



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CARLA MALONE STECK,	)	
Respondent,	)	
	)	
v.	)	WD83568
	)	
MISSOURI DEPARTMENT OF	)	FILED: April 13, 2021
NATURAL RESOURCES AND	)	
MISSOURI CLEAN WATER	)	
COMMISSION,	)	
Appellants.	)	

**Appeal from the Circuit Court of Cole County
The Honorable Daniel R. Green, Judge**

**Before Division One: Alok Ahuja, P.J., and
Thomas H. Newton and Thomas N. Chapman, JJ.**

In 2016, Carla Steck sought approval from the Department of Natural Resources for an in-ground septic system which would treat and dispose of wastewater from both a residential property and an adjacent parcel of commercial property (a so-called “cluster” system). The Department approved the wastewater treatment system, but on conditions which Steck found unacceptable. Steck pursued an administrative appeal. After a hearing, the Administrative Hearing Commission (the “AHC”) issued a decision recommending that the Clean Water Commission sustain the Department’s approval of the cluster wastewater treatment system. The Clean Water Commission unanimously adopted the AHC’s recommendation.

Steck then petitioned for judicial review in the Circuit Court of Cole County. The circuit court reversed the Commission’s decision. It held that the Department

of Natural Resources did not have regulatory authority to approve a wastewater treatment system in this case, and that the Clean Water Commission unlawfully considered new, extra-record evidence when it reviewed the AHC's recommended decision. The Department appeals. We reverse the circuit court's judgment, and affirm the decision of the Clean Water Commission sustaining the Department of Natural Resources' conditional approval of Steck's proposed wastewater treatment system.

Factual Background

On December 22, 2000, Carla Steck (along with her husband Charles) submitted a request to the Department of Natural Resources for approval of on-site wastewater treatment systems in a proposed residential development, Beverly's Hill, in Jefferson City. The Stecks planned a residential housing development consisting of 32.3 acres, to be divided into twelve individual lots. Each lot would employ an on-site wastewater treatment system, also known as a septic system.

The 2000 application included a geohydrologic evaluation (prepared by the Department's Division of Geology and Land Survey), a soils report (completed by a soil scientist retained by the Stecks), and a proposed plat map for the development. The geohydrologic evaluation concluded that a minimum lot size of 2.2 acres would be required, based on "the potential impact of absorption-field effluent on groundwater." In comparison, the soils evaluation report concluded that a minimum lot size ranging from 0.92 to 2 acres would be sufficient to support individual wastewater treatment systems for the lots in the development.

Under 10 CSR 20-6.030(7)(A), the applicable minimum lot size is "the larger of the values calculated" in the geohydrologic evaluation and in the soils report, meaning that the 2.2-acre minimum lot size recommended by the geohydrologic evaluation would be controlling. The proposed plat map attached to the Stecks'

request for approval divided Beverly's Hill into twelve lots, each equal to or greater than 2.2 acres.

On December 28, 2000, the Department approved the use of individual septic systems for each of the twelve lots in the Beverly's Hill subdivision. The Department's approval letter noted that Beverly's Hill would consist of a "thirty-two (32) acre tract . . . divided into twelve (12) lots, all of which are 2.2 acres and larger in size." The Department conditioned its approval as follows:

1. The effluent from the on-site wastewater system shall be contained on the lot and handled in such a manner that there is no violation of the Missouri Clean Water Law and Regulations.
2. Residences are intended for single family residences and only one (1) shall be constructed on each lot.
3. No lot may be reduced in size by more than 10% without prior approval of the Department of Natural Resources.

On December 6, 2016, Steck submitted a new request for approval of a wastewater treatment system to the Department. Steck's 2016 request concerned a single lot within the Beverly's Hill subdivision, Lot 1, which Steck still owned. Steck proposed to subdivide Lot 1 in the existing development into two lots: Lot 1-A, a one-acre lot that would remain within the Beverly's Hill subdivision, and which Steck would deed to her son; and Lot A-1, consisting of approximately 1.2 acres, which would be joined to a commercial parcel of 0.11 acres which was located adjacent to, but outside of, Beverly's Hill. The application indicated that Steck's son would build a two-bedroom, two-bathroom, single-family home on Lot 1-A. A barn was located on Lot A-1, which Steck used as an art studio; the barn had one non-public bathroom. Steck sought Department approval of a "cluster" system for wastewater treatment that would service both lots, and for which the owners of both lots would share ownership and responsibility. Steck proposed that this cluster system would be located entirely on the one-acre Lot 1-A.

The 2016 request included a new geohydrologic evaluation, a soils report, and a proposed re-platting which reconfigured Lot 1 and the commercial parcel outside Beverly's Hill into Lots 1-A and A-1. The 2016 geohydrologic evaluation was consistent with the findings of the geohydrologic report completed in 2000, although the 2016 evaluation did not itself establish a minimum lot size.

On June 12, 2017, the Department issued its final approval of a cluster wastewater treatment system to serve Lots 1-A and A-1.¹ The approval letter noted that a soil study indicated that "the size of Lot 1-A could potentially be one acre."

The letter continued:

However, per 10 CSR 20-6.030(7)(A), the minimum lot size will be the larger of the value calculated in the geohydrologic evaluation if required or the soils report. In [a geohydrologic evaluation] dated October 30, 2000, the minimum lot size was established at 2.2 acres. In comparison of the findings of that report and a [geohydrologic evaluation] dated December 12, 2016, the local hydrologic and geologic characteristics are identical to that of the October 30, 2000 rating. Given the geohydrologic information has not changed, the rating sheet from October 30, 2000, remains valid

The Department's June 12 letter approved the subdivision of Beverly's Hill Lot 1. It also approved construction of a cluster wastewater treatment system that would service both the single-family residence on Lot 1-A, and the barn/art studio on Lot A-1, with responsibility for the system to be shared by the present and future owners of the two lots. The Department's approval letter required, however, that the acreage of both lots be used for dispersal of wastewater from the septic system.

Charles Harwood is a soil scientist in the Department of Natural Resources who reviewed Steck's 2016 application. Harwood testified that, based on the

¹ The Department issued earlier approval letters on January 4, 2017, and on March 17, 2017. The Department's June 12 letter states that it was issued as a result of Steck's request for the Department to "re-evaluate soils and geological information" that had since been received, and to "clarify or revise" the conditions of the Department's approval.

geohydrologic evaluation, it would not be safe for the environment to have a septic system located solely on Lot 1-A, which serviced both Lot 1-A and Lot A-1. Harwood testified, however, that the system would be acceptable if it took advantage of the entire acreage of the two combined parcels, by locating lateral lines which would disperse effluent on both lots. In his testimony, Harwood recognized that Lot A-1 was not itself subject to Department regulation. He testified, however, that “a septic system for the 1 acre Lot 1-A,” standing alone, “would not be approvable,” and that the Department “had to look a little bit outside the box to help get this approved.”

On June 21, 2017, Steck sought administrative review of the conditions of the Department’s approval pursuant to 10 CSR 20-6.030(7)(E). In accordance with §§ 621.250 and 640.013,² the Administrative Hearing Commission proceeded with contested case review of Steck’s appeal. The AHC held an evidentiary hearing on August 25, 2017. On October 13, 2017, the AHC issued its decision recommending that the Clean Water Commission sustain the Department’s June 12 approval letter.

The Clean Water Commission considered the AHC’s recommended decision at a public meeting on April 4, 2018. During that meeting the Commission questioned not only counsel for the Department and for Steck, but also questioned Steck and Harwood directly. At the conclusion of the meeting, the Clean Water Commission voted unanimously to adopt the AHC’s recommended decision without changes.

Steck sought judicial review of the Clean Water Commission’s decision in the Circuit Court of Cole County, pursuant to §§ 536.100 to 536.140.³ The circuit court

² Statutory citations refer to the 2016 edition of the Revised Statutes of Missouri, updated through the 2020 Cumulative Supplement.

³ Pursuant to § 644.071.1, “[a]ll final orders or determinations of the commission or the director made pursuant to the provisions of sections 644.006 to 644.141 are subject to judicial review pursuant to the provisions of chapter 536,” with an exception

reversed the Clean Water Commission’s decision, finding that the Department lacked regulatory authority over Steck’s construction of the cluster wastewater treatment system, and that the Commission had improperly considered new evidence during the meeting at which it considered the AHC’s recommended decision.

The Department appeals.

Standard of Review

On appeal following the circuit court’s reversal of an agency decision, we “review[] the agency’s decision rather than the judgment of the circuit court.” *Danna v. Mo. Dep’t of Soc. Servs., Family Support Div.*, 449 S.W.3d 821, 823 (Mo. App. W.D. 2014) (citation omitted). “[T]he party aggrieved by the agency decision has the duty to file the appellant’s brief and bears the burden of persuasion before this court.” *Guthrie v. Mo. Dep’t of Labor & Indus. Relations*, 503 S.W.3d 261, 265 (Mo. App. W.D. 2016) (citing Rule 84.05(e); other citation omitted); *see also Versatile Mgmt. Grp. v. Finke*, 252 S.W.3d 227, 232 (Mo. App. E.D. 2008).

Our review is limited to determining whether the [commission]’s actions: (1) violates a constitutional provision; (2) exceeds the [commission]’s statutory authority or jurisdiction; (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. § 536.140.2.

Countryclub Homes, LLC v. Mo. Dep’t of Nat. Res., 591 S.W.3d 882, 887 (Mo. App. W.D. 2019). “We defer to the [agency]’s findings of fact so long as they are supported by competent and substantial evidence” and “[w]e review questions of law *de novo*.” *Id.* (citations omitted). The commission’s “decision is presumed valid, and

not relevant here. Because this proceeding does not involve the Clean Water Commission’s approval or denial of a construction or operating permit, the special judicial review provision found in § 644.051.6 is inapplicable.

the burden is on the party attacking it to overcome that presumption.” *Id.* at 887-88 (citation and internal quotation marks omitted).

Discussion

Although she prevailed before the circuit court, pursuant to Rule 84.05(e) Steck is treated as the appellant in this Court. She raises two Points on appeal. First, Steck argues that the Clean Water Commission violated the statute governing its review of the AHC’s recommended decision when it “hear[d] and consider[ed] testimony and evidence taken outside the Administrative Hearing Commission” record. Second, Steck argues that the Department “had no lawful authority” to approve the method of wastewater treatment for the property at issue.

I.

In Point I, Steck argues that the Clean Water Commission exceeded its statutory authority by considering testimony outside the record created before the Administrative Hearing Commission.

Section 621.250.1 transfers “[a]ll authority to hear contested case administrative appeals granted . . . [to] the clean water commission” to the Administrative Hearing Commission (or “AHC”). The Clean Water Commission, however, retains “[t]he authority to render final decisions after hearing on appeals heard by the administrative hearing commission.” *Id.* Section 621.250.3 requires that the Clean Water Commission’s final decision “be based only on the facts and evidence in the hearing record” created before the AHC.

The Clean Water Commission considered the AHC’s recommended decision at its regular business meeting on April 4, 2018. At that meeting, the Commission gave counsel for the Department and for Steck the opportunity to present argument and answer questions from Commissioners. The Commission also heard from, and asked questions of, both Steck and the Department’s soil scientist Charles Harwood, who reviewed Steck’s 2016 application.

Steck argues that the public meeting before the Commission “became an opportunity for [the Department], through its attorney and its primary witness, to testify regarding the facts and law in the case – to essentially correct and supplement the AHC record to plug holes and satisfy the commission members’ concerns and unanswered questions regarding the decision.” Steck argues that, under § 621.250, the “exclusive power” to conduct an evidentiary hearing in this matter rested with the AHC, not the Clean Water Commission, and that the Commission was required to base its decision only on the evidence in the record developed before the AHC.

In a proceeding governed by § 621.250, it is unusual, and likely inadvisable, for the Commission to permit non-lawyer fact witnesses to speak (unless they are unrepresented parties). Section 621.250.3 limits the Commission to the evidentiary record developed before the AHC. Proceedings before the Commission should be limited to argument concerning the weight and credibility of the evidence presented to the AHC, and the legal effect of that evidence. If fact issues were not adequately addressed in the AHC proceeding, the Commission should decide only the legal consequences of such an evidentiary gap – it should not attempt to *fill that gap* by hearing further testimony or receiving further evidence. Permitting fact witnesses to speak, and to answer Commissioners’ questions, at hearings governed by § 621.250.3 runs the risk of introducing improper extra-record evidence into the decision-making process.

Steck has failed to establish grounds for reversal in this case, however. The Commission’s chairperson emphasized more than once during the Commission meeting that the Commission was confined to considering the evidence submitted during the AHC hearing. Steck has not identified any particular fact, or piece of evidence, that was introduced during the Commission meeting, that was not already present in the record before the AHC. In particular, Charles Harwood’s

statements to the Commission appear to merely summarize some of the facts to which he testified at much greater length during the AHC proceeding. The eight-and-a-half minutes during which Harwood addressed the Clean Water Commission stands in sharp contrast to the nearly one hundred pages of transcribed testimony he gave during the AHC proceeding.

The only “new fact” which appears to have been addressed during the Clean Water Commission hearing was Steck’s claim that, subsequent to the AHC hearing, Cole County authorities had approved the construction of a cluster septic system located wholly on the one-acre Lot 1-A – apparently contrary to the Department’s June 12, 2017 approval letter. But members of the Commission, and the Department’s counsel, both emphasized that any actions taken by Cole County subsequent to the AHC hearing were not in the record, and were irrelevant to the issue to be decided by the Clean Water Commission anyway.

It is also significant that the Commission adopted the AHC’s recommended decision without modification. In *Countryclub Homes, LLC v. Missouri Department of Natural Resources*, 591 S.W.3d 883 (Mo. App. W.D. 2019), parties who applied for a permit for a concentrated animal feeding operation (“CAFO”) challenged the Clean Water Commission’s denial of their permit application. They argued that the Commission’s decision should be reversed because a Commissioner had considered information outside the AHC record by personally visiting the proposed CAFO site. We rejected this argument, reasoning that

Commissioner Reece voted to approve the AHC’s recommended decisions in both cases in their entirety and without any modifications. [Petitioners] do[] not specify *anything* in the AHC’s recommended decisions . . . that was based upon facts or evidence outside the record. Thus, despite Commissioner Reece’s comments during the hearing [concerning his visit to the proposed CAFO site], it appears that his *final decisions* were based only on the facts and evidence in the hearing record, as Section 621.250.3 required. [Petitioners] ha[ve] not

met [their] burden of demonstrating that Commissioner Reece violated Section 621.250.3.

Id. at 894 (footnote omitted).

The same is true here. The Clean Water Commission voted to approve and adopt the Administrative Hearing Commission's recommended decision in its entirety, without any change or modification. Steck does not contend that *the AHC's recommended decision*, which the Commission adopted *in toto*, was itself based on extra-record evidence. The Clean Water Commission's final decision was not improperly based on facts or evidence from outside the AHC hearing record.

Point I is denied.

II.

In her second Point, Steck argues that the Department did not have regulatory authority to approve her subdivision of Beverly's Hill Lot 1, or the cluster wastewater treatment system for Lots 1-A and A-1.

Steck's argues that her proposed subdivision of Lot 1 in the Beverly's Hill development did not itself constitute a "residential housing development," and therefore did not implicate the Department's regulatory authority. The relevant regulation, 10 CSR 20-6.030(1)(D), provides that,

[u]nless exempted in this rule, the developer of any residential housing development shall obtain approval from the department for the method of sewage treatment and disposal to be used in the development prior to the sale or lease of any lot, or the commencement of construction on any lot by the developer or any person.

A "residential housing development" means: "Any land which is divided or proposed to be divided into three (3) or more lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan." 10 CSR 20-6.030(1)(A)(6).

Steck does not dispute that her establishment of the Beverly's Hill subdivision in 2000 constituted a "residential housing development" which required Department approval before on-site wastewater treatment systems could be

implemented. Rather, Steck argues that her further subdivision of a *single lot* in 2016 did not itself constitute a “residential housing development” subject to 10 CSR 20-6.030. She also argues that the Department had no authority to regulate the manner of wastewater treatment for the commercial parcel, Lot A-1, which was located outside of the Beverly’s Hill residential development.

Steck’s arguments miss the mark. The reason she was required to obtain Department approval for her subdivision of Lot 1, and for her plan to operate a septic system on Lot 1-A, was because the entire Beverly’s Hill development was subject to the conditions imposed by the Department when it approved on-site wastewater treatment in the subdivision in 2000. In 2016, Steck was seeking to modify, or obtain an exemption from, the conditions the Department had imposed on the entire Beverly’s Hill development (including Lot 1) in 2000. The Department’s regulatory authority was triggered by Steck’s request for relief from the conditions the Department had lawfully imposed on her development in 2000.

The Department’s December 28, 2000 approval letter made clear that further Department approval would be required for material deviations from the conditions specified in the approval letter. The letter noted that each of the lots in the planned Beverly’s Hill subdivision was “2.2 acres and larger in size,” and specified that “[n]o lot may be reduced in size by more than 10% without prior approval of the Department of Natural Resources.” The requirement for Department approval of any material reduction in the size of the lots is consistent with 10 CSR 20-6.030(7)(C), which provides that:

there shall be no deviation or change that may adversely affect the geohydrologic evaluation, lot sizes, number of lots or the proposed water supply for a residential housing development following departmental approval without first securing written approval of the proposed changes from the department.

While the Department may not have had *original* regulatory authority over Steck's proposed subdivision of Lot 1 in 2016, the Department had *continuing* authority over her request to modify the conditions imposed on the lots in Beverly's Hill in the Department's 2000 approval letter.

Steck emphasizes that, by its own admission, the Department has no independent regulatory authority over her commercial property. She therefore argues that the Department had no authority to impose conditions on the wastewater treatment system servicing Lot A-1. Steck's argument ignores, however, that she proposed to create Lot A-1 by reducing the size of Beverly's Hill Lot 1 by more than 10% – a reduction in size which triggered the Department's regulatory authority. Steck's argument also ignores that she proposed to dispose of wastewater generated on Lot A-1 in a wastewater treatment system located wholly within the Beverly's Hill subdivision. Thus, while all or part of Lot A-1 may have itself been outside the Department's regulatory power, the method of wastewater treatment Steck proposed for the lot plainly implicated the Department's regulatory authority over the residential development itself.

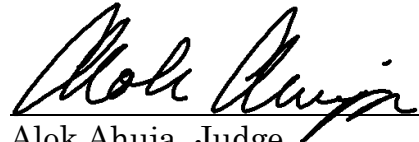
Finally, Steck cites to 10 CSR 20-6.030(1)(C)(5), which exempts "[r]esidential housing developments located in areas where the department has determined that the local administrative authority has a local program sufficient to meet the goals of this rule." Steck asserts in her Brief that this exemption applies here because "Cole County became an Ordinance County in 2014." There is nothing in the record on appeal, however, to indicate that Cole County has adopted a program of regulation of wastewater treatment systems in residential developments sufficient to meet the goals of 10 CSR 20-6.030, or – equally important – that *the Department has determined* that any such regulatory program is sufficient to meet the rule's goals. Steck's Brief cites a short exchange from Harwood's AHC testimony, in which he explained that the Cole County Health Department had authority to issue permits

which approved of the specific *design* of the wastewater treatment systems in Beverly's Hill. Harwood did not testify, however, that Cole County would itself evaluate the potential environmental impacts of this *method* of wastewater treatment, given the soil characteristics and geohydrology of the Beverly's Hill property. Steck's argument that the Department's regulatory authority was displaced by Cole County is without merit.

Point II is denied.

Conclusion

The judgment of the circuit court is reversed. We affirm the decision of the Clean Water Commission, which adopted the Administrative Hearing Commission's recommendation to sustain the Department's June 12, 2017 approval letter.


Alok Ahuja, Judge

All concur.