

Findings of Fact

Land Reclamation Program

1. The Department, through its Land Reclamation Program (Program), issues permits for surface mining, inspects the mine sites to ensure they comply with the provisions of §§ 444.760-.790,¹ and ensures that the sites are reclaimed when the mining operation is complete.²

2. The Program issues one-year permits, subject to yearly renewal, to mine operators.

3. In addition to a mining permit from the Program, applicants are required to obtain permits from the Water and Air Pollution Protection programs. These permits need not be in place before the Program issues them.

4. The Program does not consider health, safety, and undue impairment of livelihood in the permitting process.

5. Larry Lehman has been the director of the Program for six years. He has been employed with the Department for 29 years.

6. Bill Zeaman is the Unit Chief of the Program's Industrial and Metallic Minerals Mining Unit. He has served in this position since 2007 and has been employed with the Program since 1996.

7. Zeaman has a Bachelor of Arts degree in sociology, a Bachelor of Science degree in forestry, and a Master of Science degree in forestry.

8. Zeaman was involved in reviewing Nexgen's permit application (application).

¹ Unless otherwise stated, statutory references are to RSMo 2016.

² Section 444.774 imposes reclamation requirements on mine operators such as requiring mine sites that are no longer operational to be restored for forest, pasture, crop, horticulture, etc. The purpose of reclamation is to try to maintain some value in the property after it is mined.

9. Colin Priest is an environmental specialist with the Program. He reviews and processes various permit applications and conducts inspections on both permitted and unpermitted sites to ensure compliance with the Land Reclamation Act. He has been with the Program for six years and was also involved in reviewing Nexgen's application.

Nexgen's Application Process

10. On March 4, 2022, the Program received Nexgen's application for a new permit to engage in surface mining for sandstone – an industrial mineral – on 115 acres of the 249 acres in its mine plan boundary. Roger Faulkner – Nexgen's managing member – signed the application.³

11. The application requires the applicant to state the "Source of the Legal Right to Mine." For each landowner/mineral rights owner involved, Nexgen indicated in a letter dated March 16, 2022, from Faulkner to Zeaman that the source of that right is a mining lease agreement (Agreement) between Nexgen and Missouri Proppants, LLC (MoPro), signed on March 16, 2022.⁴ The letter asks Zeaman to update the application accordingly. Zeaman noted the lease date on the application with the notation "WSZ w/Clark Bollinger," following a discussion he had with Clark Bollinger, Nexgen's general manager. Ex. 1 at 3.

12. MoPro is a Texas limited liability company formed on June 14, 2017. On July 28, 2022, MoPro registered with the Missouri Secretary of State to do business in Missouri as a foreign limited liability company.

13. No one from the Department requested a copy of the Agreement or investigated its terms or the parties' right to enter into an agreement. The Program considers its duty to

³ Stan Schultz, a consultant working for Nexgen, submitted the application paperwork.

⁴ The arrangement between the individual property owners listed below and MoPro is unclear. But MoPro, not the individual owners, is listed as lessor in the Agreement.

investigate applications to consist of checking the signature of the landowner giving consent against the name of the landowner listed as holding the property rights.

14. The Agreement includes an “Exclusive Due Diligence Period” provision running from March 16, 2022 to March 16, 2023, granting Nexgen the right to enter the property and determine the feasibility of removing sands and to conduct other necessary investigations. Ex. 18 at 1-2. At the end of the due diligence period or if extended, at the end of the extended period, Nexgen has the right to exercise its option to lease the sand rights on the property by sending written notice and payment to MoPro.

15. The following landowners in the lease area signed the application acknowledging the reclamation process and granting Program representatives permission to inspect their land:

- a. Rose Lee Buatte and Donald L. Buatte
- b. Chris Holman and Tiffany Holman
- c. Markis Glassey
- d. Ray Glassey and M. Naomi Glassey
- e. John T. Buatte
- f. James W. Eppy and William M. Eppy

16. Mineral rights were transferred by General Warranty Deed by the land and mineral rights holders as follows:⁵

<u>Plot</u>	<u>Date</u>	<u>Owner</u>	<u>Grantee</u>
1	5/23/2017	John T. Buatte	Glassey Buatte, LLC ⁶
1	3/15/2022	GBB	MoPro
2	5/23/2017	Donald and Rose Buatte	GBB
2	3/15/2022	GBB	MoPro
3	5/23/2017	Ray and M. Naomi Glassey	GBB
3	3/15/2022	GBB	MoPro

⁵ The deeds granting rights from GBB to MoPro were executed on August 11, 2022, and filed with the Recorder of Deeds.

⁶ Hereinafter, GBB.

4	5/23/2017	Ray and M. Naomi Glassey	GBB
4	3/15/2022	GBB	MoPro
5	5/29/2017	Markis Glassey	GBB
5	3/15/2022	GBB	MoPro
6	6/4/2021	Chris and Tiffany Holman	GBB
6	3/15/2022	GBB	MoPro

17. GBB is a Missouri limited liability company organized on May 23, 2017. M. Naomi Glassey is the managing member. Members include Ray A. Glassey, Rose Lee Buatte, Donald L. Buatte, and John T. Buatte. Longhorn Proppants (Longhorn) is a Texas limited liability company registered to do business in Missouri on July 31, 2022. Its members include Cowtown Consulting, Ltd., Kyle Carrick, Earl Harcrow, and Sam Adams. M. Naomi Glassey is its registered agent.

18. GBB and Longhorn are members of MoPro.

19. On February 20, 2022, Nexgen purchased the property owned by the Eppy Family Trust from trustees William and James Eppy.

20. On March 17, 2022, Priest sent Faulkner a letter deeming Nexgen’s application complete and informing him that under 10 CSR 40-10.020(2)(H), Nexgen is required to advertise in a newspaper in Ste. Genevieve County, where the mine is located, a notice of intent to mine and to send by certified mail notice of intent to mine to “any contiguous or adjacent landowners within a half mile of the mine plan and the governing body of the county or city” where the proposed mine is situated. Ex. A at 1.

21. On September 16, 2022, Nexgen submitted an amended mine plan form to the Program with updated information on the landowners. Nexgen was added as a landowner and mineral rights holder. The source of the legal right to mine Nexgen’s property is a warranty deed signed on March 28, 2022, “obtained per the Lease between Nexgen Silica, LLC and

Missouri Proppants, LLC, a Texas limited liability company d/b/a/ MO Proppants, LLC.” Ex. 617 at 3. MoPro is also listed as a landowner. The Eppy Family Trust, the Buattes, the Glasseys, and the Holmans continue to be listed individually as landowners.

Public Notice and Public Meeting

22. Nexgen sent out letters to adjacent landowners on March 22, 2022, and published a public notice beginning March 23, 2022. A public comment period began the same day and continued through April 28, 2022.

23. OS is a limited liability company organized on April 12, 2022. One of its organizers testified that she lives less than one half mile from the proposed mining site.

24. After receiving multiple requests for a public meeting, the Program contacted Nexgen and instructed it to arrange a time and place for the meeting.

25. The public meeting occurred on May 19, 2022, at the community center in Ste. Genevieve. Nexgen provided police security at the public meeting. Representatives from Nexgen’s advisory board were available for questions. Nexgen general manager Bollinger offered to speak with people outside of the meeting and provided his phone numbers to interested audience members. In addition, Nexgen offered to conduct monthly meetings to answer additional questions.

26. Department representatives who attended the meeting include Lehman, Zeaman, Priest, members of the Southeast Regional Office’s Water Protection and Air Pollution Prevention Programs, and members of the Missouri Geological Survey.

27. In a May 10, 2022 e-mail to Stan Schultz and Clark Bollinger, Mikel Carlson, a principal geologist at GREDELL Engineering Resources, Inc., and one of Nexgen’s consultants, stated that wells to the west of the mining operation would not be contaminated by the proposed activity, but that “nothing between the assumed floor of the quarry and the aquifer would serve as a buffer to protect groundwater resources.” Ex. 19. Carlson testified that he did not have

operational information regarding Nexgen's mining plan before preparing the e-mail and did not intend to imply that Nexgen's operations would contaminate wells or the groundwater resources. He admitted that Schultz had forwarded him some records prior to the May 10, 2022 e-mail.

28. Approximately 350 people attended the public meeting. Nexgen conducted a PowerPoint presentation with information about Nexgen, the area it proposes to mine, the mining process, related safety concerns and regulatory requirements, and contact information for its consultants. It also provided attendees with related handouts.

29. The Department received numerous comments concerning possible adverse effects on residents living near the mine plan boundary. OS members are among the concerned citizens who commented.

30. One OS member, who commented regarding concerns about the mining operation's impact on her air and water quality, testified at the hearing that she researched the effects of silica mining and remains concerned about the impact that mining will have on the well water she and her family use for drinking and bathing. In addition, she is concerned about consequences related to blasting.

31. Some of the other concerns raised by members of the public include: adverse consequences to wildlife generally and to farm animals that drink from nearby creeks; adverse impact on Hawn State Park, Hickory Canyon Natural Area, Pickle Springs, and Horton Farms Conservation Area; noise and light pollution; detrimental effects of inhaling silica particles; removal of water from the aquifer in the mining process; contamination of the ecosystem; and damage to property and property devaluation.

32. The Department responded that a Heritage Review Report by the Missouri Department of Conservation does not show the presence of federally endangered species in the proposed mining area, and there are no records to show whether state endangered species are

present. If Nexgen abides by the Department's regulations, no sediment should leave the site or enter streams, and erosion should be controlled. There have been no studies on the proposed light and noise levels, but Nexgen is not prohibited from mining 24 hours a day, seven days a week as it proposed.

33. On May 23, 2022, counsel for OS sent Lehman a letter detailing problems at the public meeting and requesting a second meeting. Specifically, OS stated that people sitting on bleachers at the ends of the community center room could not see the monitors showing Nexgen's presentation; the microphone failed on several occasions, making it difficult for attendees to hear; technical presentations ran longer than the time they were allotted, causing attendees to believe they would not have time to ask questions; the information displayed was too small to see and was difficult for the audience to understand; and the Department did not provide a moderator, making it difficult for all who wanted to ask a question to do so.

34. The Program did not forward the request for a second meeting to Nexgen or respond to OS.

Joint Health Ordinances⁷

35. On May 16, 2022, the Ste. Genevieve County Commission (SGCC) passed and approved Joint Health Ordinance 05162022, for the protection of the public health of citizens of St. Genevieve County from the adverse effects of silica sand mining. The ordinance regulates the location of mining facilities.

36. The SGCC passed a second Joint Health Ordinance (07252022) on July 28, 2022, calculating the minimum distance a mining facility may be located from various entities as 2,640 feet rather than a one-half mile.⁸

⁷ Nexgen is currently involved in a civil suit challenging the validity of the July ordinance.

⁸ The distance is the same; only the units changed.

37. Both ordinances prohibit locating mining facilities less than 1,320 feet from any losing stream;⁹ tributary of any losing stream; or any stream segment that the Department has designated as “beneficial use” for irrigation, livestock and wildlife protection, warm water habitat protection, or whole-body contact recreation.

38. Establishment Creek is designated as a beneficial use stream in 10-CSR 20-7.031, Table H. One of its tributaries runs through the mine plan boundary.

Mining Permit

39. On June 30, 2022, Lehman sent Faulkner a letter issuing Nexgen a mining permit pursuant to § 444.773.¹⁰ The letter states that Nexgen is bound to follow applicable laws and regulations administered by the Air Pollution Control Program, Environmental Remediation Program, Land Reclamation Program, Geological Survey Program, Waste Management Program, and Water Protection Program.

40. The letter further states: “The Missouri Mining Commission permit to engage in surface mining does not supersede nor remove liability of the applicant for compliance with any local, state or federal requirements.” Ex. 2 at 2.

Conclusions of Law

We have authority to conduct a hearing in this matter and make a recommended decision to the MMC pursuant to §§ 621.250.1 and 444.773.2. The Department has the burden to prove that it lawfully issued a permit to Nexgen. Section 640.012. OS has the burden to prove by competent and substantial scientific evidence that “an interested party’s health, safety, or livelihood will be unduly impaired by the issuance” of the permit. Section 444.773.2; *see also*

⁹ See <https://dnr.mo.gov/land-geology/geology/karst-missouri/losing-streams> for a definition of “losing stream.”

¹⁰ The issuing entity is listed as the MMC, and the permit is signed by Lehman in his capacity as Director of Staff of the Missouri Mining Commission.

Lake Ozark-Osage Beach Joint Sewer Bd. v. Mo. Dep't of Natural Res., 491 S.W.3d 667 (Mo. App. W.D. 2016) and 10 CSR 40-6.080(1)(B)5.

We must judge the credibility of witnesses, as well as the weight and value of the evidence. We have the discretion to believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 18 (Mo. App. W.D. 1992), citing *Ragan v. Smarr*, 810 S.W.2d 718, 719-20 (Mo. App. W.D. 1991). When there is a direct conflict in the testimony, we must make a choice between the conflicting testimonies. *Dorman v. State Bd. of Regis'n for Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D. 2001). Our recommended findings of fact reflect our credibility determinations.

The Missouri Land Reclamation Act (Act), §§ 444.760-.790,¹¹ is administered by the Director of the Department, and its purpose is to “strike a balance between mining of minerals and reclamation of land subjected to surface disturbance by mining . . .” including the conservation of land, wildlife and aquatic resources. Section 444.762. The MMC has the power to review and approve all applicable mining applications. Section 444.767. The commercial mining of sandstone in Missouri requires a permit from the MMC. Section 444.770.

The Act provides that an operator that wants to engage in surface mining in Missouri must submit a written application to the staff director of the MMC and comply with the provisions of §§ 44.500-.790 and any rules or regulations promulgated thereunder. Section 444.772.¹² After the permit is deemed complete by the staff director, the operator must provide notice to the public, landowners situated within a half mile of the proposed mine plan area, and governing bodies of the county or city where the property sits. Section 444.772.10. The staff director is obligated to investigate the application and must consider all public comments. Sections 444.773.1 and 444.772.10. He or she must then issue or deny the application and may

¹¹ The applicable state regulations are 10 CSR 40-10.010 – 40-10.100.

¹² RSMo Supp. 2018.

impose reasonable conditions on the permit consistent with §§ 444.760 - .790. Section 444.773.1. The decision is deemed to be the decision of the Director of the Department of Natural Resources. *Id.*

In its complaint, OS alleges that its members live in the immediate vicinity of or downstream from the mine plan area and are thus adversely affected and aggrieved by the decision to issue Nexgen a surface mining permit. OS claims that Nexgen's application was defective, in that (1) MoPro was not identified as an entity with a legal interest in the lands to be mined, and (2) the Agreement did not convey a legal right to mine to Nexgen, both because MoPro was not permitted to do business in Missouri at the time it entered into the Agreement and because the Agreement granted Nexgen an option to lease the mineral rights, but did not convey those rights. Because the application was defective, OS contends the decision to issue Nexgen a permit was unlawful. OS further alleges that the permit was issued unlawfully because Program staff failed to undertake an adequate examination and investigation of Nexgen's application before recommending Nexgen be issued a permit; the mining plan violates the Joint Health Ordinances enacted by Ste. Genevieve County in May and July 2022; and the public meeting conducted in response to citizens' requests did not comply with the requirements of § 444.772.10.

Nexgen contends that OS has no standing to bring a claim in this matter; that under our de novo review, it is entitled to a permit based on the information concerning persons with interest in the property and its legal right to mine available at the time of the hearing, not at the time the Program deemed the application complete; that the Joint Health Ordinances are void and ineffective, and in any case, the only ordinance in play is the July ordinance that it contends was untimely added to the complaint; and that the Program adequately reviewed Nexgen's application and complied with the statutory public notice and meeting requirements.

Objections Taken with the Case

Nexgen objects that OS did not comply with our August 16, 2022 scheduling order requiring parties to exchange deposition designations by September 20, 2022, and electronically exchange witness lists and exhibits by 5:00 p.m. on September 22, 2022. Specifically, it claims OS failed to transmit an exhibit list containing the exhibits used in the depositions of Zeaman and Faulker (as Exhibit 23) before the hearing or provide marked copies of its hearing exhibits, including Exhibits 17 (OS's organizational documents), 21 (Deposition of Roger Faulkner), 22 (Deposition of William Zeaman), and 23 (exhibits for Faulkner and Zeaman depositions) by the September 22, 2022 deadline. In addition, Nexgen states that OS did not identify Exhibit 23 until after the deadline and failed to serve a copy of Exhibits 17 and 23 on Nexgen's counsel before the hearing. It asks us to sanction OS under 1 CSR 15-3.425 by striking OS's deposition designations, Exhibits 17, 21, 22, and 23, and testimony by the single witness who testified on behalf of OS at the hearing.

OS contends that DNR and Nexgen already had the exhibits, either because they were part of the DNR's administrative record, attached to OS's pleadings, or disclosed as part of discovery. In addition, at the time the exhibit and witness lists were due, OS was struggling with internet issues that resulted in lost or missing e-mails.

Regulation 1 CSR 15.3-425 gives us the discretion to impose sanctions on parties who do not comply with our orders. We decline to exercise that prerogative here because we find no wrongdoing by OS or prejudice to Nexgen. As it is entitled to do, OS designated the full deposition transcripts of Zeaman and Faulkner as exhibits. We instructed OS at the hearing to designate in its brief the excerpts it would like us to consider. Because the Zeaman deposition designations merely corroborated Priest's testimony, we find they add nothing prejudicial toward Nexgen. The deposition designations for Faulkner merely confirm his role in Nexgen's

organization, the facts concerning which Nexgen is already aware of. OS did not rely on the exhibits from those depositions (Ex. 23), although it claims that Nexgen had copies of them and in fact transmitted them to the parties on September 9, 2022. As for Exhibit 17 (OS's organizational agreement), OS contends that it produced that exhibit on September 5, 2022 as part of its response to Nexgen's requests for production. Finally, OS alleges it sent an e-mail to opposing counsel listing its witnesses. Even if Nexgen did not receive the e-mail, we decline to exclude OS's single witness, as her testimony did not include information not already in the record; her concerns are documented in the Program's summary of comments by attendees at the May 19, 2022 public meeting. In addition, based on OS's explanation to this Commission, we believe that internet issues interfered with the transmission of the witness list rather than that OS deliberately defied our order.

We also note that while Nexgen seeks to sanction OS for failing to comply with our order, it attached to its November 1, 2022 brief a document dated October 27, 2022, that it would like to add to the record. Not only was the document not produced before or during the hearing, it did not exist until a month after the record was closed. It is inadmissible both because at the time of the hearing, Nexgen made no request to keep the record open and because the document is unauthenticated, lacks foundation, and is prejudicial to OS. In addition, even if the document were admissible, we could not determine whether Nexgen complied with the Agreement because the Agreement has been redacted. *See Ex. 603 at 2.*

That Nexgen can conceive of seeking to admit its own documents outside the time frame of our order and post-hearing, where the document and any related witnesses are not subject to cross-examination and rebuttal at hearing, undermines its position that evidence not produced in accordance with the terms of our order should be excluded.

While we do not condone missing deadlines or handling documents in a sloppy manner, we are not convinced that any difficulties in this case arose from carelessness or a deliberate

disregard for our order. Therefore, we decline to sanction OS or to exclude its exhibits as evidence. All other objections not ruled on at the hearing are overruled.

Standing

Pursuant to § 444.773.2, “any aggrieved person” may file an appeal with this Commission within 30 days of the time a surface mining operation permit is issued. Section 621.250 similarly grants parties and persons who are “aggrieved or adversely affected” by a decision made pursuant to Chapter 444 the right to file an appeal with us.

In addressing the question of standing, the court in *Countryclub Homes, LLC v. Mo. Dep’t of Nat. Resources*, found that “standing roughly means that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight, or remote.” 591 S.W.3d 882, 888 (Mo. App. W.D. 2019), quoting *St. Louis Ass’n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 622-23 (Mo. banc 2011). The party’s interest must be a “legally protected interest,” and “exists only if the [party] is **affected directly and adversely** by the challenged action **or if the [party]’s interest is conferred statutorily.**” *Id.* (internal citation omitted; emphasis added.) The permittee in *Countryclub* argued that a neighborhood group does not have standing under § 644.051.6 to appeal the Director’s decision to the Clean Water Commission because that section limits the right of appeal to applicants or potential applicants. In dismissing this argument, the court found that it is the “legislature’s clear expression of intent in § 621.250.2 to allow ‘any person or entity who is a party to, or who is **aggrieved or adversely affected by**’ a decision of the Director to appeal.” *Id.* at 889 (emphasis added).

Likewise, when the petitioner is an entity, standing requires a personal interest particular to the petitioner. “In Missouri, an entity has ‘associational standing’ to bring a challenge on behalf of its members if: ‘1) its members would otherwise have standing to bring suit in their own right; 2) the interests it seeks to protect are germane to the organization’s purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual

members in the lawsuit.”” *Saxony Lutheran High Sch., Inc. v. Mo. Land Reclamation Comm’n*, 392 S.W.3d 52, 54 n.2 (Mo. App. W.D. 2013) (internal citations omitted).

OS members have a personal stake in this matter based on the cognizable claim that the mining operation will have an adverse effect on their health and safety as a consequence of blasting vibrations and reduced air and water quality. The latter concern is supported by the assertion in Carlson’s e-mail that wells to the west will not be contaminated (with no mention of wells to the east) and that if the mine goes as deep as Carlson assumes it will, there will be no buffer to protect the aquifer. We therefore find that OS has standing.

Administrative Review

We review the Program’s actions in issuing the permit de novo, and may consider information available at the time that was not submitted to or reviewed by the Program when it made its decision to issue Nexgen a permit. *See State ex rel. Mississippi Lime Co. v. Mo. Air Conservation Comm’n*, 159 S.W.3d 376, 385 (Mo. App. W.D. 2004) (under de novo review, “the commission [] is not limited to the record before the department at the time [the] permit was issued”); *see also Lederer v. State Dep’t of Soc. Servs., Div. of Aging*, 825 S.W.2d 858, 864 (Mo. App. W.D. 1992), *abrogated on other grounds by State Bd. of Regis’n for the Healing Arts v. Trueblood*, 368 S.W.3d 259 (Mo. App. W.D. 2012) (“[A]dministrative review is upon evidence *de novo* and by decision with findings of fact.”).

Thus, we have the authority to consider new evidence in determining whether the Program can meet its burden to show that it acted lawfully when it issued Nexgen a permit.

Nexgen’s Permit Application

According to § 444.772.2,¹³ an application for a surface mining permit must include the name of all persons with any interest in the land to be mined and the source of the applicant’s

¹³ *See also* 10 CSR 40-10.020.

legal right to mine the land affected by the permit. OS contends that Nexgen's application was deficient and should have been denied because Nexgen failed to list MoPro as a person with interest in the land to be mined, and failed to establish a legal right to mine under its Agreement with MoPro.

OS further contends that the Program failed to fully investigate the application as required by § 444.773.1 to ensure that all interested parties were listed and that Nexgen actually had a legal right it claimed to mine the property. In addition, OS claims that no statute provides for an "iterative" application process in which new landowners may be added to the application; it contends that § 444.772.5 authorizes an amendment to the permit only if the permittee seeks to add additional land to the plan.

List of Interested Parties

The Agreement shows that GBB and Longhorn are members of MoPro, which owns the 217 acres comprising the mine plan area. There is no record of when the original property owners transferred ownership to GBB, Longhorn, or MoPro; the record merely shows that the mineral rights were transferred from the individual owners to GBB and then to MoPro. An interest in the mineral rights establishes an interest in the property. However, because the March 16, 2022 Agreement states that MoPro is leasing the *property*, not just the mineral rights to Nexgen, we conclude that MoPro also came into possession of the property before that date.

The Program became aware of MoPro's existence when Faulkner informed Zeaman that Nexgen entered into the Agreement with MoPro purportedly granting Nexgen a legal right to mine the property. It was incumbent on Nexgen at that time to update the names of persons with an interest in the property and ensure their signatures granting Program staff the right to enter the property and agreeing to the plan for land reclamation after mining operations cease were added to the application. Alternatively, as part of his duty to investigate the application before "making

a decision to issue or deny the permit” under § 444.773.1, Zeaman should have recognized the application was deficient and notified Nexgen of the deficiency.

Nexgen claims that under our de novo review, because its September 16, 2022 updated list of persons with an interest in the land meets the requirement in § 444.772.2(1), it is entitled to obtain a mining permit. Nexgen contends that permit applications may be modified or supplemented “at any time before the Mining Commission makes a final permitting decision.” Reply brief at 4. It relies on *Saxony Lutheran High School, Inc. v. Mo. Dep’t of Nat. Resources*,¹⁴ in which the court held that the Missouri Land Reclamation Commission¹⁵ may modify or add conditions to a permit plan before it issues the permit, and *Lake Ozark/Osage Beach Joint Sewer Bd. v. Mo. Dep’t of Nat. Resources*,¹⁶ in which the court held that an incomplete application may be supplemented after the Department deems the application to be complete but before the permit has been issued. The hearing in *Lake Ozark* took place pursuant to 10 CSR 40-10.080(1)(A) when the applicant declined to hold a public meeting to address citizens’ concerns. Likewise, the hearing in *Saxony* took place after DNR recommended that the MMC issue a permit, but before it did so.¹⁷ Conversely, in the instant case, the permitting process is complete;

¹⁴ 404 S.W.3d 902 (Mo. App. E.D. 2013).

¹⁵ Now the MMC.

¹⁶ 326 S.W.3d 38 (Mo. App. W.D. 2010).

¹⁷ The hearing was granted pursuant to § 444.773.3, RSMo Supp. 2011, which provides in pertinent part:

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

(Emphasis added.)

the MMC¹⁸ has issued Nexgen a permit, and we are reviewing that decision on appeal. While the MMC may reconsider its permitting decision according to our recommendation, there is no indication that its initial decision was provisional or temporary. As the court in *Saxony* finds, “the power to modify a permit after it has been issued is different than the power to impose a condition on a permit as part of the process of initial approval.” *Saxony*, 404 S.W.3d at 907. Allowing the Department to modify permits after they have been issued undermines the legislative intent to involve the public in the permitting process. *Id.* at 907-08.

Nexgen also argues that § 444.772.1 is directory, rather than mandatory so its failure to provide all the required information should not prevent it from obtaining a permit. “Generally, the word ‘shall’ connotes a mandatory duty.” *Bauer v Transitional Sch. Dist. of City of St. Louis*, 111 S.W.3d 405, 408 (Mo. banc 2003). However, our courts have held that when a statute does not provide consequences for failing to comply with its terms, it is directory. *Id.* Still, “the presence of absence of a penalty provision is ‘but one method for determining whether a statute is directory or mandatory.’” *Id.* (internal citation omitted). Rather, the determination of whether “shall” is mandatory or directory “is primarily a function of context and legislative intent.” *Id.* (internal citation omitted). In this case, we are not persuaded that the legislature would condition a permitting decision on the contents of the application and then allow the applicant to leave out information that the legislature, by listing such information in the statute, has deemed relevant.

Our de novo review shows that the application was incomplete at the time the permit was issued; no new evidence suggests that Nexgen submitted all the required application information before it obtained the permit. We have no power to amend the application after a permit has been issued or allow Nexgen to retroactively correct its application. Because necessary information

¹⁸ As noted above, pursuant to § 444.773.1, the staff director of the MMC **issues the permit** and its decision “shall be deemed to be the decision of the director of the department of natural resources and **shall be subject to appeal to the administrative hearing commission . . .**” (emphasis added). See also § 444.765(7) which defines “Director” as “the staff director of the Missouri mining commission of his or her designee[.]”

was omitted from the application, the Program unlawfully issued a permit based on an incomplete application. We therefore recommend that the MMC rescind the permit.

*Legal Right to Mine*¹⁹

I. Validity of the Lease Agreement

MoPro was formed as a Texas limited liability company on June 14, 2017, and registered with the Missouri Secretary of State to do business in Missouri as a foreign limited liability company on July 7, 2022. OS argues that because MoPro entered into the Agreement nearly four months before it registered with the Missouri Secretary of State, MoPro could not lawfully transact business in this state when it signed the Agreement, and, therefore, the Agreement is invalid. OS relies on § 347.037.4, which provides that “[a] limited liability company may not transact business . . . except that which is incidental to its organization . . . until the articles of organization have been filed with the secretary or until the formation date specified in the articles.” However, this section further states that it shall not be interpreted “to invalidate any . . . contracts . . . incurred solely on behalf of a limited liability to be formed.” When a limited liability company is formed for the purpose of acquiring property rights, a contract entered into to effectuate the assignment of those rights is incidental to the organization of the limited liability company to be formed and “therefore, not subject to the prohibition against transaction of business prior to filing articles of organization.” *Briar Road, L.L.C. v. Lezah Stenger Homes, Inc.*, 256 S.W.3d 131, 138 (Mo. App. S.D. 2008). Because MoPro was formed for the purpose of acquiring mining rights to lease to Nexgen, the Agreement is incidental to its organization and is therefore valid for purposes of Nexgen’s application.

¹⁹ In its brief, Nexgen argues that this claim is time-barred. We find no basis for this claim. The allegation appeared in paragraph 19 of both the original and the amended complaint.

II. Rights Under the Lease Agreement

The Agreement between MoPro and Nexgen provides an “Exclusive Due Diligence Period” between March 16, 2022, and March 16, 2023, during which time Nexgen may enter the property and determine the feasibility of removing the sand located there. Ex. 603 at 1. In this regard, Nexgen is permitted to “conduct exploratory drilling, assess the requirements for wetland, stream, runoff and other water related mitigation permitting” and other necessary investigatory activities. *Id.* At any time during the due diligence period, the Agreement allows Nexgen to exercise an option to lease the sand rights on the property by giving MoPro notice in writing plus consideration in an amount provided in the Agreement.

An option contract such as this conveys the right to consider a deal, but does not convey the right to the property interest. *See State v. Mitchell*, 573 S.W.3d 752, 758-59 (Mo. App. W.D. 2019) (“The mere fact that [lessees] possessed an option to purchase the [] property—if they took certain actions in the future—did not make them owners of that property, or give them legally enforceable rights with respect to that property.”). An option “is merely a continuing and irrevocable offer that the seller cannot withdraw during a stated period. . . . [U]ntil the buyer accepts, there is no enforceable contract.” *Riddle, ex rel. Estate of Riddle v. Elk Creek Salers, Ltd.*, 52 S.W.3d 644, 646-67 (Mo. App. S.D. 2001). A binding bilateral contract is formed only after the optionee accepts the offer in the manner prescribed by the agreement. *HGS Homes, Inc. v. Kelly Res. Group, Inc.*, 948 S.W.2d 251, 255 (Mo. App. E.D. 1997).

We have no evidence that Nexgen exercised its option to lease the sand rights from MoPro before the Program issued it a permit.²⁰ Consequently, Nexgen has not established that it has a legal right to mine the property as required under § 444.772.2 and, as no right exists,

²⁰ As discussed above, we do not accept the document attached to Nexgen’s November 1, 2022, brief as evidence. Furthermore, it does not show that Nexgen had exercised its option prior to June 30, 2022, when the permit was issued.

cannot provide a source granting it that right. Because its application was incomplete at the time it was issued, we find that the Program cannot meet its burden to show that it lawfully issued Nexgen a mining permit.

III. Joint Health Ordinances

OS contends that because the mine plan site does not comply with setback requirements provided in the Joint Health Ordinance adopted by the Ste. Genevieve County Commission on May 17, 2022, and replaced by the Joint Health Ordinance adopted on July 28, 2022, Nexgen does not have a legal right to mine the area. Nexgen argues that OS untimely added to its complaint the claim concerning the July 28, 2022 ordinance and it should be dismissed. While a petitioner has 30 days to appeal a permitting decision to this Commission, there is no prohibition against amending the complaint to include new facts or allegations that arise concerning the same subject matter. We therefore consider the claim properly included in the amended complaint.

The Program argues that it is not bound to consider local ordinances when making a permitting decision; nor is an applicant exempt from complying with federal, state, and local laws by virtue of obtaining a permit. Nexgen is currently engaged in a civil suit challenging the ordinance, claiming that it was enacted solely to prevent Nexgen from operating its mine. We lack authority to consider whether an ordinance is valid. *See State Tax Comm'n v. Admin. Hrg. Comm'n*, 641 S.W.2d 69 (Mo. banc 1982), citing *State ex rel. Kansas City Terminal Ry. v. Pub. Serv. Comm'n*, 308 Mo. 359, 373, 272 S.W. 957, 960 (1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance). Additionally, we find no support for OS's argument that the Program should consider laws and regulations other than those pertaining to or promulgated by the Department when determining whether a permittee has a legal right to mine.

Investigation

Pursuant to § 444.773.1, the Program director shall “promptly investigate the application and make a decision within six weeks after completion of the process provided in subsection 10 of section 444.772 to issue or deny the permit.” If the application “has not fully complied with the provisions of section 444.772 or any rule or regulation promulgated pursuant to that section, the director may seek additional information from the applicant.” Section 444.773.1.

OS contends that as part of its investigation, the Program was required to confirm that all entities with an interest in the proposed mining area were listed on the application, MoPro was authorized to transact business in Missouri, and Nexgen had the legal right to mine that it claimed to possess. At the hearing, the Program’s witness, Colin Priest, testified that its investigation customarily consists of making sure the landowners identified on the Program’s map as adjacent to the mine plan area have signed the application consenting to inspection of their property, and confirming that the applicant has a lease agreement or other entitlement to a legal right to mine. However, the Program does not require the applicant to submit documentation or otherwise prove it has such a right; nor does it investigate the right independently.

The term “investigate” means “To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition” BLACK’S LAW DICTIONARY 740 (Sp. 5th ed. 1979). Taking another individual or entity’s word that something is true does not accord with the definition of “investigate.” As a case in point, the Program admits that when it receives a complaint against a permittee, it investigates the complaint by conducting a site inspection to ensure that permit holders are complying with the law; it does not merely ask the permittee if everything is up to code.

However, while it is clear that the Program’s procedure for investigating applications led it to issue Nexgen’s permit unlawfully, we have no power to superintend another agency’s

procedures. *Missouri Health Facilities Review Comm. v. Admin. Hrg. Comm'n*, 700 S.W.2d 445, 450 (Mo. banc 1985). Thus, we may not impose our own procedures instead of the Program's.

Because the statute does not specify a procedure for investigating applications, the procedure the Program followed does not provide grounds to deny Nexgen a permit.

Public Meeting

Before determining whether to issue a permit, the Director must consider any public comments he or she receives. Section 444.773.1. Section 444.772.10 provides in relevant part:

If any person requests a public meeting, the applicant shall cooperate with the director in making all necessary arrangements for the public meeting to be held in a reasonably convenient location and at a reasonable time for interested participants, and the applicant shall bear the expenses.

The Program received multiple requests from the public for a public meeting. Nexgen arranged the meeting, held May 19, 2022, at a local community center. The facility accommodated the estimated 350 attendees; there is no evidence that any person interested in attending was unable to do so. A summary prepared by the Program following the meeting lists numerous comments and questions by members of the public in the following categories: (1) potential damage to state parks, conservation areas, and local ecology; (2) failure to notify all landowners near the mining site in compliance with other laws and regulations; (3) water and air pollution concerns; (4) blasting concerns; and (5) road and traffic concerns. Most of the responses provided by the Program are derived from information Nexgen provided to the Program rather than its independent evaluation.²¹

Based on the number of comments the Program received, it is clear that the forum provided an adequate opportunity for public input. Furthermore, the record shows that Nexgen went to great lengths to provide information in its PowerPoint presentation and handouts and to

²¹ The Heritage Review Report regarding endangered species was commissioned by the Program and conducted by the Department of Conservation.

answer attendees' questions. At least one Nexgen official provided his contact information so that citizens could contact him after the meeting with additional questions, and further offered to meet with residents on a monthly basis.

Although there is some dispute about whether technical problems interfered with attendees' ability to understand all aspects of the presentation, we find that the meeting provided an adequate opportunity for attendees to ask questions and register their concerns for the Program's consideration in making its permit determination.

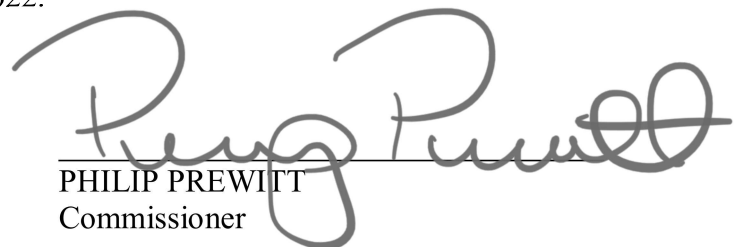
Health and Safety Concerns

OS contends that the health and safety of its members will be compromised by the surface mining operation. However, it produced no "competent and substantial scientific evidence," § 444.773.2, or other evidence, beyond members' speculation, to support its claim. While the e-mail by Carlson provides some foundation for OS's concerns, it does not establish that those concerns are valid. Because we have no evidence that the surface mining will affect OS members' air and water quality or that the blasting vibrations will have a negative impact on their health or safety, we find no reason to deny Nexgen a permit on this basis.

Summary

We recommend that the MMC reverse its decision to issue a permit to Nexgen Silica, LLC, because it was issued unlawfully in that Nexgen did not comply with the requirement to list all known property owners on its application and to list a source granting it a legal right to mine the area in its mine plan.

SO RECOMMENDED on November 15, 2022.


PHILIP PREWITT
Commissioner