Before the
Administrative Hearing Commission
State of Missouri

IN RE COUNTRY CLUB HOMES, LLC, Permit No. MOG010872	)))	No. 18-0501

RECOMMENDED DECISION

The Administrative Hearing Commission ("AHC") recommends that the Missouri Clean Water Commission ("CWC") reverse the Department of Natural Resources' ("Department") decision to issue Permit No. MOG010872 (the permit) to County Club Homes, LLC, [sic] and subsequently to Valley Oaks Real Estate, LLC, ("Valley Oaks") to operate a Class IB concentrated animal feeding operation ("CAFO").

Procedure

On June 27, 2018, Powell Gardens, Inc., Ryan and Elizabeth Deich and the Robert M. Chamness Trust (collectively, "Powell Gardens"), filed a complaint appealing the Department's decision to issue the Permit. On July 2, 2018, Valley Oaks filed a motion to intervene, which we granted by order dated July 5, 2018. On July 2, 2018, Valley Oaks also filed its answer to the complaint. On August 3, 2018, the Department filed a motion to file its answer to the complaint out of time and its answer. By order dated August 3, 2018, we granted the motion. On August 7, 2018, with our leave, Valley Oaks filed an amended answer to the complaint. On August 20, 2018, Powell Gardens and the Petitioners in Case No. 18-0498 filed motions for leave to file amended complaints. On August 21, 2018, Valley Oaks filed a response to the motion to file an

amended complaint. By order dated August 22, 2018, we granted both petitioners leave to file an amended complaint "solely on the issue of the Department of Natural Resources' action of August 9, 2018." On August 24, 2018, Powell Gardens filed its first amended complaint. On August 27, 2018, Valley Oaks filed an answer and motion to strike.

On June 27, 2018, Powell Gardens filed a motion for stay. On July 9, 2018, Valley Oaks filed suggestions in opposition to the motion for stay. On July 9, 2018, we held a hearing on the stay. By order dated, July 26, 2018, we granted the motion. On August 6, 2018, the Department filed a motion to reconsider our stay order, and on August 7, 2018, Valley Oaks also filed a motion to reconsider. On August 10, 2018, Powell Gardens filed suggestions in opposition to the motion to reconsider the stay order. By order dated August 14, 2018, we reconsidered our stay order and declined to lift or vacate it. The Department filed for an extraordinary writ in the Cole County Circuit Court to overturn the stay. The writ remains under review by the court.

On August 7, 2018, Valley Oaks filed a motion to dismiss Powell Gardens' appeal, arguing Powell Gardens lacked standing. On August 10, 2018, Powell Gardens filed suggestions in opposition to the motion. By order dated August 14, 2018, we denied the motion to dismiss. On August 14, 2018, Valley Oaks filed a motion to hold separate hearings in this case and Case No. 18-0498. On August 16, 2018, Powell Gardens filed suggestions in opposition to the motion. By order dated August 21, 2018, because of the substantial overlap of issues and potential witnesses, we denied the motion.

On August 27-28, 2018, we held a hearing. Charles W. Hatfield, Aimee Davenport and Matthew D. Moderson, with Stinson Leonard Street, represented Powell Gardens. Assistant Attorneys General Jennifer Hernandez and Shawna Bligh represented the Department. Jennifer

Griffin and Doug Nelson, with Lathrop Gage, represented Valley Oaks.[1] The matter became ready for our decision on October 10, 2018, the date the last written argument was filed.

Findings of Fact

1. Powell Gardens is a non-profit public charity that owns and operates a 970-acre botanical garden, located approximately three miles from the Valley Oaks CAFO. Powell Gardens uses clean water to, among other things, irrigate its property.

2. Ryan and Elizabeth Deich (the "Deichs") reside on a family farm next to Valley Oaks, in a home located less than 1,900 feet from a Valley Oaks CAFO building. The Deichs use clean water, among other things, for recreational purposes and for agriculture.

3. Powell Gardens and the Deichs are adversely affected by the Department's decision to issue the permit.

4. Countryclub Homes, LLC, is Missouri limited liability company registered in good standing with the Secretary of State. David Ward is the sole member of Countryclub Homes, LLC. Ward testified at the stay hearing on July 9, 2018.

5. Ward, through business entities owned by him, began operating an animal feeding operation ("AFO") in September 2016.

6. The AFO was comprised of approximately 900 head of cattle.

7. On December 19, 2017, Ward submitted a Permit Application (Form W) to the Department for a proposed CAFO to be located on the property comprising the AFO in Johnson County, Missouri. ("the facility" or "Valley Oaks").

[1] The Petitioner in Case No. 18-0498 was represented by Stephen G. Jeffery, with Jeffery Law Group, LLC.

8. Greg Caldwell reviewed the permit application. He has been employed by the Department for over 30 years. Caldwell testified on behalf of the Department and Valley Oaks at the hearing.

9. "Country Club Homes, LLC" was listed on the application as both the owner and the continuing authority that is responsible for the operation, maintenance, and modernization of the facility to which the permit is issued.

10. A "Certificate of No Record," dated June 27, 2018, from the Missouri Secretary of State indicates than no entity named "Country Club Homes, LLC," with the address 1120 NE Eagle Ridge Blvd., Grain Valley, Mo 64029 exists. Ex. 7.

11. On June 15, 2018, Department issued Permit No. MOG010872 "County Club Homes, LLC, 1120 NE Eagle Ridge Blvd., Grain Valley, MO 64029" [sic] for the operation of a Class IB CAF0. A Class IB CAFO requires a permit from the Department.

12. Ward submitted a Form W to the Department requesting a transfer of the Permit from Country Club Homes, LLC to Valley Oaks Real Estate, LLC.

13. The request for transfer was signed by David L. Ward purporting to be a member of Country Club Homes, LLC.

14. By letter dated August 9, 2018, the Department purportedly issued a modified permit "for ownership transfer and facility name change." Ex.103. the modified permit, dated August 8, 2018, is issued in the name of Valley Oaks Real Estate, LLC.

15. The neighbor notice letter prepared by Valley Oaks was dated January 30, 2018.

16. The U.S. Postal Service certified mail receipts provided to the Department as proof of mailing of neighbor notice letters were all dated January 30, 2018.

17. The holder of a Class IB CAFO permit may hold up to 6,999 animal units in its facility. One cow is equal to one animal unit.

18. As of June 15, 2018, there were approximately 900 head of cattle at the facility, and since that time, the facility has added 1,000 head of cattle. Ward plans to add 2,600 additional head of cattle to the Valley Oaks CAFO by the end of 2018.

19. With the permit application, plans were submitted for a facility with six confinement barns and two manure storage sheds that Valley Oaks projects that, when operating at full capacity, the allotted capacity of 6,999 beef cattle raised on the facility would generate approximately 111,134 tons of manure and urine on an annual basis.

20. In its application materials, Valley Oaks projected that it would dispose of approximately 70% of that process waste by land application (under the Nutrient Management Plan), and approximately 30% of that waste by exporting it from the site.

21. Valley Oaks indicated in its application that it would store the process waste in the animal confinement barns and the manure storage sheds.

22. Valley Oaks proposed to have 186 days of temporary manure storage available on site, a conclusion reached by determining that manure will be stacked 2.3 feet high against the stem walls in the animal confinement pens.

23. The stem walls in the animal confinement buildings are also 2.3 feet high.

24. The automatic waterers supplying drinking water to the cattle are located 2.0 feet high on the stem walls. If manure stored in the animal confinement pens reaches the maximum permitted capacity, the manure will completely bury the animals' only source of drinking water.

25. Valley Oaks' storage calculations are based upon 17 pounds of bedding per 100 pounds of waste, resulting in 80% moisture content.

26. Pursuant to 10 CSR 20-6.300(1)(A)11, dry process waste must not exceed 75% moisture content.

27. In order to reduce the process waste to 75% moisture content, 25 pounds of bedding per 100 pounds of waste are necessary.

28. Using 75% moisture content, 4.72 million cubic feet of manure plus bedding will need to be stored rather than the 3.87 million cubic feet used by Valley Oaks in its calculation, an increase of approximately 22%.

29. Using 75% moisture content and Valley Oaks' maximum storage volume of 1,179,210 cubic feet, the facility has 152 days' storage capacity.

30. The Permit requires process waste to be "collected and reused as a soil amendment by spreading onto agricultural fields at agricultural rates," as set forth in the nutrient management plan attached thereto as Attachment A (the "Nutrient Management Plan").

31. The Nutrient Management Plan was submitted to the Department on behalf of Valley Oaks and ultimately approved by the Department.

32. Some of the land on which Valley Oaks has indicated it will land apply manure is in the same watershed (Blackwater) as Powell Gardens.

33. The Nutrient Management Plan projects cool season grass hay yields of 6.0 tons per acre on fields I SA, 18B, 18C, 18D, 19A, 19B, 20A, 36A, 37A, 40A, 40B, 40C, 40D, 76A, 76B, 76C, 76D, 76E, 76F, 76G, 77A, 77B, 77C, 93C, 93D, 93E, 93F, 93G, 93H, and 93I.

34. Valley Oaks' proposed cool season grass hay yields, at 6.0 tons per acre, are approximately three times higher than the Johnson County, Missouri, average, and the State of Missouri average for 2015, 2016, and 2017, which was approximately 2.0 tons per acre.

35. Valley Oaks submitted no field-specific data indicating that 6.0 tons per acre was a realistic, achievable yield goal for cool season grass hay in Johnson County, Missouri.

36. The Department acknowledged that its record on the application contains no documents that show how Valley Oaks arrived at its cool season grass hay yields of 6.0 tons per

acre. The Department's record does not contain any historical records for the particular fields on which cool season grass hay will be grown, any scientific literature that suggests 6.0 was a reasonable tonnage, any explanation of how Valley Oaks came up with 6.0 tons, or any record that Valley Oaks consulted with anyone regarding the cool season grass hay yields.

37. Caldwell determined that the Nutrient Management Plan was reasonable based on his recollection of having seen cool season grass hay yields of 6.0 tons per acre in the annual reports of other CAFOs in the northern part of Missouri.

38. Valley Oaks' application indicates that the facility, as designed, will have 186 days of dry process waste storage. Dry process waste consists of feces, urine, and bedding. Pursuant to 10 CSR 20-6.300(1)(A)11, dry process waste must not exceed 75% moisture content.

39. The capacity of bedding to absorb moisture depends upon the type of bedding used.

40. Valley Oaks' manure storage calculations require storage in the animal confinement areas up to 2.3 feet in depth. The stem walls in the animal confinement areas are 2.3 feet tall. The automatic waterers supplying drinking water to the cattle are located approximately 2.0 feet high on the stem walls.

41. An unnamed tributary to East Branch Crawford Creek bisects the Valley Oaks property, flowing from the North to the South.

42. Valley Oaks' CAFO buildings, including its actual and planned manure storage sheds, are located immediately to the West and uphill from the tributary.

43. In between the CAFO buildings and the tributary, Valley Oaks has a northern pond and a southern pond. The ponds are located within 100 to 200 feet of the tributary. The northern pond is located in the floodplain of the tributary.

44. The topography of the site is such that water will flow downhill from the Valley Oaks CAFO buildings to the ponds.

45. The open design of the Valley Oaks manure storage sheds and the dense population of animals on site make it likely that water from rain events will flow into the ponds.

46. The ponds were not depicted in Valley Oaks' original permit application; therefore, the application contains no information regarding their design or engineering.

47. The Department received between 1,300 and 1,400 public comments, primarily in opposition to Valley Oaks' permit applications. Caldwell reviewed all of the comments and prepared the Department's responses to the comments.

Conclusions of Law

We have jurisdiction to conduct the hearing on appeal from a clean water permit and recommend a decision to the CWC, under contested case procedure. Section 621.250.[2] In all contested case administrative appeals heard by the AHC pursuant to § 621.250, the burden of proof is on the Department of natural resources to demonstrate the lawfulness of the finding, order, decision or assessment being appealed. Section 640.012.

Standing

Valley Oaks again raises the issue of Powell Gardens' standing to bring this action. It argues that Lone Jack is not the permit applicant and thus lacks standing to appeal anything regarding the permit. As we noted in our order denying Valley Oaks' motion to dismiss, this argument finds support in *Craven v. State ex rel. Premium Standard Farms, Inc*., 19 S.W.3d 160 (Mo. App. W.D. 2000). The court in that case found that a third party did not have standing to challenge permits issued by the Clean Water Commission (CWC) because the language of § 644.051.6 allowed only the Intervenor to appeal a permitting decision. In 2000, however, § 644.051.6 was amended to give the authority to grant or deny permits to the Director of DNR. The Supreme Court, in *Missouri Coalition for the Environment v. Herrmann*, 142 S.W.3d 700

[2] Statutory references are to RSMo 2016.

(Mo. banc 2004), overruled *Craven* and found that because the Director of DNR issues the permits, § 640.010.1 was the applicable statutory provision authorizing appeals. "Section 644.051.6 does not limit the right of appeal to the commission solely to those denied a permit, and 10 CSR 20–6.020(5)(C) [authorizing appeals by those adversely affected] is not in conflict. . . . Therefore, the commission has subject matter jurisdiction to hear the coalition's appeal." *Id.* at 702. Powell Gardens and the Deichs have demonstrated that they are adversely affected by the Department's decision to issue the permit. We therefore conclude that Powell Gardens has standing to appeal the Director's decision.

Evidentiary Rulings

At the hearing, we took a number of objections with the case. Valley Oaks and the Department objected to our consideration of evidence presented at the stay hearing because the purpose for which it was presented – threatened harm – was an operational concern, and therefore not relevant to the sole issue in this case, regulatory permitting requirements. We are able to take official notice of the entire content of the case file; as a result, the objections are overruled at this time. However, with the exception of certain background information and evidence relating to parties and standing, all the evidence reflected in our findings of fact was taken from the August 27-28 hearing.

In addition, the Department filed a motion *in limine* to exclude testimony regarding geological formations underlying the permitted facility; any evidence related to groundwater monitoring systems at the permitted facility, or land application areas potentially utilized by the permitted facility; any evidence or testimony regarding the administration of veterinary drugs to animals at the facility and the potential discharge of such pharmaceutical residue in manure through land application; and evidence or testimony regarding non-point source runoff from the permitted facility or land application areas or storm water runoff from fresh water retention

ponds located at the permitted facility. We denied the motion *in limine* on the first day of the hearing, but permitted a standing objection to evidence and testimony on these topics. Our conclusions of law below reflect our finding that these topics are largely irrelevant. Nonetheless, we include certain summary information in our findings of fact as background for a better understanding of the facility and its operations, and the Petitioners' arguments.

All other objections and motions not specifically ruled upon elsewhere, including Valley Oaks' motion to strike portions of Powell Gardens' first amended complaint, are overruled at this time.

Count I – Nutrient Management Plan

The Department's regulations require that all Class IB CAFO permit applicants develop and implement nutrient management plans that have "realistic production goals." 10 CSR 20-6.300(3)(G)2.A. A nutrient management plan must "include a field-specific assessment of the potential for phosphorus transport from the field to surface waters and address the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters[.]" *Id*.

The "Missouri Concentrated Animal Feeding Operation Nutrient Management Technical Standard approved by the Clean Water Commission on March 4, 2009" ("NMTS"), which is incorporated by reference into the regulations governing CAFO applications (and into Valley Oaks' Permit), requires that "[y]ield goals should be based on crop yield records from multiple years for the field. Good judgment should be used to adjust yield goals to counteract unusually low or high yields. When a field's yield history is not available another referenced source may be used to estimate yield goal." Ex. P, at 3.

10 CSR 20-6.300(3)(G)2.D states that a nutrient management plan must "[i]nclude conditions that will ensure manure, litter, and process wastewater applications are conducted in a

manner that prevents surface runoff of process wastewater beyond the edge of the field. Such measures will include, but not be limited to, restricting the timing, soil conditions, and placement of manure during land application[.]"

Powell Gardens alleges that the Department erred in two ways in approving Valley Oaks' Nutrient Management Plan. First, the Department did not consider any historical data, referenced sources, or other discrete information prior to approving the plan, and second, the cool season grass hay yields are unrealistic.

Valley Oaks proposed yield goals of 6 tons per acre on cool season grass hay fields. The NMTS requires that "yield goals be based on crop yield records from multiple years for the field," and only when a field's yield history is not available may another source be considered to estimate yield goals. The Department did not consider either here. Valley Oaks did not submit historical yields or other referenced sources for the identified fields. Caldwell acknowledged that the Department did not receive any historical yields or other information for the identified fields. Instead, Caldwell relied on his recollection of having seen 6-ton-per-acre yields reported in the annual reports of other CAFOs in the northern part of the state. These reports were not made a part of the record of the review of Valley Oaks' application.

At the hearing, Powell Gardens produced an interrogatory answer showing that Valley Oaks intended to obtain 6 tons per acre through an "intensive management strategy." Ex. 202. Valley Oaks' expert, Darrick Steen, opined that an "intensive management strategy" and/or different species of grass could lead to yields of 6 tons per acre. But the weight of the evidence is to the contrary. Exhibit 1003A is a copy of e-mail correspondence with a Kansas State University Extension Specialist who stated she believed a 4- or 5- ton-per-acre yield would be realistic, absent "a source that has seen 6 tons/acre within the same area….." Patrick Splichal, Powell Gardens' expert, admitted that there is a large margin for error and a wide range of

factors that vary widely in determining a yield goal, such as soil, rainfall, variety of fescue, the presence of other species, and grazing management. But the average cool season grass hay yields in Johnson County, Missouri (as reported by the University of Missouri), ranged from 1.95 tons per acre to 2.20 tons per acre for 2015, 2016 and 2017.

Given the ready availability of data – even assuming that none was available specific to the proposed application fields – we conclude that Valley Oaks' application was deficient in that it failed to provide realistic crop yield goals as part of its Nutrient Management Plan. The Department approved the permit based solely on Caldwell's recollection of having seen anecdotal instances of yields reported in the range of Valley Oaks' submitted figures. The Department failed in its burden to prove that the yield goals it approved – 6 tons per acre for cool season grass hay – are realistic as required by 10 CSR 20-6.300(3)(G)2.A.

Count II – Manure Storage

Powell Gardens alleges that the Department failed to ensure that Valley Oaks has the minimum required manure storage on site. 10 CSR 20-8.300(5)B.1 recommends that CAFOs have at least 365 days of manure storage on site. 10 CSR 20-8.300(5)B.2 requires, at a minimum, the "design storage period for liquid manure, solid manure, and dry process waste to be land applied is one hundred eighty (180) days."

Powell Gardens expert, Dr. John M. Sweeten, essentially worked backward from the permitting documents to find the assumptions upon which Valley Oaks' manure storage calculations were based. He drew two conclusions. First, he found that the amount of bedding to be used in the confinement barns was insufficient to absorb enough moisture to allow for proper handling of the manure and urine stored in the confinement barns. He opined that the mixture would be more liquid than solid, presenting problems with containment and leakage from the barns, and in handling it with heavy equipment to remove it from the barns. Second, in order to

reach a minimum of 180 days' storage, the waste would have to be stacked to the very top of the stem walls of the confinement barns, covering the animals' source of fresh drinking water and allowing waste to spill over the walls.

Pursuant to 10 CSR 20-6.300(1)(A)11., dry process waste is defined as:

> A process waste mixture which may include manure, litter, or compost (including bedding, compost, mortality by-products, or other raw materials which is commingled with manure) and has less than seventy-five percent (75%) moisture content and does not contain any free draining liquids[.]

Valley Oaks' calculations are based upon 17 pounds of bedding per 100 pounds of waste, resulting in 80% moisture content. According to Sweeten's calculations, in order to meet the regulatory requirement of 75% moisture content, 25 pounds of bedding per 100 pounds of waste are necessary. Using Valley Oaks' formula, Sweeten calculated that 4.72 million cubic feet of manure plus bedding will need to be stored rather than the 3.87 million cubic feet used by Valley Oaks to justify its storage capacity, an increase of approximately 22%. Given Valley Oaks' maximum storage volume from Exhibit B, 857 of 1,179,210 cubic feet, Sweeten calculated 152 days' storage capacity.

Valley Oaks argues that 10 CSR 20-8.300(5)B.2 only requires a CAFO facility to be designed to have 180 days of storage for manure that will be land applied by the CAFO itself, not all the manure generated by the CAFO, e.g. waste exported and land applied by third parties. The calculations for the Valley Oaks CAFO include all manure to be generated even though the Valley Oaks CAFO only will land apply 70% of it. This argument ignores the very next subsection of the regulation, which provides:

> 3. Solid manure and dry process waste to be sold or used as bedding shall have a minimum design storage period of ninety (90) days unless justification is given for a shorter time period.

All dry process waste, whether land applied by the CAFO operation or sold, must be accounted for in the storage calculations. Valley Oaks chose to make its calculations, under an engineer's

seal, using 180 days' storage as its benchmark. In doing so, it misapplied the definition of "process waste." No alternate calculation accounting for 180 days' storage for 70% and 90 days' storage for 30% of its waste was before the Department when it approved the permit, and none is in the record here. Although Valley Oaks' expert, Steen, made calculations using the regulatory requirement of 75% to arrive at more than 180 days' storage, he used a lower weight for the cattle in production. This departure from the professional engineer's assumption is not justified because no law or regulation mandates a particular weight per cow. The engineer's assumptions were reasonable in this regard. We conclude that the Department's decision to issue the permit was unlawful because Valley Oaks used facially inaccurate moisture content assumptions in calculating its required storage capacity.

Count III – Groundwater Monitoring

10 CSR 20-8.300(12) requires the Missouri Geological Survey to determine whether a groundwater monitoring program must be implemented at a CAFO and identified land application areas. That section states a determination will be made "by the Missouri Geological Survey on a case-by-case basis and will be based on potential to contaminate a drinking water aquifer due to soil permeability, bedrock, distance to aquifer, etc." However, § 640.710, the statute upon which the regulation is based, allows the Department to require monitoring only when, "in the determination of the division of geology and land survey, **class IA concentrated animal feeding operation lagoons** are located in hydrologically sensitive areas where the quality of groundwater may be compromised." (emphasis added.) An administrative agency may not promulgate a regulation that is broader than the authorizing statute. *See Teague v. Mo. Gaming Comm'n,* 127 S.W.3d 679, 687 (Mo. App. W.D. 2003); *Westwood Country Club v. Director of Revenue,* 6 S.W.3d 885, 887 n.2 (Mo. banc 1999) ("The regulation of course cannot be broader than the statutory language"). Valley Oaks applied for a permit as a Class IB CAFO,

and it is beyond the Department's statutory authority to apply 10 CSR 20-8.300(12) to an application in this class. A case-specific determination was therefore unnecessary, and the Department's decision to issue the permit was not unlawful on this basis.

Count IV – Protection of Water Quality

There is an unnamed tributary to the East Branch Crawford Creek that bisects the property on which the Valley Oaks CAFO is located. Valley Oaks' original CAFO application did not identify any ponds to be constructed near the facility. During the application process, however, Valley Oaks submitted a revised site plan that proposed building two new ponds located downhill and to the east of the confinement buildings, less than 200 feet from the tributary. One of the ponds is located in a flood zone for the tributary. Powell Gardens alleges that due to the design of facility, there is a significant likelihood that rainwater will contact manure and flow into the ponds, making them process wastewater ponds subject to additional regulatory requirements.

10 CSR 20-6.300(2)(E) provides:

> 1. The Department will not examine the adequacy or efficiency of the structural, mechanical, or electrical components of the waste management systems, only adherence to rules and regulations. The issuance of permits will not include approval of such features.

The Valley Oaks application has the required seal and signature of an engineer, and his statement indicating the project was designed in accordance with 10 CSR 20-8.300 as a no-discharge facility. No evidence suggests the ponds are intended to store process wastewater. And although there may be a significant likelihood of some spillage into the ponds, this is an operational concern, not a permitting concern. The Department is not permitted to inquire further into the design. 10 CSR 20-6.300(2)(E). We conclude that the Department's decision to issue the permit was not unlawful on this basis.

Count V – Neighbor Notice

10 CSR 20-6.300(3)(C) requires that certain neighbors be notified of a proposed CAFO, and makes this neighbor notice a prerequisite to filing a permit application with the Department:

> 1. Prior to filing an application for an operating permit with the Department for a new or expanding Class I concentrated animal feeding operation, the following information shall be provided by way of a letter to all the parties listed in paragraph (3)(C)2 of this section:
>
> A. The number of animals designed for the operation;
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> B. A brief summary of the waste handling plan and general layout of the operation;
>
> C. The location and number of acres of the operation;
>
> D. Name, address, and telephone number of registered agent or owner;
>
> E. Notice that the Department will accept written comments for a thirty- (30-) day period. The Department will accept written comments from the public for thirty (30) days after receipt of the operating permit application; and
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> F. The address of the Department office receiving comments.
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> 2. The neighbor notice shall be provided to the following:
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> A. The Department's Water Protection Program;
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> B. The county governing body; and
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> C. All adjoining owners of property located within one and one-half (1 1/2) times the buffer distances specified in subsection (3)(B). Distances are to be measured from the nearest animal confinement building or wastewater storage structure to the adjoining property line.
>
> 3. The operating permit applicant shall submit to the Department proof the above notification has been sent. An acceptable form of proof includes copies of mail delivery confirmation receipts, return receipts, or other similar documentation.

See also § 640.715.

Twenty-four delivery confirmation receipts, as well as a copy of the notice, were provided to the Department in connection with Valley Oaks' permit application. All 24 receipts were stamped as received for certified mailing by the postal service on January 30, 2018. The

notice itself was dated January 30, 2018. The permit application that was reviewed and ultimately approved by the Department was filed by Valley Oaks on December 19, 2017. Caldwell testified on cross examination that neighbor notices are required to be provided prior to the submission of a permit application. The Department did not offer excuse, justification or authority for waiving this requirement. Darrick Steen, a former employee of the Department, testified that in his experience, if there had been residences that did not receive a neighbor notice during his tenure, the Department would have called that to the applicant's attention and allowed the error to be corrected. He did not offer an opinion as to what he thought should happen where, as here, the applicant skipped over the process entirely.

The timelines for review of permit applications set forth by the legislature in § 644.051 mandate a speedy process. We conclude that providing the required neighbor notices before, rather than during, the Department's review is essential to preserving the balance between the legislature's desire that the Department issue a timely and definitive decision and its mandate for a meaningful public participation process. Because Valley Oaks submitted its application before providing the required neighbor notices, the permit was issued unlawfully.

Count VI – Continuing Authority

Counts I and VIII of Powell Gardens' second amended complaint allege that in its application, Valley Oaks failed to furnish proof that a "permanent organization exists which will serve as the continuing authority for the operation, maintenance, and modernization of the facility for which the application [was] made" as is required by 10 CSR 20-6.010(3)(A). In *In the Matter of Trenton Farms Re, LLC v. Missouri Dep't of Natural Resources,* the Court of Appeals provided guidance as to what this regulation requires, which is simply to identify the entity that will serve the function. 504 S.W.3d 157, 166 (Mo. App. W.D. 2016). Valley Oaks failed in this

simple task, and the Department failed to ask it to correct the mistake pursuant to 10 CSR 20-6.300.

In his testimony, Caldwell explained that in his review process, he used the search function of the Secretary of State's web site to look for the named entity, Country Club Homes, LLC, and found among the results "Countryclub Homes, LLC." Because this entity was affiliated with David Ward, the signatory to the application, Caldwell assumed this was the correct entity and that it was adequately identified. But the law does not allow for such an assumption. Section 347.020 requires that the name of an LLC "must be distinguishable upon the records of the secretary from the name of any corporation, limited liability company [or other registered business entity]." In other words, a difference of one word – or one space – distinguishes one entity from another. *See, Shipley v. Cates*, 200 S.W.3d 529, 538 (Mo. banc 2006). The statute further provides that an LLC's name, as set forth in its articles of organization, "shall be the name under which the limited liability company transacts business in this state unless [it registers another name as a fictitious name]." In other words, spelling counts.

The entity identified in the application to serve the function of the continuing authority simply did not exist in the records of the Secretary of State. Caldwell's discovery of a similarly named entity is of no import, because he did not have the authority to change or make corrections to the application. The correct course of action would have been to call attention to the mistake to the applicant or its engineer. *See*, 10 CSR 20-6.300(2)(E)4. Instead, the Department granted a permit based on a deficient application. Compounding the error, the permit issued by the Department on June 15, 2018 was issued in the name of "County Club Homes, LLC," a name so obviously wrong that none of the parties bothered to submit evidence as to whether an entity by that name exists in the records of the Secretary of State.

During the pendency of the case before the AHC, the Department re-issued Permit MOG010872 to "Valley Oaks Real Estate, LLC" as owner and continuing authority. The AHC permitted Powell Gardens to amend its complaint to address this change is circumstance. Powell Gardens argues that the rule authorizing such a transfer requires "an application to transfer signed by the existing owner and/or continuing authority and the new owner and/or continuing authority." 10 CSR 20-6.010(11)(A). For the Department, Caldwell testified at the hearing that if the Department discovers a typographical error, then it has the option of an "internal modification." Tr. at 145-46. Authority for such a modification may be found in § 644.052.8. This section refers to "name changes, address changes, or other nonsubstantive changes to the operating permit," and prescribes a fee. But even assuming that Valley Oaks intended to apply for the permit in the name of Countryclub Homes, LLC, the change made by the Department is neither a name change nor nonsubstantive. "Country Club Homes, LLC," a non-existent entity, is listed as both owner and continuing authority on the Form W application. The permit issued on August 9, 2018 was issued to "Valley Oaks Real Estate, LLC," a completely different entity. We agree with Powell Gardens that this was a purported transfer of the permit, and because no one can sign for a non-existent entity, the transfer was ineffective. In any case, for the reasons stated here and below, we have found that the permit was issued unlawfully, and the transfer of a void instrument to a new owner cannot revive it.

Summary

The AHC recommends that the Missouri Clean Water Commission reverse the Department's decision to issue Permit No. MOG010872 because the applicant failed to provide realistic yield goals for the fields it identified for land application of manure in violation of 10 CSR 20-6.300(3)(G)2.A; failed to provide for adequate storage by misapplying the definition of dry process waste in violation of 10 CSR 20-6.300(1)(A)11 and 10 CSR 20-8.300(5)B.2; failed

to provide neighbor notice prior to filing its application in violation of § 640.715 and 10 CSR 20-6.300(3)(C); and failed to identify a continuing authority in violation of 10 CSR 20-6.010(3)(A).

SO RECOMMENDED on October 23, 2018.

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BRETT W. BERRI
Commissioner