

IN THE CIRCUIT COURT OF STE. GENEVIEVE COUNTY
STATE OF MISSOURI

NEXGEN SILICA, LLC,)

Plaintiff,)

v.)

Case No.

Division No.

STE. GENEVIEVE COUNTY,)

Serve: Sue Wolk, County Clerk)

55 South Third St., Room 2)

Ste. Genevieve, MO 63670)

STE. GENEVIEVE COUNTY)

COMMISSION,)

Serve: Gary Nelson)

Presiding Commissioner)

55 S. 3rd Street, Room 1)

Ste. Genevieve, MO 63670)

GARRY NELSON, in his Official)

Capacity as Commissioner of Ste.)

Genevieve County Commission,)

Serve: 55 S. 3rd Street, Room 1)

Ste. Genevieve, MO 63670)

KAREN STUPPY, in her Official)

Capacity as Commissioner of Ste.)

Genevieve County Commission,)

Serve: 55 S. 3rd Street, Room 1)

Ste. Genevieve, MO 63670)

RANDY RUZICKA, in his Official)

Capacity as Commissioner of Ste.)

Genevieve County Commission,)

Serve: 55 S. 3rd Street, Room 1)

Ste. Genevieve, MO 63670)

STE. GENEVIEVE COUNTY)

HEALTH DEPARTMENT,)

Serve: Robert Bach)

Chairman of the Board of Trustees)

13434 Lakewood Dr.)

Ste. Genevieve, MO 63670)

ROBERT BACH, in his Official Capacity)
as Member of the Board of Trustees of Ste.)
Genevieve County Health Department,)
Serve: 13434 Lakewood Dr.)
Ste. Genevieve, MO 63670)

JAMES BROCHTRUP, in his Official)
Capacity as Member of the Board of)
Trustees of the Ste. Genevieve County)
Health Department,)
Serve: 5684 Dry Fork Rd.)
Festus, MO 63028)

CARL KINSKY, in his Official)
Capacity as Member of the Board of)
Trustees of the Ste. Genevieve County)
Health Department,)
Serve: 720 Market St.)
Ste. Genevieve, MO 63670)

DAVID WOODS, in his Official Capacity)
as Member of the Board of Trustees of the)
Ste. Genevieve County Health)
Department,)
Serve: 782 3rd Street)
St. Mary, MO 63673)

and,)

MATTHEW BOSNER, in his Official)
Capacity as Member of the Board of)
Trustees of the Ste Genevieve County)
Health Department,)
Serve: 575 Pine Dr.)
Ste. Genevieve, MO 63670)

Defendants.)

VERIFIED PETITION FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

Plaintiff Nexgen Silica, LLC ("Nexgen") brings this action seeking the Court's declaration that Defendants' recently adopted Joint Health Ordinance No. 05162022 is unlawful and void

because it is preempted by the Missouri statutes, was passed using a defective and unlawful procedure, and is unconstitutional. The Ordinance, which provide that it is effective upon passage, was passed and signed into law by the County's Commissioners on May 16, 2022, and by the County's Health Department Chairman and Directors on May 17, 2022. Because the Ordinance causes immediate and irreparable harm to Plaintiff's legally protected interests in a mining Sandstone under its lease, state-issued permit and Missouri law that cannot be redressed by any other legal remedy, or undone by any court order, Plaintiff also seeks temporary, preliminary, and permanent injunctive relief to prevent enforcement of the Ordinance. Plaintiff states its cause of action as follows:

PARTIES

Nexgen

1. Plaintiff Nexgen is a limited liability company organized and existing under the laws of the State of Missouri with its principal place of business located in Ste. Genevieve County, Missouri.
2. Nexgen has a lease granting it the right to construct and conduct a sand mining operation on 249 acres of land in Ste. Genevieve County, Section 5-T36N-R7E, Section 4-T36N-R7E, Section 33-T37N-R7E, Section 32-T37N-R7E ("Lease"). Nexgen holds Permit to Engage in Surface Mining No. 1211 ("Permit") issued by the Missouri Mining Commission. A true and correct copy of the Permit is attached as Exhibit A and incorporated herein by reference. The Permit allows Nexgen to conduct mining operations during the approximate dates of June 30, 2022, to June 29, 2023.
3. Nexgen has a legally protectable interest in its Lease and Permit.

Defendants

4. Defendant Ste. Genevieve County (“County”) is a third-class county in the State of Missouri.

5. Defendant Ste. Genevieve County Commission (“Commission”) is the governing body of Ste. Genevieve County, Missouri, which is charged with passing, administering and enforcing certain ordinances of the County.

6. The Commission has indicated that the County adheres to Chapter 610, RSMo, per the Missouri Attorney General’s book, “Missouri Sunshine Law – Open Meetings and Records Law.”

7. Defendant Garry Nelson, in his Official Capacity, is the Presiding Commissioner of the Commission.

8. Defendant Karen Stuppy, in her Official Capacity, is the Commissioner of District 1 of the Commission.

9. Defendant Randy Ruzicka, in his Official Capacity, is the Commissioner of District 2 of the Commission.

10. Defendant Ste. Genevieve Health Department (“Health Department”) is a county health center that was established by a vote of the residents of Ste. Genevieve County on August 3, 1976, and exists under the provisions of §§ 205.010-205.150, RSMo. The Health Department is operated by and under the exclusive control of a Board of Trustees that is comprised of five trustees who are referred to as directors.

11. Health Department’s By-Laws recite that it must comply with Chapters 205 and 610, RSMo. The Health Department has authority to pass and enforce certain regulations.

12. Defendant Robert Bach, in his Official Capacity, is a Member of the Board of Trustees of the Health Department, serving as its Chairman.

13. Defendant James Brochtrup, in his Official Capacity, is a Member of the Board of Trustees of the Health Department, serving as its Vice-Chairman.

14. Defendant Carl Kinsky, in his Official Capacity, is a Member of the Board of Trustees of the Health Department, serving as its Secretary.

15. Defendant Matthew Bosner, in his Official Capacity, is a Member of the Board of Trustees of the Health Department, serving as its Treasurer.

16. Defendant David Woods, in his Official Capacity, is a Member of the Board of Trustees of the Health Department.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this action and the authority and power to enter a declaratory judgment by virtue of § 527.010, RSMo, and Supreme Court Rule 87.

18. Venue is proper in this Court under § 508.060, RSMo.

FACTS

The Surface Mining of Silica Sand is a Lawful Activity in Missouri

19. Under Chapters 444, 260, 640, 643 and 644, RSMo, mining, including sand and rock (e.g., limestone and gravel), is a lawful business activity in Missouri.

Nexgen Provides Notice of Its Application for a Permit

20. On March 22, 2022, Nexgen provided written notice by letter and/or public notice by publication in the Ste. Genevieve Herald beginning on March 22, 2022, to the Commission, neighboring landowners and public of its permit application and business plans, and the right to

submit written comments to or request an informal public meeting from the Director of the Land Reclamation Program, the staff of which support the MMC.

Commission's Actions Following Receipt of Notice of Nexgen's Permit Application

21. The minutes for the Commission's March 31, 2022, meeting reflect discussion about:

- a. A local resident contacting the Commission to express concerns over a "proposed silica plant" that is "In Process" and the Commission referring the resident to DNR.

The agenda for this meeting did not reflect it would consider public comments about Nexgen's silica mining plant.

22. The minutes for the Commission's April 7, 2022, meeting, reflect discussion about:

- a. The Commission's conversation with Bill Zeaman with DNR regarding calls DNR received from resident regarding a proposed silica plant. During the call, Mr. Zeaman noted that the public comment period ended on April 28, 2022 and indicated that DNR would hold a public meeting to discuss the proposed silica plant in mid to late May 2022 at which other agencies would be invited to attend. Commissioner Stuppy ask that documents from Mr. Zeaman be sent to the Commission for review before the public meeting to be held by DNR.

The agenda for this meeting reflects "NexGen SILICA" as an item for discussion.

23. The minutes for the Commission's April 14, 2022, meeting reflect:

- a. The Commission considered a question about County planning and zoning and indicated the County had no planning and zoning.

- b. Discussion about the Commission being contacted by the St. Louis Post Dispatch about a potential article regarding Nexgen’s “proposed silica sand plant” and “public health.”
- c. Discussion about a local resident contacting the Commission referencing Section “192.300 as it relates to public health” and a proposed “silica mining plant.”

The agenda for this meeting does not reflect any of these topics as items for discussion.

- 24. The minutes for the Commission’s April 18, 2022, meeting, reflect:
 - a. A contact from a local radio station to Commission regarding a proposed silica mine.
 - b. Concerned residents appearing before the Commission regarding a proposed silica mining plant. Minutes state that “[a]ll parties referenced that they have been advised to mention RSMO 192.300—as it related to public health.”
 - c. Residents appeared regarding silica mine plant and that “[c]ompiled information from said residents was left with Ste. Genevieve Commission.”
 - d. Discussion regarding an email from Bill Zeaman, DNR, regarding public meeting on silica plant and state that “(Copy of referenced e-mail from Mr. Zeaman attached to Commission Record Supplement for this Date along with copy of RSMo 192.300).”

The agenda for the Commission’s April Agenda just states “RSMo 192.300” with no reference to any proposed silica mine or consideration or discussion of interviews regarding a proposed silica plant.

25. The minutes from the Commission’s April 28, 2022, meeting reflect:
 - a. A meeting was held with Steve Jeffery representing a group at 10:00 a.m. and “[a]ttendance list of parties attending on file in Ste. Genevieve County Clerk’s Office.”
 - b. Steve Jeffery presented a power point to the Commission, Commissioner Stuppy directed all information presented to be forwarded to legal counsel, and that “all information presented to be sent to legal counsel for Ste. Genevieve County, Mr. Ivan Schrader.”
 - c. Potential violation of 610.020.1, RSMo, by Ste. Genevieve County Health Board: Minutes state that “[s]everal representatives with the Ste. Genevieve County Health Department were in attendance at said meeting as well.”

The agenda for this meeting reflects, “10:00 A.M. RESIDENTS TO APPEAR re: SILICA SAND MINE.”

26. The minutes for the Commission’s May 2, 2022, meeting reflect:
 - a. A local resident appeared to express concerns over a proposed silica plant.

The agenda for this meeting does not reflect the proposed silica plant as an item for discussion.

27. The minutes for the Commission’s May 12, 2022, meeting reflect:
 - a. Steve Jeffery appeared before the Commission and discussed a possible ordinance related to mining activity.

- b. Steve Jeffery provided handouts relating to “Air Quality Standards” to the Commission.

The agenda for this meeting does not reflect discussion about mining activity or a mining ordinance.

- 28. The minutes for the Commission’s May 16, 2022, meeting reflect:
 - a. The Commission discussed and adopted an ordinance regulating silica mining.
 - b. That “information [was] received by the County from legal counsel” and that “[c]onsideration must be given to legal counsel’s information.”
 - c. That “[s]everal representatives with the Ste. Genevieve County Health Department appeared before the Commission.”
 - d. “Copy of proposed Joint Health Ordinance reviewed with Revisions.”

The agenda for this meeting state “Ordinance” without any indication of the subject matter, in particular silica sand.

Health Department’s Actions Following Receipt of Notice of Nexgen’s Permit Application

- 29. The minutes for the Health Department’s April 25, 2022, meeting reflect:
 - a. Stephen Jeffery, an attorney with Operation Sand, a group opposed to the construction and operation of a silica sand mine off of Highway 32 west of Weingarten, addressed the board, outlining his health concerns regarding such an operation, and providing a proposed draft regulation for the Board to consider. Chris Eckenfels, a concerned citizen whose family lives near the proposed site, addressed the board. Greg Stevenson, a member of the Friends of Hawn Park, also expressed his group’s opposition to the proposed mine.
 - b. The next scheduled regular board meeting is Wednesday, May 25, 2022.

30. On May 12, 2022, the Health Department posted notice of a meeting on May 13, 2022, the agenda for which is “Discussion regarding updates on Silica Mine.” The minutes for this meeting reflect:

- a. The Board members discussed “the risk of silica mine operations without knowing the extent of the potential impacts to the health of the community.”
- b. The Board members decided to contact Nexgen to seek information regarding risks.
- c. The Board members discussed whether it had authority to pass a regulation related to the mine and concluded it did since “the health concerns did not involve a contagious disease.”
- d. The Board members set a meeting for May 17, 2022, at which it planned to hear citizen concerns and “to hold a vote regarding regulations relating to the mine.”

31. On May 16, 2022, upon information and belief, the Health Department posted a notice of public meeting to be held on May 17, 2022. The same day it sent a letter to Nexgen requesting information about Nexgen’s mining operation.

32. At the Health Department’s May 17, 2022, meeting:

- a. Nexgen representatives spoke, telling the Health Department it lacked authority to adopt Ordinance 05162022, expressing the lack of public health risk posed by its proposed sand mine and mentioning that a study possessed by the Health Department corroborated this conclusion, and asking the Health Department to consider additional information, including information from it

and information to be conveyed at the public meeting scheduled by DNR for May 19, 2022, before voting on Ordinance 05162022.

- b. Residents spoke against the proposed mine.
- c. The Board members discussed proposed mine. It was admitted that the Board should review and consider information from both sides and that the Board had not done so. It was expressed that the Board wanted to pass the Ordinance before Nexgen was issued a Permit.

The Board Chairman ordered a vote on Ordinance 05162022 and Board members Bach,

Brochtrup, Kinsky, and Woods voted to pass the Ordinance. **The Ordinance**

33. On or about May 16, 2022, and May 17, 2022, the Commission and Health Department respectively passed and signed Joint Health Ordinance No. 05162022 (the “Ordinance”), which purports to amend the County Code.¹ A true and accurate copy of the Ordinance is attached hereto as Exhibit B and incorporated herein by reference.

34. By its terms the Ordinance became effective immediately after the Commission passed it on May 16, 2022.

35. The Commission and Health Department are charged with implementing and enforcing the Ordinance on behalf of the County. *See Ex. B*, at § 2.E. (authorizing the Commission or Health Department to provide complaints about violations of the Ordinance to mining facility operators for provision of a response); *see also i.d.* at § 3.B. (authorizing the Commission and Health Department to enforce the Ordinance in a civil action).

¹ Board member Matthew Bosner signed the Ordinance on May 25, 2022.

36. Upon information and belief, the Commission and the Health Department passed the Ordinance with the intent to prohibit the mining of silica sand deposits in the County. *See* Ex. B, at § 1.7. (defining “mining” as “the removal and processing of overburden, extraction of underlying silica sand deposits, or the extraction of exposed natural deposits of silica sand for a commercial purpose”).

37. Upon information and belief, all Defendants, directly and through their agents, employees and attorneys, intend to take immediate steps to implement and enforce the Ordinance against Nexgen and prohibit it from mining under its Lease and Permit.

38. The Ordinance claims that “silica sand mining can produce fugitive dust and other materials containing crystalline silica,” “according to the Federal Occupational Safety & Health Administration, respirable crystalline silica causes multiple diseases, including silicosis,” “OSHA and the International Agency for Research on Cancer have designated respirable crystalline silica as a human carcinogen,” and “silica sand mining activities can consume significant quantities of groundwater and potentially affect regional groundwater supplies.” *Id.* at 1.

39. The Ordinance purports “to be necessary in order to enhance and protect the public health of the citizens in Ste. Genevieve County, Missouri from the foregoing potential adverse impacts associated with silica sand mining.” *Id.*

40. The only authority cited in the Ordinance for its passage is § 192.300, RSMo, which provides:

1. The county commissions and the county health center boards of the several counties may make and promulgate orders, ordinances, rules or regulations, respectively as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county, but any orders, ordinances, rules or regulations shall not:

(1) Be in conflict with any rules or regulations authorized and made by the department of health and senior services in accordance with this chapter or by the department of social services under chapter 198; or

(2) Impose standards or requirements on an agricultural operation and its appurtenances, as such term is defined in section 537.295, that are inconsistent with, in addition to, different from, or more stringent than any provision of this chapter or chapters 260, 640, 643, and 644, or any rule or regulation promulgated under such chapters.

2. The county commissions and the county health center boards of the several counties may establish reasonable fees to pay for any costs incurred in carrying out such orders, ordinances, rules or regulations, however, the establishment of such fees shall not deny personal health services to those individuals who are unable to pay such fees or impede the prevention or control of communicable disease. Fees generated shall be deposited in the county treasury. All fees generated under the provisions of this section shall be used to support the public health activities for which they were generated.

3. After the promulgation and adoption of such orders, ordinances, rules or regulations by such county commission or county health board, such commission or county health board shall make and enter an order or record declaring such orders, ordinances, rules or regulations to be printed and available for distribution to the public in the office of the county clerk, and shall require a copy of such order to be published in some newspaper in the county in three successive weeks, not later than thirty days after the entry of such order, ordinance, rule or regulation.

4. Any person, firm, corporation or association which violates any of the orders or ordinances adopted, promulgated and published by such county commission is guilty of a misdemeanor and shall be prosecuted, tried and fined as otherwise provided by law. The county commission or county health board of any such county has full power and authority to initiate the prosecution of any action under this section.

5. Any orders, ordinances, rules, or regulations made and promulgated under the authority in this section shall comply with the provisions of section 67.265.

41. The Ordinance purports to contain “public health standards and criteria” that are “consistent with State law” and “have been prepared based upon State law and scientific studies presented to and considered by the Ste. Genevieve County Commission and Ste. Genevieve County Health Department, as well as the experience of the members of the St. Genevieve

County Commission and Ste. Genevieve County Health Department with local conditions in Ste. Genevieve County, Missouri.” *Id.* at 2.

42. The Ordinance purports “to establish public health standards in order to protect the public health, including but not necessarily limited to air quality, drinking water supplies, and water quality in Ste. Genevieve County, Missouri.” *Id.*

43. The Ordinance requires “all Mining Facilities” to “be designed, constructed, and operated in accordance with all applicable laws and regulations currently in effect or as may hereafter be adopted by the [Missouri] Department [of Natural Resources].” *Id.* at § 2.1.

44. “Mining Facilities” are defined as:

all real property where any silica sand mining or processing is conducted, including the Permit Area, Mine Plan Area, and all adjacent or adjoining property owned, leased or otherwise controlled by the Operator for any purpose relating to silica sand mining or processing.

Id. at § 1.7.

45. “Operator” is defined as:

any Person engaged in silica sand mining or processing and owning, leasing or otherwise controlling a Mining Facility.

Id. at § 1.9.

46. “Silica Sand” is defined as:

naturally, occurring, unconsolidated silica sand or friable sandstone present in the St. Peters Sandstone or Lamotte Sandstone formations located in Ste. Genevieve County, Missouri.

Id. at § 1.16.

47. The sole “standards” in the Ordinance are “Setbacks,” which term is defined as “the required distance from the property line to the Mining Facility to locations described in Section Two of this Ordinance.” *Id.* at §§ 1.15 and 2.1.

48. Section 2.A. of the Ordinance provides:
- A. No Mining Facility shall be located less than one-half (1/2) mile from:
- (1) The defined incorporated limits of a City, Town, Village within the limits of the County of Ste. Genevieve.
 - (2) A School or property owned and operated by any of the School Districts or educational institutions within Ste. Genevieve County.
 - (3) Any Church or place of worship.
 - (4) Any Populated Area or platted subdivision.
 - (5) Parks, ball fields, and public recreational areas (sic)
 - (6) Public or private wells used for purposes of supplying potable drinking water for human consumption. Any well used solely and exclusively for livestock watering is not included in this section.

49. Section 2.B. of the Ordinance provides:
- B. No Mining Facility shall be located less than one-quarter (1/4) mile from:
- (1) Any Occupied Dwelling.
 - (2) Any cave or sinkhole.
 - (3) Any losing stream or tributary of any losing stream.
 - (4) Any stream segment of any Department-designated "Outstanding State Resource Waters; (sic)"
 - (5) Any stream segment which has a Department-designated "Beneficial Use Designation" for "IRR-Irrigation," "LWP-Livestock & Wildlife Protection," "WWH-Protection of Warm Water Habitat," or "WBC-Whole Body Contact Recreation."

Id. at § 1.B.

50. The Ordinance states:

No Person shall (i) construct or operate a Mining Facility, or (ii) resume operations at any inactive Mining Facility that has not operated for a continuous twenty-four (24) month period prior to the effective date of this Joint Ordinance, in any manner that does not comply with any Permit(s) issued by the [Missouri] Department [of Natural Resources] and this Joint Ordinance. Failure to comply with the requirements of this Joint Ordinance shall be a violation.

Id. at § 3.B.

51. The Ordinance also provides that it:

may be enforced in a civil action against any Operator or Person violating any provision in the Joint Ordinance by ... any City, Town, Village, School District, Church, property owner, or any other Person with a protectable legal interest who is a member of any class described in Section 2.1.A or 2.1.B herein for which this Joint Ordinance is intended to protect.

Effect of the Ordinance

52. The Ordinance prohibits Nexgen from constructing and conducting its sand mining operation authorized by its Lease, Permit and Missouri law.

53. Upon information and belief, the Ordinance also prohibits the construction and conduct of a sand mining operation anywhere in the County.

54. The Ordinance thus deprives Nexgen of the exercise of its legally protected rights under its Lease, Permit and Missouri law to construct and conduct its sand mining operation, causing it immediate and irreparable harm: such damages cannot be sufficiently ascertained and cannot be remedied by a damages award after the Ordinance is determined void.

55. The immediate and irreparable harm at issue in this lawsuit is compounded by the fact that the Ordinance does not preclude Nexgen's competitors who mine rock, e.g., limestone and gravel, that also contains silica, from constructing and conducting their mining operations.

56. Nexgen's immediate and irreparable harm from the Ordinance includes but is not limited to: (1) being prohibited from the construction and conduct of its sand mining operation; (2) refraining from long-term contracts, including employment contracts; (3) delaying necessary projects; (4) losing rights in contracts; and (5) reputational harm due to Defendants' conclusions that it cannot or will not construct and conduct a sand mining

operation in a reasonable manner without risk to the public health and the environment. This harm is immediate and irreparable because it cannot be adequately remedied once the Ordinance is determined to be illegal. To wit, a court order cannot restore a businesses' lost operations and employees; contractual interference; lost reputation and good name, and public trust tainted by Defendants' unfounded, false, and discriminatory conclusions.

57. There is now a real and existing controversy between the parties hereto concerning the validity of the Ordinance and the effect the Ordinance will have on Nexgen's mining operations and other mining operations.

58. Nexgen lacks an adequate remedy at law.

59. The balancing of the harms weighs in favor of Nexgen because Nexgen will sustain great harm in the absence of an immediate grant of a temporary restraining order/injunction and Defendants will not be harmed by being enjoined from enforcing the unlawful and void Ordinance.

60. Nexgen has a strong likelihood of success on the merits of its claims.

61. The public interest is served by granting a temporary restraining order/injunction because the public is not served by the enforcement of a void law and the interference with the regulatory authority conferred upon the DNR, LRP and MMC by the legislature.

COUNT I
THE ORDINANCE IS PREEMPTED BY §§ 640.016 and 444.760 TO 444.790, RSMO
(All Defendants)

62. Plaintiff realleges and incorporates by reference paragraphs 1 through 61 as if fully set forth herein.

63. Defendants' inherent powers are restricted only to those which are delegated to them by the state and those which are implied in its authority to carry out those delegated powers.

64. Sections 444.760 to 444.790, RSMo, comprise the Land Reclamation Act.

65. Section 444.762 provides:

It is hereby declared to be the policy of this state to strike a balance between mining of minerals and reclamation of land subjected to surface disturbance by mining, as contemporaneously as possible, and for the conservation of land, and thereby to preserve natural resources, to encourage the planting of forests, to advance the seeding of grasses and legumes for grazing purposes and crops for harvest, to aid in the protection of wildlife and aquatic resources, to establish recreational, home and industrial sites, to protect and perpetuate the taxable value of property, and to protect and promote the health, safety and general welfare of the people of this state.

66. The MMC created by § 444.520, RSMo, is vested with exclusive jurisdiction regarding the administration of the Land Reclamation Act. § 444.767, RSMo. The MMC is within the Missouri Department of Natural Resources ("DNR").

67. Under the Land Reclamation Act, any person desiring to engage in surface mining must submit a permit application to the MMC and obtain a permit. § 444.772, RSMo.

68. Under §§ 444.765 and 444.772, RSMo, the MMC has authority to process applications and to make permitting decisions.

69. The Land Reclamation Act prescribes the sole setback applicable to surface mining permits in the State of Missouri, providing:

the commission and the department shall not issue any permits under this chapter or under chapters 643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property where an accredited school has been located for at least five years prior to such application for permits made under these provisions, except that the provisions of this section shall not apply to any request for an expansion to an existing mine or to any underground mining operation.

70. Once the MMC issues a permit, § 640.016.4 prohibits DNR from revoking or changing it for a period of one year absent written permission from the permittee or a determination that immediate action is necessary to protect human health, public welfare, or the environment.

71. The comprehensive scheme contained in §§ 640.016.4 and 444.760, *et seq.*, in the area of mining and land reclamation leaves no room for local control, fully occupying this area of the law.

72. Defendants' attempt to add local regulation by passing the Ordinance governing surface mining and land reclamation is invalid.

73. Defendants' Ordinance also conflicts with § 444.760, *et seq.*, because it purports to prohibit what these statutes allow: surface mining of silica sand in Ste. Genevieve County by Nexgen under its Permit and surface mining of silica sand anywhere in Ste. Genevieve County.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against all Defendants:

- a. Declaring that Ordinance 05162022 is preempted by §§ 640.016.4 and 444.760, *et seq.*, and, therefore, is void and of no force and effect;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance;
- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT II
THE ORDINANCE IS PREEMPTED BY CHAPTER 643, RSMO
(All Defendants)

74. Plaintiff realleges and incorporates by reference paragraphs 1 through 73 as if fully set forth herein.

75. Defendants' inherent powers are restricted only to those which are delegated to them by the state and those which are implied in its authority to carry out those delegated powers.

76. Chapter 643, RSMo, is the Missouri Air Conservation Law. § 643.010, RSMo.

77. Under § 643.030, RSMo:

It is the intent and purpose of this chapter to maintain purity of the air resources of the state to protect the health, general welfare and physical property of the people, maximum employment and the full industrial development of the state. The commission shall seek the accomplishment of this objective through the prevention, abatement and control of air pollution by all practical and economically feasible methods.

78. The legislature has charged the Missouri Air Conservation Commission ("MACC") with administration of the Missouri Air Conservation Law. § 643.040, RSMo.

79. The MACC is in DNR.

80. The MACC is vested with exclusive jurisdiction in the field of air pollution and the establishment of establish standards and guidelines to ensure that the state of Missouri complies with the provisions of the federal Clean Air Act, which standards may be no stricter than those required by the federal Clean Air Act. §§ 643.050 and 643.055, RSMo.

81. Any person desiring to construct or operate a regulated air contaminant source recognized by the MACC must submit an application to the MACC and obtain a permit. § 643.773 and 643.075, RSMo.

82. Persons desiring to construct or operate an air contaminant source not regulated or recognized by the MACC are not required to first obtain a permit from MACC.

83. Nothing in Chapter 643, RSMo prohibits Nexgen from constructing and conducting its sand mining operation or requires Nexgen to obtain a permit from the MACC prior to constructing and conducting its sand mining operation.

84. Under § 643.140, RSMo, the legislature has expressly preempted local regulation in the field of air pollution other than that which it allows.

85. Under § 643.140, RSMo, a third-class county may only regulate in the field of air pollution if it: (1) forms an air pollution region approved by the MACC; or (2) is adjacent to a constitutional charter, first and second class counties holding a certificate of authority from the MACC, or adjacent to an air pollution region, and its county commission adopts the rules applicable to that area of the state.

86. The comprehensive scheme contained Chapter 643, RSMo, in the area of air pollution leaves no room for local control except as authorized in § 643.140, fully occupying this area of the law.

87. Defendants attempt to add local regulation by passing the Ordinance governing silica sand mining is unauthorized by § 643.140 and invalid.

88. Defendants' Ordinance also impermissibly conflicts with Chapter 643, RSMo, because it purports to prohibit what these statutes allow: sand mining in the County by Nexgen under its Permit and sand mining anywhere in the County.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against all Defendants:

- a. Declaring that Ordinance 05162022 is preempted by Chapter 643, RSMo, in particular § 643.140 and, therefore, is void and of no force and effect;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance;
- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT III
THE ORDINANCE IS PREEMPTED BY CHAPTER 644, RSMO
(All Defendants)

89. Plaintiff realleges and incorporates by reference paragraphs 1 through 88 as if fully set forth herein.

90. Defendants' inherent powers are restricted only to those which are delegated to them by the state and those which are implied in its authority to carry out those delegated powers.

91. Sections 644.006 to 644.141, RSMo, is the Missouri Clean Water Law. § 644.006, RSMo.

92. Under § 644.011, RSMo:

... this state must possess the authority required of states in the Federal Water Pollution Control Act, as amended, if it is to retain control of its water pollution control programs, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses and for the

propagation of wildlife, fish and aquatic life; to provide that no waste be discharged into any waters of the state without first receiving the necessary treatment or other corrective action to protect the legitimate beneficial uses of such waters and meet the requirements of the Federal Water Pollution Control Act, as amended; to provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of the state, agencies of other states, the federal government and any other persons in carrying out these objectives. It is also the policy of this state to strive to meet these objectives while maintaining maximum employment and full industrial development of the state. The commission shall seek the accomplishment of these objectives through the prevention, abatement, and control of water pollution by all practical and economically feasible methods.

93. The legislature has charged the Missouri Clean Water Commission (“CWC”) with administration of the Missouri Clean Water Law. §§ 644.021 and 644.026, RSMo.

94. The CWC is in DNR. § 644.021, RSMo.

95. Excepted as otherwise provided in law, the CWC is vested with exclusive jurisdiction in the field of water pollution, establishing water quality standards and ensuring that the state of Missouri complies with the provisions of any federal water pollution control act. §§ 644.026, RSMo.

96. Section 644.051, RSMo requires any person desiring to operate, use or maintain any water contaminant or point source in this state subject to the CWC’s standards, rules or regulations, subject to exceptions prescribed by the commission, must submit an application to DNR and obtain a permit. Final permitting decisions are made by the CWC. § 644.051, RSMo. The CWC may also require construction permits under certain circumstances. § 644.051.3, RSMo.

97. It is unlawful for any person to cause or take steps reasonably certain to cause pollution of any waters of the state, or to discharge water contaminants into any waters of the

state which reduce the quality of such waters below the water quality standards. § 644.051.1, RSMo.

98. Nothing in Chapter 644, RSMo prohibits Nexgen from constructing and conducting its sand mining operation or requires Nexgen to obtain a permit from the CWC prior to constructing and conducting its sand mining operation.

99. The comprehensive scheme in Chapter 644, RSMo, in the area of water pollution leaves no room for local control except where expressly stated otherwise in the statutes, fully occupying this area of the law.

100. Unlike is the case with concentrated animal feeding operations governed by §§ 640.700 to 640.760, RSMo, no provision in Chapter 644, RSMo, says local controls are not restricted.

101. Defendants attempt to add local regulation by passing the Ordinance governing sand mining is unauthorized by the Missouri Clean Water Law and invalid.

102. Defendants' Ordinance also impermissibly conflicts with the Missouri Clean Water Law because it purports to prohibit what these statutes allow: sand mining by Nexgen under its Permit and sand mining anywhere in the County.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against all Defendants:

- a. Declaring that Ordinance 05162022 is preempted by the Missouri Clean Water Law in Chapter 644, RSMo, and, therefore, is void and of no force and effect;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance;

- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT IV
THE ORDINANCE IS ZONING ADOPTED IN VIOLATION OF CHAPTER 64,
RSMO
(All Defendants)

103. Plaintiff realleges and incorporates by reference paragraphs 1 through 102 as if fully set forth herein.

104. Defendants' inherent powers are restricted only to those which are delegated to them by the state and those which are implied in its authority to carry out those delegated powers.

105. Chapter 64, RSMo, grants planning and zoning authority to third-class counties.

106. Sections 64.530 and 64.800, RSMo, authorize the county commission of a third-class county to adopt county planning and zoning only after approval by vote of the people.

107. Sections 64.550 and 64.815, RSMo, generally authorize the use of planning and zoning for the purpose of developing an official master plan to conserve the natural resources of the county, and to promote the health, safety, convenience, prosperity and general welfare of the inhabitants. Such a plan can include studies and recommendations relative to the location, character and extent of roads, bridges, parks, schools, buildings, etc.

108. The voters of the County have not approved any county planning and zoning.

109. Defendants are well aware that the County has no voter-approved county planning and zoning, and cannot enact county planning and zoning without first obtaining such approval.

110. Defendants' Ordinance, by design, does not impose any regulatory requirements such as monitoring or testing, and consists solely of setbacks that restrict the location of sand mine operations in the County.

111. Defendants' Ordinance constitutes a zoning measure that could only be adopted after voter-approval of County planning and zoning and pursuant to an official master plan for the County developed and approved as prescribed by §§ 64.500 through 64.727 or 64.800 through 64.905, RSMo, but was not and is thus void.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against all Defendants:

- a. Declaring that Ordinance 05162022 is zoning adopted in violation of Chapter 64, RSMo, and, therefore, is void and of no force and effect;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance;
- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT V
DEFENDANTS LACKED AUTHORITY TO PASS THE ORDINANCE UNDER §
192.300, RSMO
(All Defendants)

112. Plaintiff realleges and incorporates by reference paragraphs 1 through 111 as if fully set forth herein.

113. Defendants' inherent powers are restricted only to those which are delegated to them by the state and those which are implied in its authority to carry out those delegated powers.

114. As modified by HB 271 effective on June 15, 2021, § 192.300.5, RSMo, only authorizes the passage of ordinances and regulations that comply with the provisions of section 67.265.”

115. Section 67.265, RSMo, only authorizes the issuance of ordinances and regulations relating contagious diseases for the purpose of preventing their spread. § 67.265.1, RSMo.

116. As modified by HB 271 effective June 15, 2021, § 192.300.1 does not authorize an ordinance or regulation other than one that tends to:

- a. Enhance public health; and
- b. Prevent the entrance of contagious diseases.

117. Under § 192.300.4, RSMo, the only entities granted “full power and authority to initiate the prosecution of an action” to prosecute an action for a violation of a valid health ordinance are county commissions or county health boards.

118. Defendants' Ordinance consists solely of setbacks that dictate the location of silica sand mining and processing facilities within the County.

119. These setbacks do not enhance public health because their only effect is to prohibit Nexgen's construction and conduction of its sand mining operation under its Lease, its Permit and Missouri law, an activity that would not impact public health.

120. The Ordinance also does not prevent the entrance of any contagious disease, stating on its face that it “is not adopted ‘for the purpose of preventing the spread of a contagious disease.’” *See* Ex. A at 1.

121. The Ordinance also provides that it “may be enforced in a civil action” by not only Defendants, but also “any City, Town, Village, School District, Church, property owner, or any other Person with a protectable legal interest, who is a member of any class described in Section 2.1.A or 2.1.B herein for which this Joint Ordinance is intended to protect.”

122. Defendants lacked authority to pass the Ordinance under § 192.300, RSMo because the Ordinance does not enhance the public health and prevent the entrance of any contagious disease.

123. Defendants also lacked authority to pass the Ordinance because it impermissibly conflicts with the § 192.300, RSMo, by purporting to allow what the statute prohibits: enforcement by persons and entities other than Defendants Commission and Health Department.

124. Defendants’ passage of the Ordinance is unauthorized by § 192.300, RSMo, and invalid.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against all Defendants:

- a. Declaring Defendants’ Ordinance 05162022 is unauthorized by and conflicts with § 192.300, RSMo, and, therefore, is void and of no force and effect;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and

enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance;

- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT VI
DEFENDANT HEALTH DEPARTMENT LACKED AUTHORITY TO PASS THE
ORDINANCE UNDER §§ 205.042 AND 192.300, RSMO
(Defendants Health Department, Board Members and County)

125. Plaintiff realleges and incorporates by reference paragraphs 1 through 124 as if fully set forth herein.

126. Defendant Health Department’s inherent powers are restricted only to those which are delegated to it by the state and those which are implied in its authority to carry out those delegated powers.

127. Health Department is a creature of statute the powers and duties of which are governed by § 205.042, RSMo, which provides that it has the power to “make and adopt such bylaws, rules and regulations for its own guidance and for the government of the county health center as may be deemed expedient for the economic and equitable conduct thereof.” Section 205.042 (emphasis added).

128. While § 205.042, RSMo, does provide Health Department the power to adopt rules and regulations for its own guidance, it does not provide Health Department the power to enact an ordinance regulating the residents of the County like it purportedly did in passing the Ordinance.

129. Section 192.300, RSMo, recognizes Health Department’s authority to promulgate rules or regulations, authorizing it to promulgate county health regulations under certain circumstances.

130. Section 192.300, RSMo, does not grant Health Department authority to promulgate an ordinance.

131. Health Department’s passage of the Ordinance is unauthorized by §§ 205.042 and 192.300, RSMo, and invalid.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against Defendants Health Department, Bach, Bosner, Brochtrup, Kinsky, Woods, and County:

- a. Declaring that Defendants’ passage of Ordinance 05162022 is unauthorized by §§ 205.042 and 192.300, RSMo, and, therefore, is void and of no force and effect;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance;
- c. Awarding Plaintiffs its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT VII
DEFENDANTS FAILED TO COMPLY WITH THE PUBLICATION
REQUIREMENTS IN § 192.300, RSMO
(All Defendants)

132. Plaintiff realleges and incorporates by reference paragraphs 1 through 131 as if fully set forth herein.

133. Defendants' inherent powers are restricted only to those which are delegated to them by the state and those which are implied in its authority to carry out those delegated powers.

134. Section 192.300, RSMo, contains two separate requirements related to publication.

135. First, § 192.300, RSMo, requires a county commission or county health board to "make and enter an order or record declaring such orders, ordinances, rules or regulations to be printed and available for distribution to the public in the office of the county clerk."

136. Section 192.300, RSMo, also requires a county commission or county health boards to "require a copy of such order to be published in some newspaper in the county in three successive weeks, not later than thirty days after the entry of such order, ordinance, rule or regulation."

137. The publication requirements of § 192.300, RSMo, are mandatory. *State ex rel. City of Berkeley v. Holmes*, 219 S.W.2d 650 (Mo. banc 1949).

138. Defendants wholly failed to satisfy these publication requirements of section 192.300 in that they did not: (1) make or enter an order or record declaring the Ordinance to be printed and available for distribution to the public in the county clerk's office; or (2) require a copy of the required (but not made or entered) order to be published in a newspaper in the county in three successive weeks, not later than thirty days after the entry of the required order.

139. Defendants' failure renders the Ordinance void and unenforceable as a matter of law.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against Defendants:

- a. Declaring that Defendants failed to comply with the publication requirements in § 192.300, RSMo, after passing Ordinance 05162022 and, therefore, it is void and of no force and effect;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance;
- c. Awarding Plaintiffs their costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT VIII
DEFENDANTS' ADOPTION OF THE ORDINANCE
VIOLATED § 536.014, RSMO, AND IS ARBITRARY AND CAPRICIOUS,
UNREASONABLE, UNJUST, UNDULY OPPRESSIVE AND UNFAIRLY
DISCRIMINATORY
(All Defendants)

140. Plaintiff realleges and incorporates by reference paragraphs 1 through 139 as if fully set forth herein.

141. Defendants' inherent powers are restricted only to those which are delegated to them by the state and those which are implied in its authority to carry out those delegated powers.

142. Section 536.014, RSMo, provides:

No department, agency, commission or board rule shall be valid in the event that:

- (1) There is an absence of statutory authority for the rule or any portion thereof; or
- (2) The rule is in conflict with state law; or
- (3) The rule is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected.

143. Section 536.010, RSMo, defines an “agency” as “any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.” § 536.010.

144. Section 536.010, RSMo, defines a “rule” as “each agency statement of general applicability that implements, interprets, or prescribes law or policy.”

145. Defendants Commission and Health Department are an “agency” for purposes of § 536.014, RSMo. *See* Mo. Const. Art. VI, § 7 requiring that a county commission “shall manage all county business as prescribed by law” and Chapters 49, 64, 67 and 70 granting county commission authority to promulgate certain ordinances; *see also* § 205.010 authorizing county health centers like Health Department to make certain rules.

146. The Ordinance is a rule of general applicability that prescribes law applicable to any person conducting sand mining operations and owning, leasing or otherwise controlling a sand mining facility, and therefore is a “rule” for purposes of § 536.014.

147. Section 536.014, RSMo, thus restricts Defendants’ authority to exert control over mining in the County.

148. The Ordinance is arbitrary, capricious, unreasonable, unjust, unduly oppressive, and unfairly discriminatory in violation of § 536.014, RSMo, and Missouri law because:

- a. It was adopted without the prior provision of adequate and lawful notice to all interested parties, with Defendants violating Chapter 610, RSMo, and relying on one-sided, incomplete information not justifying adoption to

ensure its adoption (without regard for legality) before the issuance of Nexgen's Permit;

- b. It is not based on substantial and competent evidence, with Defendants relying only on information provided by opponents of Nexgen's Sandstone mine, ignoring problems with studies provided to it, and without consideration of information, research and studies that Nexgen offered to provide;
- c. It draws an arbitrary distinction in the County between sand mining operations and other rock mining operations even though all mined materials contain silica;
- d. It contains setbacks that are unsupported by any substantial and competence evidence;
- e. Its ban of Nexgen's (and others) sand mining operations is overly oppressive and unnecessary;
- f. It does not tend enhance public health; and
- g. It does not prevent the entrance of any contagious disease into the county.

149. These infirmities render the Ordinance unauthorized by § 192.300, RSMo, and void and unenforceable as a matter of law.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against all Defendants:

- a. Declaring that the Ordinance 05162022 and the manner of its adoption render it arbitrary, capricious, unreasonable, unjust, unduly oppressive, and unfairly discriminatory in violation of § 536.014, RSMo, and Missouri law and, therefore, it is void and of no force and effect;

- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance;
- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT IX
DEFENDANTS' ADOPTION OF THE ORDINANCE
VIOLATED CHAPTER 610, RSMO
(All Defendants)

150. Plaintiff realleges and incorporates by reference paragraphs 1 through 149 as if fully set forth herein.

151. Defendants' inherent powers are restricted only to those which are delegated to them by the state and those which are implied in its authority to carry out those delegated powers.

152. Section 610.011, RSMo, provides:

It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy.

153. Defendants are "public governmental bodies" under § 610.010 (4), RSMo, that are required to comply with Chapter 610, RSMo, ("Sunshine Law") in the conduct of their meetings, records, votes, actions, and deliberations.

154. Section 610.028.2, RSMo, provides "[e]ach public governmental body shall provide a reasonable written policy in compliance with sections 610.010 to 610.030...."

155. Defendants recognize that they are required to comply with the Sunshine Law.

156. Defendants Commission and Health Department have policies that require them to comply with the Sunshine Law.

157. Section 610.020.1, RSMo, provides:

All public governmental bodies shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to advise the public of the matters to be considered.....

158. Section 610.020.2, RSMo, provides:

2. Notice conforming with all of the requirements of subsection 1 of this section shall be given at least twenty-four hours, exclusive of weekends and holidays when the facility is closed, prior to the commencement of any meeting of a governmental body....

159. As noted in paragraphs 21 through 28 above, Defendants Commission and Commissioners considered matters relating to Nexgen's proposed sand mining operation at seven meetings held between March 13 and May 16, 2022, including receiving and discussing resident concerns about the proposed operation, zoning questions, discussing communications with reporters proposing to write articles and conduct interview about the proposed facility, discussing a potential ordinance related to mining operations, and discussing and voting on adoption of an ordinance relating to mining operations.

160. The agenda for five out of seven (over 70%) of these meetings does not advise the public that Defendants Commission and Commissioners will consider any matters relating to Nexgen's proposed mining operation as required by subsections 1 and 2 of § 610.010, RSMo. Remarkably, the agenda for the May 16, 2022, meeting at which the Ordinance was passed, makes reference only to "Ordinance" with no mention of mining operations whatsoever!

161. Defendants Health Department and Board Members have not yet produced meeting minutes requested on May 17, 2022, but also are believed to have failed to publish agendas advising the public that it would consider matters relating to Nexgen's proposed mining operation subsections 1 and 2 of § 610.010, RSMo.

162. Defendants Commission, Commissioners, Health Department, and Board Members' violations of the Sunshine Law deprived Nexgen of opportunities to present information germane to the adoption of the Ordinance and culminated in the adoption of the Ordinance.

163. Defendants' violations of the Sunshine were knowing and purposeful and done for the purpose of preventing Nexgen and others from participating in meetings at which its proposed mining operation and the Ordinance were discussed, and obfuscating information relied upon in adopting the Ordinance.

164. The public interest in enforcing the Sunshine Law outweighs enforcement of the unlawfully adopted Ordinance.

165. Defendants' violations contravene public policy underlying the Sunshine Law and the need for the open conduct of public business.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against all Defendants:

- a. Finding and declaring that Defendants' adoption of Ordinance 05162022 was made in violation of Chapter 610, RSMo, and is void because the public interest in enforcing the Sunshine Law outweighs enforcement of the Ordinance and, therefore, the Ordinance is void and of no force and effect;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and

enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance;

- c. Finding and declaring that Defendants' violations of the Sunshine Law were purposeful and/or knowing, and imposing upon Defendants the maximum civil penalty per violation and ordering Defendants to pay Nexgen's attorneys' fees;
- d. Awarding Plaintiff its costs in bringing this action; and
- e. Granting such other and further relief as the Court deems just and proper.

COUNT X
DEFENDANTS VIOLATED CHAPTER 610, RSMO AFTER ADOPTING THE
ORDINANCE

166. Plaintiff realleges and incorporates by reference paragraphs 1 through 165 and paragraphs 142 through 148 as if fully set forth herein.

167. Section 610.023.2, RSMo, provides:

3. Each request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received by the custodian of records of a public governmental body.

168. On May 17, 2022, counsel for Nexgen submitted a Sunshine Law request for records to Custodian of Records for Defendant Health Department seeking the following public records dated from January 1, 2021, through the present:

2. All records, including, but not limited to, documents, communications, emails, text messages, meeting agenda, notes of meetings both electronic and hand written, meeting minutes, and information and documents provided to the Commission or any member or staff thereof, relating to or in any way concerning any of the following:
 - a. Silica;
 - b. Mining;
 - c. Nexgen;
 - d. Operation Sand; and

3. All records, including, but not limited to, documents, communications, emails, text messages, meeting agenda, notes of meetings both electronic and hand written, meeting minutes, and information and documents provided to the Commission or any member or agent thereof, including any attorney retained by the Commission, to, from, about or concerning Steve Jeffery.

169. On May 17, 2022, counsel for Nexgen submitted a Sunshine Law request for records to Custodian of Records for Defendant Health Department seeking these same records to the extent in the Health Department's possession.

170. On May 31, 2022, Defendant Commission provided the following records:

- *Minutes from Thursday, 1/27/2022**
- *3/22/2022 – Certified Letter from NexGen Silica**
- *Minutes from Thursday, 3/31/2022**
- *Minutes from Thursday, 4/7/2022**
- *Minutes from Thursday, 4/14/2022**
- *Minutes from Monday, 4/18/2022**
- *Minutes from Thursday, 4/28/2022**
- *Minutes from Monday, 5/2/2022**
- *Flyer Received from Operation Sand designated "Proposed Silica Sand Mine"**
- *E-Mail from Jeffery Law Group Dated Monday, 5/2/2022**
- *E-Mail from Jeffery Law Group Dated Thursday, 5/5/2022**
- *Minutes from Thursday, 5/12/2022**
- *Minutes from Monday, 5/16/2022 (*Ordinance 05162022 Attached as well)**
- *Minutes from Thursday, 5/19/2022**
- *Minutes from Monday, 5/23/2022**

171. To date, Defendant Commission has failed to provide the following records (to the extent they exist) requested in Nexgen's Sunshine Law request:

- a. Its Sunshine Law policy;

- b. Documents received from DNR referenced in the minutes of its 4/14/22 and 4/18/22 meetings (*See* paragraphs 23 and 24 above);
- c. Documents received from residents referenced in the minutes of its 4/18/22 meeting (*See* paragraph 24 above);
- d. Mr. Jeffery’s Powerpoint presentation and any other information Mr. Jeffery provided to the Commission or its counsel, Ivan Schrader, referenced in the minutes of its 4/28/22 meeting (*See* paragraph 25 above);
- e. Any email or other communications with Mr. Jeffery before 5/2/22 referenced in the 5/2/22 email produced by the Commission;
- f. Any draft ordinances, handouts or other documents received from Mr. Jeffery referenced in minutes of its 5/12/22 and 5/16/22 meetings and in the 5/2/22 and 5/5/22 emails produced by the Commission (*See* paragraphs 27 and 28 above);
- g. The information from legal counsel and copy of Ordinance with revisions referenced in the minutes of its 5/16/22 meeting (*See* paragraph 28 above);
- h. The “Influx of messages” regarding the proposed mine “forwarded to the DNR over the last (2) months approximately” referenced in the minutes of the Commission’s 5/23/22 meeting;
- i. Any other communications (including attachments) between the Commissioners, Health Department Board members and anyone else regarding silica, mining, Nexgen and Operation Sand;
- j. Any studies relied on by the Commissioners as justification for adoption of the Ordinance.

172. To date, Defendant Health Department has wholly failed to produce any of the requested documents despite mentioning review of studies and documents at its May 17, 2022, meeting (and presumably other meetings).

173. Defendants' actions constitute a failure to act upon a public request for documents as soon as possible in violation of subsection 2 of § 610.023, RSMo.

174. Defendants' violations contravene public policy underlying the Sunshine Law and the need for the open conduct of public business.

175. Defendants' violations of the Sunshine Law were knowing and purposeful and done for the purpose of obfuscating information relied upon in adopting the Ordinance.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against Defendants:

- a. Finding and declaring that Defendants' failure to act upon a public request for documents as soon as possible violated Chapter 610, RSMo;
- b. Finding and declaring that Defendants' violations of the Sunshine Law were purposeful and/or knowing, and imposing upon Defendants the maximum civil penalty per violation and ordering Defendants to pay Nexgen's attorneys' fees;
- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT XI
THE ORDINANCE VIOLATES ARTICLE III, § 40 OF THE CONSTITUTION OF
MISSOURI PRECLUDING SPECIAL LAWS

176. Plaintiff realleges and incorporates by reference paragraphs 1 through 175 as if fully set forth herein.

177. Article III, Section 40 of the Constitution of Missouri prohibits the legislature from enacting “special laws” “regulating ... mining” when a general law can be made applicable. Mo. Const., art. III, § 40 (27), (30).

178. The prohibition against special laws applies to Defendants Commission, Commissioners, Health Department and Board Members.

179. A special law does not apply to all who are similarly situated and creates a classification of those similarly situated that is not made on a reasonable basis.

180. All persons engaged in sand and rock mining operations in the County are similarly situated because all sand and rocks contain silica.

181. Despite all persons engaged in sand and rock mining operations in the County being similarly situated, Defendants’ Ordinance creates a special class for persons engaged in sand mining operations. *See* Ex. B, generally.

182. Defendants’ classification is not made on a reasonable basis and unfairly discriminates against Nexgen and other persons like it.

183. A general law could have been made applicable to all persons engaging in sand and rock mining operations but was not such that Defendants’ Ordinance violates Article III, Section 40 of the Missouri Constitution and is void.

184. Nexgen has no adequate remedy at law.

185. Defendants’ Ordinance unlawfully prohibits Nexgen from conducting lawful sand mining operations under its Lease, Permit and Missouri law, proximately causing damage to Nexgen.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against Defendants:

- a. Finding and declaring that Defendants’ Ordinance constitutes an unconstitutional special law in violation of Article I, § 40 of the Constitution of Missouri;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance; Awarding Plaintiff actual and consequential damages that are fair and reasonable;
- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT XII
THE ORDINANCE IS AN REGULATORY TAKING THAT VIOLATES ARTICLE I, SECTION 26 OF THE CONSTITUTION OF MISSOURI

186. Plaintiff realleges and incorporates by reference paragraphs 1 through 185 as if fully set forth herein.

187. Article I, Section 26 of the Constitution of Missouri provides that “private property shall not be taken or damaged for public use without just compensation.”

188. Defendants Commission’s and Health Department’s Ordinance deprives Nexgen of all its valuable rights under its Lease, Permit and Missouri law to construct and conduct sand mining operations on 249 acres of land located in Ste. Genevieve County, Section 5-T36N-R7E, Section 4-T36N-R7E, Section 33-T-37N-R7E, and Section 32-T37N-R7E.

189. Defendants’ passage of the Ordinance is for a purported health purpose that purportedly is of an ongoing benefit to the public.

190. As a direct and proximate cause of Defendants’ passage of the Ordinance, Nexgen’s property rights under its Lease, Permit and Missouri law lost all value.

191. As a direct and proximate cause of Defendants' passage of the Ordinance, Nexgen also has suffered the loss of its business on the premises to be mined, costs associated with developing the business. It also has incurred substantial attorneys' fees and costs to protect its rights.

192. Defendants have provided Nexgen no compensation.

193. Defendants' deprivation of rights is permanent and continuing because the Ordinance has no termination date.

194. Defendants' passage of the Ordinance constitutes an unlawful regulatory taking of property for public use without compensation and is void.

195. Nexgen has no adequate remedy at law.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against Defendants:

- a. Finding and declaring that Defendants' passage of the Ordinance constitutes an unconstitutional regulatory taking in violation of Article I, § 26 of the Constitution of Missouri;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance; Awarding Plaintiff actual and consequential damages that are fair and reasonable;
- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

COUNT XIII
THE ORDINANCE VIOLATES NEXGEN'S CONSTITUTIONAL RIGHT TO
EQUAL PROTECTION

196. Plaintiff realleges and incorporates by reference paragraphs 1 through 195 as if fully set forth herein.

197. Article I, Section 2 of the Constitution of Missouri provides that all persons are entitled to equal right and opportunities of the law, and that the State of Missouri and its officers may not abridge those rights.

198. Nexgen, as a person seeking to conduct sand mining operations, is similarly situated to other persons who conduct or seek to conduct rock mining operations in the County and has been denied equal protection and equal rights by the preferential, unfair, and discriminatory treatment of Defendants described herein.

199. By passing the Ordinance, Defendants have created a new preferential class from among those who conduct sand and rock mining operations. That class is defined as persons who conduct sand mining operations. This new class must comply with onerous, burdensome, and prohibitory setbacks while others similarly situated persons who conduct rock mining operations do not.

200. Nexgen is, by definition, included in this new loathed class, and is harmed by having to comply with onerous, burdensome, and prohibitory setbacks that persons conducting rock mining operations do not, despite their rock containing silica just like Nexgen's sand.

201. More specifically, by virtue of being a member of this new loathed class, Nexgen is prohibited from exercising its right to construct and conduct a sand mining operation under its Lease, Permit and Missouri law.

202. There is no rational basis for the difference in treatment because all sand and rock, including limestone and gravel, contain silica.

WHEREFORE Plaintiff respectfully requests the Court to enter its Order and Judgment in its favor and against Defendants:

- a. Finding and declaring that Defendants, in passing the Ordinance, have violated Nexgen's entitlement to equal rights under the law guaranteed by Article I, § 2 of the Constitution of Missouri;
- b. Enjoining Defendants, temporarily, preliminarily, and permanently, from administering and enforcing, or taking steps to administer and enforce, the provisions of the Ordinance, including, but not limited to, the setbacks in the Ordinance; Awarding Plaintiff actual and consequential damages that are fair and reasonable;
- c. Awarding Plaintiff its costs in bringing this action; and
- d. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: /s/ Jennifer S. Griffin
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Attorneys for Plaintiff, Nexgen Silica, LLC

VERIFICATION

STATE OF MO)
) ss.
COUNTY OF Jefferson)

The below named person, being duly sworn on oath, states that he/she has read the foregoing interrogatories and, following reasonable inquiry, believes that the averments in the Verified Petition are true based on the information that is reasonably available to Nexgen Silica, LLC at this time.

Clark Bollinger
Clark Bollinger
General Manager
Nexgen Silica, LLC

The foregoing answers were subscribed and sworn to before me this 30 day of June, 2022.

Margie A Persch
Notary Public

My Commission Expires:

5/20/25

