours, attorneys' fees, average hourly rates, and costs as reflected by the invoices submitted to Saxony in connection with these matters. In arriving at these numbers, Petitioners' counsel represents that the above stated hours do not include time billed by the attorneys either in relation to Petitioners' challenges to other permits issued to Heartland by the Missouri Department of

Natural Resources (“DNR”), or in relation to Petitioners’ challenges to permits issued by the Commission and the DNR to Strack. The Commission accepts the representation as made in good faith. The Commission does not stipulate to the rates charged by Petitioners’ attorneys.

Joint Stipulation, ¶ 14.

26. The total attorneys’ fee requested by Petitioners for the stipulated hours is \$155,814.00. *Joint Stipulation, ¶ 15.*

27. The total expenses requested by Petitioners are \$8,406.86. For purposes of the Joint Stipulation, the Commission accepts Petitioners’ representation that the expenses do not include expenses Petitioners incurred either in relation to Petitioners’ challenges to other permits issued to Heartland by DNR, or in relation to Petitioners’ challenges to permits issued by the Commission and the Department to Strack. *Joint Stipulation, ¶ 16.*

28. Each Petitioner has a net worth of less than \$ 7 million and employs less than 500 employees. *Joint Stipulation, ¶ 17.*

29. Heartland Materials, LLC, is not a party to this dispute between Petitioners and the Commission regarding Petitioners’ application for award of attorneys’ fees and costs. *Joint Stipulation, ¶ 18.*

30. The Commission has stipulated to the admissibility of Saxony Exhibits 1 through 10. *Joint Stipulation, ¶ 20.*

Conclusions of Law

1. Section 536.087.1, RSMo, provides, “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 or agency

proceeding, unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust.”

2. Section 536.087.2, RSMo, provides, “In awarding reasonable fees and expenses under this section to a party who prevails in any action for judicial review of an agency proceeding, the court shall include in that award reasonable fees and expenses incurred during such agency proceeding unless the court finds that during such agency proceeding the position of the state was substantially justified, or that special circumstances make an award unjust.”

3. Before the General Assembly had revised the Land Reclamation Act (effective August 28, 2014), section 444.773 set forth an unusual, multistep, process for the issuance of a mining permit which is at issue here. As the Commission explained at the start of the Commission’s January 27, 2011, proceeding, the Commission’s regulations required the petitioners to present “good faith evidence of how their health safety or livelihood will be unduly impaired by the issuance of the permit.” See 10 CSR 40-10.080(B). The Land Reclamation Program Director previously had recommended issuance of the permit. Petitioners presented their evidence at the Commission’s January 27 proceeding, as did the applicants for the permits. The parties, including the Commission, were represented by counsel at this proceeding. This Court received the transcript of the January 27 proceeding when the parties submitted the underlying case on motions for summary judgment.

4. Subsequently, on February 7, 2011, the Commission determined that no standing had been established by Petitioners on the issue of whether issuance of the permit to Heartland would unduly impair anyone’s health, safety or livelihood. *Joint Stipulation*, ¶ 2. The Commission was represented by counsel at this proceeding. *State’s Ex. D, p. 1 of 3; Testimony*

of Bill Zeaman. On February 7, 2011, the Commission issued a permit to Heartland. *Joint Stipulation*, ¶ 3.

5. The Court concludes that the statutory scheme in effect at the time required that there be proceedings before the Commission in which legal rights, duties or privileges of specific parties were required by law to be determined after hearing. This suit arose from those proceedings. The Commission has been represented by counsel throughout, the proceedings have been adversary proceedings throughout, and legal rights, duties or privileges have been determined from those proceedings.

6. Although § 444.773.3 of the Land Reclamation Act provides that a “public meeting or a hearing ‘may’ be held” instead of ‘shall’ be held, the Court of Appeals already has ruled in this case that “once the applicant refuses the petitioners’ request for a public meeting and the Director exercises his discretion to refer the petitioners’ objection to the Director’s permit issuance recommendation, there is no discretion on the part of the Commission to refuse a formal public hearing unless the Commission correctly concludes that the petitioners lack standing to be entitled to a formal public hearing. Once the petitioners establish standing, they are entitled to a formal public hearing before the Commission.” *Saxony Lutheran High Sch., Inc. v. Missouri Land Reclamation Comm’n*, 392 S.W.3d 52, 57 (Mo. App. W.D. 2013). If the petitioners were entitled to a formal public hearing once they established their standing, clearly, they also were entitled by law to a hearing to establish their standing in the first instance. Moreover, the standing determination is a prerequisite to the evidentiary hearing required by section 443.773; therefore the standing determination is part and parcel of the contested case hearing.

7. In a section 536.087 proceeding, a party “prevails” when it obtains a settlement or obtains a favorable decision on a single issue if the issue is one of significance to the underlying case. *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 353 (Mo. banc 2001). Further, the statutory definition of “prevails” includes a civil proceeding that arises out of a prior administrative proceeding that results in the correction or modification of the agency decision. *State, Div. of Child Support Enforcement v. Grimes*, 998 S.W.2d 807, 810 (Mo.App. E.D.1999). When an agency initiates an administrative action, and the agency subsequently appears by counsel in a circuit court proceeding to defend its action, it is an “agency proceeding” as defined under the statute. *Washington v. Jones*, 154 S.W.3d 346, 350 (Mo. App. E.D. 2004).

8. The Court concludes that the proceedings before the Commission consisted of an agency proceeding within the meaning of § 536.087, R.S. Mo.

9. In November 2012, Petitioners prevailed on an issue of significance to the underlying case when this Court entered Judgment in favor of Petitioners and against the Commission. In addition, this Court concluded the Commission’s position was not substantially justified. ¶ 20 of *Joint Exhibit 1; Saxony Exhibit 8*.

10. In January 2013, Petitioners prevailed on an issue of significance to the underlying case when the Court of Appeals, Western District, affirmed the Judgment of this Court. Further, the Court of Appeals noted that the inconsistency of the Commission’s rulings “begs the question of its arbitrariness,” and agreed that “the Commission’s position was not substantially justified.” ¶ 20 of *Joint Exhibit 1; Saxony Exhibit 9*. In a subsequent order, the Court of Appeals noted that it was “aware of no special circumstances that would make an award of reasonable fees and expenses unjust.” ¶ 20 of *Joint Exhibit 1; Saxony Exhibit 10*.

11. In August 2013, Petitioners prevailed when they entered into a settlement with Heartland (the quarry that was the subject of the underlying litigation), in which Heartland agreed to certain obligations which impose additional health, safety, and environmental protections to Petitioners that are over and above the terms and conditions reflected in the permit issued by the Commission to Heartland. ¶ 20 of *Joint Exhibit 1; Saxony Exhibits 2 and 7; Testimony of Steven Fritzler*. The Commission does not dispute that it has the authority to regulate the distance between a permit applicant's mine pit and an adjoining property owner's property line. The Commission, however, elected not to place such a condition in the permit it issued to Heartland.

12. There is no requirement that the Commission acquiesce to the additional protections obtained by petitioners by way of an amendment to the permit in order for petitioners to have prevailed. It is enough that petitioners obtained a settlement on an issue of significance to the underlying case. *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 353 (Mo. banc 2001). Moreover, the Commission put forth testimony that it does possess the authority to impose conditions in a permit other than a condition which regulates the distance between the mine pit and the property line if the permit holder agrees. *Testimony of Bill Zeaman*. The permit holder did agree to additional conditions through settlement. However, when the petitioners and the permit holder moved to dismiss the proceedings and requested that the Commission enter an order incorporating the settlement, the hearing officer recommended that the motion be denied. Petitioners and Heartland then jointly filed with the Commission a Stipulation for Dismissal of the matter. The Commission acknowledged the dismissal by letter. Saxony Exhibit 7. Thus, it was the Commission that chose not to approve the settlement.

13. Through settlement, Saxony was able to obtain an enforceable, protective, buffer zone between Heartland Materials' mine pit area and Saxony's property line. This buffer zone, in itself, confers a substantial benefit upon Saxony. Moreover, although Mr. Zeaman testified he believes that the Commission has no authority to impose any other permit condition in the absence of an agreement from the permit holder, that conclusion is questionable in light of the holding of the Eastern District Court of Appeals in *Saxony Lutheran High School, Inc. v. Missouri Dep't of Natural Resources*, 404 S.W.3d 902, 910 (Mo. App. E.D. 2013) ("... the legislature intended the Commission to have power to conditionally approve permits. As we have noted, every DNR agency we have examined includes a provision in some way for conditional approval of a permit. . . we have no reason to believe the legislature intended this agency to be the only permit-granting entity without power to impose conditions on such permits during the process").

14. The Court concludes that Petitioners are prevailing parties within the meaning of § 536.087.

15. The Court concludes that the Commission's position throughout this matter was not substantially justified.

16. The Court concurs with the reasoning of the Court of Appeals and concludes that there are no circumstances that would make an award of reasonable fees and expenses unjust.

17. The Court concludes that Saxony Exhibit 3, as stipulated to by the parties, accurately reflects the hours, rates, average rates, and costs claimed by the Petitioners in this matter.

18. The Court concludes that the hourly rates charged by petitioners' counsel are reasonable, and that the number of hours billed by petitioners' counsel is reasonable. It is

apparent from the efforts of Saxony to locate counsel that there existed a limited availability of qualified attorneys to represent Petitioners in this matter. Despite their efforts, Petitioners were unable to locate a qualified attorney to represent them at an hourly rate of \$75. The Court concludes that the prevailing hourly rate for the services performed by Petitioners' counsel greatly exceeds \$75.

19. Further, the Court takes judicial notice of its file and concludes that the legal services performed in this case were highly specialized and that this case involved a degree of complexity. The Court notes that the parties, and this Court, were presented with the testimony of a variety of experts, including air modelers and medical doctors.

20. Further, the Court takes judicial notice that The Missouri Bar maintains a series of committees for attorneys who practice in specific and identifiable substantive areas of law, including a committee for "Environmental and Energy Law." Accordingly, the Court finds that environmental law is an identifiable practice area specialty. *See Baker v. Dep't of Mental Health*, 408 S.W.3d 228, 242 (Mo. App. W.D. 2013).

21. Further, the Court finds that the health and environmental issues that formed the basis of the underlying case required attorneys with significant experience in the identifiable practice area specialty of environmental law. *Saxony Exhibits 5 and 6*.

22. The Court concludes that the total amount of fees in the amount of \$155,814.00, the overall average hourly rate of \$196.14, and the total expenses of 8,406.86 - as shown in Saxony Exhibit 3 - are reasonable.

For the foregoing reasons, the Court sustains Petitioners' Application for Award of Attorneys' Fees, and orders Respondent to pay forthwith to Petitioners the amount of \$155,814.00 in reasonable attorneys' fees and \$8,406.86 as reasonable expenses incurred.

So Ordered on this ___ day of August, 2014.

8/7/2014



Daniel Green, Circuit Judge

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