No. SC97695

IN THE SUPREME COURT OF MISSOURI

HICKORY NEIGHBORS UNITED, INC.,
Appellant,

v.

MISSOURI DEPARTMENT OF NATURAL RESOURCES, ET AL.,
Respondents,

and

TRENTON FARMS RE, LLC,
Respondent/Intervenor

SUBSTITUTE BRIEF OF RESPONDENTS MISSOURI DEPARTMENT OF NATURAL RESOURCES MISSOURI CLEAN WATER COMMISSION

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ATTORNEYS FOR RESPONDENTS MISSOURI DEPARTMENT OF NATURAL RESOURCES AND MISSOURI CLEAN WATER COMMISSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

Case Summary

Appellant Hickory Neighbors United, LLC, challenges a permit that Respondent Department of Natural Resources issued to Intervenor/Respondent Trenton Farms RE, LLC, under the Missouri Clean Water Law (Chapter 644, RSMo). The permit authorizes Trenton Farms to operate a concentrated animal feeding operation ("CAFO") for hogs. Hickory Neighbors appealed to Respondent Clean Water Commission, which approved the permit after a contested case hearing and a recommended decision submitted by the Administrative Hearing Commission. Hickory Neighbors United filed a petition for judicial review in the Court of Appeals, Western District. This Court transferred the case following the Western District's opinion.

This brief responds to the merits of the two points argued in Hickory Neighbors' substitute brief, but argues that Hickory Neighbors did not preserve certain issues in either the agency proceeding or the Court of Appeals. Respondents regard as abandoned issues Appellant has not argued in its substitute brief. *Wisdom v. Wisdom*, 689 S.W.2d 82, 85 (Mo. App. W.D. 1985); *Gover v. Empire Bank*, 574 S.W.2d 464, 468 (Mo. App. 1978).

Statement of Facts[1]

A. The administrative and judicial review process

A party adversely affected by the Department's issuance of a permit under the Clean Water Law may appeal to the Administrative Hearing Commission under § 644.051.6, RSMo. The AHC follows contested case procedures in §§ 536.063 through 536.090, RSMo, and its own rules at 1 CSR 15-3.200, *et seq*. As required by § 621.250, RSMo, the AHC conducts a hearing of evidence, prepares a record, and transmits the record and a recommended decision to the Clean Water Commission for a final decision. The Department bears the burden of proof. *See* §640.012, RSMo.

Section 644.051.6, RSMo, provides judicial review of the Clean Water Commission's decision under the procedures set forth in Sections 536.100 – 536.140, RSMo, by filing a petition with the Court of Appeals in the district where the permitted facility is located.

1. The AHC proceeding

a. Procedure

The Department issued the operating permit on November 23, 2016. (*ROA 1429.*) Hickory Neighbors United filed a complaint with the AHC on December 23, 2016. (*ROA 19.*) On January 4, 2017, Trenton Farms RE, LLC, filed a motion to intervene, which the AHC granted two days later. (*ROA 41.*) Hickory Neighbors filed an amended complaint on

1. References to the record on appeal are designated by (*ROA*) and Bates stamp page numbering, but without unnecessary zeros. Only the first page of a document will be indicated, unless a reference to another page within the document is needed. Statutory references are to the 2016 Revised Statutes of Missouri, unless otherwise indicated.

January 18, 2017. (*ROA 42*.) The amended complaint did not allege issues that were later raised on judicial review, namely that § 644.021, RSMo as enacted in 2016, under which several members of the Clean Water Commission were appointed, is unconstitutional; that the composition of the Commission violated § 644.021, RSMo, as it existed before the change in 2016, and that under the previous version of the statute, Commissioners Stan Coday, Ashley McCarty, and Patricia Thomas were not qualified to vote in this case.

Trenton Farms filed its answer to the amended complaint on January 31, 2017. (*ROA 73*.) The Department filed an amended answer to the amended complaint on February 1, 2017. (*ROA 51*.) The AHC conducted the hearing on May 4 and 5, 2017. The hearing was continued, by agreement of the parties, on June 21, 2017. (*ROA 1638*.)

b. The permit

The Department presented its case first through one witness, Gorden Wray, the permit writer. (*ROA 113*.) Mr. Wray described the permit, which the AHC received into the record as the Department's Exhibit I. (*ROA 138; Exhibit I beginning at 1427*.) The permit's "Detailed Operation Description" shows that the CAFO is to be located in Grundy County, and that it will house 6,376 swine over 55 lbs. each and 320 swine under 55 lbs. (*ROA 1430*.) The design includes two deep pit buildings – one of these for gestation and one as a gilt development unit (*ROA 119*.); one small pit building for farrowing; and the composter for mortalities. (*ROA 1430*.) The floors of the buildings will be slotted. *Id.* The manure storage structure types include underfloor pits with a capacity of 365 days, and a mortality composter with a 365-day storage capacity. (*ROA 1430*.) The farrowing building is designed to drain to the gestation building. *Id.* The pits beneath the buildings are

rectangular and made of concrete. (*ROA 120-121.*) The pits collect all manure generated in the buildings until it is later applied to land as fertilizer for crop production. (*ROA 120, 1429.*)

The "applicability" section of the permit states that the permit authorizes the operation of a no-discharge CAFO. (*ROA 1431, ¶4.*) The permit defines "discharge" as "the causing or permitting of one or more water contaminants to enter waters of the state." The definition further states: "A CAFO is said to discharge when it is designed, constructed, operated, or maintained such that a discharge of process waste to surface waters of the state will occur." (*ROA 1432.*) Any discharge will be a violation of this permit. (*ROA 1431, ¶4.*) The permit's requirements apply to all manure, litter, process wastewater, or mortality by-products generated within the CAFO production area. *Id.*, ¶ 2.

There is no permit more protective than a no-discharge permit. (*ROA 156.*) This permit does not allow a discharge for any reason, as contrasted with a federal permit, which would allow for a discharge during a chronic or catastrophic storm event. (*ROA 114.*) The permit applies only to requirements under the Missouri Clean Water Law and the implementing regulations; it does not apply to other environmental laws and regulations. (*ROA Exhibit I at 1431, ¶ 8.*) It also does not apply to such issues as odor and property values, as the Department stated in replying to public comments. (*ROA 128-130; Exhibit H at 1420.*)

c. The 100-year flood issue

Hickory Neighbors' amended complaint at the AHC consisted of eight counts, but only Count I is before this Court. Count I asserted that DNR and Trenton Farms failed to

adequately show that the manure storage areas are protected from inundation or damage due to the 100-year flood, as required by 10 CSR 20-8.300. Count I includes eight subparts. The first alleges that the FEMA-designated 100-year floodplain runs through the proposed CAFO site, a fact that the Department and Trenton Farms do not dispute. The other seven subparts assert deficiencies in the floodplain modeling report that Trenton Farms submitted with the application. (*ROA 44-45*.)

John Holmes, who prepared the report and testified for Trenton Farms, is a registered professional engineer in Missouri, with training and experience in hydrology and fluid dynamics. (*ROA 207*.) Mr. Holmes opined, based upon reasonable engineering and hydraulic certainty stemming from his modeling and observations of the site, that a conservative estimate of the base flood elevation for a 100-year event would be 744.35 feet, which will be below the lowest point of manure storage at the site. Specifically, the finished floor elevation (top of slat) for the gestation barn is 757.80' (about 13.5' higher than the flood water elevation); the bottom of the manure containment pit below the building is 747.8' (about 3.5' above the flood water elevation). Mr. Holmes sealed his report, in which he concluded that the permit application and supporting materials meet all regulatory design requirements, including protection from a 100-year flood event. (*ROA 1461*.) The modeling performed by Holmes is more reliable than the FEMA map, which provided no water elevation calculation. (*ROA 153*.) Mr. Wray relied upon this report. (*ROA 152*.)

The Department offered the report as Exhibit L, and the AHC admitted it because it was part of the permit application and Mr. Wray relied upon it. (*ROA 157, Exhibit L at*

1460.) The AHC deferred ruling on hearsay objections to Exhibit L (*ROA 157*), but overruled them when Trenton Farms offered Exhibit L through John Holmes. (*ROA 246.*) Hickory Neighbor did not allege in its amended complaint that the certifications of the report were legally insufficient on grounds that they violate §327.411.1, RSMo. Hickory Neighbors also did not object to the admission of the report into evidence on such grounds.

As noted by the AHC in its recommended decision, this is a second permit issued to Trenton Farms for the same location. (*ROA 1652.*) The first permit resulted in a decision by the Clean Water Commission, which was affirmed by the Court of Appeals, that Trenton Farms did not meet the requirements of the regulations as to protection from the 100-year flood. *Trenton Farms RE, LLC v. Missouri Dept. of Natural Resources*, 504 S.W.3d 157 (Mo. App. W.D. 2016) (*Trenton I*). (cited at *ROA 1652.*) The AHC noted that while many of the facts and some of the legal issues are the same as those in *Trenton I*, the AHC's recommendation here was based solely on the facts and testimony adduced as to the second permit. *Id.* In adopting the AHC's conclusions on the second application, the Clean Water Commission reached a conclusion opposite its decision on the first application. (*ROA 1789, ¶36.*)

As to the question whether the manure storage areas might be damaged or inundated by the 100-year flood, Mr. Wray testified that this permit application included "a lot more justification" than the one in the earlier case, explaining:

> They did a whole floodplain setting and found the base flood elevation at the site location and can definitively show it's not within the flood plain, and it is protected from inundation...they actually determined and calculated a base

> flood elevation for the 100-year floodplain at this site, and then can show with the maps associated in here that the facility is above that mark that they have calculated.

(*ROA 153-154.*)

Hickory Neighbors presented the deposition testimony of Paul Reitz, P.E., who has credentials similar to those of Mr. Holmes as an expert with respect to flood plain evaluation. (*ROA 554; Exhibit 20 at 1186.*) Mr. Reitz had some criticism of the Holmes report, but conceded that the Holmes report satisfied professional standards. (*ROA 1186. 1205-1206.*) Mr. Reitz also reached similar conclusions as Mr. Holmes about the flood water elevation in relation to the storage areas, allowing a deviation, higher or lower, of a foot or two, but closer to one foot. (*ROA 1205, 1230-1231.*) He conceded that expending money on a more accurate study would not have been justified. (*ROA 1230.*)

On August 31, 2017, the AHC issued its recommended decision, finding that DNR met is burden of proof that it issued the permit in accordance with the current law and regulations. (*ROA 1659.*)

2. Proceedings before the Clean Water Commission

The Clean Water Commission placed the AHC's recommendation on the agenda for a meeting scheduled for December 12, 2017. The Commission arranged for a court reporter to record the meeting (*ROA 1672*).[2] At the meeting, Hickory Neighbors did not

2. The parties stipulate that the transcript of the Clean Water Commission meeting on December 12, 2017, is part of the Record on Appeal. The discussion of this agenda item appears from *ROA 1720, line 20, through 1762.*

raise a contention that the certifications were legally insufficient on grounds that they violate §327.411.1, RSMo. Hickory Neighbors also did not contend to the Clean Water Commission that § 644.021, RSMo, under which several Commission members were appointed, is unconstitutional; that the composition of the Commission violated § 644.021, RSMo, as the statute existed before 2016; or that under the previous version of the statute, Commissioners Stan Coday, Ashley McCarty, and Patricia Thomas were not qualified to vote in this case.

The Clean Water Commission approved and signed the recommended decision, with corrections noted by interlineation. (*ROA 1760-1762.*) Commissioners McCarty, Thomas, Coday and Reece signed the AHC's recommended decision with their changes noted. (*ROA 1779-1801.*) Section 644.066.3(3), RSMo, requires that any final action by the Commission shall be approved by at least four members in writing.

3. Proceedings before the Court of Appeals

Hickory Farms filed a petition for judicial review in Court of Appeals, Western District, on January 10, 2018. The petition included seven numbered "grounds for appeal," two of which raised issues that were not before the Commission: (1) the claim that § 644.021, RSMo, under which several members of the Commission were appointed, is unconstitutional (Paragraph No. 1 under "grounds for appeal"); and (2) the claim that because the composition of the Clean Water Commission violated § 644.021 as the statute existed before 2016, Commissioners Stan Coday, Ashley McCarty, and Patricia Thomas

were not qualified to vote on the Trenton Farms permit (Paragraph no. 2).[3] The petition set forth allegations in 51 numbered paragraphs, none of which assert that the engineering certifications for the Holmes report were legally insufficient under §327.411.1, RSMo.

Hickory Neighbors attached to the petition 14 exhibits (numbered 100-113), which were not included in the Record on Appeal that was certified to the Western District by the Clean Water Commission. Hickory Neighbors later filed a supplemental record on appeal to add exhibits, and also attempted to include materials in the appendix to its brief. The Court of Appeals expressly did not consider any materials that were not a part of the record before the Clean Water Commission.

> Sitting as a court with original jurisdiction to conduct judicial review of a contested case pursuant to section 536.140, we are limited to review of the agency action "upon the petition and the record filed." Section 536.140.2.

Opinion, p. 21. In discussing Hickory Neighbors' contention that Commissioner Thomas was disqualified by bias – a contention not argued in its substitute brief here – the Court of Appeals noted that Hickory Neighbors had neither argued nor demonstrated that its complaint involved evidence that could not have been

3. Because of the constitutional issues, the Western District transferred the matter to this Court on February 16, 2018, pursuant to Article V, §3 of the Missouri Constitution. But this Court retransferred the case on May 14, 2018, because §644.051.6 vests the Court of Appeals with ***primary*** jurisdiction to conduct judicial review of a contested case; whereas, the state constitution vests this Court with ***appellate*** jurisdiction to review a case involving the validity of a statute.

produced in the exercise of reasonable diligence, or that was improperly excluded in the proceedings before the Commission. *Id.*

Hickory Neighbors raised the contention that the certifications were legally insufficient on grounds that they violate §327.411.1, RSMo, for the first time during oral argument. The Court of Appeals so noted in its opinion and did not rule on the merits of the contention because it was beyond the scope of Hickory Neighbor's brief. (*See* footnote 6 of the opinion.)

On application by Hickory Neighbors, this Court transferred the case following the opinion by the Court of Appeals.

Argument

Response to Appellant's Point I

Hickory Neighbors failed to preserve its constitutional challenges to HB 1713, and it fails to establish standing and redressability to raise its constitutional claims. In addition, its constitutional claims challenge the validity of service of members of the Clean Water Commission, and thus they can only be asserted in a *quo warranto* action initiated with the cooperation of a government attorney, and they are barred by the *de facto* officeholder doctrine for the same reason. If this Court reaches the merits, HB 1713's provisions all fairly relate to the single subject of the "regulation of water systems," which is clearly expressed in the bill's title, and they are all consistent with the original purpose of the bill.

Standard of Review. The validity of HB 1713's amendments to section 644.021.1, RSMo, under Article III, sections 21 and 23 of the Constitution raises a question of law to

which this Court applies *de novo* review. *Williams v. Mercy Clinic Springfield Communities*, 568 S.W.3d 396, 406 (Mo. banc 2019).

A. Hickory Neighbors failed to timely raise and preserve its constitutional challenges to the validity of HB 1713.

Hickory Neighbors concedes that it did not raise any challenge to the validity of HB 1713's amendments to section 644.021.1, RSMo, until after the Clean Water Commission made its substantive decision to approve the CAFO permit. App. Br. 9-10. By not challenging the validity of § 644.021 at any point in the course of the proceedings before the Administrative Hearing Commission and the Clean Water Commission, Hickory Neighbors failed to preserve the issue for further review.

A constitutional challenge must be presented at the earliest possible moment that good pleading and orderly procedure will admit under the circumstances of a given case, or it is waived. *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708 (Mo. banc 2011). A party raising a constitutional question must do so at the first available opportunity, designate specifically the provision claimed to have been violated, state the facts showing the violation, and preserve the constitutional question throughout for appellate review. *Id.* at 712-713. The purposes of the rule are to prevent surprise to the opposing party, and to permit the trier of fact an opportunity to fairly identify and rule on the constitutional issues. *Land Clearance for Redevelopment Authority of Kansas City v. Kansas University Endowment Ass'n*, 805 S.W.2d 173, 175 (Mo. banc 1991). "An attack on the constitutionality of a statute is of such dignity and importance that a record touching the

issues should be fully developed and not raised as an afterthought or in a post-trial motion or on appeal." *Id*. at 176.

In reviewing a contested case involving a constitutional question, this Court determines whether the administrative tribunal's decision is supported by competent and substantial evidence, independently rules on legal issues, and originally determines constitutional questions. *Gammaitoni v. Director of Revenue*, 786 S.W. 2d 126 (Mo 1990). But this Court has stressed the necessity of preserving a constitutional challenge in the record of evidence:

> We cannot assume a fact which the record shows is not a fact, or even fails to show is a fact. Nor will it make any difference whether there was only one or more than one issue below. If the constitutional question was not raised and preserved in the trial record it cannot be in the case on appeal, since our appellate jurisdiction is derivative and so limited by the Constitution.

City of St. Louis v. Butler Co., 219 S.W.2d 372, 378 (Mo. 1949) (overruling the doctrine that appellate jurisdiction can be based upon "an inherent constitutional question not raised below").

In this case, Hickory Neighbors claims to have been unable to raise the constitutional challenge until Hickory Neighbors was aggrieved by the Commission approving the permit (Appellant's brief at p. 31). But § 644.021, RSMo, was effective October 14, 2016, according to the Revisor's footnote. Hickory Neighbors filed its complaint on December 23, 2016. (*ROA 19.*) Hickory Neighbors could have made a record of evidence in order to preserve the constitutional questions for each stage of review.

Hickory Neighbors could have preserved the constitutional challenge in its motion to disqualify certain commissioners that Hickory Neighbors now argues to this Court would not be qualified under the previous version of § 644.021, RSMo.

Hickory Neighbors argues that it was "not aggrieved by the HB 1713 amendment to § 644.021.1 until the Clean Water Commission made the substantive decision on December 12, 2017 to approve the Trenton Farms CAFO permit." App. Br. 9. This argument misconstrues the nature of Hickory Neighbors' alleged injury—*i.e.*, the deprivation of the right to have its case considered by a lawfully constituted Commission. *See id.* Nothing in the statute prior to HB 1713 granted Hickory Neighbors any guarantee to any particular *outcome* of its case. Section 644.021.1 sets out the Commission's composition; it does not guarantee that the Commission will rule any particular way. Thus, to the extent that Hickory Neighbors suffered any cognizable injury—which it did not, *see infra*—it suffered that injury when its case was *considered* by the allegedly unlawfully composed Commission, not when that unlawfully composed Commission ruled against it. Otherwise, a litigant could do what Hickory Neighbors did here—wait until after it had lost its case before the Commission to decide whether to complain about the composition of the decision-making body. This perverse rule would allow every litigant to try its case and see what the outcome is before deciding whether to raise its objections to the authority of the decision-maker. Missouri law prevents such strategic behavior. *Prestige Travel*, 344 S.W.3d 708.

Hickory Neighbors is asking this Court to glean a record to support such arguments from the allegations set forth for the first time in its petition for judicial review and the

exhibits attached thereto. The Court should deny the purported constitutional challenge because Hickory Neighbors did not properly raise and preserve the issue at the earliest possible opportunity.

B. Hickory Neighbors lacks standing to challenge the composition of the Commission because its injury from the Commission's composition is hypothetical, speculative, and conjectural.

To the extent that it contends that its injury is the adverse decision against it, *see* App. Br. 9-10, Hickory Neighbors lacks standing to challenge the composition of the Commission because the question whether a differently composed Commission would have rendered a different decision is inherently hypothetical, speculative, and conjectural.

Standing requires that a party have a personal stake arising from a threatened or actual injury. *State ex rel Williams v. Mauer*, 722 S.W.2d 296, 298 (Mo banc 1986). The issue of standing is whether plaintiff has "a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief." *Schweich v.* Nixon, 408 S.W.3d 769, 775 (Mo. banc 2013). A party with standing must also ask the court to find that there is "a conflict that is presently existing," and "grant specific relief of a conclusive character." *Id.* at 774. To have standing to challenge the constitutionality of a statute, a party must be "adversely affected by the statute in question." *W.R. Grace & Co. v. Hughlett*, 729 S.W. 2d 203, 206 (Mo. banc 1987) (quoting *Ryder v. County of St. Charles*, 552 S.W.2d 705, 707 (Mo banc 1977). This is to ensure that there is "a sufficient controversy between the parties [so] that the case will be adequately presented to the court." *Id*.

An alleged injury that is merely speculative, hypothetical, or conjectural is insufficient to confer standing. In Missouri law, there is "no indication that mere speculation can confer standing." *State ex rel. Parsons v. Bd. of Police Comm'rs of Kansas City*, 245 S.W.3d 851, 854 (Mo. App.W.D. 2007); *see also, e.g., City of Slater v. State*, 494 S.W.3d 580, 589 (Mo. App. W.D. 2016).

Here, to the extent that Hickory Neighbors contends that its injury constituted the review of its case by an improperly constituted Commission, it had no excuse for failing to raise its constitutional challenge earlier. *See supra*, Part A. But to the extent that Hickory Neighbors contends that its injury constituted the actual adverse decision against it, *see* App. Br. 9 ("Appellant was not aggrieved . . . until the Clean Water Commission made the substantive decision to approve the Trenton Farms CAFO permit."), this alleged injury is inherently speculative and cannot support standing. It is entirely a matter of conjecture and speculation whether a differently constituted Commission would have rendered the same decision or a different decision, and Hickory Neighbors can cite no evidence to demonstrate otherwise. (In fact, for the reasons discussed below, it is extremely likely that any composition of Commission would have rendered the same decision based on the evidence.) Thus, on this formulation of its injury, its claim is based on "mere speculation" that cannot confer standing. *Parsons*, 245 S.W.3d at 854. For the same reason, its claim is not redressable, because there is no indication that composing the Commission differently would yield a different outcome. *City of Slater v. State*, 494 S.W.3d 580, 590 (Mo. App. W.D. 2016).

C. Hickory Neighbors' claims are not redressable because Hickory Neighbors does not argue that the composition of the Commission that reviewed its case would have violated the prior version of § 644.021.

In the Statement of Facts in its opening brief, Hickory Neighbors does not identify any appointments to the Clean Water Commission pursuant to the amended version of the statute that it contends would have rendered the composition inconsistent with the prior version of the statute. *See* App. Br. 4-6. Instead, Hickory Neighbors merely alleges that "[b]etween October 2017 and December 5, 2017, the Governor replaced the four Commissioners who voted to reverse and vacate the previous Trenton Farms permit with four new Commissioners." *Id.* at 5. Hickory Neighbors does not claim that the new appointments rendered the composition of the Commission inconsistent with the previous version of the statute, for example, by exceeding two members designated for agriculture, industry, and mining.4 This failure undermines Hickory Neighbors' standing and the redressability of its claims.

As noted above, in 2016, the legislature repealed § 644.021, RSMo, and enacted a new version. Prior to the repeal, the pertinent portion of the former provision read:

> …**All members shall be representative of the general interest of the public** and shall have an interest in and knowledge of conservation and the effects and control of water contaminants. **Two such members, but**

4 In fact, during this case, the Clean Water Commission included only two members designated for agriculture, industry, or mining positions, which is consistent with both the prior and the amended versions of the statute. *See* Clean Water Commission, https://boards.mo.gov/userpages/Board.aspx?40 (accessed March 25, 2019).

> **no more than two, shall be knowledgeable concerning the needs of agriculture, industry or mining and interested in protecting these needs** in a manner consistent with the purposes of sections 644.006 to 644.141. One such member shall be knowledgeable concerning the needs of publicly owned wastewater treatment works. **Four members shall represent the public**….

The pertinent language of the new § 644.021 reads:

> …**All members shall be representative of the general interest of the public** and shall have an interest in and knowledge of conservation and the effects and control of water contaminants. **At least two members shall be knowledgeable concerning the needs of agriculture, industry or mining and interested in protecting these needs** in a manner consistent with the purposes of sections 644.006 to 644.141. One such member shall be knowledgeable concerning the needs of publicly owned wastewater treatment works. **No more than four members shall represent the public**….

§ 644.021.1, RSMo (emphases added). The difference between the versions of the statute is that the current one provides more flexibility for appointments. Under both versions, all appointees shall be representative of the "general interest of the public," but under the prior version, four members "shall represent the public" – juxtaposed to the "no more than two" who "shall be knowledgeable concerning the needs of agriculture, industry or mining and interested in protecting these needs…."

Under the new version, "at least" two members may be knowledgeable concerning the aforesaid needs, and "no more than four" shall "represent the public." The new statute does not preclude a governor from appointing four members who shall "represent the public;" rather, it just removes the language that gave the governor no choice but to appoint four in that category, but no more than two in the other category.

Importantly, certain compositions of the Commission are consistent with both the prior and the amended version of the statute. A commission that contains two members knowledgeable of agriculture, industry, or mining; and four members who represent the public; satisfies *both* versions of the statute. Hickory Neighbors' opening brief does not argue or cite any evidence to demonstrate that the composition of the Commission that reviewed its case was inconsistent with the prior version of the statute. Accordingly, Hickory Neighbors has failed to identify any redressable injury. Even if the statute as amended by HB 1713 had been declared invalid, the composition of the Commission would still have been legal under the prior version of the statute.

"If the plaintiff's grounds for relief and remedy sought cannot alleviate the alleged injury, then, by necessity, the litigation cannot vindicate the plaintiff's alleged personal interest or stake in the outcome of the litigation. If that is the case, then the plaintiff has no standing to bring the claims he or she alleges." *St. Louis County v. State*, 424 S.W.3d 450, 453 (Mo. banc 2014) (citations and internal quotation marks omitted). For this reason, "to establish standing," a plaintiff is "required to demonstrate that the relief he seeks would redress the injury he has allegedly suffered." *City of Slater v. State*, 494 S.W.3d 580, 590 (Mo. App. W.D. 2016). "[W]hether Appellant has standing" to seek injunctive relief

depends on "the extent to which Appellant is suffering harm addressable through an injunction." *Eaton v. Doe*, No. ED106000, -- S.W.3d --, 2018 WL 2122907, at *1 (Mo. App. E.D. May 9, 2018) (citing cases). Here, even if Hickory Neighbors were to obtain the relief requested—a declaration that HB 1713 was enacted in violation of Article III, §§ 21 and 23 of the Constitution—it would make no difference to this case, because Hickory Neighbors has failed to argue that the Commission's composition on December 12, 2017, would not have been lawful anyway.

D. Hickory Neighbors cannot seek to disqualify any Commissioner or set of Commissioners because the exclusive method to remove a state official from office is a *quo warranto* action initiated with the cooperation of a government attorney.

To assert a redressable injury, Hickory Neighbors must identify at least one Commissioner or set of Commissioners whose appointment was unlawful because of the alleged invalidity of HB 1713. *See supra* Part I.C. For the reasons stated above, it has not done so. But even if it had, its constitutional claims would still be barred because the exclusive method of disqualifying a state officer from his or her office is a *quo warranto* action, which must be initiated with the cooperation of a government attorney.

Under Missouri law, private plaintiffs have no authority to seek to remove statewide officials from office through litigation. Rather, a private party seeking to oust a public official from office must proceed under the *quo warranto* statute, § 531.010, RSMo. Under that statute, the exclusive method to remove statewide officials from office is a *quo warranto* action initiated with the cooperation of a government attorney, *i.e.*, the Attorney

General or the local elected prosecutor. *See id.* The *quo warranto* statute provides the exclusive procedure under Missouri law to disqualify a state official from office by litigation, and a private plaintiff lacks authority to initiate a *quo warranto* action on his or her own. *Id.*

Hickory Neighbors does not dispute that the Commissioners on its case were at least *de facto* officeholders, even if the statute pursuant to which they were appointed was invalidly enacted. These Commissioners were appointed by the Governor pursuant to a duly enacted statute. Thus, they plainly "hold[] office by some color of right and title," and so their "acts . . . are not invalid as to third persons and the public." *Benne v. ABB Power T&D Co.*, 106 S.W.3d 595, 599 (Mo. App. W.D. 2003).

Because they are *de facto* officeholders, private plaintiffs like Hickory Neighbors have no authority to disqualify these Commissioners in litigation, even if Hickory Neighbors contends that the Governor lacked legal authority to appoint them. *Benne*, 106 S.W.3d at 597-98. In *Benne*, a private litigant challenged the validity under the Missouri Constitution of one of Governor Holden's appointments to the Labor and Industrial Relations Commission. *Id.* On appeal, the private litigant argued that it should have been permitted to submit evidence regarding the putative constitutional invalidity of the appointment before the LIRC. *Id.* at 598. The Court of Appeals held that any such evidence would have been irrelevant, because a private plaintiff lacks authority to challenge the legality of a public officer's service through litigation. "Even had a proper record been developed," the Court held, "this court is not in the position to rule via this case on the issue of whether [the commissioner] was properly on the LIRC. Rather, the

proper method for challenging the constitutional validity of an officer's service is through a *quo warranto* action." *Id.* "[G]enerally the courts will not inquire into an officer's qualifications except in a collateral proceeding by *quo warranto*." *Id.* at 600.

A private litigant like Hickory Neighbors lacks authority to initiate a *quo warranto* action on its own. The participation of a public official, either the Attorney General or an elected prosecutor, is required. *State ex inf. Graham v. Hurley*, 540 S.W.2d 20, 23 (Mo. banc 1976). Under Missouri law, "[t]he discretion of the government attorney is complete," and without the participation of such a government attorney, "the private relator can proceed no farther." *Id.*

In reaching this conclusion, the Court of Appeals in *Benne* relied on the well-established *de facto* doctrine for public officeholders, which poses an independent bar to relief for Hickory Neighbors here. "The *de facto* doctrine is a long standing rule to the effect that when an individual holds an office under a cloud as to current qualifications for the office, the acts of that officer are not invalid as to third persons and the public." *Benne*, 106 S.W.3d at 599. "The doctrine is founded on the societal need for stability arising from confidence in the acts of government when there is an issue as to legal qualification of a person holding office." *Id.* "An officer '*de facto*' holds office by some color of right and title." *Id.* Because the LIRC commissioner in *Benne* was the *de facto* officeholder, the court had no authority to consider the validity of his appointment except in a duly authorized proceeding in *quo warranto*. *Id.*

Benne's holding comports with the plain text of the *quo warranto* statute. That statute provides: "In case *any person* shall usurp, intrude into or unlawfully hold or execute

any office or franchise, *the attorney general of the state*, or *any circuit or prosecuting attorney of the county in which the action is commenced*," may initiate a *quo warranto* proceeding to remove that person from office. § 531.010, RSMo (emphases added). To the extent that Hickory Neighbors contends that "any person"—*i.e.*, any Commissioner or set of Commissioners—is unlawfully "intrud[ing] into or unlawfully hold[ing]" the office of Clean Water Commissioner, its claim constitutes a disguised *quo warranto* action. Without the participation of the Attorney General or an elected prosecutor, "the private relator can proceed no farther." *Graham*, 540 S.W.2d at 23.

Thus, the Court of Appeals' opinion on this specific question was both correct and rooted in longstanding, well-established doctrines. As the Court of Appeals reasoned, "in reality, Hickory Neighbors is asking this court to find that commissioners appointed pursuant to section 644.021.1 as amended were serving on the CWC unlawfully . . . . Hickory Neighbors does not have the authority to assert this claim." *In re Trenton Farms RE, LLC v. Hickory Neighbors United, Inc.*, No. WD81385, 2019 WL 73232, at *7 (Mo. App. W.D. Jan. 2, 2019). "The proper method for challenging the constitutional validity of a commissioner's service is through a *quo warranto* action." *Id.* (quoting *Benne*, 106 S.W.3d at 598) (alterations omitted). "Quo warranto . . . is to be used 'solely to prevent an officer or corporation of persons purporting to act as such from usurping a power which they do not have." *Id.* (quoting *State ex inf. Dykehouse v. City of Columbia*, 509 S.W.3d 140, 151 (Mo. App. W.D. 2017)).

"Here, Hickory Neighbors is seeking to prevent commissioners from usurping a power they are alleged not to have," *id.*, and so their proper remedy is in *quo warranto*.

But "a private party can never proceed in a quo warranto suit in his own name without the interposition of a proper state official." *Id.* (quoting *State ex rel. City of O'Fallon v. Collier Building Corp.*, 726 S.W.2d 339, 340 (Mo. App. E.D. 1986)). "[T]he relator in a quo warranto action may *only* be the attorney general or a prosecuting or county counselor of this state," because "quo warranto proceedings are an exercise of the police power of the state that cannot be delegated to private persons." *Id.* (emphasis in original) (quoting *Dykehouse*, 509 S.W.3d at 149) (alterations omitted). "The restriction on private plaintiffs is designed to prevent the harassment of public officials at the whim of private citizens." *Id.* (quoting *Dryer v. Klinghammer*, 832 S.W.2d 3, 4 (Mo. App. E.D. 1992)).

Moreover, as the Court of Appeals suggested, the closely related *de facto* doctrine also bars the relief that Hickory Neighbors seeks here. As noted above, "[t]he *de facto* doctrine is a long standing rule to the effect that when an individual holds an office under a cloud as to current qualifications for the office, the acts of that officer are not invalid as to third persons and the public." *Id.* at 8 (quoting *Benne*, 106 S.W.3d at 599) (citing *Boggess v. Pence*, 321 S.W.2d 667, 671-72 (Mo. banc 1959), and *Harbaugh v. Windsor*, 38 Mo. 327, 332 (1866)). "The doctrine is founded on the societal need for stability arising from confidence in the acts of government where there is an issue as to legal qualification of a person holding the office." *Benne*, 106 S.W.3d at 599. Here, Hickory Neighbors seeks to challenge one of the "acts" of the Commission that was supposedly unlawfully constituted—*i.e.*, the decision adverse to it. *See* App. Br. 9. Because the Commissioners are *de facto* officeholders who hold office pursuant to "some color of right and title," their

acts "are not invalid as to third persons and the public," including Hickory Neighbors. *Benne*, 106 S.W.3d at 599.

Hickory Neighbors contends that this Court should create an exception to both the *quo warranto* statute and the *de facto* doctrine for constitutional challenges to the composition of a decision-making body. App. Br. 11 (arguing for an exception to these doctrines "where a party timely challenges the composition of a decision-making body, as opposed to a challenge to the qualifications of individual members of the decision-making body"). But Hickory Neighbors offers no principled basis to distinguish between a challenge to the lawfulness of one member's service, and a challenge to the lawfulness of multiple members' service—and none exists. The plain language of the *quo warranto* statute, which provides the exclusive procedure to disqualify "*any* person" who purports to "usurp, intrude into or unlawfully hold or execute *any* office or franchise," § 536.010, RSMo, applies equally to single-member challenges and multiple-member challenges. And the policies underlying both doctrines are, if anything, stronger in the context of multiple-member challenges. It would be even more disruptive to the public interest to permit private litigants to seek to disqualify groups of state officials, such as entire Commissions, as opposed to mere individual office-holders. A challenge to the lawfulness of an entire panel or Commission—as here—casts "a cloud as to current qualifications" over the entire class of decisions of that Commission, where a challenge to a single member's qualifications would affect only those decisions in which that member personally participated. *Benne*, 106 S.W.3d at 599. And, for similar reasons, Hickory Neighbors' proposed exception would invite even greater "harassment of public officials

at the whim of private citizens." *Dryer*, 832 S.W.2d at 4. Thus, all the reasons that *Benne* and other cases provide in support of application of the doctrine to single members apply at least as strongly here.

For this reason, no Missouri court has adopted the novel exception to the *quo warranto* statute and the *de facto* doctrine that Hickory Neighbors proposes. Hickory Neighbors cites several cases that it contends supports this exception. App. Br. 11-14. But its principal cases are non-Missouri cases that do not address the question whether Missouri's *quo warranto* statute (or any analogous statute) provides the exclusive for the challenge, and so these cases have little persuasive value here. For example, neither *Ryder v. United States*, 515 U.S. 177 (1995), nor *Daniels v. Industrial Commission*, 775 N.E.2d 936 (Ill. 2002), discussed the applicability of *quo warranto* as a procedure to raise the claims at issue in those cases. In fact, Hickory Neighbors explicitly concedes that those cases did not address the dispositive question here: "[I]n *Ryder* and *Daniels*, neither the Supreme Court nor the Illinois Supreme Court suggested that such challenge to the composition of a decision-making body could only be brought as a quo warranto action. In fact, neither Court even mentions quo warranto in discussing a challenge to the composition of the decision-making body." App. Br. 13-14. Because the question of *quo warranto* was not raised or addressed in those decisions, they have no persuasive value on that question here.

The same is true of *State v. Ralls*, 8 S.W.3d 64 (Mo. banc 1999), which invalidated a statute that authorized the appointment of a "drug commissioner" in Jackson County who would have "all the powers and duties of a circuit judge," including the power "to preside

over a jury trial to determine an individual's guilt or innocence of a felony charge." *Id.* at 64. In invalidating the statute, this Court did not consider or address the question whether the *quo warranto* statute provided the proper procedure to remove the drug commissioner. *See id.* Hickory Neighbors contends that, in *Ralls*, "this Court showed its reluctance to apply the de facto doctrine when faced with questions involving 'strong policy concerning the proper administration of judicial business,'" App. Br. 12 (quoting *Ralls*, 8 S.W.3d at 65), but this statement misconstrues *Ralls*. In fact, *Ralls* did not consider or discuss the *de facto* doctrine. Rather, it applied the exception for questions involving "strong policy concerning the proper administration of judicial business" to overlook "procedural objections," such as reaching the constitutional question "even though [it was] not raised at the earliest practicable opportunity." *Ralls*, 8 S.W.3d at 65 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962)).

Finally, *Ralls* invalidated a statute that authorized a non-Article V judge to preside over the felony jury trial of a criminal defendant, which could result in the conviction and sentence of that defendant on felony charges. *Id.* Invalidating that statute, this Court emphasized the absolutely fundamental nature of the criminal trial in our system of justice, to conclude that the case involved "a strong policy concerning the proper administration of judicial business." *Id.* (quoting *Glidden*, 370 U.S. at 535). No comparably "strong policy," *id.*, is at issue in this case. This case involves a constitutional challenge to the validity of appointments to an administrative agency that conducts review of administrative decisions over admittedly important but entirely *civil* administrative matters, all of which are subject to direct judicial review by Article V courts. On this issue, the instant case directly

resembles *Benne*, which considered the validity of an appointment to the Labor and Industrial Relations Commission, and does not resemble *Ralls*. *See Benne*, 106 S.W.3d at 599. Thus, the "strong policy concerning the proper administration of judicial business" at issue in *Ralls* does not apply with anything like the same force here. *See also Ralls*, 8 S.W.3d at 65 (noting that "many functions [of a circuit judge] might properly be delegated to a drug court commissioner subject to the review of an article V judge").

In sum, the *quo warranto* statute provides the exclusive procedure to challenge the validity of appointments to the Clean Water Commission, and the *de facto* doctrine independently prohibits Hickory Neighbors from challenging the validity of the Commission's decision in this case.

E. HB 1713's single core subject is "the regulation of water systems," which is clearly expressed in its title, and each of its provision fairly relates to that single subject.

The Court should not reach the merits of the Hickory Neighbors' constitutional claims for all the reasons stated above. But if it does, the Coalition's claims fail on the merits because the statute does not violate the Constitution's single-subject, clear-title, or original-purpose requirements.

Article III, § 23 provides that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title." The "bill as enacted is the only version relevant to the single subject requirement." *Mo. State Med. Ass'n v. Mo. Dep't of Health*, 39 S.W.3d 837, 840 (Mo. banc 2001). Focusing on the final title of the bill, the test is whether all provisions of the bill "fairly relate to the same subject, have a natural connection therewith

or are incidents or means to accomplish its purpose." *Hammerschmidt v. Boone Cty.*, 877 S.W.2d 98, 102 (Mo. banc 1994). As this Court has said for 150 years, the "'subject' within the meaning of article III, § 23, includes all matters that fall within or reasonable relate to the general core purpose of the proposed legislation." *Id.* (citing *State v. Mathews*, 44 Mo. 523, 527 (1869)). "The subject of a bill may be 'clearly expressed by . . . stating some broad umbrella category' when a bill has 'multiple and diverse topics' within a single, overarching subject." *Am. Eagle Waste Indust. v. St. Louis Cty.*, 379 S.W.3d 813, 826 (Mo. banc 2012) (per curiam) (quoting *Jackson Cty. Sports Complex Auth. v. State*, 226 S.W.3d 156, 160 (Mo. banc 2007)).

The Court has upheld bills similar to H.B. 1713 in scope against single-subject challenges:

- "environmental control" included provisions relating to release of hazardous substances, USTs, and asbestos abatement projects. *Corvera Abatement Techs., Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 862 (Mo. banc 1998).
- "environmental regulation" included provisions relating to a surface mining fee, improper waste disposal criminal penalties, and solid waste collection services for political subdivisions. *Am. Eagle Waste Indus.*, 379 S.W.3d at 826.
- "education" included provisions increasing taxes to fund education programs. *Akin v. Director of Revenue*, 934 S.W.2d 295, 301 (Mo. banc 1996).

- "transportation" included various provisions relating to billboards. *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 328-29 (Mo. banc 2000).
- "health services" included provisions relating to health insurance, medical records, and standard information. *Mo. State Med. Ass'n v. Mo. Dep't of Health*, 39 S.W.3d 837, 840-41 (Mo. banc 2001).
- "intoxicating beverages" included various provisions relating to liquor control. *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325-26 (Mo. banc 1997).

HB 1713's title, relating to the "regulation of water systems," covered nine statutory provisions. Hickory Neighbors does not dispute that eight of the nine provisions of HB 1713 fairly related to the "regulation of water systems." *See* App. Br. 18. But Hickory Neighbors contends that the provision relating to the Clean Water Commission lies outside the single subject of the bill, because it urges that the phrase "water systems" refers only to "*public* water systems – a subject matter over which the Clean Water Commission has no authority or jurisdiction." App. Br. 17 (emphasis added). Thus, Hickory Neighbors seeks to graft a limitation on the scope of the single subject expressed in the title of the bill that is not present in the text of the bill. *Id.* This attempt fails. The single subject of the bill, by its plain terms, refers to the regulation of "water systems," not just "public water systems." The plain meaning of "water systems" includes wastewater systems that are directly regulated by the Clean Water Commission, public drinking water systems that benefit from the Commission's rules and regulations that protect the "waters of the state," and natural water systems around the state like rivers and streams—all of which are

hydrologically interconnected and interrelated. *See* § 644.011, RSMo. Hickory Neighbors cites no cases to support its attempt to artificially narrow the subject of the bill in this manner, and the cases cited above indicate that the subject "regulation of water systems" identifies a valid subject at a perfectly adequate level of generality.

A fair review of the bill's provisions demonstrates that all its provisions relate to the single subject of the "regulation of water systems." Hickory Neighbors concedes that "HB 1713 did contain several provisions affecting 'water systems,'" including "design-build contracts for public water supply systems; establishing a Multipurpose Water Resource Program under Chapter 256, RSMo; notification of changes in fluoridation by a public water system; and requiring DNR to provide community assistance to municipalities." App. Br. 18. As noted, Hickory Neighbors admits that the design-build contract provisions in Section 67.5070 of H.B. 1713 relate to the "regulation of water systems." *Id.* But section 67.5070.4 allows for funding consideration of design-build contracts by the Water and Wastewater Loan Fund, and the Clean Water Commission administers the Water and Wastewater Loan Fund. Thus, HB 1713's Section 67.5070 relates to the Commission and its jurisdiction, which undercuts Hickory Neighbors' argument.

In addition, Hickory Neighbors does not dispute that the wastewater treatment system provisions in Section 644.200 of HB 1713 relate to the "regulation of water systems." But the Clean Water Commission's oversight extends to "treatment facilities and sewer systems" and "wastewater treatment plants." § 644.026(15), RSMo; § 644.053.1(1), RSMo). Thus, H.B. 1713's Section 644.200 also relates to the authority of the Clean Water Commission.

Hickory Neighbors also admits that the fluoridation of public water supplies provisions in Section 640.136 relate to the "regulation of water systems." App. Br. 18. But the Clean Water Commission is charged with considering the impact its decisions may have on drinking water. § 644.143, RSMo. The Clean Water Commission also is required to implement the intended use plan developed by the Safe Drinking Water Commission. § 644.116, RSMo. Thus, H.B. 1713's Section 640.136 also relates to the Commission and its authority.

Further, Hickory Neighbors admits that the remaining five sections in Section 256 of HB 1713 relate to the "regulation of water systems." App. Br. 18. The Section 256 amendments relate to construction-related activities for public drinking water supply projects. But the Commission may authorize state assistance to local bodies "to assist them in the construction of public drinking water and water pollution control projects." § 644.101, RSMo. Though a separate funding source, HB 1713's Section 256 involves the same projects in which the Commission also may be involved.

In short, Hickory Neighbors does not dispute that eight of nine sections of H.B. 1713 fairly relate to the "regulation of water systems." But those eight sections involve or relate to the Commission and its regulatory powers. Thus, the provisions relating to the composition of the Clean Water Commission are closely related to the subject of the rest of the bill—all relate closely to the "regulation of water systems." Indeed, given the close hydrological connection among all water systems in Missouri—both public and private—Hickory Neighbors' attempt to draw an artificial distinction between the regulation of

"public water systems" and all other "water systems" is no more convincing from a scientific perspective than from a legal perspective.

HB 1713 does not resemble the few bills that this Court has invalidated for violating Article III, § 23. In these cases, the subjects of the provisions at issue were entirely unrelated to the bills' subjects. For example, explosives permits did not relate to fish protection and preservation. *State v. Hurley*, 167 S.W. 965, 966 (Mo. 1914). Similarly, exclusive Supreme Court appellate jurisdiction over circuit court review of administrative decisions did not relate to public works construction wages. *United Bhd. of Carpenters & Joiners of Am., Dist. Council, of Kansas City & Vicinity v. Indus. Comm'n*, 352 S.W.2d 633, 635 (Mo. 1962). Likewise, a new form of county governance previously unknown in Missouri did not relate to elections. *Hammerschmidt v. Boone Cty.*, 877 S.W.2d 98, 103 (Mo. banc 1994). Finally, statewide office candidates did not relate to political subdivisions. *Rizzo v. State*, 189 S.W.3d 576, 579 (Mo. banc 2006) (per curiam). Because the Clean Water Commission regulates water systems and HB 1713 relates to the "regulation of water systems," this bill does not involve and unrelated subject matter. Instead, HB 1713 closely resembles previous bills upheld by this Court relating to "environmental control" or "environmental regulation."

F. HB 1713's original purpose of regulating water systems did not change during the bill's passage through the General Assembly.

Article III, § 21 provides that "no bill shall be amended in its passage . . . as to change its original purpose." The original purpose requirement "was not designed to inhibit the normal legislative processes, in which bills are combined and additions

necessary to comply with the legislative intent are made." *Blue Cross Hosp. Serv., Inc. of Mo. v. Frappier*, 681 S.W.2d 925, 929 (Mo. banc 1984), *vacated on other grounds by Blue Cross Hosp. Serv., Inc. of Mo v. Frappier*, 472 U.S. 1014 (1985), *original judgment confirmed by Blue Cross Hosp. Serv., Inc. of Mo. v. Frappier*, 698 S.W.2d 326, 328 (Mo. banc 1985). "Alterations that bring about an extension or limitation of the scope of the bill are not prohibited; even new matter is not excluded if germane." *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325-26 (Mo. banc 1997).

Courts determine a bill's original purpose by looking to the bill at the time of its introduction in the General Assembly. *Mo. State Med. Ass'n v. Mo. Dep't of Health*, 39 S.W.3d 837, 839 (Mo. banc 2001). And the original purpose may be ascertained without referring to the original title. As this Court has held, "the Constitution does not require that the original purpose be stated anywhere, let alone in the title as introduced." *Id.* In fact, even when a bill's original title includes the specific statutes to be amended or repealed, the bill's original purpose is "not necessarily limited by specific statutes referred to in the bill's original title or text." *McEuen ex rel. McEuen v. Mo. State Bd. of Educ.*, 120 S.W.3d 207, 210 (Mo. banc 2003).

This Court has upheld bills similar to HB 1713 in the face of original-purpose challenges. For example, the Court upheld a bill authorizing political-subdivision cooperation agreements and an exhibition center and recreational facility district because the original purpose of the legislation "was regulating taxes even though the original title stated 'relating to city sales taxes.'" *St. Louis Cty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 715 (Mo. banc 2011). Similarly, the Court upheld the adoption of federal special

education services standards because the original purpose of the legislation was educational placement of special education students, even though the original title stated "relating to resolution conferences." *McEuen*, 120 S.W.3d at 210. Likewise, the Court upheld a bill containing a prohibition of certain loan arrangement fees because the original purpose of the legislation related to credit transactions, even though the original title stated "relating to interest." *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 38 (Mo. banc 1982); *see also Mo. State Med. Ass'n*, 39 S.W.3d at 840 (upholding a bill requiring information about breast implantation because the original purpose of the legislation related to mandating health services for serious illnesses, even though the original title stated "relating to insurance coverage for cancer early detection").

Hickory Neighbors presents no arguments in favor of its original-purpose challenge that differ from its single-subject challenge, discussed above. *See* App. Br. 16-19. In other words, Hickory Neighbors presumes without textual support that the original purpose of the bill was to regulate only *public* water systems, not all water systems. App. Br. 17. This artificial attempt to narrow the original purpose of the bill by focusing solely on the original bill's title is foreclosed by the cases cited above. And, for the reasons discussed above, all provisions of HB 1713 as passed relate to the regulation of water systems, consistent with the bill's original purpose.

This is not a case where there is no logical or remote connection between HB 1713's original purpose and the Clean Water Commission. Thus, HB 1713 does not resemble the bills which this Court has held to violate the original-purpose requirement, because those cases involve instances where provisions in the final bill were not remotely connected to

the original subject matter in the bill. *See Legends Bank v. State*, 361 S.W.3d 383, 387 (Mo. banc 2012) (ethics and capitol-keys provisions "are not logically connected or germane to procurement"); *Missouri Ass'n of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006) (adult entertainment provisions "were not remotely within the original purpose" of alcohol-related traffic offenses); *Allied Mut. Ins. Co. v. Bell*, 185 S.W.2d 4, 8 (Mo. 1945) (taxation definitions were not related to elimination of certain taxation deductions). Instead, HB 1713 directly resembles the bills upheld by the Court in *Prestige Travel*, *McEuen*, and *Lincoln Credit*, because there is a very close logical connection between the "regulation of water systems" and the Clean *Water* Commission.

The original purpose of "regulation of water systems" was consistent with the final version of H.B. 1713. Accordingly, H.B. 1713 did not violate the Constitution's original purpose requirement.

Response to Appellant's Point II

Competent and substantial evidence supports the Commission's decision that manure storage areas are protected from inundation by a 100-year flood, in compliance with 10 CSR 20-8.300(4)(A), because the evidence indicates that structures within the FEMA floodplain stand above the water level for a 100-year flood, and Appellant's chief argument on this point is not preserved.

1. Standard of Review for Point II

Section 640.010, RSMo, provides that decisions of the Department of Natural Resources director shall be subject to appeal as provided by law. Section 621.250, RSMo, transferred to the Administrative Hearing Commission ("AHC") "all authority to hear

contested case administrative appeals granted to the clean water commission in chapter 644…." Section 621.250 authorizes the AHC to conduct a hearing and send the record with a recommended decision to the Clean Water Commission, which makes the final decision. Subsection 3 of the statute requires the decision to be based "only on the facts and evidence in the hearing record." Section 644.051.6, RSMo, allows the Clean Water Commission to adopt, modify, or vacate the AHC's recommended decision. If the Clean Water Commission changes a finding of fact or conclusion of law, or modifies or vacates the recommended decision, the Commission shall issue its own decision, which shall include findings of fact and conclusions of law.

Under the statutory provisions cited above, the administrative proceeding is a contested case, as defined by § 536.010(4), RSMo: "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Review of a contested case is subject to the criteria of § 536.140, RSMo, upon the record of the agency. *Bowen v. Missouri Dept. of Conservation*, 46 S.W.3d 1, 6-7 (Mo. App. W.D. 2001). The reviewing court must defer to the agency's determination on the credibility of witnesses. *Phillips v. Schafer*, 343 S.W.3d 753, 757 (Mo. App. E.D. 2011). The court will not disturb the Commission's factual findings unless they are against the overwhelming weight of the evidence on the whole record, in which case they would not be supported by competent and substantial evidence. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

2. The Commission correctly applied the law to credible evidence that manure storage areas located in the FEMA-designated flood plain will be protected from inundation and damage.

Manure storage areas appear to be in the 100-year flood plain as depicted on a FEMA map. Paragraph no. 33 of the AHC's recommended decision so states. But that paragraph (with the correction noted by the Clean Water Commission shown in parenthesis) further provides:

> …however, taking into account the base flood elevations of the 100-year floodplain, the worst case scenario is that flood elevation is 755.35', without any fill, of the principal building sites. This base flood elevation is 13.5' ~~above~~ (error – should read "below") any opening in the CAFO buildings, plus or minus a foot. The lowest proposed pit of any CAFO building, the gestation barn, is 3.5' above the base flood elevation. Therefore, all of the proposed buildings are above the base flood elevation, even though located in the area mapped by Holmes as within the boundary lines of FEMA map Zone A.
>
> (*ROA 1788*.)

Paragraph no. 36 concludes, as a fact, that the CAFO building site is protected from inundation or damage due to the 100-year flood. (*ROA 1789*.)

In determining that the construction of the CAFO buildings will be above the calculated flood plain elevation, the Commission expressly relied upon the certifications of two Trenton Farms engineers, including John Holmes, P.E., who conducted modeling

of the 100-year flood. The Commission also relied upon Appellant's own expert, Paul Reitz, P.E., who essentially concurred with Holmes' calculations, give or take a foot. (*ROA 1797*.) Because the FEMA Map Zone A presents only a horizontal boundary line, the Commission relied upon calculations and modeling of flood water elevations to determine that areas within that boundary will be protected from inundation and damage.

In the "conclusions of law" section, the underlying decision cited 10 CSR 20-8.300(4), which expressly requires that manure storage structures, confinement buildings, open lots, composting pads, and other manure storage areas in the production area "shall be protected from inundation or damage due to the 100-year flood." (*ROA 1795-1797*.) The rule does not expressly prohibit location of such areas in a 100-year flood plain; rather, the rule unambiguously allows manure storage in such a location, so long as it is "protected from inundation or damage." *Id.* In applying the regulation to the facts, the Commission relied upon guidance by the Court of Appeals in a previous appeal from an earlier Trenton Farms permit: "This protection may be accomplished by constructing all listed sites above the one hundred-year flood plain or by including with the permit application certification from an engineer that all relevant sites are protected." (*Id*.); *Trenton Farms RE, LLC v. Missouri Dept. of Natural Resources,* 504 S.W.3d 157, 161 (Mo. App. W.D. 2016). Consistent with this analysis, the Court of Appeals, in its opinion in the present matter, stated in footnote 7 that:

> …Though the FEMA 100-year flood plain boundaries are relevant, they are not controlling. The issue is whether, if structures are within those boundaries, they are nonetheless protected from inundation or damage.

This Court should also so conclude.

3. Appellant did not preserve the issue whether the AHC improperly relied upon professional engineering certifications as legally insufficient.

The Court of Appeals, in footnote 6 of its opinion, stated:

> During oral argument, Hickory Neighbors challenged for the first time the legal sufficiency of professional engineering certifications relied on by the AHC to make its findings. This issue is not preserved for our review as it exceeds the scope of the point relied on.

Nothing in the record contradicts this statement, and it was correct. Further, Hickory Neighbors did not allege in the first amended complaint filed with the AHC that the certifications were insufficient on grounds that they violate §327.411.1, RSMo. Also, Hickory Neighbors did not object to the legal sufficiency of the certifications on such grounds during the hearing. Finally, Hickory Neighbors did not include such an allegation in the petition for judicial review. It would be inappropriate for this Court to consider on transfer, for the first time, that the finder of fact could not consider the certifications on the basis of an objection that was not raised to the fact finder. *See McHaffie v. Bunch*, 891 S.W.2d 822, 830 (Mo. banc 1995) (holding that a party who fails to object to testimony at trial fails to preserve the issue for appellate review) (citing *Williams v. Enoch*, 742 S.W.2d 165, 168 (Mo. banc 1987)); *see also id.* (holding that a party is not permitted to advance on appeal an objection different from that stated at trial) (citing *Wilson v. Shanks*, 785 S.W. 2d, 282, 285 (Mo. banc 1990)).

The Court should deny Point II.

Conclusion

The Court should affirm the Clean Water Commission's decision.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief complies with Supreme Court Rule 84.06(b) and contains 11,977 words.

/s/ *D. John Sauer*
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on the 8th day of July, 2019.

/s/ *D. John Sauer*
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