



19TH JUDICIAL CIRCUIT COURT

Cole County
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PATRICIA S. JOYCE
Circuit Judge

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LOCATION: COURTHOUSE, JEFFERSON CITY, MO

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DATE: *12/9/08* TIME:

RE: *State, ex rel. vs. Mo Dept. Natural Resources*

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Amended Judgment

SENDER: *Bridget Hareley*

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At the hearing on July 21, 2008, counsel for DNR, without even providing a courtesy copy of this decision to the Court or to counsel for Plaintiffs in advance of the hearing, handed to the Court and counsel for Plaintiffs the decision in the case of *Lee v. Ofield*, 847 S.W.2d 99 (Mo.App. W.D. 1992), in which the Appellate Court stated as follows:

... a party who has failed to respond to requests for admissions can request leave to file a belated response, and the trial court may properly allow the late filing of answers to requests for admissions where there is no showing of bad faith or prejudice.

Counsel for DNR did not file any brief with the Court setting forth any factual basis which would entitle DNR to fall under this exception. The Court granted counsel for DNR time in which to file such a brief and when none was filed and there being nothing in the record to support a finding that DNR was entitled to the benefit of the exception in the *Lee* decision, this Court denied the Motion of DNR to file a belated Response to Plaintiffs' First Request for Admissions.

DNR also argues that under the Rule that DNR is entitled to alter, amend or withdraw responses under certain limited circumstances. DNR has never advanced any legal or factual basis for the exception to apply.

The law of Missouri is absolutely clear that since DNR failed to respond to Plaintiffs' Request for Admissions within the 30 day time period mandated by Rule 59.01(d), the Request for Admissions are all deemed true in all respects and binding upon DNR in the context of Plaintiffs' Motion for Summary Judgment. Missouri case law demands this result. See, *Metropolitan St. Louis Dist. v. Zykan*, 495 SW2d 643 (Mo. 1973) (all matters in plaintiff's request for admissions were deemed admitted where defendants failed to timely serve denials or written objections to any of the requests); *City of Warrenton v. Pickens*, 906 SW2d 411 (Mo.App. 1995) (failure to respond timely to requests for admissions results in admitting all requests,

despite some calling for legal conclusions); *Dana Commercial Credit Corp. v. Cukjati*, 880 SW2d 612 (Mo.App. 1994) (failure to file timely responses to request for admissions admits all requests, and thus all matters are conclusively established and bind the party to whom requests were addressed); *Lee v. Ofield*, 847 SW2d 99 (Mo. App 1992) (admissions resulting from failure to respond can be used in a motion for summary judgment on the merits); and *TBF Financial, LLC v. Stone*, 213 SW3d 231 (Mo.App. 2007) (a party who fails to respond timely to requests for admissions admits all matters, and no further sanction is necessary or available to the proponent, who instead can use the admissions in dispositive motions or at trial).

FINDINGS OF FACT

The Plaintiff, The Village of Arrow Rock, is a State Historic site which was designated a National Historic Landmark in 1964, and the DNR has acknowledged the historical importance of The Village of Arrow Rock. The Village of Arrow Rock is home to a number of historic buildings. In near proximity to The Village of Arrow Rock is the Sappington Cemetery State Historic Site. (Request 16.)

On January 5, 2007, Dennis Gessling ("Gessling") submitted to the DNR a Form F Application for Approval of Permit for Concentrated Animal Feeding Operation (the "Gessling Application") seeking a permit for the construction of a 4,800 head deep-pit, wean-to-finish Concentrated Animal Feeding Operation ("CAFO"). (Request 66.) It is proposed that the Gessling CAFO is to be located within two miles of the Village of Arrow Rock and the Sappington Cemetery State Historic Site. (Request 66.)

The National Trust has been concerned about the impact on this Nation's historic sites and rural heritage by CAFOs. (Request 67.) The National Trust issued a position paper

outlining the adverse effects on historic sites caused by CAFOs. (Request 68.) The policy statement by the National Trust states that:

In Missouri, proposed factory farms threaten four historic sites and state parks, including the National Historic Landmark town of **Arrow Rock** (one of the National Trust's Dozen Distinctive Destinations in 2006), the **Battle of Athens State Historic Site**, **Roaring River State Park**, and **Sappington Cemetery State Historic Site**. (Request 70.)

On January 11, 2007, the National Trust filed with DNR a protest and opposition to the proposed Gessling Application. (Request 71.) In its opposition to the Gessling Application the National Trust stated as follows:

We are concerned that approval of the aforementioned CAFO in this location would have an adverse effect on the historically significant town of Arrow Rock, listed as a national Historic Landmark by the U.S. Department of the Interior for its significance in the history of westward expansion. National Historic Landmark designation is an honor given only to those places which possess exceptional value or quality in illustrating or interpreting the heritage of the United States. Like all national Historic Landmarks, Arrow Rock is an essential and irreplaceable building block of America's shared cultural identity that should be safeguarded for future generations. We are concerned that the effects of the proposed CAFO on air and water quality will be detrimental to the town of Arrow Rock, as well as to the nearby State Historic Sites and National Register-listed Prairie Park.

In 2006, the National Trust honored the town of Arrow Rock by designating it one of our "Dozen Distinctive Destinations," the first time a Missouri community had been chosen for the award. (Request 72.)

A group of scientists selected by the United Nations and the World Health Organization have prepared an over 400 page report expressing their concern with the adverse impact that CAFOs and related operations are having on the health of people and on the environment. (Request 74.) The DNR and Director Childers approved the Gessling Application and issued a permit for the construction of Gessling's proposed CAFO. (Request 75.) If the Gessling CAFO is constructed and placed in operation as planned, this will decimate and destroy an irreplaceable

part of the historical heritage of this Nation and this State in the Village of Arrow Rock and surrounding historic sites. (Request 77.)

The Gessling Application calculates the total annual waste volume from both barns combined equal to 279,663 cubic feet of hog manure per year, which is over 2,091,879 gallons of hog manure annually. (Request 91.) The waste that the Gessling Application calculates will be produced each year is more waste than produced in a major city. (Request 92.)

These airborne pollutants generated annually by the over 2,091,879 gallons of hog waste from the Gessling CAFO facility and spread on fields near Arrow Rock will contain numerous dangerous and harmful components including ammonia, hydrogen sulfide, bioaerosols, including bacteria, antigens, glucans, and endotoxins, particulates, such as grain dust, dust mites, animal dander, pollen grains, molds and fungal spores, and dry fecal matter, and volatile organic compounds. (Request 99.) The airborne pollutants generated annually by the over 2,091,879 gallons of hog waste from the Gessling CAFO facility and spread on fields near Arrow Rock will destroy and decimate historic Arrow Rock and the other numerous landmarks and historic sites listed on the National Register and State and Federally protected parks and sites in the surrounding area. (Request 101.)

The Environmental Protection Agency ("EPA") has determined that nearly three-fourths of the ammonia air pollution in the United States can be attributed to animal agricultural operations such as the proposed Gessling CAFO. (Request 110.) This determination by the EPA is consistent with the finding by the United Nations and World Health report. (Request 111.)

CAFO emissions also contain significant amounts of hydrogen sulfide, which are both an irritant and an asphyxiant. (Request 112.) U.S. Public Health Service studies show that exposure to hydrogen sulfide, even in small quantities, can cause adverse health effects including

shortness of breath, eye irritation, nausea, and loss of sleep. (Request 113.) Chronic community exposure to hydrogen sulfide has been linked to asthma, bronchitis, and nasal and eye irritation. (Request 114.) CAFO operations emit endotoxins which are detrimental with regard to airway function and asthma. (Requests 117 and 118.) Studies of exposure to the foregoing components of CAFO emissions show that residents living in proximity to CAFO operations report an increased likelihood for respiratory and gastrointestinal problems and mucus membrane irritation. (Request 123.) Studies of exposure to the foregoing components of CAFO emissions show that children attending elementary schools near CAFOs are two and a half times more likely to develop asthma than children attending schools not in proximity to CAFOs. (Request 124.) Studies of exposure to the foregoing components of CAFO emissions show that persons living within the area near CAFOs frequently suffer eye, nose and throat irritation, headache, nausea, diarrhea, hoarseness, sore throat, cough, chest tightness, nasal congestion, heart palpitations, shortness of breath, and drowsiness. (Request 125.)

The DNR has approved the Gessling Application; and if the DNR should allow the construction of the Gessling CAFO to proceed and then allow the Gessling CAFO to operate, the Gessling CAFO will generate noxious fumes and stench (Request 128) and these noxious fumes and stench will cripple the tourist industry in the Village of Arrow Rock area and will decimate the historic Village of Arrow Rock, several State Historic Sites, acres of State Park land, structures on the National Register and other historic structures near the Village of Arrow Rock. (Request 129.)

If the Gessling CAFO facility is constructed and allowed to operate where it is proposed, then that CAFO facility will cause irreparable damage to the Village of Arrow Rock, the Sappington Cemetery Historic Site and the entire historic community in this area. (Request 131.)

Millions of dollars of Federal, State and private funds have been invested in the Village of Arrow Rock, in the State Visitors Center, in the Lyceum Theater Complex, and in the restoration and maintenance of other historic State properties and park structures; the restoration of several Friends of Arrow Rock properties; and the restoration and construction of many private buildings through direct grants, Neighborhood Assistance Program grants, and private and foundation funding. (Request 132.)

If the DNR and Director Childers allow the construction and operation of the Gessling CAFO where planned, then all these funds and this restoration will be lost. (Request 133.)

No amount of money can adequately replace or compensate Plaintiffs, the citizens of the Village of Arrow Rock or the citizens of the State at large for the damage the Gessling CAFO will cause to these historical treasures. (Request 134.)

The DNR conducted no tests and did no studies and had no one conduct any tests or run any studies to determine if there would be any airborne pollutants or odors emitted from the Gessling CAFO if the Gessling CAFO is constructed and placed into operation. (Request 145.)

Post-judgment motions filed by DNR on September 23, 2008 and November 24, 2008 state that Dennis Gessling has petitioned to transfer his operating permit which expired on August 30, 2008 to his company name.

CONCLUSIONS OF LAW

Any findings of fact stated hereinabove that is more appropriately deemed to be a conclusion of law shall be deemed to be a Conclusion of Law.

It is the constitutional duty of the State of Missouri and the statutory obligation of DNR on behalf of the State to protect the historic sites in the State of Missouri. (Request 22.) DNR is statutorily vested with the responsibility to care for, protect and preserve the Missouri State

Parks, State Historic sites and landmarks on the National Register. (Request 25.) DNR is also responsible for the preservation and administration of Missouri State Parks and State Historical Sites. (Request 26.)

The director of the DNR is statutorily designated as the State Historic Preservation Officer and he is responsible for establishing, implementing and administrating federal and state programs or plans for historic preservation. (Request 28.) The director of DNR has a duty to prepare and implement comprehensive statewide historic preservation plans and to administer the state program of Federal assistance for historic preservation within the State. (Request 31 and 32.)

Section 253.035 RSMo requires the DNR to establish "regulations necessary for the proper maintenance, improvement, acquisition and preservation of all state parks." (Request 39.) DNR has promulgated 10 CSR 90-1.010, which establishes the Division of Parks, Recreation, and Historic Preservation ("Division of Parks") and describes the Division of Parks' role as follows:

The activities of the division consist of making various state owned facilities accessible to all segments of today's society including the youth, handicapped, senior citizens and the disadvantaged through a systematic program which will permit the division to acquire, protect, develop and interpret for the inspiration, use and enjoyment of the people of the State a well balanced system of areas of outstanding scenic, recreational and historic significance. (Request 40.)

The DNR is responsible for the administration of the National Historic Preservation Act of 1966, 16 USC § 470, *et seq.*, pursuant to § 253.022 RSMo. (Request 42.) DNR is statutorily obligated by § 253.022(3) RSMo to expend any monies appropriated to the DNR from The National Historic Preservation Fund "for the purpose of assuring preservation and protection of sites listed on the National Register, with private citizens, societies, associations, corporations, municipalities and state and federal agencies." (Request 47.)

The DNR and Director Childers have assumed responsibility for preventing the loss or alteration of historic properties significant to the Nation's heritage, especially as it relates to National Historic Landmarks. *See*, 16 USC § 470(b). (Request 49.) The DNR and Director Childers, as the State Historic Preservation Officer, have a duty to protect National Historic Landmarks "to the maximum extent possible". (Request 55.)

The State Legislature has promulgated legislation establishing an endowment that the DNR can use only for "the preparation of museum exhibits, acquisition of artifacts, publication of information, payment of fees for exhibits or lectures, or other similar interpretive needs at Arrow Rock state historic site and for no other purpose." (Request 56.) The endowment is known as the Arrow Rock State Historic Site Endowment Fund. (Request 57.) The DNR must perform certain functions for the preservation of Arrow Rock specifically pursuant to the Arrow Rock State Historic Site Endowment Fund. (Request 58.)

A group of scientists selected by the United Nations and the World Health Organization have prepared an over 400 page report expressing their concern with the adverse impact that CAFOs and related operations are having on the health of people and on the environment. (Request 74.) The DNR and Director Childers approved the Gessling Application and issued a permit for the construction of Gessling's proposed CAFO. (Request 75.)

The DNR and Director Childers, by approving the Gessling Application and issuing a permit for the construction of Gessling's proposed CAFO, are in direct violation of the State's obligation under Article 1, Sections 2 and 10 of the Missouri Constitution and the statutory obligation of the DNR and Director Childers. (Request 76.)

If the Gessling CAFO is constructed and placed in operation as planned, this will deny the citizens of the Village of Arrow Rock, the residents living in and around the Village of

Arrow Rock and visitors to the Arrow Rock area their Constitutional Rights by exposing them to countless harmful health threats. (Requests 77 and 78.)

The DNR and Director Childers are legally and dutifully bound to protect and preserve the historic Village of Arrow Rock, several State Historic Sites, acres of State Park land, structures on the National Register and other historic structures near the Village of Arrow Rock. (Request 130.) If the Gessling CAFO facility is placed and allowed to operate where it is proposed, then that CAFO facility will cause irreparable damage to the Village of Arrow Rock, the Sappington Cemetery Historic Site and the entire historic community in this area. (Request 131.)

Millions of dollars of Federal, State and private funds have been invested in the Village of Arrow Rock, in the State Visitors Center, in the Lyceum Theater Complex, and in the restoration and maintenance of other historic State properties and park structures; the restoration of several Friends of Arrow Rock properties; and the restoration and construction of many private buildings through direct grants, Neighborhood Assistance Program grants, and private and foundation funding. (Request 132.)

If the DNR and Director Childers allow the construction and operation of the Gessling CAFO where planned, then all these funds and restoration will be lost and the DNR and Director Childers will have abrogated their duty and obligations to preserve and protect historic sites in the State, with the resultant, irreparable harm to those historic sites and residents of the State of Missouri. (Request 133.)

No amount of money can adequately replace or compensate Plaintiffs, the citizens of the Village of Arrow Rock or the citizens of the State at large for the damage the Gessling CAFO will cause to these historical treasures, leaving the Plaintiffs with no adequate remedy at law.

(Request 134.) This action for a Writ of Mandamus and declaratory judgment are the only remedies available to Plaintiffs to prevent this irreparable damage. (Request 135.)

The Administrative Hearing Commission of the State of Missouri previously entered a Stay Order commanding that construction not proceed on a large chicken operation near the Roaring River State Park. (Request 137.) The DNR failed and refused to honor or enforce the Stay Order issued by the Administrative Hearing Commission and a large chicken operation was allowed to be constructed and operate at Roaring River. (Request 138.) That chicken operation threatens the spring in Roaring River, the historic sites and the visitor facilities in that area. (Request 139.) The Administrative Hearing Commission did not enforce its Stay Order that it issued as to the large chicken operation near the Roaring River State Park and the Administrative Hearing Commission does not have the ability or the authority to enforce its Stay Orders. (Request 140.)

An appeal has been filed with the Administrative Hearing Commission from the DNR granting the construction permit to Gessling to construct the two barns and CAFO operation sought by Gessling. (Request 136.) Even if the appeal is sustained by the Administrative Hearing Commission, the Plaintiffs are without an adequate remedy since the DNR has not within the past five years enforced, complied with or honored any Stay Order rendered by the Administrative Hearing Commission. (Request 141.) The DNR within the last five years has not enforced any Stay Order rendered by the Administrative Hearing Commission. (Request 142.)

The DNR within the last five years has not complied with any Stay Order rendered by the Administrative Hearing Commission. (Request 143.) The DNR within the last five years has

not honored any Stay Order rendered by the Administrative Hearing Commission. (Request 144.)

In view of this failure of DNR to enforce or honor any Orders of this Administrative Hearing Committee such an appeal will not protect the interests of the Plaintiffs and will not prevent the DNR from continuing to fail to perform its constitutional and statutory obligations to preserve and protect Arrow Rock , the Landmarks, Historic Sites and State Parks surrounding Arrow Rock.

DNR maintains in its post judgment brief that the instant lawsuit is moot because the Gessling permit expired on August 30, 2008. The original judgment of the Court was issued on August 25, 2008. The Court, in considering this issue, finds that Mr. Gessling has sought to transfer his permit to his company name for another operation in the area of the instant lawsuit. If such transfer was permitted, similar threats to the community such as exposing them to odors and volatile and dangerous airborne pollutants could occur as admitted by DNR. As such, the Court declines to rule that the instant lawsuit is moot.

Any conclusion of law stated hereinabove that is more appropriately deemed a finding of fact shall be so deemed.

CONCLUSION

After reviewing the pleadings and considering the arguments of counsel, the Court hereby enters judgment in favor of the Plaintiffs and against the Defendant, Missouri Department of Natural Resources, on all claims set forth in the Petition declaring (a) that it is the constitutional duty of the State of Missouri and the statutory obligation of the DNR and its Director to preserve and protect the Missouri State Parks, State Historical Sites and Landmarks on the National Register in the State of Missouri; (b) that a Concentrated Animal Feeding

Operation, from the Gessling Application or its successor may not be allowed within a distance of (2) two mile radius of the Village of Arrow Rock and the Sappington Cemetery State Historic Site in the State of Missouri and that no Concentrated Animal Feeding Operation from the Gessling application or its successor can transport, spread or otherwise deposit or dispose of any waste from its operation within a two mile radius from the Village of Arrow Rock and the Sappington Cemetery State Historic Site in the State of Missouri as these operations and activities pose a threat to the Village of Arrow Rock and the Sappington Cemetery State Historic Site in the State of Missouri; (c) that the DNR must revoke the Gessling Application permit and deny the transfer of such permit because such approval of that Application will deny the local citizenry their constitutional due process rights to life, liberty, and the pursuit of happiness by exposing them to odors and volatile and dangerous airborne pollutants that will threaten the health and welfare of citizens and others in and around the Arrow Rock area; (d) that failure to revoke the permit and allow the transfer of the Gessling permit would be an avoidance and an abrogation by the DNR and its Director of their respective duties and obligations assigned to the DNR and its Director who, as the State Historic Preservation Officer, is statutorily bound to protect and preserve State Parks and State Historic Sites as the Gessling CAFO will generate odors and volatile and dangerous airborne pollutants that will decimate and destroy the historic Arrow Rock region, its State Historic Sites, structures on the National Register and other historic structures, and cripple the tourist industry; and (e) that a Writ of Mandamus is hereby issued commanding DNR to revoke the Gessling Permit and deny the transfer of the permit and prohibiting DNR from issuing any such permits to Gessling to construct or operate a Concentrated Animal Feeding Operation within a distance of two mile radius from the Village of Arrow Rock and the Sappington Cemetery State Historic Site in the State of Missouri since such

operation might expose or cause to be exposed that area in the State of Missouri to odors and volatile and dangerous airborne pollutants that might be emitted from a Concentrated Animal Feeding Operation and that no waste from such Concentrated Animal Feeding Operation can be transported, spread or otherwise deposited or disposed of within a two (2) mile radius from the Village of Arrow Rock and the Sappington Cemetery State Historic Site in the State of Missouri.

The protection and preservation of the State Parks, Historic Sites and Landmarks in the State of Missouri are the absolute essential duty of the DNR and its Director to be certain that dangerous airborne pollutants and odor from Concentrated Animal Feeding Operations do not reach or threaten to reach the Village of Arrow Rock and the Sappington Cemetery State Historic Site. If dangerous pollutants or odor or both from Concentrated Animal Feeding Operations reach or threaten to reach the Village of Arrow Rock and the Sappington Cemetery State Historic Site and since DNR and its Director have a history of failing to honor and enforce Stay Orders issued by the Administration Hearing Commission as to such situations, then this Court shall retain jurisdiction of this matter to ensure that the DNR and its Director take immediate steps to shut down and such offending Concentrated Animal Feeding Operations until positive, adequate steps are taken that ensure such will not occur or reoccur.

All other pending motions are hereby denied.

DATED: 12.9.08



Judge Patricia S. Joyce
19th Judicial Circuit Court