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IN THE SUPREME COURT OF MISSOURI

Case No. SC97695

IN RE TRENTON FARMS RE, LLC, PERMIT NO. MOGS10520; MISSOURI DEPARTMENT OF NATURAL RESOURCES; and MISSOURI CLEAN WATER COMMISSION

Respondents.

v.

HICKORY NEIGHBORS UNITED, INC.,

Appellant.

RESPONDENT TRENTON FARMS RE LLC'S SUBSTITUTE BRIEF

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STANDARD OF REVIEW

Concerning the standard of review, in *Trenton Farms RE, LLC v. Mo. Dep't of Natural Res.*, 504 S.W.3d 157, 160 (Mo. App. W.D. 2016), the Missouri Court of Appeals, Western District, previously stated:

> Section 644.051.6 provides that decisions by the CWC shall be subject to appellate review pursuant to chapter 536 of the Missouri Administrative Procedure Act. Section 536.140.2 provides that, on review, this Court may determine whether the action of the agency: (1) violates a constitutional provision; (2) is in excess of statutory authority or jurisdiction of the agency; (3) is unsupported by competent and substantial evidence upon the whole record; (4) is unauthorized by law; (5) is made upon unlawful procedure or without a fair trial; (6) is arbitrary, capricious or unreasonable; or (7) involves an abuse of discretion.
>
> We give deference to the agency's findings of fact so long as they are supported by competent and substantial evidence. *Bd. of Educ. Of City of St. Louis v. Mo. State Bd. of Educ.*, 271 S.W.3d 1, 7, 12 (Mo. Banc 2008). As to questions of law, this Court conducts its review *de novo*. *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 428 (Mo. banc 2009); *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993).

The standard for upholding an agency decision "would not be met *in the rare case* when the [agency's decision] is contrary to the overwhelming weight of the evidence."

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Albanna v. State Bd. of Registration for Healing Arts, 293 S.W.3d 423, 428 (Mo. 2009) (emphasis added).

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INTRODUCTION

The issuance of General State Operating Permit MOGS10520 (the "Permit") by Respondent Missouri Department of Natural Resources ("MDNR") to Respondent Trenton Farms RE, LLC ("Trenton Farms") to operate a concentrated animal feeding operation was lawful in every respect. Notably, the issuance of the Permit was lawfully issued because the evidence shows that Trenton Farms' facility is protected from inundation from the 100-year flood as required by 10 CSR 20-8.300. Trenton Farms submitted uncontroverted evidence that the 100-year base flood elevation was approximately 13.5 feet below the point at which floodwaters could enter one of Trenton Farms' hog barns. Respondent Missouri Clean Water Commission's (the "Commission") decision to uphold the issuance of the Permit was supported by competent and substantial evidence and was not unreasonable or arbitrary. The Commission voted unanimously to approve the Permit.

The final decision of the Commission was lawfully made under § 644.021, RSMo, both as it existed before and after the statute was amended by House Bill 1713 (2016). The amendment allows more than two Commission members to be "knowledgeable concerning the needs of agriculture, industry or mining."

Appellant argues the amendment is unconstitutional. Even if the amended statute is deemed unconstitutional, the Commission's vote remains valid under the prior version of the statute because only two members represented the needs of agriculture, industry or mining at the time of the vote as required under the earlier version. Moreover, the *de facto* doctrine would preserve the validity of the vote. Nonetheless, Appellant is not

challenging the qualifications of any individual Commissioner, and therefore cannot contest the validity of the Permit on any grounds that is rooted in any Commissioner's capacity or qualifications to serve. Nor is Appellant challenging the vote based on the Commission appointments being constitutionally infirm. For these reasons, this Court should affirm the decision of the Commission upholding the issuance the Permit.

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STATEMENT OF FACTS

Trenton Farms provides the following supplemental facts and response to Appellant's Statement of Facts.

Additional Facts related to the December 12, 2017 vote

At the December 12, 2017 hearing, the Commission voted four to zero (4-0) to adopt the AHC's Recommended Decision and approve the Permit. ROA001760-62; A1-23. Commissioner Hurst abstained from voting on the Permit. ROA001761. Commissioner Kleiboeker did not vote on the Permit. ROA001761-62. At the beginning of the meeting, Commissioner Kleiboeker participated in hearing by telephone. However, when it came time to vote, he had hung up, was disconnected or did not speak. ROA001761-62. The Final Decision was signed by the four voting Commissioners -- Ashley McCarty, Stan Coday, John Reece and Patricia Thomas -- on December 12, 2017. ROA001801; A1-23.

Commissioners McCarty and Coday were appointed by the Governor to be knowledgeable concerning the needs of "agriculture, industry or mining." Commissioner Reece was appointed to be knowledgeable concerning the needs of "publicly owned wastewater treatment works." Finally, Commissioners Thomas and Kleiboeker were appointed to represent the "public." A105-107.[1]

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[1] This Court may take judicial notice of each Commissioners' classification or designation of whom they represent (e.g. "public", or "agriculture, industry or mining" or "publically owned wastewater treatment works"). Missouri courts take judicial notice of facts relating to public officials such as their names, their authority, their terms office and their signatures and seals. *See Sowers-Taylor Co. v. Collins*, 14 S.W.2d 692 (Mo.App. 1929); *State v. White*, 263 S.W.192 (Mo. 1924); *Mayes v. Palmer*, 103 S.W. 1140 (Mo.

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Additional Floodplain Facts

Trenton Farms' permit application included a Floodplain Modeling Report prepared by John Holmes of Allstate Consultants in Columbia, Missouri. ROA001467-1579; A30-34. Mr. Holmes is a registered professional engineer with extensive experience in floodplain modeling. Holmes is a certified flood plain manager. ROA000558-562.

Mr. Holmes explained that the Federal Emergency Management Agency ("FEMA") issued a Flood Hazard Boundary Map for Grundy County, Missouri in the 1980s. ROA001072-1073; A24. The Grundy County Flood Hazard Boundary Map delineates "Zone A," which FEMA characterizes as the 100-year floodplain.

Mr. Holmes explained that the perimeter or outline of Zone A is not tied to a specific elevation. ROA000562-563. Due to the map's large scale, it is difficult to pinpoint where Zone A begins. When overlaid on a USGS topographical map, Zone A's perimeter crosses at least three different contours exceeding 36 feet in elevation changes. ROA001623, ROA000224; A36.

Mr. Holmes digitized the Zone A map and overlaid it over a geo-referenced elevation map showing the location of the hog barns. ROA000216-220, ROA001622; A35. When Mr. Holmes overlaid the digitized Zone A map over geo-referenced locations of Trenton Farms' hog buildings, Mr. Holmes estimated that the edge of the FEMA Zone

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1907); *State ex. Rel. United Bonding Co. of Indianapolis v. Kennedy*, 364 S.W.2d 642 (Mo.App. 1963); *State v. Zehnder*, 168 S.W. 661 (Mo.App. 1914). See https://boards.mo.gov/userpages/Board.aspx?40; *also see* https://dnr.mo.gov/env/wpp/cwc/index.html#members (TF Appx A105-107).

A 100-year floodplain boundary would cross over part of the gestation barn. ROA001471.

The purpose of the Floodplain Modeling Report was to calculate a 100-year base flood elevation to compare to the elevation of the proposed buildings. The hog barns' elevation was set on the engineering drawings submitted with the permit application. ROA001463; A29. The base flood elevation was used to demonstrate whether the barns would be located inside or outside the 100-year flood zone. If located in the 100-year flood plain, the study will demonstrate whether the barns would be constructed above the 100-year flood elevation (protected from inundation) or below the 100-year flood elevation. ROA000213.

Mr. Holmes calculated the base flood elevation using the Hydraulic Engineering Center - River Analysis System (HEC-RAS) model developed by the U.S. Army Corps of Engineers. ROA000560. Holmes' HEC-RAS modeling results calculated a base flood elevation at the Trenton Farms gestation barn site to be 744.35 feet. ROA001470; A33.

Trenton Farms' gestation barn will be located most downgradient (furthest downhill). ROA001463. The barn will be built upon earthen fill to raise the elevation of the barn. The barn will be constructed on top of the concrete pit (basement) in which to store manure. ROA0000174. The top of the pit wall will have an elevation of 757.8 feet. ROA001463; A29. Manure stored in the gestation barn's deep pit would be flooded if water exceeded an elevation of 757.8 feet, which is the top of the pit's slatted floor. ROA001463, 1470. The pit basement floor will have an elevation of 747.8 feet. ROA001463; A29.

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Significantly, the base flood elevation will be 13.5' below, plus or minus one foot, the top of the gestation barn's pit wall where it could be inundated (not "protected") by floodwaters. Also, note that the gestation barn's pit (basement) floor will be 3.5' above the base flood elevation. ROA001470. Therefore, all of the proposed buildings, including the gestation barn, will be above the base flood elevation and protected from inundation. ROA000245, 1461.

Appellant offered the testimony of Paul Reitz, a registered professional engineer, to review Mr. Holmes' Floodplain Modeling Report. ROA001194-1195, 1236. Mr. Reitz did not do any of his own modeling or calculations. ROA001194.

Mr. Reitz agreed the HEC-RAS is an appropriate modeling tool. ROA001201. Mr. Reitz agreed Mr. Holmes' "modeling approach was reasonable" and "met the standard of care for someone in my profession to do a model of that sort." ROA001201, 1206.

Mr. Reitz said that Mr. Holmes' Floodplain Modeling Report base flood elevation would be accurate plus or minus one to two feet, closer to one foot. Mr. Reitz said he would "anticipate that they [the baseflood elevations] are probably within 1 to 2 feet of the correctly modeled or the completely modeled flood elevations out there. Maybe more in the one level than the two -- 1 foot, not 2 feet. So reasonably accurate, but not absolutely accurate." ROA001202, 1230-1231. Mr. Reitz testified that if the basement of the barn is three feet above the base flood elevation (i.e., there is three feet of freeboard), he "certainly would counsel my client that it's not worth doing additional [modeling] work. . . ." ROA001230-1231.

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Glen Briggs, the Grundy County Emergency Management Director and the Grundy County Flood Plain Administrator, sent a letter to MDNR dated October 25, 2016 stating that Trenton Farms' property was "outside Zone A and thus would not need a flood development permit from Grundy County." ROA0001608; A95.

Mr. Reitz testified that the purpose of a Letter of Map Revision ("LOMR") or a Conditional Letter of Map Revision ("CLOMR") is to remove property from the "requirements of flood insurance" and to assist in getting a floodplain development permit. ROA001224. Since the Grundy County Floodplain Administrator believed the Trenton Farms' site was outside the 100-year floodplain, Mr. Reitz agreed there would be no need to get a floodplain development permit. ROA001224.

Mr. Holmes was not aware that the Grundy County Floodplain Administrator ruled that the Trenton Farms' site was not located within Zone A – the FEMA 100-year floodplain. ROA000276. Since the Trenton Farms' buildings will be built upon earthen fill that raises building elevation above the base flood elevations, Trenton Farms could apply to FEMA for a LOMR-F ("Letter of Map Revision-Fill") using the floodplain modeling report as justification. ROA000250. In the event Trenton Farms would need a floodplain permit or be exempted from floodplain insurance based upon a LOMR-F, Mr. Holmes prepared a floodplain elevation certificate. ROA000268-269. The certificate was not needed since Grundy County did not require a floodplain permit. ROA001224.

The project engineer for Trenton Farms certified the following in regard to the permit application: "To the best of my knowledge, I believe Trenton Farms RE, LLC's CAFO Operating Permit application and supporting materials meets all of the design

requirement, including the need to protect certain parts of the operation from inundation and damage from a 100 year flood event per Missouri state rule 10 CSR 20-8.300 (5)." ROA001461; A27-28.

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Appellant's Abandonment of Factual Assertions

On appeal to the Court of Appeals, Western District, Appellant challenged the personal qualifications of certain members of the Commission in Point Relied On III of its Amended Brief. A majority of the factual assertions in support of this challenge were based on matters outside of the record on appeal or which otherwise failed to comply with Missouri Rule 84.04. Trenton Farms filed a motion to strike those portions of Appellant's Brief. However, Trenton Farms believes its motion to strike now is moot because Appellant has abandoned its challenge to the Commissioners' personal qualifications both expressly and by operation of law.

On page 14, footnote 2, of Appellant's Brief filed with this Court, Appellant states "[i]n the present appeal, however, Appellant is not challenging the personal qualifications of individual members." By this statement, Appellant has expressly abandoned any and all challenges it previously made in the Court of Appeals contesting the qualifications of individual Commissioners to serve.

Moreover, pursuant to Missouri Rule 83.08(b),[2] "[a]ny material included in the court of appeals brief that is not included in the substitute brief is abandoned." Appellant's substitute brief filed with this Court makes no reference to the evidence Appellant asserted in the court of appeals relating to its challenge to the individual Commissioners' qualifications to serve. As a result, those factual assertions are abandoned as a matter of law pursuant to Missouri Rule 83.08(b).

[2] References to "Missouri Rule" or "Rule" are to the Missouri Rules of Civil Procedure.

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ARGUMENT

I. RESPONSE TO APPELLANT'S POINT RELIED ON ("PRO") I

Appellant argues that the amendment to § 644.021.1, RSMo, by HB 1713 is unconstitutional and, therefore, the prior version of the statute is in full force and effect. To prevail on PRO I, Appellant must:

1. Convince this Court that HB 1713 is unconstitutional;
2. Convince this Court that the Commission's "composition" was not valid even though Appellant is not challenging "personal qualifications of individual commissioners;"
3. Convince this Court that the Commission's 4-0 vote to issue the Permit was invalid even though the Commission's composition was compliant with the pre- and post-HB 1713 versions of § 644.021.1, RSMo;
4. Convince this Court to overrule legal precedent and ignore state statutes that officials may only be challenged through *Quo Warranto* actions; and
5. Convince the Court to ignore or create new case law that invalidates or dramatically revises the *De Facto* doctrine in Missouri.

The following subpoints refute each argument listed above.

1. <u>House Bill 1713 is constitutional</u>.

Appellant challenges the constitutionality of § 644.021.1, RSMo, as amended by House Bill 1713 (2016). In accordance with § 527.110, RSMo, whenever a party

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challenges the constitutionality of a statute, "the attorney general of the state shall also be served with copy of the proceeding and be entitled to be heard." Missouri Rule of Civil Procedure 87 pertains to declaratory judgments. Rule 87.04 is identical to § 527.110, RSMo.

In this appeal, the Attorney General's Office is defending the constitutionality of § 644.021, RSMo as amended by House Bill 1713. Trenton Farms endorses the Attorney General's defense of § 644.021, RSMo, as amended by House Bill 1713, and endorses Respondent MDNR's brief defending its constitutionality.

2. Even if amendment is unconstitutional, Appellant has no evidence that the Commission's "composition" was unlawful under prior statute.

A. Appellant has abandoned challenge to individual Commissioners.

PRO III of Appellant's Brief filed with the Court of Appeals, Appellant argued the Commission's decision was "unauthorized by law in that more than two commission members who participated in the consideration of permit MOGS-10520 represented the agricultural industry in violation of § 644.021.1, RSMo (the pre-HB 1713 version of § 644.021.1 that remained in effect)." Appellant has expressly and explicitly abandoned this argument. On page 14, footnote 2, of Appellant's Substitute Brief filed with this Court, Appellant states "[i]n the present appeal, however, Appellant is not challenging the personal qualifications of individual members." By this statement, Appellant has abandoned any and all challenges it previously made in the Court of Appeals challenging the qualifications of individual Commissioners. Rule 83.08(b). A55.

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B. Appellant's Substitute Brief violates rule 83.08(b).

Not only has Appellant abandoned its argument that the vote was invalid because certain Commissioners were not qualified, but Appellant has modified its attack on the validity of the vote. Appellant now is claiming that the Commission was not properly "constituted" pursuant to new authority that was never discussed or mentioned at any point in the earlier proceedings. Rule 83.08(b) states that substitute briefs "shall not alter the basis of any claim that was raised in the court of appeals brief."

As stated above, PRO III of Appellant's Amended Brief filed with the Court of Appeals challenged the personal qualifications of Commissioners by arguing more than two commission members represented the agricultural industry in violation of the earlier version of § 644.021.1, RSMo. In this Court, Appellant is challenging the Commission's "composition," but not the "personal qualifications of individual commissioners." Since Appellant's Substitute Brief alters the basis of claims made in the Court of Appeals, this Court should strike or ignore that portion of Appellant's Substitute Brief challenging the July 8, 2019 "composition" of the Commission and all cases that are being raised and cited for the first time by Appellant.

C. There is no evidence of unlawful Commission composition before this Court.

Assuming for sake of argument that this Court agrees with Appellant and finds that House Bill 1713 is unconstitutional and that the prior version of the statute it amended applies, Appellant's Brief does not address or provide any evidence supporting its claim that the Commission's composition was unlawful. Because it has abandoned its

prior arguments that certain members were unqualified to serve, Appellant asks this Court to assume, without evidence, that the make-up of the Commission did not comply with the original version of § 644.021.1, RSMo. A43. Appellant states "the public was, and continues to be, well aware of the true state of the unlawful appointments. *** As a result of the unlawful composition, there continues to be less public representation on the Clean Water Commission." Appellant's Substitute Brief, page 15. There is no evidence in the record that no more than two Commissioners have been appointed to represent the needs of "agriculture, industry, and mining" that would have resulted in a corresponding reduction in the number of "public" members of the Commission. Appellant asks this Court to invalidate a Permit based upon legal conclusions and "public awareness" without evidence showing its alleged unlawfulness. Given these deficiencies, this point must fail.

Moreover, the cases relied on by Appellant in it Substitute Brief, which were never briefed or discussed by the parties, do not support Appellant's modified challenge. In all three cases there was evidence before the court as to why the decision-making body was not "properly constituted." Moreover, all three cases involved appointments that violated constitutional rights and protections and/or very similar statutory ones. In *Ryder v. U.S.*, 515 U.S. 177, 115 S.Ct. 2031 (1995), the record reflected that two of the judges on a three-judge panel of the Coast Guard Court of Military Review were civilians appointed by the General Counsel of the Department of Transportation rather than the President of the United States, in violation of the Appointments Clause of the United States Constitution. A70. Similarly, in *Daniels v. Industrial Commission*, 775 N.E. 2d

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936 (Ill. 2002), the record reflected that two members of a panel of arbitrators were appointed by the Chairman of the Illinois Industrial Commission instead of the Governor by and with the consent of the Senate in contravention of an Illinois statute. A81. Finally, in *State of Missouri v. Ralls*, 8 S.W.3d 64 (Mo. banc 1999), there was no dispute that a drug court commissioner presided over a trial in violation of Article I of the Missouri Constitution. A78. The main focus of *Ryder* and *Daniels* was the application of the de facto doctrine in light of the trespass upon the Executive branch's power to appoint the decision makers. In a very brief opinion, *Ralls* reversed the lower court's judgment because the statute that authorized the drug court commissioner to have powers of a circuit court judge violated the Constitution.

No evidence is before this Court showing why Appellant believes the Commission was improperly constituted. This is a fatalistic flaw in Appellant's position because a failure to preserve this argument in Appellant's opening brief with this Court acts as a permanent waiver. "[I]ssues not raised in an appellant's opening brief cannot be raised for the first time in the reply brief, and are not properly preserved." *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 784 (Mo. App. W.D. 2008).

3. The evidence before this Court is that the Commission's "composition" was in fact lawful.

Even if this Court finds H.B. 1713 and the amendment to § 644.021.1, RSMo unconstitutional, the evidence shows that Commission's composition was in compliance with the prior version of § 644.021.1, RSMo. The prior version of § 644.021.1, RSMo allowed "no more than two" members who are "knowledgeable concerning the needs of

agriculture, industry or mining." § 644.021.1, RSMo (effective before October 14, 2016). HB 1713 amended this statute to allow more than two Commissioners to represent "agriculture, industry, and mining." However, neither Governors Greitens nor Parson has appointed more than two Commissioners to represent "agriculture, industry, and mining." A105-107. (also see footnote 1 on page 9). Therefore, the "composition" of the Commission has been compliant with both HB 1713's amended version and the prior version of § 621.021.1, RSMo.

It is undisputed that the Commission's composition at the time of the vote on Trenton Farms' permit was compliant with the prior version of § 621.021.1, RSMo. Therefore, the Commission's vote was lawful.

4. Appellant's sole basis to challenge Commission appointments is through a *quo warranto* action.

In the unlikely event this Court finds the amendments to § 644.021.1, RSMo, to be unconstitutional, the Commission's decision approving the Permit still is valid under the prior version of the statute because Appellant did not pursue the appropriate legal remedy to disqualify any of the Commissioners who voted to approve the Permit. A45-46. This remedy is a *quo warranto* action. Appellant no longer brings any challenge to the qualifications of any Commissioner nor was such an action commenced by proper parties with standing at any point during Appellant's challenge to the Permit. Therefore, this Court lacks jurisdiction to declare any Commission unqualified to serve or to invalidate the composition of the Commission.

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The only authority to challenge a Commission appointment is by the Missouri Attorney General or a prosecuting attorney who may bring a *quo warranto* action to remove a Commissioner. Only in a *quo warranto* action may a court have an opportunity to rule on a Commissioner's qualifications to serve.

The proper and exclusive method of declaring a state officer unqualified to serve is a *quo warranto* action. *Benne v. ABB Power T & D Co.*, 106 S.W.3d 595, 598 (Mo.App. W.D. 2003); *State v. Kinder*, 89 S.W.3d 454, 456 (Mo.2002); *Boggess v. Pence*, 321 S.W.2d 667, 671 (Mo.1959). A64-69. Only the Missouri Attorney General or a prosecuting attorney can bring *quo warranto* actions. *See* § 531.010, RSMo, *et seq.* and Missouri Rule 98.01 *et seq*. A37-42, A57-63. Specifically, § 531.010, RSMo, 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, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same.

A37.

In other words, *quo warranto* is the proper procedure where it is alleged that an official has exercised a power he or she does not have. *Kinder*, 89 S.W.3d 454, 456 (Mo. 2002). The restriction on private plaintiffs is designed to prevent the harassment of public officials at the whim of private citizens. *Dryer v. Klinghammer*, 832 S.W.2d 3, 4 (Mo.App. E.D. 1992).

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Neither the Missouri Attorney General nor a prosecuting attorney has brought a *quo warranto* action to date. Additionally, Appellant has cited no Missouri case law that refutes that *quo warranto* is the sole remedy to challenge individual commissioners. Instead, Appellant is encouraging this Court to ignore § 531.010, RSMo and the precedent cited above.

5. Commissioners' vote to approve the Permit was valid pursuant to the *de facto* doctrine

If Appellant were somehow able to successfully challenge the qualifications of individual Commissioners who voted to approve the Permit, the Commissioners' vote would remain valid under the *de facto* doctrine.[3] "When an officer is holding 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, *citing Boggess,* 321 S.W.2d at 671-72; *In re F—— C——,* 484 S.W.2d 21, 24-25 (Mo.App.1972). A67. The "*de facto* 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 office." *Benne,* 106 S.W.3d at 599. A67.

Benne is highly instructive here. A64-69. In *Benne*, Commission Madigan was appointed to the Labor and Industrial Relations Commission ("LIRC") by Governor Robert Holden to the position of Acting Chair on February 11, 2002. ABB filed an objection to Mr. Madigan's participation in the case and moved that Madigan recuse

[3] Trenton Farms does not concede, but opposes any suggestion, that any Commissioner was wrongly or unlawfully appointed.

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himself. It also filed a motion requesting that the LIRC allow additional evidence to be entered into the record on that issue. The motions were denied. On appeal, ABB argued that the LIRC erred when it denied ABB's motion to allow for additional evidence to be submitted for the record which would have provided the basis for challenge of the constitutionality of the participation of Madigan on the LIRC. The Court of Appeals, Western District, agreed with the LIRC and explained that:

> ABB misunderstands law. Even if a proper record had been developed, this court is not in a position to rule via this case on the issue of whether Madigan 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. at 598, *citing* § 531.020, RSMo, and Missouri Rule of Civil Procedure 98.02. A67.

The court applied the *de facto* doctrine and affirmed the award of the LIRC and its denial of the motion to adduce additional evidence. It explained that, "[t]he method for establishing that a person has unlawfully held an office is through a *quo warranto* action. No such action was sought against Madigan." *Id.* at 601. A69. ABB's action to adduce additional evidence would have been to no avail even it had been granted.

In reaching its holding in *Benne*, the court of appeals relied on *VanKirk v. Board of Police Commissioners of Kansas City,* 586 S.W.2d 35 (Mo. banc 1979) holding that the members of the police board whose qualifications were in question were *de facto*, or perhaps even *de jure,* members of the board. Therefore, their acts were valid given that no action had been taken to remove them. A67. The court in *Benne* also relied on *F*——

C—— (holding that a petition filed by a *de facto* juvenile officer was not void, and accordingly the court had jurisdiction to proceed on that petition), and *Boggess,* 321 S.W.2d at 671-72 (holding that the validity of bonds authorized by the city council could not be challenged just because the councilman whose qualification to hold office was in question was a *de facto* officer of the city). A67-68. Consequently, the *de facto* doctrine holds that all Commissioners' votes on the Permit were valid given their status as *de facto*, if not *de jure*, members of the Commission. This Court should affirm the Commission's decision on the Permit on these grounds.

The new cases cited by Appellant in support of its argument that the *de facto* doctrine does not apply are distinguishable from the facts of this case. *Ryder* involved a challenge to the "constitutional validity of the appointment" itself. *Ryder*, 115 S.Ct. at 2031. Here, there is no claim that the Commission appointments themselves were constitutionally infirm. Instead, Appellant only challenges the constitutionality of the process by which the General Assembly passed HB 1713.

Likewise, in *Daniels*, the appointment of arbitrators by the Chairman of the Illinois Industrial Commission instead of by the Governor constituted an important statutory defect in the arbitrators' authority because they were incompetent to sit and act on the panels. *Daniels*, 775 N.E.2d at 938-39. Therefore, the agency acted without statutory authority in making the authority. As in *Ryder*, *Daniels* involved an attack on the appointment itself based on a statutorily-created process that vested that appointing authority in the Governor. Thus, both cases involved trespasses to the executive power of

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appointment. Finally, *Ralls* again involved a decision made by a commissioner without constitutional authority to act. 8 S.W.3d at 65-66.

Here, as in *Benne*, Appellant initially challenged Commissioners' statutory qualifications to serve. Appellant has never lodged a challenge to their appointment by the Governor as being in violation of the constitution or an applicable statute related to the appointment process or procedure. At most, Appellant's claim before the court of appeals, which it has now abandoned, "was a mere matter of statutory construction" or a misapplication of the underlying statute that defined the makeup of the Commission. *Ryder*, 115 S.Ct. at 181-182. In the unlikely event this Court finds H.B. 1713's amendment to § 644.021.1, RSMo unconstitutional and certain Commissioners disqualified, the Court should follow the Missouri case of *Benne* and hold that the *de facto* doctrine does not invalidate the Commission's vote on the Permit.

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II. RESPONSE TO APPELLANT'S PRO II

1. **The Permit is valid because the hog barns are protected from inundation from 100-year flood.**

Appellant alleges that Trenton Farms and MDNR failed to adequately show that Trenton Farms' confinement buildings are protected from inundation or damage due to the 100-year flood, as required by 10 CSR 20-8.300 (4)(A) (September 30, 2016) (emphasis added)[4] which provides in pertinent part as follows:

> 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 one hundred- (100) year flood.

A72. Note that even if planned buildings are to be constructed in the 100-year flood zone, they need only be "protected from inundation."

The 100-year floodplain is an area designated by FEMA with a one percent probability of flooding in any given year. ROA000214-215. The Grundy County floodplain map depicts "Zone A" which is a shaded area that represents FEMA's designated 100-year floodplain area. ROA001072-1073; A24, A35.

This appeal follows a second permit application submitted by Trenton Farms to MDNR to operate a swine CAFO in Grundy County, Missouri. The first application was denied by the Commission which was appealed by Trenton Farms to the court of appeals.

[4] Prior to September 30, 2016, section (4)(A) of the regulation was found at 10 CSR 20-8.300 (5)(A).

Matter of Trenton Farms RE, LLC v. Missouri Department of Natural Resources, 504 S.W.3d 157 (Mo.App. W.D. 2016) ("*Trenton Farms I*"). A96. The Western District affirmed the Commission's finding that the application did not adequately prove the site was protected from inundation from the 100-year flood. Nonetheless, the court recognized that Trenton Farms "retains the right to seek a CAFO permit from the MDNR" in a subsequent permit application. *Id*. at 163.

In its opinion, the Western District ruled that the Commission regulation requiring protection from the 100-year flood "may be accomplished by constructing all listed sites above the 100-year floodplain **or** by including the permit application certification from an engineer that all relevant sites are protected." *Id.* at 161 (emphasis added). A CAFO may be "protected from inundation" if barn openings are located at an elevation above the 100-year flood regardless of whether the buildings are located in the floodplain or not. 10 CSR 20-8.300 (4)(A).

In *Trenton Farms I*, MDNR witnesses' testimony "merely went to the issue of flooding of the soil and were not actually dispositive of the issue of whether the CAFO project was located in the FEMA Zone A floodplain." *Id*. at 161; A96. Unfortunately, the first permit application did not include any evidence of the elevation of the 100-year floodplain. Without elevation data, MDNR could only determine whether the proposed CAFO buildings were outside of the 100-year floodplain. In the present case, the second permit application included unrefuted evidence of the 100-year flood elevation that was compared to elevation of Trenton Farms' barns.

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In *Trenton Farms I*, the Court of Appeals, Western District, ruled that 10 CSR 20-8.300 (4)(A) may be satisfied if the permit application includes a "certification from an engineer that all relevant sites are protected [from inundation from the 100-year flood]." *Id.* at 161; A96. In the first appeal, the Court of Appeals held that "there was no evidence to suggest that . . . [the engineer] intended to certify the compliance of all CAFO buildings and operations locations as to 100-year floodplain." *Id.* at 162; A97. However, in its second application, which is the subject of this appeal, Trenton Farms submitted a detailed application which included an unequivocal statement from the engineer that certified all CAFO buildings were protected from inundation from the 100-year flood. ROA001337-1364, 1460-1461.

The second permit application was signed and certified by Todd Van Maanen of Stockwell engineering firm, a registered professional engineer with Stockwell Engineers, Inc. Mr. Van Maanen certified that the permit "application and supporting materials meets all of the design requirement, including the need to protect certain parts of the operation from inundation and damage from a 100 year flood event. . . ." ROA001460-1461; A28. MDNR is required to rely on this certification to ascertain compliance with 10 CSR 20-8.300 (4)(A).[5] In accordance with this Court's holding in *Trenton Farms I*, that is all that should be required. *Id.* at 161.

[5] *See* § 644.051.3, RSMo, which exempts this facility from the requirement of a construction permit (since the manure will be collected in concrete pits, and not stored in an earthen storage structure), but instead requires that the facility shall be designed by a professional engineer registered in Missouri.

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If the engineering certification is not enough, Trenton Farms' second application and engineering certification are reliant upon a Floodplain Modeling Report prepared by John Holmes of Allstate Consultants. Stockwell subcontracted with Allstate Consultants to prepare the Floodplain Modeling Report. ROA001467; A30-34. Mr. Holmes' report established the elevation of the 100-year flood which can be compared to barn elevations shown on the geo-referenced engineering drawings. ROA001467-1470, ROA001462-1463; A29.

Mr. Holmes calculated a base flood elevation of 744.35 feet. ROA001470; A33. Trenton Farms' gestation building would be inundated if a flood reached an elevation of 757.8 feet. ROA001463, 1470. That is 13.45 feet above the 100-year base flood elevation. ROA001470. In fact, the bottom of the concrete pad the gestation barns' concrete pit is at an elevation of 747.8 feet which is 3.45 feet higher than the calculated 100-year base flood elevation. ROA001463, 1470. Therefore, according to Allstate's Floodplain Modeling Report, the Trenton Farms buildings would not be in the 100-year floodplain, and thus, the buildings would be protected from inundation. ROA000245, 1461.

Appellant did not offer any evidence to contradict John Holmes' calculation of the base flood elevation. Significantly, Appellant's own floodplain expert, Paul Reitz, agreed that Allstate's Floodplain Modeling Report was "reasonable" and "met the standard of care" for someone in the hydrological engineering profession. ROA001201, 1206. Moreover, Reitz admitted the calculated base flood elevation was "reasonably" accurate to plus or minus one to two feet, and closer to one foot. ROA001202, 1230-1231. Reitz

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also admitted it "was not worth" doing any additional surveyed cross sections to refine the baseflood elevation since the bottom of the gestation building was over three feet higher than the baseflood elevation. ROA001230-1231

Since the Zone A floodplain is not tied to an elevation, the base flood elevation calculated by Allstate Consultants is the best and only evidence in the record to determine if the buildings are protected from inundation.

Appellant asserts that the Commission was bound to follow and only consider FEMA's Zone A floodplain map. Appellant cites no authority to support this claim. In fact, there is no Clean Water Regulation that requires the Commission to follow FEMA's crude and unreliable Zone A maps. The Commission may consider any evidence, including the engineer's certification, to determine if buildings are protected from inundation. In this case, the best evidence is the engineer's certification and the Floodplain Modeling Report that establishes a base flood elevation.

The Grundy County Floodplain Administrator found the property does not lie in the Zone A 100-year flood plain. ROA001608; A95. However, Mr. Holmes' Floodplain Modeling Report showed that Trenton Farms' proposed gestation building may lie within Zone A on FEMA's floodplain map. ROA000216-220, 224, 1471; A34, A25. Mr. Holmes digitized FEMA's Zone A map and overlaid it on an aerial photo that depicted the location of the gestation barn. ROA000216-220, 224, 1471; A34. Stockwell Engineering also overlaid Allstate Consultants' digitized Zone A line on their site plans. ROA001463; A25. Due to the crude nature of Zone A maps and anomalies aligning the digitized map, the location of Zone A on Allstate's and Stockwell's maps is only an

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estimated location. ROA0000219. According to Allstate Consultants' map and one of Stockwell Engineering's site plans, the Zone A line runs through the gestation barn. ROA001471 and ROA001075. However, even if the building is partially located in the edge of Zone A, the engineering documents in the permit application show that the buildings will be built upon fill that raises the building 13.5 feet above the 100-year floodplain elevation. ROA001470; A29. Thus, all buildings are protected from inundation. ROA000245, 1461.

Appellant alleges that Trenton Farms and MDNR failed to show that FEMA has issued a Letter of Map Revision (LOMR) or a CLOMR to revise the 100-year flood designation in the Flood Hazard Boundary Map for Grundy County, Missouri. This claim has no relevance or merit for a number of reasons. First, the Grundy County Floodplain Administrator determined that the site is not in the Zone A floodplain, and therefore, Grundy County is not requiring a floodplain development permit.[6] A95. Second, the Commission has no legal authority to enforce FEMA regulations. Third, there is no legal authority that requires the Commission to defer or accept FEMA floodplain determinations.

Commission regulations allow buildings to be constructed in the 100-year floodplain if they are protected from inundation. But here, the base flood elevation calculation shows the buildings are situated well above the 100-year flood base elevation.

[6] Glen Briggs, the Grundy County Flood Plain Administrator, submitted to MDNR a letter stating that Trenton Farms' property "was outside Zone A and thus would not need a flood development permit from Grundy County." ROA001608.

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Finally, FEMA regulations only require flood insurance for structures located in the floodplain or if the buildings are financed by a federally backed loan. In short, if Trenton Farms secures a federally-backed loan to finance the hog buildings, then Trenton Farms will be required to either obtain flood insurance or get FEMA's approval of a LOMR or LOMR-F (based on "fill"). 44 CFR § 59.2 and 44 CFR Part 72.[7]

There is no evidence in the record that Trenton Farms will secure a loan and that, if it did, the loan would be federally-backed. If any of Trenton Farms' buildings are on the Zone A floodplain and Trenton Farms obtains a federally-backed loan, then it will be incumbent upon Trenton Farms to either get insurance or request a LOMR from FEMA. But both of these options for complying with FEMA–related requirements are outside the Commission's authority to impose upon Trenton Farms as a condition for a general operating permit.

Appellant alleges "Trenton Farms and MDNR failed to show that the Grundy County Commission has changed its 100-year floodplain designation which currently shows the Trenton Farms CAFO is located in the 100-year floodplain." This statement is wholly irrelevant. First, the Commission is not bound to use or follow FEMA floodplain maps or designations. The Commission may make its own assessment whether CAFO barns are "protected" from inundation based on any credible evidence. Second, Grundy County determined that Trenton Farms' property is not in the 100-year floodplain and that a floodplain development permit is not required. Moreover, even if Grundy County

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[7] A LOMR removes a site from the FEMA regulated area. An entity does not have to meet FEMA regulations if it is not in a FEMA regulated area.

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were to change its 100-year floodplain designation for the Trenton Farms' property, this would not be relevant because there still would be no threat of inundation according to the evidence that the manure will be stored above the base flood elevation.

In conclusion, the MDNR and the Commission relied upon the engineer's certification that the barns are protected from inundation by a 100-year flood. The Commission also relied upon the Floodplain Modeling Report to establish a 100-year base flood elevation that is 13.5 feet below the point where floodwaters would enter the barn. Appellant did not present any evidence to dispute the base flood elevation. Therefore, Trenton Farms' barns are protected from inundation from a 100-year flood as required by 10 CSR 20-8.300 (4)(A).

2. <u>The Permit is valid because Appellant did not raise or preserve a challenge to engineer's certification</u>.

Appellant argues there is "no evidence in the record that show that Mr. Van Maanen conducted or supervised the flood study or that he prepared the Flood Study Report, Exhibit L." Mr. Van Maanen is a professional engineer registered in Missouri who certified Trenton Farms' permit application. His certification stated that the animal feeding operation was protected from inundation from the 100-year flood.

Appellant's Substitute Brief also states that "Because there is no evidence in the record that Mr. Van Maanen conducted, prepared or supervised the flood study work of Mr. Holmes, or that Mr. Van Maanen conducted any independent review of the flood study, Mr. Van Maanen's baseless certification cannot serve as competent insubstantial

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evidence. Further, Mr. Van Maanen's certification at the facility is protected from the 100-year flood violates § 327.411.1, RSMo."

Appellant did not raise any of these concerns or challenges in its Complaint filed with the Administrative Hearing Commission on December 23, 2016. ROA000019-24. Consequently, Appellant did not preserve this issue on appeal. Furthermore, Appellant did not raise this issue in Appellant's Amended Brief filed with the Missouri Court of Appeals, Western District on August 21, 2018.

Since Appellant did not raise engineering certification issues in its Complaint, neither the MDNR nor Trenton Farms offered evidence pertaining to the scope of Mr. Van Maanen's certification of the permit application. As an engineer registered in the State of Missouri, Mr. Van Maanen is constructively aware of § 327.411.1, RSMo that requires any professional engineer who seals technical submissions must do so for all work that they prepare "or personally supervise." Consequently, Mr. Van Maanen's certification must be taken at face value since Appellant did not challenge his certification in its Complaint and did not offer any evidence to support this claim.

3. Trenton Farms' floodplain expert explains FEMA regulations and letters of map revision.

Appellant attempts to discredit Mr. Holmes' Floodplain Study Report by referencing to an email from Mr. Holmes to Mr. Van Maanen. Mr. Holmes was responding to an email from engineer Todd Van Maanen dated May 26, 2016. In Mr. Holmes' email he states that "as I interpret the site plan, it appears there are two buildings in the floodplain, . . ." ROA1307. The email goes on to say that "the calculated

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100-year flood plain is included for information only. The 100-year floodplain limits shown on the FEMA Map and included in the drawing on the 'FLOODPLAIN-REGULATORY' layer are still what must be referenced for determining whether the project is in the floodplain."

Appellant's brief offers little context for statements made in Mr. Holmes' email. Taken in context with Mr. Holmes' testimony, Mr. Holmes merely said that until such time as a LOMR ("Letter of map revision") is approved by FEMA, the original Zone A Flood Plain Map controls for FEMA's regulatory purposes. At the hearing, Mr. Holmes testified that his 100-year floodplain line based upon calculated elevations "hasn't gone to FEMA for a LOMR-F to get FEMA to agree. Until that happens if your buildings are in the Zone A, you will be required to buy flood insurance if you get a federally-backed loan. It doesn't mean you're going to get inundated because the FEMA approximate Zone A doesn't have elevations associated with it." ROA000268-269.

Mr. Holmes also testified as follows:

> Q: And isn't it true you also provided Mr. Van Maanen with the lines showing where you estimated the floodplain regulatory was?
>
> A: That's right. I did do that, yes.
>
> Q: And that's what your email in Exhibit 26 is referring to, correct?
>
> A: Yeah. It's saying I provided him my interpretation of where Zone A was, and my interpretation of where the real floodplain was based on my model.

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At the time of his email, Mr. Holmes was not aware and could not predict that several months later on October 25, 2016, the Grundy County Floodplain Administrator would send a letter to the MDNR concluding that the Trenton Farms property was "outside Zone A and thus would not need a flood development permit from Grundy County." ROA0001608; A95.

In conclusion, Mr. Holmes did not admit or imply that FEMA's Zone A map is binding on the Clean Water Commission. Instead, he merely said that if FEMA or the Grundy County Floodplain Administrator finds the buildings are within Zone A, FEMA may require a LOMR (letter of map revision) to modify the Zone A map. What FEMA does or does not do has no bearing on the Clean Water Commission's administration of its regulations and its independent finding that Trenton Farms' buildings are "protected from inundation" from a 100-year flood.

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CONCLUSION

This Court should affirm the Clean Water Commission's Final Decision upholding MDNR's issuance of the Permit to Trenton Farms. All the requirements for issuance of the Permit had been satisfied under Missouri statutes and regulations and the vote was properly taken and the hearing was properly held. Appellant's assertions in its Brief are unsubstantiated and unsupported by the record on appeal. Trenton Farms respectfully requests that this Court affirm and uphold the decisions by MDNR, the AHC, the Commission and the Court of Appeals to uphold the issuance of the Permit. This Court should affirm the Commission's December 12, 2017, Final Decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

WITH RULE 84.05(b) AND 84.06(c)

Counsel for Respondent Trenton Farms certifies to this Court as follows:

1. Respondent's Brief complies with the limitations contained in Rule 84.06(b).

2. Respondent's Brief contains 8,094 words.

/s/ Robert J. Brundage

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed electronically on this 9th day of July, 2019, with the Clerk of Court to be served by operation of the Court's electronic filing system on all attorneys of record.

/s/ Robert J. Brundage