IN THE SUPREME COURT OF OHIO

TRANS RAIL AMERICA, INC.,	)	Case No. 08-0359
	)	
Appellee,	)	On Appeal from the
	)	Franklin County
v.	)	Court of Appeals,
	)	Tenth Appellate District
JAMES J. ENYEART,	)	
HEALTH COMMISSIONER,	)	Court of Appeals Cases
TRUMBULL COUNTY HEALTH	)	Nos. 07AP-273 and 07AP-284
DEPARTMENT,	)	
	)	
Appellant.	)	

MERIT BRIEF OF *AMICUS CURIAE* CONSTRUCTION AND DEMOLITION ASSOCIATION OF OHIO, INC. IN SUPPORT OF APPELLEE TRANS RAIL AMERICA, INC.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Amicus Curiae Construction and Demolition Association of Ohio, Inc. ("CDAO") is a non-profit Ohio corporation providing legislative, regulatory and educational assistance to Ohio's construction and demolition debris ("C&DD") industry. The CDAO, through its trustees, members and legal counsel, have historically participated in legislative and regulatory proceedings regarding the regulation of the C&DD industry, including participation in the most recent Construction and Demolition Debris Facility Study Committee created in House Bill No. 66 (2005) and the General Assembly's debates on Am. Sub. H.B. No. 397 (2005) which revamped many of Ohio's C&DD laws in R.C. Chapter 3714.

The CDAO requests that this Court affirm the decision of the Tenth District Court of Appeals requiring that the Environmental Review Appeals Commission ("ERAC") hold an evidentiary hearing regarding the decision of Appellant James J. Enyeart, Health Commissioner, Trumbull County Health Department ("Appellant") that the license application of Appellee Trans Rail America, Inc. ("Trans Rail") was "incomplete" and would not be considered. The outcome of this case will potentially affect every licensed C&DD facility in Ohio, as well as initial applications for new or modified facilities. While R.C. 3714.05 requires the initial licensing of new or modified facilities, R.C. 3714.06 requires the filing of an application for an annual license by September 30 of every year and the obtaining of the license by January 1 in order to continue operations. Allowing a local licensing authority like the Appellant to perpetually deem an application "incomplete" without permitting the applicant to test the reasonableness of that action at a hearing before ERAC could potentially result in the premature closure of every C&DD facility in Ohio. The decision of the Tenth District Court of Appeals recognizes that ERAC has jurisdiction to vacate an unreasonable or unlawful decision of the

local licensing authority and, after a hearing on the issue, to order that licensing authority to consider a license application on the merits without further delay. The General Assembly vested ERAC with exclusive original jurisdiction over Ohio EPA's regulatory program, including decisions on C&DD license applications. The Court of Appeals ruling does not circumvent the licensing authority's discretionary authority to grant or deny the license. To the contrary, the ruling requires the licensing authority to fulfill its duty to grant or deny the license based on applicable statutory and regulatory criteria rather than unreasonable, unlawful or political concerns.

STATEMENT OF THE CASE AND FACTS

A. Trans Rail's License Application And The Local Community's Opposition.

In 2003, Appellee Trans Rail purchased 243 acres of industrial property located at 6415 Mt. Everett Road, Hubbard Township, Ohio for the purpose of opening a small C&DD facility of approximately 20 acres. Almost immediately, Hubbard Township Trustees, without notice or a public hearing, took steps to prevent the installation of the new C&DD facility by attempting to change the zoning of the property so that the proposed use would no longer be permitted. The original industrial classification of the property was upheld by the Trumbull County Common Pleas Court, and the Eleventh District Court of Appeals affirmed, recognizing that the industrial classification of the property was suitable for a C&DD facility. *Trans Rail America, Inc. v. Hubbard Township* (2007), 172 Ohio App.3d 499, 2007-Ohio-3478, 875 N.E.2d 975, discretionary appeal not allowed (2007), 116 Ohio St.3d 1440, 2007-Ohio-6518, motion for reconsideration denied (2008), 2008-Ohio-381, 880 N.E.2d 485. As recognized by the Trumbull County Court of Common Pleas, the C&DD license at issue in this matter is the only remaining requirement to using the property for a C&DD facility. See *Trans Rail America, Inc. v. Hubbard*

Township (July 3, 2006 Judgment Entry), Trumbull C.P. No. 04CV1767, unreported at p. 6 ("[Trans Rail] would be permitted to operate a C&DD facility on the property upon obtaining a license for the same from the proper state authorities.")

On May 21, 2004, Trans Rail submitted its initial license application to Appellant as required by Ohio EPA's licensing rule in Ohio Adm. Code 3745-37-02. The application was prepared by an experienced environmental engineering firm with multiple successful license applications for C&DD facilities. On the same date, Hubbard Township's Trustee Chairman sent a letter to Trans Rail stating that the proposed use of the property would require a zoning change. See *Trans Rail America, Inc. v. Hubbard Township* (July 3, 2006 Judgment Entry), Trumbull C.P. No. 04CV1767, unreported at pp. 2-3. Thereafter, the Township Trustees and Amicus Curiae Hubbard Environmental and Land Preservation ("HELP") sent numerous letters to the Appellant urging the Health Department to reject Trans Rail's application. Although the Appellant was on Ohio EPA's "approved" list for the licensing of C&DD facilities and had previous experience in the licensing of C&DD facilities, it hired, for the first time, an outside consultant to review Trans Rail's application. It did so for the specific purpose of finding Trans Rail's application incomplete.

In his initial rejection of the application on July 16, 2004, the Health Commissioner merely listed the section of the C&DD Regulations, Ohio Adm. Code Chapter 3745-400, allegedly not satisfied by the application, despite Ohio Adm. Code 3745-37-02(A)(2)'s requirement that the applicant be notified of the nature of the deficiency. Although Trans Rail's engineering consultant provided the Appellant with a detailed response, the Appellant continued to refuse to process the application, simply attaching the "findings" by the new outside consultant on February 15, 2006 and May 31, 2006 as grounds for rejection of the Application.

Although Trans Rail responded thoroughly to each finding of "incompleteness," the Appellant's consultant merely identified additional "concerns" not contained in either the first or second rejection. The Appellant cited these additional "concerns" as grounds to reject the application a third time on May 31, 2006. During this review process, the Appellant continued to receive communications from counsel for Hubbard Township, Amicus Curiae HELP and U.S. Congressman Timothy Ryan urging Appellant to reject the application so that Trans Rail would not qualify for the savings provisions of Am. Sub. H.B. No. 397 (2005).

B. The Appeal To ERAC Of The Health Department's Refusal To Consider The License Application

Since Appellant's request for "additional information" was a perpetual moving target, Trans Rail appealed Appellant's rejection of its application to ERAC, invoking ERAC's exclusive original jurisdiction to hear appeals under Ohio's regulatory authority. The appeal was from the Appellant's May 31, 2006 ruling that the application was incomplete, requested a de novo hearing on this determination, and demanded an order that Appellant either grant or deny the license. Upon the Appellant's Motion to Dismiss, ERAC ruled that the Health Commissioner's May 31, 2006 rejection of the application was not a "final appealable action" and, therefore, ERAC lacked jurisdiction to consider the appeal. However, ERAC conceded that it "does not intend to imply that repeated, unreasonable requests for additional information by a licensing authority could never give rise to a final appealable action" under R.C. 3745.04. *Trans Rail America, Inc. v. Enyeart* (March 8, 2007), ERAC Case No. 78591, 2007 Ohio ENV LEXIS 18, unreported at p. 19, fn 9. Surprisingly, in the stated absence of jurisdiction, ERAC went on to adversely rule on the merits of Trans Rail's appeal. Without any hearing on the evidence as required by R.C. 3745.05, ERAC held that Trans Rail's application was, in fact, incomplete. Id. at pp. 18-19, ¶14.

C. The Tenth District Court of Appeals' Reversal, Holding That The General Assembly's Grant Of Exclusive Original Jurisdiction To ERAC Includes The Authority To Order A Licensing Authority To Act On A Complete Application.

Trans Rail appealed ERAC's dismissal to the Tenth District Court of Appeals pursuant to R.C. 3745.06. Recognizing that the General Assembly has granted ERAC exclusive original jurisdiction "to order the director or board of health to perform an act," the Court of Appeals reversed. It held that ERAC has the authority to hold a hearing to consider whether Trans Rail's application is complete and, if it is, to order the Appellant to issue or deny Trans Rail a license. In addition, the Court of Appeal held that ERAC had prematurely determined the merits of the appeal without the required de novo hearing. Judge Judy French dissented, believing that the Health Commission's May 31, 2006 rejection of the application may not have been a "final" act or action. Nevertheless, Judge French conceded, as did ERAC, that numerous repeated requests for information might give rise to a final action and indicated she would remand this matter to ERAC for further consideration of the jurisdictional question. *Trans Rail America, Inc. v. Enyeart* (Dec. 31, 2007), 10th Dist. Nos. 07AP-273, 07AP-284, 2007-Ohio-7144, 2007 Ohio App. LEXIS 6242, unreported at ¶¶16, 20, 23 (French, J., dissenting).

ARGUMENT

Amicus Curiae CDAO Proposition of Law No. 1:

In R.C. 3745.04(B), the General Assembly gave ERAC exclusive original jurisdiction over appeals of all actions, acts or failures to act of a licensing authority, including the authority to order a licensing authority to act on a complete license application.

A. The General Assembly Intended That ERAC Have Exclusive Original Jurisdiction To Hear Appeals From The Unreasonable Or Unlawful Decisions Of A Local Licensing Authority

In R.C. 3745.04(B), the General Assembly vested ERAC with exclusive original jurisdiction to review the actions, acts or failures to act of the Director of the Ohio EPA or other authorized authority. R.C. 3745.04(B) stipulates:

> Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. The environmental review appeals commission has exclusive original jurisdiction over any matter that may, under this section, be brought before it.

In construing this statutory provision, the paramount concern is legislative intent. *State ex rel. Musial v. N. Olmsted* (2005), 106 Ohio St.3d 459, 2005-Ohio-551 at ¶23. Words and phrases are to be read in context and in accordance with the rules of grammar and common usage. *State ex rel. Russo v. McDonnell* (2006), 110 Ohio St.3d 144, 2006-Ohio-3459 at ¶37.

The words used in R.C. 3745.04(B) clearly evidence the General Assembly's intent that ERAC, specially created in R.C. 3745.02 to consider appeals of environmental issues, would be the exclusive forum for the initial resolution of all disputes involving environmental regulatory issues before the Director of Environmental Protection or any of the local health districts which were authorized to carry out the functions of the Director. See R.C. 3714.09(A) (outlining the procedure to place health districts on an approved list for the purposes of issuing C&DD licenses). According to its plain language, R.C. 3745.04(B) authorizes appeals to ERAC (1) where the director or local licensing authority has taken some affirmative action; or (2) where the director or local licensing authority has refused or failed to perform an act required by law. The use of a comma and the word "or" -- under the customary rules of grammar -- connotes that

there are, contrary to Appellant's position, two separate subjects of ERAC's exclusive original jurisdiction.

The Court of Appeals correctly held that the Appellant's affirmative refusal to act on a license application was properly brought before ERAC and that ERAC, after a de novo hearing on the evidence, has jurisdiction to order the Appellant to consider Trans Rail's application on the merits if it determines that Appellant's refusal to consider the application is not in accordance with reason or lacks a valid factual foundation (i.e. "unreasonable") or is not in accordance with law (i.e. "unlawful"). This is the standard of review set forth by the General Assembly in R.C. 3745.05. See *Waste Management of Ohio, Inc. v. Board of Health of the City of Cincinnati* (2005), 159 Ohio App.3d 806, 2005-Ohio-1153, 825 N.E.2d 660 at ¶46, citing *Citizens Committee v. William* (1977), 56 Ohio App.2d 61, 70, 10 Ohio Op.3d 91, 381 N.E.2d 661. The Court of Appeal's jurisdictional ruling should be affirmed.

B. Filing A Writ of Mandamus In A Court Ignores The General Assembly's Directive That The Initial Authority Of ERAC In Matters Involving Ohio EPA's Regulatory Programs Is Exclusive.

Although it may be tempting to bypass the special statutory proceedings before ERAC contemplated by the General Assembly in R.C. 3745.04, the proper vehicle for seeking relief under the circumstances of this case is an appeal for an order from the ERAC -- not a petition for a writ of mandamus from an Ohio court. Both Amicus Curiae State of Ohio, see pp. 13-15 of its Merit Brief, and Hubbard Environmental and Land Preservation, see pp. 11-12 of its Merit Brief, are wrong when they suggest that the General Assembly does not have the power to (and never intended to) vest exclusive initial jurisdiction in ERAC to order Appellant to act upon Trans

Rail's license application where Appellant has unreasonably or unlawfully refused to do so.[1] As this Honorable Court recognized in *State ex rel. Ohio Democratic Party v. Blackwell* (2006), 111 Ohio St. 3d 246, it is well within the General Assembly's prerogative to grant exclusive original jurisdiction in an administrative tribunal, such as ERAC, to initially review an agency's actions or to order an agency to act. This is a lawful exercise of legislative power even if granting such jurisdiction deprives Ohio courts of initial subject matter jurisdiction to consider a petition for a writ of mandamus. See id. at ¶49.

In *Blackwell*, the Ohio Democratic Party petitioned this Honorable Court for a writ of mandamus, ordering Ohio Secretary of State Kenneth Blackwell to perform certain acts allegedly required by Ohio's Campaign Finance law. Id. at ¶1. This Court considered whether it had subject matter jurisdiction to issue a writ of mandamus in light of the fact that the General Assembly had vested in the Ohio Elections Commission exclusive original jurisdiction over the subject matter of the Democratic Party's petition. Id. at ¶5. The relevant statutory language expressly provided that complaints concerning "acts or failures to act" under specified provisions were to be filed with the Ohio Elections Commission. Id. at ¶10. The *Blackwell* Court held that the General Assembly's use of "broad and sweeping" language indicated a clear intent to vest exclusive original jurisdiction in the Ohio Elections Commission over the subject matter of the Ohio Democratic Party's mandamus petition and <u>not</u> provide the courts or other tribunals with initial jurisdictional authority to consider the issue. Id. at ¶¶ 13-16. This was true "regardless whether the action is in declaratory judgment and injunction or in mandamus." Id. ¶48. The Ohio Democratic Party was required to first seek a remedy with the Ohio Elections Commission. See id. The *Blackwell* Court could have easily been speaking to the facts of this case had Trans

[1] Presumably, Appellant James J. Enyeart and the Trumbull County Health Department recognize that this argument is without merit since they have not raised it in their Merit Brief.

Rail filed a petition for a writ of mandamus in an Ohio court instead of filing its appeal with ERAC.

Contrary to the suggestion made by Amicus Curiae State of Ohio or HELP, Trans Rail could not have petitioned an Ohio court for a writ of mandamus in light of this Court's ruling in *Blackwell* and other controlling precedent.[2] R.C. 3745.04(B) provides Trans Rail with an adequate remedy and that remedy is found in ERAC's de novo hearing and authority to order the Appellant to consider a complete license application on the merits. R.C. 3745.04(B) confers broad and sweeping authority to ERAC over the director's or the local health district's actions, acts or failures to act. The General Assembly vested subject matter jurisdiction in the ERAC (1) over appeals from an "action" for an order "vacating or modifying" the action, and (2) over appeals requesting an order that the director or board of health "perform an act" not otherwise taken. If the General Assembly had intended to authorize the courts or other tribunals to exercise initial jurisdiction over these matters, it would have so provided, but it did not. See *Blackwell*, supra, at ¶16.

Moreover, it is apparent that there is no existing precedent recognizing mandamus as an appropriate remedy for the issues presented in this case. "'If the General Assembly has provided a remedy for the enforcement of a specific new right, a court may not on its own initiative apply another remedy it deems appropriate.'" *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9* (1991), 59 Ohio St.3d 167, 169, 572 N.E.2d 87, quoting *Fletcher v. Coney Island, Inc.* (1956), 165 Ohio St. 150, 155, 59 O.O. 212, 134 N.E.2d 371. Trans Rail appropriately sought relief from ERAC under the circumstances of this case.

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[2] Of course, if this Honorable Court concludes that the General Assembly has not vested exclusive original jurisdiction in ERAC to order the director or local health district to perform an act, then Trans Rail has a right to initially petition the Ohio courts -- including this Honorable Court -- for a writ of mandamus.

Amicus Curiae State of Ohio and HELP cite *State ex rel. Northeast Ohio Sewer District v. Ohio EPA* (March 1, 2007), Eighth Dist. No. 87928, 2007-Ohio-834, 2007 Ohio App. LEXIS 754 for the proposition that Trans Rail's proper remedy is to file petition for a writ of mandamus in an Ohio court. The Eighth District's decision in *State ex rel. Northeast Ohio Sewer District v. Ohio EPA*, however, does not support this conclusion. A writ of mandamus will issue only if the relator demonstrates: (1) a clear legal right to the relief sought; (2) the agency has a clear legal duty to perform the requested actions; and (3) relator has no adequate remedy at law. *State ex rel. Ohio Assn. of Pub. School Emp. v. Batavia Local School Dist. Bd. of Edn.* (2000), 89 Ohio St. 3d 191, 2000-Ohio-130, 729 N.E.2d 743. In *State ex rel. Northeast Ohio Regional Sewer District v. Ohio EPA*, the Eighth District held that the trial court correctly dismissed relators' mandamus petition to order the director of Ohio EPA to issue a permit because relators did not demonstrate that they had a clear legal right to the relief sought, i.e. the absence of discretionary authority on the part of the administrative officers in making their decision. Id. at ¶¶ 11, 23. The court did not consider whether R.C. 3745.04(B) provides an adequate remedy at law under the circumstances presented here, nor is there any indication that the court considered whether ERAC has exclusive original jurisdiction to order the director or health district to act where either has unreasonably or unlawfully refused to do so. As the Tenth District correctly held in this matter, ERAC has the authority, under R.C. 3745.04(B), "to consider whether the application is complete and, if it is, to order the [Appellant] to issue or deny Trans Rail a license." *Trans Rail America, Inc.*, 2007-Ohio-7144 at ¶ 10. This is an adequate remedy foreclosing the use of a writ of mandamus.

Amicus Curiae CDAO Proposition of Law No. 2:

A licensing authority's decision that a license application is incomplete and its stated refusal to process the application is an appealable "action" or "act."

A. The Appellant's Stated Refusal To Process An Application Is Final With Respect To The Subject Matter Of The Decision.

Although the Tenth District focused on the "act" of the licensing authority in refusing to consider the application, the Appellant's decision that Trans Rail's application was "incomplete," as it was then constituted, is a "final" affirmative action justifying appellate review. There is no indication in Appellant's letter that Trans Rail had an opportunity to further discuss the contents of its application and persuade Appellant that each and every item required in Ohio Adm. Code 3745-37-02(E) was, in fact, within the application. There was no indication that reconsideration would be given on the content of the application in the absence of the demanded information (which Trans Rail believes is unreasonable and not required by Ohio Adm. Code 3745-37-02(E)). In essence, the Appellant's ruling on this critical issue -- compliance with the requirements of Ohio Adm. Code 3745-37-02(E) -- is an "act" or "action."

The terms "act" and "action" are not limited to the mere "issuance, denial, modification, or revocation" of the license. As recognized by longstanding precedent:

> It is well-established that the ERAC has jurisdiction over acts of the director beyond those enumerated in [R.C. 3745.04(A)]. As noted by the court in *Youngstown Sheet & Tube Co. v. Maynard* (1984), 22 Ohio App.3d 3, 488 N.E.2d 220. "The General Assembly, however, in drafting R.C. 3745.04 chose to illustrate rather than define an appealable action, thereby vesting the board with jurisdiction over acts of the director beyond the adopting, modification or appeal of a rule."

Dayton Power and Light Co. v. Schregardus (1997), 123 Ohio App.3d 476, 478, 704 N.E.2d 589. Moreover, Ohio courts have long recognized that the broad definition of "act" or "action" in R.C. 3745.04 is to be liberally construed in favor of appeals. *Northeast Ohio Regional Sewer*

Dist. v. Tyler (1986), 34 Ohio App.3d 129, 133, 517 N.E.2d 972; *Jackson County Environmental Committee v. Shank* (1990), 67 Ohio App.3d 635, 639, 588 N.E.2d 153.

As recognized by Appellant and its Amicus Curiae, an "act" or "action" need not meet the so-called "traditional" indicia of "finality," such as an express statement concerning the right to appeal. See *Wheeling-Pittsburgh Steel Corp. v. Jones* (Sept. 24, 2002), ERAC Case No. 995015, 2002 Ohio ENV LEXIS 6, unreported. Rather, there must be an examination of the substance and form of the letter as well as the circumstances surrounding the document. See *Dayton Power & Light Co.*, supra, at 589. In this matter, Trans Rail's right to construct and operate a C&DD facility was effectively terminated when the Appellant refused to consider the license application. The decision to terminate consideration of the application was made by the highest ranking official of the Appellant on behalf of the Appellant -- just like the Director acting on behalf of Ohio EPA. These circumstances are vastly different from the cases cited by Appellant and its Amicus Curiae that have disallowed appeals from letters written by low-level staff employees that do not address a determination of any legal right or privilege. See *U.S. Technology Corp. v. Korleski* (2007), 173 Ohio App.3d 754, 2007-Ohio-6087, 880 N.E.2d 498.

Long standing precedent exists for the proposition that a return of an application for incompleteness is, indeed, a final action. As found in *Cain Park Apartments v. Nied* (June 25, 1981), Tenth Dist. Nos. 80AP-817, 80AP-852, 80AP-867, 80AP-868, 80AP-869, 1981 Ohio App. LEXIS 12873, unreported, a ruling that an application is incomplete is, in essence, a denial of the application which creates an appealable action to ERAC. The *Cain Park Apartments* court held:

> In light of the above discussion, there can be no question that EPA may return defective applications for registration status and treat the application as if it had never been filed. However, the decision to treat the application for registration status as if it had never been

> filed is a denial of a permit to operate with registration status and may serve as the basis for an appeal to the EBR. We find no distinction between a denial of an application for registration status and a decision to treat the application as if it had never been filed, where, as in this case, the applicant has submitted information which it believes demonstrates that it qualifies for registration status pursuant to Ohio Adm. Code, Sec. 3745-35-05(F)(1). From the point of view of the EPA, any application which has been deemed to be defective may be returned to the applicant without further hearing or the procedure required in a denial of an application. Ohio Adm. Code, Sec. 3745-35-05(B)(9). However, in the eyes of an applicant, the return of a defective application has the same legal significance and effect as a denial where, as in this case, the applicant believes he has complied with the application requirements.

Cain Park Apartments, supra, at 3. The Eighth District Court of Appeals has also recognized the reasoning found in *Cain Park Apartments* in *City of Cleveland v. Martin* (Dec. 8, 2005), Eighth Dist. No. 85374, 2005-Ohio-6482, 2005 Ohio App. LEXIS 5844 at ¶3:

> In *Cain Park*, the court held that the return of an application for registration status by the OEPA for the reason that the application was incomplete or defective constituted an "action" that could serve as a basis for an appeal. Because the application had been returned as defective, the court found this action had the same legal significance as a denial and could be appealed.

See also *Roosevelt Apartments v. Nichols* (1983), 10 Ohio App.3d 232, 232-233, 461 N.E.2d 1324 (recognizing that letters indicating that applications were deficient due to lack of complete information on emissions were appealable to the predecessor of ERAC). At some point, an applicant must have an opportunity to demonstrate that the local licensing authority has acted unreasonably or unlawfully in repeatedly rejecting an application as "incomplete." At a minimum, a hearing is required to determine whether this point has been reached. According to the arguments presented by the Appellant, a finding of "incompleteness" can never be appealed,

leaving the applicant without a de novo hearing to obtain a ruling that the licensing authority erred in its decision.

Under the circumstances of this case, the decision by the Appellant was "final" on the subject matter in Trans Rail's application. This final action was wrong. Trans Rail is entitled to a de novo hearing before ERAC to demonstrate that the information required by Ohio Adm. Code 3745-37-02(E) is contained within the application and that the Applicant's decision to the contrary was unreasonable or unlawful.

B. An Unreasonable Or Unlawful Determination That An Application Is "Incomplete" Deprives This License Applicant Of A Valuable Right.

A license is required by R.C. 3714.06 to establish and operate a C&DD facility in Ohio. Disposal of C&DD without a license is a serious violation of R.C. 3714.13, subjecting the operator to significant civil penalties. In *Dayton Power and Light Co.*, supra, the Tenth District Court of Appeals recognized that the decision of the Director of Ohio EPA to place property of an electric company on a "Master Sites List" of contaminated properties was a "final action" under R.C. 3745.04 because the decision affected a valuable property right (i.e., property found by the Director to be contaminated with high levels of volatile organic compounds ("VOCs") would prevent or inhibit the electric company's use or sale of the property.) Since the electric company had been given no opportunity to contest the Director's findings that the VOC levels were of such a degree as to constitute "contamination," the Court found the "action" to be sufficiently "final" to warrant an evidentiary hearing before ERAC.

The circumstances in this matter are exactly the same as those presented in *Dayton Power & Light Co.* The Appellant's affirmative decision that the application was incomplete and would not be considered significantly affects the value of the applicant's property and prevents the owner from realizing a return on its investment backed expectations in the property -- just like

the decision regarding the absence of contamination sought by the electric company in *Dayton Power and Light Co.*

Moreover, a determination that Trans Rail's application is or is not "complete" vitally affects Trans Rail's status under the current C&DD laws. On December 22, 2005, the General Assembly enacted Am. Sub. H.B. No. 397 after a six-month moratorium on the licensing of C&DD facilities pursuant to H.B. No. 66 (2005). To avoid a potential unconstitutional taking of an owner's investment backed expectation and to provide a reasonable transition to the new, more restrictive siting criteria contained in amended R.C. 3714.03, the General Assembly provided explicit instructions in Uncodified Section 3 of Am. Sub. H.B. No. 397 regarding how C&DD license applications filed prior to the effective date of Am. Sub. H.B. No. 397 were to be handled. For applications filed prior to the July 1, 2005 moratorium (as in this case), a qualifying application would be completely "grandfathered" from the new amendments to R.C. Chapter 3714. Significantly, Uncodified Section 3.(A) requires, inter alia, the application "to be complete." Failure to allow Trans Rail to demonstrate in a hearing before ERAC that its application was, in fact, complete within the meaning of Ohio Adm. Code 3745-37-02 and Am. Sub. H.B. No. 397, destroys the valuable grandfather status conferred by the General Assembly. It is no surprise that Appellant argues that its determination of "incompleteness" ought never to be the subject of a hearing on appellate review. However, an applicant must have a right to demonstrate that the termination of its application was unreasonable or unlawful.

CONCLUSION

Allowing an appeal and de novo hearing on a decision vitally affecting the rights of a license applicant does not open the "flood gates" of appeals to ERAC. A determination that an application is "incomplete" is an action, act or failure to act within the exclusive original

jurisdiction of ERAC, vested by the General Assembly with authority to protect persons against unreasonable or unlawful rulings or inactions by local licensing authorities who have been delegated authority to issued C&DD licenses.

The issue of "completeness" was never intended by the Ohio EPA's regulations to be wielded as a sword by the licensing authority to placate public opposition to an unpopular C&DD facility. See *CECOS International, Inc. v. Shank* (1991), 74 Ohio App.3d 43, 598 N.E.2d 40. Jurisdiction over the Director of Ohio EPA's and approved health districts' acts and failures to act was vested solely in ERAC to adjudicate these regulatory issues. The General Assembly intended that a knowledgeable tribunal with specialized expertise would resolve disputes over such acts or failures to act and in a cost-effective manner. Recognizing a writ of mandamus in Ohio's Courts ignores the General Assembly's decision to vest exclusive original jurisdiction in ERAC over these issues.

An orderly review of determinations on license applications is essential to the C&DD industry. According to Ohio EPA's official website, 56 C&DD facilities are currently licensed in 33 different counties in Ohio. Every year, during the month of September, these facilities must file applications for annual licenses to continue operations. R.C. 3714.06(B). Before the first day of January, each existing facility proposing to continue with operations must procure a license. Id. A refusal to process an application on the grounds that it is "incomplete" must be subject to an appeal to a knowledgeable tribunal with expertise in these regulatory matters.

The Appellant and its Amicus Curiae in this matter have suggested to this Court a loophole through which a legitimate business can be condemned to an endless succession of non-appealable decisions with the ultimate goal of frustrating an unpopular facility. Appellant's Amicus Curiae -- but not the Appellant -- would rather see decisions on license applications

(including those applications reviewed by the Director of Ohio EPA and represented on appeal by the Attorney General's office) thrust upon Ohio's already overburdened courts which may have little or no experience in Ohio EPA licensing matters. Both Appellant and its Amicus Curiae ignore the exclusive original jurisdiction vested by the General Assembly in ERAC and attempt to frustrate the rights accorded this applicant under Uncodified Section 3.(A) of Am. Sub. H.B. No. 397. The Tenth District Court of Appeals' ruling recognizing ERAC's jurisdiction in this matter is appropriate and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Merit Brief of Amicus Curiae Construction and Demolition Association of Ohio, Inc. in Support of Appellee Trans Rail America, Inc.* was served by U.S. Mail on this 3 day of September, 2008, on the following:

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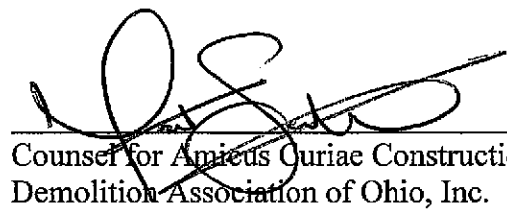

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Appendix of
Unreported Cases

1 of 1 DOCUMENT

Cain Park Apartments, et al., Appellants-Appellants, v. Gary J. Nied, Commissioner, Division of Air Pollution Control, Ohio Environmental Protection Agency, et al., Appellees-Appellees.

NO. 80AP-817, NO. 80AP-852, NO. 80AP-867, NO. 80AP-868, NO. 80AP-869

COURT OF APPEALS, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY, OHIO

1981 Ohio App. LEXIS 12873

June 25, 1981

DISPOSITION: [*1] Judgment reversed and remanded

COUNSEL: DuLAURENCE & DuLAURENCE, MR. HENRY DuLAURENCE and MS. MARY BETH BALLARD, of Counsel, 615 Hanna Building, 1422 Euclid Avenue, Cleveland, Ohio 44115, For Appellants.

MR. WILLIAM J. BROWN, Attorney General, MR. EDWARD P. WALKER and MR. MARTYN T. BRODNIK, Assistants, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, For Appellees.

JUDGES: McCORMAC and NORRIS, JJ., concur.

OPINION BY: STRAUSBAUGH, P. J.

OPINION

DECISION

This is an appeal of a judgment of the Environmental Board of Review (EBR) granting appellees' motion to dismiss appellants' appeals from letters sent by the EPA informing appellants of deficiencies in the applications for registrations for registration status submitted by appellants pursuant to Ohio Adm. Code, Sec. 3745-35-05(F)(1).

Appellants own and operate apartment buildings, each consisting of several units, which use incinerators to dispose of the residential waste generated on the premises. Appellants previously filed applications with the EPA for permits to operate the incinerators, which applications were denied on the grounds that appellants had failed to demonstrate that the incinerators [*2] were in compliance with the applicable emission standards. On appeal, the EBR affirmed the denials of the applications for permits but suggested that appellants apply for registration status pursuant to Ohio Adm. Code, Sec. 3745-35-05(F)(1).

During July and August of 1980, appellants attempted to register their incinerators in accordance with Ohio Adm. Code, Sec. 3745-35-05(F)(1) by filing with the EPA information on an application for registration status provided by the agency. Appellants received letters from the EPA notifying them that the information they had submitted was deficient in that they did not include "information as to the nature and quantity of actual emissions from the incinerator(s)." The letters also stated that failure of appellants to provide the requested information, or submit a satisfactory (stack) testing plan, within two weeks would result in the return of the application for registration.

Appellants appealed the action taken by the EPA as represented by said letters dated August 1, 1980 to the EBR which granted appellees' motion to dismiss on the grounds that it had no jurisdiction, there being no appealable order. In the appeal of the judgment of [*3] the EBR, appellants raise the following assignments of error:

"1. The Environmental Board of Review (EBR) erred in granting Appellees Motion for Dismissal for lack of jurisdiction when *O.R.C. 3745.04* clearly states that

that Board had the responsibility and duty of serving as the appellate body to which Appellants were to present their appeal from the actions of the local agencies of the O.E.P.A.

"2. The EBR erred in determining that the actions taken by the local agencies of the O.E.P.A. did not constitute 'appealable orders' for purposes of establishing the jurisdiction of the EBR to accept Appellants' appeals of such 'orders' from the local agencies of the

The above assignments of error shall be discussed to gether since they essentially raise the same issue. The appellate jurisdiction of the EBR is defined by *R. C. 3745.04*, which in pertinent part states as follows:

"As used in this section, 'action' or 'act' includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, [*4] or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

"Any person who was a party to a proceeding before the director may participate in an appeal to the environmental board of review for an order vacating or modifying the action of the director of environmental protection or local board of health, or ordering the director or board of health to perform an act. The environmental board of review has exclusive original jurisdiction over any matter which may, under this section, be brought before it."

Faced with the above statutory language, the issue before this court for determination is whether the return of an application for registration status by the EPA for the reason that the application is incomplete or defective constitutes an "action" which can serve as a basis for an appeal to the EBR. Appellants contend that the decision of the EBR finding that it had no jurisdiction improperly denied appellants of an opportunity to contest an interpretation by the EPA of the registration requirements set forth in Ohio Adm. Code, Sec. 3745-35-05(F)(1). Appellants also contend that the decision of the EPA to [*5] treat the applications for registration as if they had never been filed is, in fact, a denial of said applications and, therefore, reviewable by the EBR. We agree.

Any determination of the issue raised by this case must be based on the language contained in *R. C. 3745.04*. A review of that language reveals a liberal definition for "act" or "action", which may serve as a basis for an appeal to the EBR. Clearly, any denial of a license, permit, lease, variance, or certificate may serve as the basis of an appeal to the EBR regardless of whether said denial is based on the merits or based on a procedural defect. The EPA contends that the treatment of the application for registration in this case did not amount to a denial and, therefore, is not reviewable by the EBR.

It should be noted that while the return of the application for registration may have been improper, said return by the EPA was not an abuse of discretion. At the time the applications for registration status were filed by appellants, Ohio Adm. Code, Sec. 3745-35-05(F)(1) read as follows:

"(F)(1) Sources of particulate matter of sulfurdioxide, whose emissions are regulated solely by Chapter 3745-17 of the OEPA [*6] Regulations and which have a maximum potential yearly emission of less than 25 tons of sulfur dioxide and a maximum potential yearly emission of less than 25 tons of particulate matter, shall not be required to apply for or obtain permits to operate or variances but shall be required to register with the Director.*Registration shall be made in a form and matter prescribed by the Ohio EPA and shall contain the same information, affirmation, and signatures required for a substantially approvable application for a permit to operate or a variance."* [Emphasis added.]

The information which is required which is required on applications for permits is defined by Ohio Adm. Code, Sec. 3745-35-02(B)(6) as including the location of the source; description of the equipment and processes involved; the nature, source, and quantity of uncontrole6d and controlled emissions; the type, size and efficiency of control facilities and the impact of the emissions from such source upon existing air quality. The failure of an applicant to provide a factual bases for the agency to determine whether the applicant has complied with all necessary regulations may result in a defective application, [*7] which then may be treated as if it had not been filed. Ohio Adm. Code, Sec. 3745-35-02(B)(9).

In light of the above discussion, there can be no question that the EPA may return defective applications for registration status and treat the application as if it had never been filed. However, the decision to treat the

application for registration status as if it had never been filed is a denial of a permit to operate with registration status and may serve as the basis for an appeal to the EBR. We find no distinction between a denial of an application for registration status and a decision to treat the application as if it had never been filed, where, as in this case, the applicant has submitted information which it believes demonstrates that it qualifies for registration status pursuant to Ohio Adm. Code, Sec. 3745-35-05(F)(1). From the point of view of the EPA, any application which has been deemed to be defective may be returned to the applicant without further hearing or the procedure required in a denial of an application. Ohio Adm. Code, Sec. 3745-35-05(B)(9). However, in the eyes of an applicant, the return of a defective application has the same legal significance [*8] and effect as a denial where, as in this case, the applicant believes he has complied with the application requirements.

In the unreported decision of this court in *Thompson Apartments* v. *John F. McAvoy, Director of Environmental Protection,* No. 80AP-382, rendered September 11, 1980 (1980 Decisions, page 2894), appellant applied for a permit to operate an incinerator without submitting any information of the emission from its incinerator by stack tests, mass balance tests or any other methods. Rather than return the application as being defective, as in the case now before us, the EPA determined the amount of emissions by using emission factors from a federal publication and denied the application finding that the applicant did not bear its burden of proof of compliance with Ohio Adm. Code, Sec. 3745-35-02(C). Said denial was affirmed by the EBR and this court. The return of the application for registration by the EPA, in the case now before us, has the same legal significance as the denial of the application in *Thomson Apartments.* In fact, the decision to treat the applications for registration as if they had never been filed cannot be distinguished from a denial [*9] of the applications for registration status based on the failure of appellants to bear the burden of proof that the incinerators in question qualify for registration as defined by Ohio Adm. Code, Sec. 3745-35-05(F)(1).

By finding that the action of the EPA in this case amounts to a denial which is appealable to the EBR, we are giving effect to the liberal language used by the legislature in defining the appellate jurisdiction of the EBR in *R.C. 3745.04.* The effect of this decision should not be to limit the discretion of the EPA in returning defective applications but allow applicants to appeal the decision to return the applications for lack of information to the EBR.

For the above stated reasons, we find that the decision of the EPA to treat appellants' applications for registration status is a denial of said application. Appellants' first and second assignments of error are well taken and sustained. The judgment of the EBR, finding that it had no jurisdiction over appellants' attempted appeal, is hereby reversed and the case is remanded for further proceedings consistent with this decision and law.

LEXSEE 2005 OHIO 6482

CITY OF CLEVELAND, Plaintiff-Appellee vs. ANGELO MARTIN, ET AL., Defendants-Appellants

No. 85374

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2005 Ohio 6482; 2005 Ohio App. LEXIS 5844

December 8, 2005, Date of Announcement of Decision

PRIOR HISTORY: [**1] CHARACTER OF PROCEEDINGS: Civil appeal from Common Pleas Court. Case No. CV-461721.

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

COUNSEL: For plaintiff-appellee: TERESA BEASLEY, ESQ., Director of Law, By: RONALD J. O'LEARY, ESQ., Chief Assistant Director of Law, MICHAEL F. COSGROVE, ESQ., ROBERT P. LYNCH, JR., ESQ., Assistant Directors of Law, Cleveland, Ohio.

For defendants-appellants: SCOTT J. ORILLE, ESQ., ROBERT W. MCINTYRE, ESQ., McIntyre, Kahn & Kruse Co., LPA, Cleveland, Ohio.

JUDGES: SEAN C. GALLAGHER, JUDGE. COLLEEN CONWAY COONEY, J., CONCURS; ANN DYKE, P.J., DISSENTS.

OPINION BY: SEAN C. GALLAGHER

OPINION

JOURNAL ENTRY AND OPINION

SEAN C. GALLAGHER, J.:

[*P1] Defendants-appellants, Angelo Martin and Martin Enterprises, appeal the decision of the Cuyahoga County Court of Common Pleas that granted the city of Cleveland's motion for reconsideration and motion for summary judgment and disposed of all of appellants' claims. Plaintiff-appellee, the city of Cleveland, has filed a cross-appeal from the court's decision that denied the city's motion for summary judgment. For the reasons stated below, we affirm in part, reverse in part, and remand the matter for further proceedings.

[**2] [*P2] The city brought this action to enjoin appellants from the alleged operation of a rock crushing facility at 3926 Valley Road, Cleveland, Ohio. The city claimed this use of the property was in violation of city ordinances that prohibited rock crushing without a special permit from the board of zoning appeals ("BZA"). Appellants filed a counterclaim against the city and a third-party complaint against the City of Cleveland Division of Air Pollution and Control ("DAPC") and the Ohio Environmental Protection Agency ("OEPA"), raising claims of malicious prosecution, a "taking" without just compensation, and due process and civil rights violations.

[*P3] The trial court ultimately determined that appellants were not, by conducting concrete recycling, engaged in rock crushing, and therefore appellants were not violating the city ordinances. The trial court also found that the city could not establish its right to an injunction by clear and convincing evidence. Finally, the court determined that the city failed to join the proper defendants (the owners of the property and equipment) and that the court could not enjoin the nonparties.

[*P4] With respect to appellants' [**3] claims, the court determined that appellants lacked standing to bring the claims because they were not the real parties at interest. Alternatively, the court found that appellants'

"takings" claim failed because a mandamus action should have been brought. The court ruled the due process claims failed because the DAPC's failure to process Granger Materials' relocation request for their recycling machine was never appealed to the Environmental Appeals Review Board. Last, the court found the city was immune from the malicious prosecution claims.

[*P5] The parties have appealed the decision of the trial court. The underlying facts of the case will be discussed, as necessary, as they pertain to the respective assignments of error.

[*P6] We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 1996 Ohio 336, 671 N.E.2d 241.* Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Brown v. Scioto Bd. of Commrs. (1993), 87 Ohio App. 3d 704, 711, 622 N.E.2d 1153.* Under *Civ.R. 56*, summary judgment [**4] is appropriate when (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion, which is adverse to the nonmoving party. *Temple v. Wean United, Inc. (1997), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.*

[*P7] We begin our analysis by reviewing appellants' assignments of error. Appellants' first assignment of error provides:

[*P8] "A. The trial court erred in granting plaintiff/counter-claim defendant's motion for summary judgment based on an affirmative defense waived by the plaintiff/counter-claim defendant."

[*P9] The real property at issue in this case is owned by Valley Road Properties ("Valley Road"). The portable crusher at issue is owned by Granger Materials, Inc. ("Granger"). Neither of these entities is a party to this action. Appellant Angelo Martin is a partner in Valley Road and an officer of both Granger and Martin Enterprises. By agreement, appellant Martin Enterprises operates a concrete recycling plant and has the right to use the portable recycling machine [**5] on the property. There is no dispute that appellants own neither the real property nor the portable crusher machine.

[*P10] Appellants argue that the city did not raise the defense that appellants were not the real parties in interest in its responsive pleading and failed to raise the issue until filing its motion for reconsideration and motion for summary judgment more than two years after the counterclaim was filed. Appellants claim that as a result, the issue was waived. Appellants also argue that they have standing to assert their claims because Martin Enterprises, while not the owner of the property, has a legal right to the use of the real property and the portable crusher machine for its business purposes.

[*P11] It is well recognized that if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. *State ex rel. Jones v. Suster, 84 Ohio St.3d 70, 77, 1998 Ohio 275, 701 N.E.2d 1002.* However, the defenses of standing and real party in interest are waived if not timely raised. See *Id. at 78; Hang-Fu v. Halle Homes, Inc. (Aug. 10, 2000), Cuyahoga App. No. 76589, 2000 Ohio App. LEXIS 3625; Mikolay v. Transcon Builders, Inc. (Jan. 22, 1981), Cuyahoga App. No. 42047, 1981 Ohio App. LEXIS 11690.*

[**6] [*P12] We find that the city's real-party-in-interest argument was waived. Appellants filed their counterclaim on May 17, 2002, asserting the city was depriving Angelo Martin and Martin Enterprises of their rights to use the subject property and equipment. The city never raised a real-party-in-interest defense in its answer or in any other pleading, including the city's first motion for summary judgment. In fact, the city did not raise the issue until it filed its motion for reconsideration and motion for summary judgment, which was more than two years after it responded to the counterclaim. We find that the city failed to raise its real-party-in-interest argument in a timely fashion and waived the defense. Appellants' first assignment of error is sustained.

[*P13] Appellants' second and third assignments of error provide:

[*P14] "B. The trial court erred in finding that the existence of an appeal right precludes, as a matter of law, a claim for denial of procedural and substantive due process."

[*P15] "C. The trial court erred in finding that mandamus was the exclusive means for appellants to pursue their claim [**7] for a regulatory taking."

[*P16] Valley Road and Granger originally applied for a use permit to operate the recycling machine at the premises. The permit was denied twice by the BZA, and an appeal from the BZA ruling to common pleas court was voluntarily dismissed. Granger also applied to the DAPC for a permit to relocate the machine to a different site. The DAPC refused to process the relocation request on two occasions because Granger had not resolved the zoning issues. Granger never filed an appeal.

[*P17] The trial court found that appellants' due process claims failed because the DAPC's failure to process Granger's relocation request was never appealed to the Environmental Appeals Review Board. In reaching this determination, the trial court relied on the case of *Cain Park Apartments v. Nied (June 25, 1981), Franklin App. No. 80AP-817, 1981 Ohio App. LEXIS 12873.* In *Cain Park,* the court held that the return of an application for registration status by the OEPA for the reason that the application was incomplete or defective constituted an "action" that could serve as a basis for an appeal. Because the application had been returned as defective, the court found this action had the same [**8] legal significance as a denial and could be appealed. Id. We find that the holding of *Cain Park* is not applicable to this case.

[*P18] In this case, the application was not returned as defective. Rather, the DAPC issued letters to the appellants indicating that they could not process the relocation request until evidence of compliance with the city's zoning regulation was provided. No final determination was made; rather, it was delayed pending a resolution of the zoning issue. Thus, there was never a determination that could be appealed.

[*P19] Further, appellants refer to evidence in support of their due process claims. Roland Lacy, an environmental compliance specialist for the DAPC, testified that he did not believe there was anything that permits the refusal of a permit to relocate based on local zoning. Mark Vilem, the former commissioner of the DAPC, testified that the DAPC has no authority to enforce the zoning code. Nevertheless, Vilem acknowledged that the application was being held for processing because of the local zoning issue. He further stated that theoretically, there was nothing else in the application to relocate that would have prohibited him from [**9] processing it.

[*P20] Appellants argue that the DAPC purposely refused to process the request to prevent appellants from exercising their right to appeal an adverse decision. Appellants refer to the testimony of Vilem, who stated that until a ruling was made on the application, the permit holder has no channel of appeal. They further claim that they were deprived of their statutory right to a determination of the application.

[*P21] It is well recognized that "'in procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.'" *Shirokey v. Marth (1992), 63 Ohio St.3d 113, 119, 585 N.E.2d 407,* quoting *Zinermon v. Burch (1990), 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed. 2d 100.* Unlike *Cain Park,* in the instant case, there was never a determination or action that could serve as a basis for an appeal. Rather, the evidence reflects that the DAPC failed to process an application pending resolution of a zoning issue. We find that this presents a genuine issue of material fact as to whether [**10] there was an undue delay or failure to process the application that deprived appellants of their due process rights.

[*P22] With respect to the regulatory "takings" claims, appellants claim the city has interfered with their use of the property without just compensation. The trial court ruled that mandamus is the appropriate action to compel the city to institute appropriation proceedings in probate court when a regulatory "taking" is claimed. Appellants argue that a private right of action for damages exists separate and distinct from a mandamus action. We disagree.

[*P23] "It is well settled in Ohio that a property owner's remedy for an alleged 'taking' of private property by a public authority is to bring a mandamus action to compel the authority to institute appropriation proceedings." *Consolidated Rail Corp. v. Gahanna (May 16, 1996), Franklin App. No. 95APE12-1578, 1996 Ohio App. LEXIS 1949.* As the Supreme Court of Ohio recently recognized: "'The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation.' *State ex rel. Shemo v. Mayfield Hts. (2002), 95 Ohio St.3d 59, 63, 2002 Ohio 1627, 765 N.E.2d 345*; [**11] *Fifth* and *Fourteenth Amendments to the United States Constitution*; *Section 19, Article I, Ohio Constitution.* 'Mandamus is the appropriate action to compel public

authorities to institute appropriation proceedings where an involuntary taking of private property is alleged.' *Shemo, 95 Ohio St.3d at 63, 765 N.E.2d 345.*" *State ex rel. Duncan v. City of Mentor City Council, 105 Ohio St.3d 372, 374, 2005 Ohio 2163, 826 N.E.2d 832*; see, also, *Buckles v. Columbus Mun. Airport Auth. (6th Cir. 2004), 90 Fed. Appx. 927, 930.* Upon this authority, we find that appellants have not pursued the proper legal remedy for their "takings" claims.

[*P24] Appellants' second assignment of error is sustained. The third assignment of error is overruled.

[*P25] We next address the assignments of error raised in the city's cross-appeal. We shall address the city's first and fourth assignments of error only, as they are dispositive of the cross-appeal. These assignments of error provide:

[*P26] "I. Whether the trial court erred in denying summary judgment to the City on its complaint."

[*P27] "IV. Whether the trial court erred in denying the City's motion [**12] for a directed verdict."

[*P28] In its first assignment of error, the city argues that it was entitled to summary judgment because there was no genuine issue of fact as to the appellants' violation of Cleveland Codified Ordinance ("C.C.O.") 345.04(b), which prohibits "rock crushing" without a special permit approved by the BZA. Under its fourth assignment of error, the city argues it was entitled to a directed verdict because clear and convincing evidence was shown that the appellants engaged in rock crushing in violation of the city's ordinance. The trial court ultimately found that appellants were not, by conducting concrete recycling, engaged in crushing rock and were not violating the ordinances.

[*P29] The city initially claims that res judicata applies as a bar to relitigation of the issue of whether appellants can lawfully operate the portable crusher at the property. Valley Road and Granger applied for a change of use permit to operate the portable crusher at the property. The city denied the permit, and the BZA denied the requested permit twice. Further, an appeal from the BZA's decision was voluntarily dismissed.

[*P30] This argument is without merit. The [**13] decision of the BZA involved the issue of whether the applicants were entitled to a variance; it did not involve the issue of whether the current use of the property for concrete recycling was in violation of C.C.O. 345.04(b).

[*P31] The city argues that the activity at the property is rock crushing, which is prohibited without a special permit. C.C.O. 345.04(b) provides in relevant part:

> "*Accessory Uses by Special Permit.* The following uses are prohibited as the main or primary use of the premises; they are permitted only as uses accessory or incidental to a permitted use and only on special permit from the Board of Zoning Appeals: * * * (15) Rock crushing."

[*P32] The trial court indicated that no evidence was presented in this case that concrete recycling was a known technology at the time the original rock crushing ordinance was enacted in 1976. As the court referenced, testimony was introduced that rock crushing machines were found at quarries, that there was a significant difference between rock crushing and concrete recycling equipment, and that crushing rock with a concrete recycling machine would destroy the machine. The court found that under the [**14] plain reading of the ordinance, rock crushing is prohibited, not concrete recycling. As a result, the trial court found no special permit was required.

[*P33] On appeal, the city argues that rock is a component of concrete and that in the process of crushing concrete, the appellants are crushing rock. Appellants, on the other hand, claim that the ordinance must be construed strictly and that concrete recycling is not prohibited under the plain language of the ordinance. Appellants also refer to testimony of the city's own witness, Chief Inspector Franklin, who acknowledged that concrete recycling was not prohibited by the original ordinance and that he never observed any rock being crushed at the property.

[*P34] The Supreme Court of Ohio has set forth certain principles to be considered when reviewing a zoning ordinance. "All zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully

entitled. Therefore, such resolutions are [**15] ordinarily construed in favor of the property owner. [Citations omitted.] Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed. [Citations omitted.]" *Saunders v. Clark County Zoning Dep't (1981), 66 Ohio St.2d 259, 261, 421 N.E.2d 152.* Thus, we must strictly construe the ordinance at issue and limit the scope to only those limitations that are clearly prescribed. As the Supreme Court of Ohio has also recognized, "because zoning ordinances deprive property owners of certain uses of their property, however, they will not be extended to include limitations by implication." *Henley v. City of Youngstown Bd. of Zoning Appeals, 90 Ohio St.3d 142, 152, 2000 Ohio 493, 735 N.E.2d 433.*

[*P35] In this case, it appears that concrete recycling was not even contemplated at the time the ordinance was enacted. A strict reading of the ordinance indicates that it proscribed only "rock crushing." Although concrete may contain particles of rock and have some similarities to rock, it is not the same substance. Concrete is an aggregate of different [**16] materials, which is unlike a solid rock formation. A plain reading of the ordinance requires a permit for rock crushing; no mention is made of concrete.

[*P36] Upon our review of the record, we find the trial court did not err in denying the city's motion for summary judgment or in finding the concrete recycling activity engaged in by appellants was a permitted use.

[*P37] The city's first and fourth assignments of error are overruled. The remaining assignments of error are moot. [1]

1 The remaining assignments of error provide:

"II. Whether the trial court abused its discretion in denying the City's motion for leave to amend its complaint to add Valley Road Properties and Granger Materials as defendants."

"III. Whether the trial court erred in denying the City's request for preliminary and permanent injunctive relief."

"V. Whether the trial court erred in denying the City's motion to compel depositions of Angelo Martin and representatives of Martin Enterprises and in granting the Martin Defendants' motion for protective order."

"VI. Whether the trial court erred in denying the City's motion in limine to prohibit the introduction of evidence that the trial court prohibited the City from obtaining in discovery."

[**17] Judgment affirmed in part, reversed in part, and remanded.

This cause is affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*COLLEEN CONWAY COONEY, J., CONCURS;

ANN DYKE, P.J., DISSENTS (SEE SEPARATE DISSENTING OPINION).

SEAN C. GALLAGHER

JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D)* and *26(A); Loc.App.R. 22.* This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)* [**18] , is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E).* See, also *S.Ct.Prac.R. II, Section 2(A) (1).*

DISSENT BY: ANN DYKE

DISSENT

DISSENTING OPINION

DYKE, P.J., DISSENTING:

[*P38] I respectfully dissent.

[*P39] Because defendant Angelo Martin is a general partner in Valley Road Properties, the partnership that owns the property which was the subject of the prior zoning proceedings, I would find him to be in privity with that partnership. I would therefore find that Valley Road Property's prior abandoned appeal from the BZA determination that it was engaged in "rock crushing" is res judicata as to the Martin defendants. I would reverse the order of the trial court that denied summary judgment to the City on its complaint.

[*P40] I would also conclude that defendants' concrete recycling operation does in fact involve the crushing of rock, and therefore properly subjects defendants to the requirements of C.C.O. Section 345.04. There is no [**19] basis for concluding that the ordinance applies only to quarry rock crushing or natural rock crushing.

[*P41] I would affirm the order of the trial court that granted summary judgment to the City on the Martin defendants' counterclaim.

STATE OF OHIO EX REL., NORTHEAST OHIO SEWER DISTRICT, RELATOR-APPELLANT vs. OHIO ENVIRONMENTAL PROTECTION AGENCY, ET AL., RESPONDENTS-APPELLEES

No. 87928

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2007 Ohio 834*; *2007 Ohio App. LEXIS 754

March 1, 2007, Released

PRIOR HISTORY: [**1] Civil Appeal from the Cuyahoga County Common Pleas Court. Case No. CV-574684.

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLANT: Van Carson, David W. Burchmore, Jill A. Grinham, Squire, Sanders & Dempsey, L.L.P., Cleveland, OH; William B. Schatz, Lisa E. Hollander, Northeast Ohio Sewer District, Cleveland, OH.

FOR APPELLEES: Jim Petro, Attorney General, BY: Margaret A. Malone, Kristina Erlewine, Lawrence Scott Helkowski, Assistant Attorneys General, Columbus, OH.

JUDGES: BEFORE: Stewart, J., Cooney, P.J., and Gallagher, J. MELODY J. STEWART, JUDGE. COLLEEN CONWAY COONEY, P.J., CONCURS. SEAN C. GALLAGHER, J., CONCURS WITH SEPARATE CONCURRING OPINION.

OPINION BY: MELODY J. STEWART

OPINION

JOURNAL ENTRY AND OPINION

MELODY J. STEWART, J.:

[*P1] Northeast Ohio Regional Sewer District (NEORSD), relator-appellant, appeals the judgment of the trial court dismissing its petition for a writ of mandamus. Relator assigns as error that the trial court improperly considered matters outside of the pleadings in making its ruling and that the trial court effectively converted the motion to dismiss into a motion for summary judgment without giving relator proper notice and an opportunity to present its own evidence as [**2] required under *Civ.R. 12(B)* and *56(C)*. The trial court found that relator did not have a clear legal right to the relief prayed for in the petition. We agree and affirm the judgment of the trial court.

[*P2] Relator filed its petition for a writ of mandamus on October 12, 2005 against the respondents, Ohio Environmental Protection Agency (OEPA) and Joseph Koncelik, director of the OEPA, to compel them to issue a permit to install (PTI) additional facilities at its combined overflow treatment facility. In the petition, relator asserts that respondents had unlawfully and improperly refused to issue the permit.

[*P3] Respondents filed a motion to dismiss on December 12, 2005 for lack of jurisdiction and failure to state a claim upon which relief can be granted pursuant to

Civ.R. 12(B)(1) and *(B)(6)*. Respondents argued that *R.C. Chapter 3745* provided the exclusive statutory procedure for review of the director's actions and that the director had recently denied relator's permit application, thereby divesting the court of jurisdiction over the matter. In support of their motion, respondents attached the affidavit [**3] of Paul Novak, an OEPA engineer, that incorporated two letters from OEPA to relator. Relator opposed the motion and requested an immediate hearing on the merits of its petition.

[*P4] The court scheduled a hearing on the merits of the petition for February 24, 2006. Respondents filed a motion to reconsider the scheduling of that hearing, again claiming the court lacked jurisdiction to consider the matter. In a telephone conference on February 21, 2006, the court scheduled oral arguments for the following day on the issue of whether to go forward with the February 24, 2006 hearing on the merits. Following oral argument by both sides, the court granted respondents' motion to dismiss and cancelled the February 24, 2006 hearing.

[*P5] *R.C. 2731.02* vests the court of common pleas with authority to issue writs of mandamus. As a court of general jurisdiction, the trial court has authority to determine its own jurisdiction. The record reflects that the trial court stated specifically that it was not interested in hearing about jurisdictional arguments because, "this court is convinced it does have jurisdiction." Respondents' assertion that the court dismissed [**4] the petition for lack of subject matter jurisdiction pursuant to *Civ.R. 12(B)(1)* is wrong. The court had jurisdiction to consider the petition.

[*P6] The Ohio Supreme Court has recognized that "[i]n order for a writ of mandamus to issue, a relator must show that (1) he has a clear legal right to the relief prayed for, (2) respondent is under a clear legal duty to perform the requested act, and (3) relator has no plain and adequate remedy in the ordinary course of the law." *State, ex rel. Liberty Mills, Inc. v. Locker (1986), 22 Ohio St.3d 102, 103, 22 Ohio B. 136, 488 N.E.2d 883, 885*. See *R.C. 2731*. Relator had to prove all three elements before the trial court could grant the writ.

[*P7] *OAC 3745-42-04(E)* states, "Within one hundred eighty days after a completed application is filed, the director shall issue or propose to issue or deny a permit to install or plan approval." It is uncontested that the director failed to act on relator's application within 180 days. Relator filed its mandamus action one day after the deadline for action had passed. Relator did not seek an order compelling the director to consider the [**5] NEORSD application and to take some action. Relator sought an order compelling the director to issue the specific permit to install. The trial court found that relator did not have a clear legal right to the relief prayed for in the petition.

[*P8] Relator relies upon the Ohio Supreme Court's decision in *State ex rel. Liberty Mills v. Locker (1986), 22 Ohio St.3d 102, 22 Ohio B. 136, 488 N.E.2d 883*, to support its position that the court had the authority, not just to order the director to take some action on its application, but to order the director to issue the specific PTI for which it applied.

[*P9] *Liberty Mills* concerned the failure of the director of agriculture to grant a commodities handler license to a grain-handling business. The relator sought a writ of mandamus to order the director to issue the license, asserting that it had met all of the statutory requirements under *R.C. Chapter 926* by (1) paying the fee, (2) submitting the required financial documents, and (3) filing proof of certain insurance coverage. The supreme court granted the writ, finding that the applicant was in full compliance with the filing requirements set forth in *R.C. Chapter 926*. The court disagreed [**6] with the director's assertion that he had the discretionary authority to deny the application. Therefore, the court found that the applicant had shown a clear legal right to the issuance of the license and the director had a clear legal duty to perform the issuing act.

[*P10] In *State ex rel. Baker v. Cuyahoga Cty. Bd. of Commrs. (1988), 46 Ohio App.3d 39, 545 N.E.2d 912*, we followed the reasoning in *Liberty Mills* and affirmed the granting of a writ of mandamus ordering the board to certify certain cab drivers as minority business enterprises (MBE). We found that the only criteria for certifying minority business enterprises were that the applicant (1) be a qualified minority, (2) be a 51 percent owner of his operation, and (3) be 51 percent in control of his operation. By demonstrating compliance with these criteria, the applicants showed a clear legal right to the MBE certification.

[*P11] What distinguishes *Liberty Mills* and *Baker* from the instant case is the absence of discretionary authority on the part of the administrative officers in making their decisions. All that was required for the relators in those cases to demonstrate a clear legal right to

the [**7] relief requested was compliance with simple, clearly defined statutory criteria. Absent any discretionary authority, the administrative officers' functions were primarily ministerial. A ministerial function is one in which a person acts "without regard to or the exercise of his own judgment upon the propriety of the act being done." *State ex rel. Trauger v. Nash (1902), 66 Ohio St. 612, 618, 64 N.E. 558, 559.* Such is clearly not the case with the OEPA review of a PTI application.

[*P12] *OAC 3745-42-04* sets forth the criteria for approval of a permit application by the director as follows:

[*P13] "(A) The director shall issue a permit to install or plan approval on the basis of the information appearing in the application or information gathered by or furnished to the Ohio environmental protection agency, or both, if he determines that the installation or modification and operation of the disposal system or land application of sludge will:

[*P14] "(1) Not prevent or interfere with the attainment or maintenance of applicable water quality standards contained in *Chapter 3745-1 of the Administrative Code*;

[*P15] "(2) [**8] Not result in a violation of any applicable laws; and

[*P16] "(3) Employ the best available technology."

[*P17] The determination of what is the "best available technology" is left to the discretion of the director. The director also has the discretion to "take into consideration the social and economic impact of water pollutants or other adverse environmental impacts that may be a consequence of issuance of the permit to install or plan approval." *OAC 3745-42-04(C).* And, "the director may impose such special terms and conditions as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of environmental quality." *OAC 3745-42-04(D).*

[*P18] Relator is aware of the discretionary authority the director has in reviewing PTI applications. In its petition, relator states, "to the extent that issuance of a PTI is discretionary, Respondents have already exercised such discretion in favor of the issuance of the PTI to Relator." Relator bases this assertion on a letter sent from the respondents on July 5, 2001 in which the director states that the relator's facilities [**9] plan, "meets the applicable state and federal requirements and is hereby approved as adequate and complete." A complete reading of the letter, however, shows that relator's assertion is misleading. The director's letter goes on to state: "This facilities plan will be considered as part of any future submission of a Permit to Install/Plan Approval Application, accompanied by detail plans, as required by the *Ohio Revised Code Chapter 6111.44* and the *Ohio Administrative Code Chapter 3745-31.* Construction shall not be initiated until a permit to install, based upon the approval of detail plans, is obtained from this agency. The approval of this facilities plan shall in no way be construed as acceptance or approval of detail plans."

[*P19] Relator's petition also asserts that its permit application is "administratively complete" and that it has submitted all required plans, fees and information and therefore has a right to issuance of the permit. *OAC 3745-42-01 (K)* states, "'Complete,' in reference to an application for a permit, means that the application contains all the information necessary for processing the application. Designating an application [**10] complete for purposes of permit processing does not preclude the director from requesting or accepting any additional information." *OAC 3745-42-04(A)* states that the director shall issue a permit to install on the basis of "information appearing in the application or information gathered by or furnished to the Ohio environmental protection agency, or both ***." Unlike the situation in *Liberty Mills,* completing the statutory filing requirements under Chapter 3745 does not give the applicant a clear legal right to the issuance of the permit. It is simply the first step in the permit approval process.

[*P20] The Ohio Environmental Protection Agency is a specialized administrative body charged with protection of the environment. Created in 1972, OEPA is charged with promulgating and executing a long-term comprehensive plan to preserve and protect the natural resources of the state. The director of the agency has the power to take any action necessary to comply with the requirements of state and federal laws and regulations relating to waste disposal and treatment. *R.C. 3745.01.* To this end, the General Assembly has granted [**11] the director of environmental protection broad discretion in the decision to grant or deny permit applications. This discretion is clearly visible in the statutory criteria for issuance of a permit to install as shown above.

[*P21] Relator complied with all the procedural requirements for the filing of its application and was entitled to have the director exercise his discretion and either timely grant or deny its permit. Relator was not entitled to an order of the court directing the director to exercise that discretion in a particular way. "Mandamus will lie to compel an administrative officer or board to exercise discretion, but it will not lie to control discretion." *State ex rel. Benton's Village Sanitation Serv., Inc. v. Usher (1973), 34 Ohio St.2d 59, 60, 295 N.E.2d 657, 658.* As relator had no legal right to the relief prayed for in its petition, relator failed to state a claim upon which relief could be granted, and the trial court's dismissal was proper.

[*P22] Relator argues that the trial court improperly considered evidentiary materials and factual assertions outside of the petition in making its ruling, thereby converting respondents' motion [**12] to dismiss into a motion for summary judgment without giving relator proper notice and an opportunity to present opposing evidence as required under *Civ.R. 12(B). Civ.R. 12(B)* states, "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in *Rule 56.* *** All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by *Rule 56.*" It appears from the record that the court improperly considered matters outside of the pleadings, specifically the director's December 8, 2005 proposed denial of the permit application, when it found that relator had a plain and adequate remedy under the law through the appeals process set forth in *R.C. Chapter 3745.*

[*P23] However, this was not the only basis for the court's ruling. The trial court correctly dismissed the petition after finding that relator did not have a clear legal right to the issuance of the permit. This finding does not rely upon matters [**13] outside of the pleadings. Reversal of the court's decision, therefore, is not warranted.

[*P24] Before the trial court may dismiss the petition for failure to state a claim, it must appear beyond doubt from the petition that relator can prove no set of facts entitling it to recovery. *O'Brien v. Univ. Community Tenants Union (1975), 42 Ohio St.2d 242, 327 N.E.2d 753.* The recovery sought by relator, the issuance of the permit to install, is not relief to which relator is entitled. The decision on whether to issue a PTI requires the director to exercise discretion in several ways. He must consider the information in the application. He must consider other information provided by, or to, the agency. He must consider the social and economic consequences of issuing the permit. He must make specific subjective determinations before granting the permit. *OAC 3745-42-04.* The trial court has no authority to control these discretionary determinations and conclude that a PTI should issue. This is the relief relator seeks. It is clear from relator's petition that it can prove no set of facts that would entitle it to the specific relief sought.

Judgment affirmed.

[**14] It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, P.J., CONCURS

SEAN C. GALLAGHER, J., CONCURS WITH SEPARATE CONCURRING OPINION

CONCUR BY: SEAN C. GALLAGHER

CONCUR

SEAN C. GALLAGHER, J., CONCURRING:

[*P25] While I concur with the analysis and judgment of the majority, I write to note that this case involves not only the discretionary authority of the Ohio EPA, but its failure to timely exercise that authority. As the majority notes, the 180-day window under *OAC 3745-42-04(E)* expired. In my view, the subsequent "qualified denial" hardly amounts to the proper exercise of discretionary authority. The failure to make a timely decision, with clarity, works to the detriment of the NEORSD, which, like the EPA, has commitments [**15] and responsibilities to the public that must be

addressed.

[*P26] We are bound by the jurisdictional requirements of *R.C. 3745*. Nevertheless, whatever the real reasons for the delay and subsequent denial, the position of the Ohio EPA should be timely and clearly communicated to the petitioning authority. Only then can a meaningful administrative appeal take place. The apparent shroud of uncertainty surrounding the permit review in this case fosters a sense of unfairness that is detrimental to the petitioning authority. *R.C. 3745* should not be used as a means to delay a statutory responsibility.

LEXSEE 2007 OHIO ENV LEXIS 18

TRANS RAIL AMERICA, INC., Appellant, v. JAMES J. ENYEART, M.D. HEALTH COMMISSIONER TRUMBULL COUNTY HEALTH DEPT, Appellee

Case No. ERAC 785917

Ohio Environmental Board of Review

2007 Ohio ENV LEXIS 18

March 8, 2007, Issued

[*1]

COUNSEL FOR APPELLANT: Michael A. Cyphert, Esq., Leslie G. Wolfe, Esq., Walter & Haverfield LLP, The Tower at Erieview, Cleveland, Ohio.

COUNSEL FOR APPELLEE DIRECTOR: Robert C. Kokor, Esq., Ronald James Rice Co., LPA, Hubbard, Ohio.

PANEL: Melissa M. Shilling, Chair; Toni E. Mulrane, Vice-Chair

OPINION:

RULING ON MOTION TO DISMISS AND FINAL ORDER

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon a Motion to Dismiss filed by Appellee James J. Enyeart, M.D., Health Commissioner, Trumbull County Health Department ("Health Department") on August 22, 2006. In its motion, Appellee requests that the June 30, 2006 appeal filed by Appellant Trans Rail America, Inc. ("Trans Rail") be dismissed as there has been no final appealable action or act of the Health Department and, thus, the Commission lacks subject matter jurisdiction to hear the appeal.

Appellant Trans Rail is represented by Mr. Michael A. Cyphert, Esq. and Ms. Leslie G. Wolfe, Esq., Walter & Haverfield LLP, Cleveland, Ohio. Appellee Health Department is represented by Mr. Robert C. Kokor, Esq., Ronald James Rice Co., LPA, Hubbard, Ohio. Based upon the pleadings, memoranda and attachments filed [*2] by the parties, as well as the relevant statutes, regulations and case law, the Commission issues the following Findings of Fact, Conclusions of Law and Final Order granting Appellee Health Department's Motion to Dismiss.

FINDINGS OF FACT

1. Ohio Revised Code Section ("R.C.") 3714.09 provides:

> (A) The director of environmental protection shall place each health district that is on the approved list under division (A) or (B) of *section 3734.08 of the Revised Code* on the approved list for the purposes of issuing permit to install and licenses under this chapter.

2. Further, *R.C. 3714.06* states, in part:

> (A) No person shall operate or maintain a construction and demolition debris facility without an annual construction and demolition facility operation license issued by the board of health of the health district in which the facility is located or, if the facility is located in a health district that is not on the approved

list under *section 3714.09 of the Revised Code*, from the director of environmental protection.

3. Appellee Trumbull County Health [*3] Department is an approved health district authorized, pursuant to R.C. Chapter 3714, to license construction and demolition debris ("C&DD") facilities within its jurisdiction. (Ohio Administrative Code ["OAC"] section 3745-37-08; http://www.epa.state.oh.us/dsivvm/document_lists/approved_list_of_hds.pdf.)

4. On May 21, 2004, Appellee Trumbull County. Health Department received a license application to construct a C&DD facility in Hubbard, Trumbull County, Ohio from Appellant Trans Rail. (Case File Item R [Appellant's Brief in Opposition to Appellee's Motion to Dismiss], attachment A2.)

5. On July 16, 2004, Dr. James J. Enyeart, Trumbull County Health Commissioner, sent correspondence to Mr. Fred Hudach of Trans Rail notifying him that Trans Rail's C&DD license application had been reviewed and found to be incomplete. Dr. Enyeart cited *OAC 3745-37-02(A)(2)* ["[a]n incomplete application shall not be considered"], and documented 31 instances, under specific paragraphs of the C&DD regulations, where complete information had not been provided. Dr. Enyeart's letter closed as follows:

> As this application is incomplete on its face, a thorough [*4] review of the data supplied in the application has not been undertaken. Once the application has been properly completed, a meaningful technical review can be undertaken.
>
> I suggest that you consider these comments in your application review. The Trumbull County Health Department will be pleased to answer questions regarding your application upon receipt of a written request for same. (Case File Item R, attachment A2.)

6. Approximately one year later, on July 1, 2005, the State's Biennial Budget Bill (Amended Substitute House Bill ["H.B."] 66) became effective. Included in this bill was a provision establishing a six-month moratorium, from July 1, 2005 to December 31, 2005, during which C&DD licenses for certain new facilities could not be issued. The moratorium provision also created the Construction and Demolition Debris Facility Study Committee to "study the laws of this state governing construction and demolition debris facilities and the rules adopted under those laws and . . . make recommendations to the General Assembly regarding changes to those laws. . . ." (H.B. 66, 126th General Assembly.)

7. In a submission date-stamped December 16, 2005, Mr. Owen J. Karickhoff of CT [*5] Consultants, Inc., replied on behalf of Trans Rail to Dr. Enyeart's July 16, 2004 communication regarding Trans Rail's incomplete application. Mr. Karickhoff indicated that "[t]his correspondence follows our July 29, 2004 meeting in your office to discuss the license application." Mr. Karickhoff further stated:

> Your comments are attached hereto; each followed by our written response. As suggested in your closing paragraphs, we have supplemented the Facility Design Plan drawings in order to facilitate your review of the application. We have also reduced the active licensed disposal area to five acres.
>
> We trust that the following responses satisfy your concerns regarding completeness of the license application and request that you consider it. (Case File Item R, attachment A3.)

8. Less than a week after this submission, on December 22, 2005, H.B. 397 became effective as an emergency measure. This legislation amended a number of provisions in Ohio's construction and demolition debris program. Further, uncodified Section 3 of the act contained the following:

> **Section 3.** (A) Notwithstanding the amendments to Chapter 3714. of the Revised Code by this act, an application for [*6] a license to establish or modify a construction and demolition debris facility submitted to a board of health or the Director of Environmental Protection, as applicable, prior to July 1,

2005, shall be reviewed and the license shall be issued or denied in accordance with the provisions of that chapter as they existed on July 1, 2005, *if all of the following apply to the applicant* for the license:

(1) The applicant has acquired an interest in the property on which the facility will be located on or before May 1, 2005.

(2) The applicant has begun a hydrogeologic investigation pursuant to section *3745-400-09 of the Ohio Administrative Code* prior to submitting the application.

(3) The applicant has begun the engineering plans for the facility prior to submitting the application.

(4) The application submitted by the applicant would have been determined to be complete if the moratorium had not been in effect.

The Director shall determine whether this division applies to an applicant within forty-five days after receiving an applicant's request for a determination under this division.

(B) Notwithstanding the amendments to Chapter 3714. [*7] of the Revised Code by this act and except as otherwise provided in this division, an application for a license to establish or modify a construction and demolition debris facility submitted to a board of health or the Director, as applicable, on or after July 1, 2005, but prior to or on December 31, 2005, shall be reviewed and the license shall be issued or denied in accordance with the provisions of that chapter as they existed on July 1, 2005. However, unless division (G)(2) of section 3714.03 n1 of the Revised Code, as amended by this act, applies, to the facility, a board of health or the Director, as applicable, may apply any of the siting criteria established in *section 3714.03 of the Revised Code* by this act to such an application and may deny the application if the facility that is the subject of the application will not comply with that siting criteria. * * * (Emphasis added.) (H.B 397, 126th General Assembly.)

n1 *Revised Code § 3714.03(G)(2)* provides:

> (G)(2) The siting criteria established in this section by this amendment do not apply to an expansion of a construction and demolition debris facility that was in operation prior to the effective date of this amendment onto property within the property boundaries identified in the application for the initial license for that facility or any subsequent license issued for that facility up to and including the license issued for that facility for calendar year 2005. The siting criteria established in this section prior to the effective date of this amendment apply to such expansion.

[*8]

9. On January 19, 2006, Alan D. Wenger, legal counsel for the Hubbard Township Board of Trustees ("Board") sent a letter to Dr. Enyeart to express the Board's position concerning the applicability of Section 3.(A) of H.B. 397 to the pending license application filed by Trans Rail. In relevant part, Mr. Wenger stated:

> * * * You office issued a letter on or about July 16, 2004 which indicated that the Trans Rail License Application was incomplete in numerous respects. To our knowledge, Trans Rail did not respond until (at the earliest) a letter dated November 8, 2005 from Trans Rail's consultant, CT Consultants, Inc. which appears to not have actually been submitted until December 19, 2005, when a meeting was held at your

office attended by Attorney Michael A. Cyphert and CT's Owen Karickhoff on behalf of Trans Rail, which I also attended.

In short, it appears that Trans Rail is seeking to fit within the "grandfather" provisions of the new C&D licensing laws adopted by Amended Substitute House Bill Number 397, effective December 22, 2005. * * *

We submit that regardless of the merits of the December 19, 2005 Trans Rail application effort * * * [the] Trans Rail application [*9] is not qualified for the pre-July 1, 2005 grandfather status. * * *

Even if Trans Rail arguably (which is not conceded) met the grandfather requirements of parts 1, 2, and 3, the requirement no. 4 definitely was not met. As clearly evidenced by the Trumbull County Board of Health letter back on July 16, 2004, the 2004 Trans Rail application was not complete long before any state-imposed moratorium went into effect. Furthermore, Tans Rail did not even attempt to address the deficiencies in order to provide a complete application during the moratorium until long after the July 1, 2005 date -- not until December 19, 2005. There is obviously no way the Trans Rail application could or would have been determined to be complete by your office before December 31, 2005, when major portions of it were not even submitted until December 19, 2005. (Underlining in original.) (Case File Item R, attachment A1.)

10. In mid-January 2006, the Health Department contracted with Bennett & Williams Environmental Consultants, Inc. ("Bennett & Williams") to provide a technical review of Trans Rail's revised application, received on December 16, 2005. In a January 17, 2006 letter n2 from Linda Aller, [*10] Executive Vice President of Bennett & Williams, to Dr. Enyeart she described her firm's experience relative to C&DD facilities, as follows:

We have had extensive experience in assisting Health Departments in reviewing Construction and Demolition Debris Applications, reviewing permitting and ground-water monitoring information and in conducting training programs relating to construction and demolition landfills. We have reviewed information on existing sites as well as proposed facilities. We have looked at approximately 15 different construction and demolition debris landfills under the stafewide rules since they were promulgated by Ohio EPA. Our primary role has been to assist local health departments on these sites.

In addition, we are familiar with the history of the recently-adopted legislation on construction and demolition debris landfills and have offered testimony in support of sound technical additions and funding for local health departments to perform this program. We have been involved in special 'interested party' meetings designed to work on recently passed legislation on construction and demolition debris landfills (HB 397). We are familiar with the geology and [*11] hydrogeology of Trumbull County and have reviewed two applications for new construction and demolition debris sites specifically in Trumbull County. We have also provided litigative support for some sites and can perform these services, if necessary. (Case File Item R, attachment A5.)

n2 In this letter, Ms. Aller noted that Bennett & Williams had reviewed the original application for this site on behalf of a citizen's group (H.E.L.P.) and provided written comments to the Health Department. (Case File Item R, attachment A5.)

11. Pursuant to this contract, Ms. Aller and Mr. Michael D. Robison, also of Bennett & Williams, provided written

technical comments in a report on Trans Rail's revised application to the Health Department on February 15, 2006. Specifically, Ms. Aller and Mr. Robison concluded "[t]he application should be considered as incomplete * * *" In support of this conclusion, the letter set forth two pages of "General Comments," as well as 68 "Specific Comments," spanning 16 pages, in which inadequacies [*12] in various aspects of the application submissions were discussed, with applicable regulatory citations noted where relevant. The "General Comments" section included the following discussion regarding H.B. 397:

> As you are aware, the passage of HB 397, signed into law on December 22, 2005 by the Governor, will change some provisions of the current construction and demolition debris rules. One provision of the bill allows applications that were submitted prior to July 1, 2005 to be considered under the existing rules at the time if four criteria are met as determined by the director of the Ohio Environmental Protection Agency (OEPA). According to the bill, '*The director shall determine whether this division applies to an applicant within forty-five days after receiving an applicant's request for a determination under this division.*' To the best of our knowledge, the applicant has made no such application to the director and the director has made no such determination. Without such a determination from the director, the application is subject to the siting criteria in *section 3714.03 of the Revised Code* and must either demonstrate that the [*13] new siting criteria are met or revise the application to meet the siting criteria. This application contains no such demonstration, therefore the siting criteria must be addressed in the application.
>
> Similarly, if the application is deemed to have been a new application that was submitted on December 19, 2005, the Board of Health '*may apply any of the siting criteria established in section 3714.03 of the Revised Code by this act to such an application and may deny the application if the facility that is the subject of the application will not comply with that siting criterion.*' The applicant has not demonstrated which of the siting criteria are met. (Emphasis in original.) (Case File Item R, attachment A4.)

12: On February 15, 2006, Dr. Enyeart once again notified Mr. Hudach that Trans Rail's application had been found to be incomplete, in part, as follows:

> Upon review, the application was found to be incomplete; and thus the board of health cannot consider it. Attached to this letter is a copy of a report conducted by Bennett & Williams, a consulting firm hired by the Board of Health to review the above referenced application. The [*14] document outlines the sections of the application found to be incomplete. These items must be adequately addressed prior to consideration by the Board of Health. (Case File Item R, attachment A4.)

13. In separate replies dated March 30, 2006, Mr. Karickhoff, CT Consultants, and Mr. Stephen L. Tomkins, HzW Environmental Consultants, Inc. ("HzW Environmental"), specifically responded to the Health Department regarding the comments contained in the February 15, 2006 Bennett & Williams report. Prior to providing explicit remarks addressing the alleged inadequacies outlined in the report, Mr. Karickhoff stated:

> You should reconsider your finding the C&DD application of Trans Rail America, Inc. incomplete based, apparently, solely upon the report by Bennett & Williams that you attached to your letter. The Administrative Code is well written by the Ohio EPA and straightforward in meaning; yet, Bennett & Williams' first three comments refer to paragraphs of *OAC 3745-400-11* which concern "operation of facilities" and are not relevant to initial licensure of a facility. Bennett & Williams advise you to consider the application incomplete based [*15] upon page after page of non-technical discussion from which it is difficult to extract legitimate concerns. What is missing from the Bennett & Williams 'technical' review of the license application is an understanding of the licensure and permitting process associated with construction and demolition debris facilities.

As an example, paragraph (B) of 3745-400-07 simply states 'The owner or operator shall comply with all applicable construction specifications and performance standards required in this rule.' And, for clarity, the paragraph is followed by this regulatory comment:

> [Comment: The owner or operator need not reiterate all the construction specifications and performance standards that are in this rule in the facility design plan. The owner or operator, in accordance with rule 3745-400-11 of the Administrative Code, is required to follow the applicable specifications as part of facility operations. If the owner or operator does not follow the specifications, a violation of rule 3745-400-11 of the Administrative Code will result.]

This '*Wise Comment*' is the regulatory tone that encourages positive working relationships between a regulated facility and the responsible [*16] regulator and should be aspired toward throughout this licensure process as well. * * * (Emphasis in original.) (Case File Item R, attachments A6 and A7.)

14. On May 31, 2006, Dr. Enyeart again sent correspondence to Mr. Hudach notifying him that Trans Rail's most recent license application submission had been determined to be incomplete. In support of this finding, Dr. Enyeart attached a May 30, 2006 report prepared by Bennett & Williams in which those portions of the application found to be incomplete during a technical review were specifically outlined. The 31 page report contained discussions captioned "Siting Criteria Provisions," "General Comments," "New Comments," "Summary Comments" and "Specific Comments." In the section titled "Siting Criteria Provisions,", the report reiterated the comments relating to H.B. 397, set out in paragraph 11 above, with the following addition:

> Although the letter from Michael Cyphert n3 does appear to express his opinion that the Application should be considered under the grandfather provision, and therefore under the rules and laws as they existed on July 1, 2005, there is no indication that a determination by the director of OEPA has been [*17] requested or is pending. Lacking this determination (that only the director can make), we can only review the application as though it is subject to the new siting criteria.. We have the following comments with regard to the siting criteria contained in Amended Substitute HB 397 as adopted. Based on information submitted to date by the Applicant the following siting criteria are not met:
>
> 1) A portion of the facility is within the boundaries of a one-hundred year floodplain;
>
> 2) The proposed limits of debris placement are, within five hundred feet of a residential supply well; and
>
> 3) The proposed limits of debris placement are within five hundred feet of an occupied dwelling.
>
> In addition, information on other siting criteria is not included in the application materials that allow determination of compliance with other siting criteria. This information needs to be included to ensure that those criteria are met:
>
> 1) Are there any parks within 500 feet of the proposed limits of debris placement?
>
> 2) Are there any natural areas within 500 feet of the proposed limits of debris placement?
>
> 3) Are there any lakes or reservoirs within 500 feet of the proposed limits of debris placement? [*18]
>
> 4) Are there any state forests within 500 feet of the proposed limits of debris

placement?

5) Are there any historical landmarks within 500 feet of the proposed limits of debris placement?

6) Is the access road within 500 feet of an occupied dwelling? * * * (Case File Item O [Motion to Dismiss of Appellee], attachment A.)

n3 In addition to the referenced letter from Michael Cypert, which was not included in the case file, Response 44 in the report submitted by HzW Environmental contained the following conclusory statement:

> Trans Rail's C&DD license application was submitted in 2004 prior to the July 1, 2005 cut-off and, therefore, should qualify for 'grandfather' status. The C&DD rules effective December 22, 2005 are not applicable.

15. Further, under "General Comments" the Bennett and Williams report provided:

> * * * Apparently the respondent takes issue with questions raised in the Bennett & Williams [February 15, 2006] letter. Many of the comments in the Bennett & Williams letter attached to the [*19] Health District letter were designed to gain a more complete understanding of the site characterization and engineering design elements proposed for the site. This, in turn, allows the Health District to view the permit application holistically.
>
> Specifically, *OAC 3745-37-02(A)(3)* states that "*if the licensing authority determines that information in addition to that required by this rule is necessary to determine whether the application satisfies the requirements of Chapters 3745-400 and 3745-37 of the Administrative Code, the license applicant shall supply such information as a precondition to further consideration of the license application.*" The information requested is important to the Health District for a determination under *OAC 3745-37-03(D)* which states "*The licensing authority o a construction and demolition debris facility may impose such special terms and conditions as are appropriate or necessary to ensure that the facility will comply with Chapter 3714. of the Revised Code and Chapter 3745-400 of the Administrative Code, and to protect public health and safety and the environment* [*20] ." Therefore, where questions and comments have not been addressed by the latest responses, we recommend that the Health District request answers again.
>
> Because the many comments contained within the February 15, 2006 letter have not been addressed by the provided comments, we have chosen to repeat the comments contained in that letter with a notation in bold underneath the comment as to the disposition of the comment and whether or not it has been addressed. We found many of the responses to be argumentative, hostile and non-responsive. We have tried to again reiterate the technical issues that remain regarding the Application. This Application remains incomplete in several areas. Because of the limited information provided in the Application, the items listed may not be all of the concerns, particularly if changes are made to the Application. Changes may prompt additional questions or highlight other areas of concern. (Emphasis in original.) ((Case File Item O.)

16. On June 30, 2006, Appellant Trans Rail filed an appeal with the Commission in which it alleged the Health

Department erred in determining that its license application was incomplete and could not be considered under [*21] the requirements of *OAC 3745-37-02(A)(2)*. (Case File Item A.)

17. A Motion to Dismiss was filed with the Commission by Appellee Health Department on August 22, 2006. In its motion, Appellee asserts the Commission lacks jurisdiction to hear the instant appeal as the Health Department has taken no final appealable action or act. Specifically, Appellee maintains: 1) The May 31, 2006 letter from Dr. Enyeart to Trans Rail does not meet the definition of an "action" or "act" set out in *R.C. § 3745.04* and *OAC § 3746-1-01*; 2) The May 31, 2006 letter does not contain the requisite traditional indicia of a final action; and 3) The May 31, 2006 letter does not adjudicate with finality any legal rights or privileges of Appellant Trans Rail. (Case File Item O.)

18. A Brief in Opposition to Appellee's Motion to Dismiss was filed by Appellant Trans Rail on September 12, 2006. In its brief, Trans Rail responds: 1) *Revised Code § 3745.04* does not set forth an exclusive list of appealable "acts" or "actions" and Ohio courts have broadly [*22] interpreted this statute to confer jurisdiction over a wide range of agency decisions which constitute a final adjudication of a party's rights; 2) The May 31, 2006 letter contains substantial evidence of finality based upon both form and substance; and 3) The May 31, 2006 letter is a final adjudication of Trans Rail's right to a decision on the merits of its license application. (Case File Item R.)

CONCLUSIONS OF LAW

1. *Ohio Revised Code Section 3745.04* authorizes certain appeals to the Commission as follows:

> (B) Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. * * * n4

n4 Similarly, *Ohio Administrative Code § 3746-1-01(A)* provides:

> "Action" or "Act" includes the adoption, modification, or repeal of a regulation, resolution, or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or regulation.

[*23]

2. Further, this statute defines "action" or "act" as follows:

> As used in this section, 'action' or 'act' includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

3. An event that does not constitute an action or act of the Director cannot form the jurisdictional basis for an appeal to the Commission. *Inorganic Recycling of Ohio, Inc. v. Shank*, ERAC Case No. 252011, (November 30, 1989); *National Lime and Stone Co. v. Shank*, ERAC Case No. 321960, (January 17, 1990).

4. In the instant case, the Commission must determine whether the May 31, 2006 letter from Dr. Enyeart informing Trans Rail that its C&DD license application had been found to be incomplete is a final action or act of the Health Department and, thus, appealable to the Commission.

5. In making such a determination, the Commission first turns to the explicit wording of *R.C. 3745.04* [*24] and notes that a finding that an application is incomplete does not fall within the items explicitly enumerated as an "action" or "act" in *R.C. 3745.04*. However, as correctly pointed out by Trans Rail, the list contained in *R.C. 3745.04* is illustrative, not exhaustive. Thus, the mere fact that a determination of incompleteness is not specifically set out as a matter constituting an "action" or "act" of the Health Department is not dispositive. See *e.g., Ohio Lime, Inc. v. Jones, et al.*, ERAC Case No. 744754, (February 14, 2001).

6. If the contents of a document fall outside the enumerated matters in *R.C. 3745.04*, the Commission next examines the form and substance of the document to determine whether it constitutes an appealable action or act. In conducting its analysis relative to form, the Commission has traditionally identified the following factors as indicia that a document comprises a final action: 1) it is signed by the Director; 2) it contains language identifying it as a final action; 3) it sets out information advising the recipient of the right to [*25] appeal; and 4) it has been entered into the Director's journal. See *e.g., Wheeling-Pittsburgh Steel Corp. v. Jones*, (2002) 2002 Ohio ENV LEXIS 6; *Dr. Kevin Lake v. Jones*, (2003) 2003 Ohio ENV LEXIS 11.

7. Applying these criteria to the May 31, 2006 letter under appeal, the Commission finds: 1) while the letter was signed by Dr. Enyeart in his capacity as Trumbull County Health Commissioner, The highest officer of the Health Department, the letter did not contain language indicating that it represented a final action of the Health Department; 2) the letter did not advise Trans Rail of a right to appeal its contents; 3) there is nothing to indicate that the letter was journalized, or in any other way documented as a final action, by the Health Department. As such, the Commission finds Dr. Enyeart's May 31, 2006 letter does not possess the requisite form to qualify as a final action of the Health Department.

8. Even if a document does not, in form, constitute a final action it may still be a final action if the substance of the document adjudicates with finality any legal right or privilege of the appealing party. Conversely, if the document represents an intermediate step in [*26] a continuing process, or if the contents of the document indicate that it is only a segment of an evaluation that will ultimately lead to a final action, then, at that juncture, no final appealable action has occurred. Thus, the final inquiry the Commission must make is whether Dr. Enyeart's May 31, 2006 letter adjudicates with finality any legal right or privilege of Appellant Trans Rail. See *e.g., Inorganic Recycling of Ohio, Inc. v. Shank*, ERAC Case No. 252011, (November 30, 1989); *Auburn Community Church v. Schregardus*, ERAC Case No. 284060, (February 11, 1999).

9. Trans Rail argues that the Health Department's May 31, 2006 determination that its application is incomplete constitutes a final adjudication of Trans Rail's right to a decision on the merits of its license application, which materially and adversely affected its property rights. In support of its position, Trans Rail relies primarily upon *CECOS International, Inc. v. Shank* (1989), 1989 Ohio ENV LEXIS 10, affirmed in part, reversed in part and remanded by the Tenth District Court of Appeals in *CECOS International, Inc. v. Shank (1991), 74 Ohio App.3d 43.*

10. *CECOS* involved [*27] the Director's denial of a hazardous waste permit renewal application submitted by CECOS. The denial was based, in part, upon the Director's determination that CECOS had failed to submit a complete and adequate application as required by *OAC §§ 3745-50-40* and *3745-50-51*. CECOS appealed the Director's denial and the Commission reversed the action of the Director, finding that CECOS' application was complete. Specifically, the Commission concluded that the evidence did not support the Director's determination that CECOS' application was incomplete, as follows:

> 2. The question of when an application is complete is, ultimately, a question of fact to be determined by a review of all circumstances surrounding the application or submittal.

3. The mere fact that the Director or staff of the Ohio EPA does not agree with the information or the fact that the information submitted may not be adequate to demonstrate that the applicant is either in compliance or entitled to the permit applied for, is not, in itself, determinative of whether the application as submitted is complete.

4. An application [*28] will be deemed to be complete when it is determined that all the statutorily and regulatorily enumerated and mandatory components of the application have been reasonably and fully answered, submitted or responded to by the applicant and that any required attachments, exhibits and appropriate data have been included. The fact that the application may ultimately be denied by the reviewing authority on the basis of the quality of the information contained in the application or that the OEPA would want other information, is not necessarily relevant in determining completeness.

5. The record in the present case demonstrates that while the Director and the employees of the Ohio EPA did not agree with portions of the material submitted by Appellant with its application and in support of it, the essential statutory and regulatory requirements of the application had been met and fulfilled. The record demonstrates that the Director had in the application and its voluminous attachments and exhibits responses to all aspects of the statutes and regulations controlling applications. While there were vast differences of opinion regarding the quality of the information and while a permit might [*29] ultimately be granted or denied based on the quality of the information submitted, all areas of the application had been reasonably addressed by Appellant.

6. The application submitted by Appellant in this case was complete. *CECOS International, Inc. v. Shank* (1989), 1989 Ohio ENV LEXIS 10.

11. On appeal, the Tenth District Court of Appeals affirmed the Commission's finding that CECOS' application was complete, with the following pertinent discussion:

Initially, this court is called upon to review EBR's n5 conclusion that the director's definition of complete was unreasonable and unlawful. *R.C. 3734.05(H)(1)* requires hazardous waste facility permit holders who wish to renew their permit to '* * * submit a completed application for an installation and operation permit renewal and any necessary accompanying general plans, detail plans, specifications, and such information as the director may require to the director no later than one hundred eighty days prior to the expiration of the existing permit * * *.' Although the Revised Code does not define what constitutes a 'complete application,' *Ohio Adm. Code 3745-50-41(C)* [*30] n6 specifies that in cases such as this, where the permit applicant is seeking a modification to an existing hazardous waste facility, the director is prohibited from transmitting to the Hazardous Waste Facility Board an incomplete permit application. This section defines a completed permit application as:

> '(1) A permit application is complete:
>
> (a) When the director receives an application form and any supplemental information which are complete to his satisfaction * * *.'

* * *

In reviewing the director's determination that appellee's application was incomplete, EBR did not specifically define what constitutes a 'completed application.' However, EBR did find that appellee's application was complete because it addressed all statutory and regulatory requirements. * * * In so finding, EBR inferred that an application for a part B permit is complete if the applicant supplies all of

the information required by both statute and regulation. *We believe this definition is too restrictive in light of the various statutory and regulatory requirements imposed upon hazardous waste facility owners and operators.*

This court finds merit in the argument advanced by the director [*31] regarding the definition of a 'completed application.' As the director points out, *R.C. 3745.05(H)(1)* specifically empowers the director to request additional information with respect to a specific hazardous waste site. Although *Ohio Adm. Code 3745-50-44* contains a plethora of information required of a part B applicant, that rule also contemplates that the director will require additional information. See *Ohio Adm. Code 3745-50-44(A)(20)* and (C)(9)(e) n7. Moreover, even the specific provisions of this rule are not so precise as to define for the applicant the specificity which the director may require for proper review of the application.

For example, *Ohio Adm. Code 3745-50-44(C)(2)(d)*, requires the applicant to provide a '* * * diagram of piping, instrumentation, and process flow for each tank system.' The regulation does not specify whether the diagram of the piping is to be drawn to scale, or whether the diagram of the piping should specify the type of connector used to connect the pipes to one another or [*32] to the tanks. Such information could well be relevant to the director's review of a particular application given the nature of the site and the type of materials to be handled at the site. *The director must be free to amplify the statutory and regulatory requirements imposed upon part B applicants as the need arises.* Thus, the director does have the authority to require an applicant to amplify the information specified in *Ohio Adm. Code 3745-50-44* as the exigencies of a particular site may require. Accordingly, an application for renewal of a permit to operate a hazardous waste facility is complete to the director's satisfaction under *R.C. 3734.05(H)(1)* when all statutory and regulatory requirements, *as amplified by the director*, have been fulfilled. (Emphasis added.)

n5 The Environmental Board of Review ("EBR") was the predecessor to ERAC.

n6 At the time of this decision, *OAC § 3745-50-41(C)* stated:

> (C) The Director shall not transmit an incomplete permit application to the Board [Hazardous Waste Facilities Board]. A permit application is complete when the Director receives an application form and any supplemental information which are complete to his satisfaction. . . .

[*33]

n7 *Ohio Administrative Code § 3745-50-44(A)(20)* provided:

> (A) The following information is required for all hazardous waste facilities, except as rule 3745-54-01 of the Administrative Code provides otherwise: * * *
>
> (20) Applicants may be required to submit such information as may be necessary to enable the director to carry out his duties under other laws.

Similarly, *OAC § 3745-50-44(C)(9)(e)* stated:

(C) The following additional information is required from owners or operators of specific types of hazardous waste facilities that are used or to be used for storage, treatment or disposal. * * *

(9) Except as otherwise provided in rule 3745-57-90 of the Administrative Code, owners and operators of facilities that treat, store, or dispose of hazardous waste in miscellaneous units must provide the following additional information: * * *

(e) Any additional information determined by the director to be necessary for evaluation of compliance of the unit with the environmental performance standards of rule 3745-57-91 of the Administrative Code.

- - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - [*34]

12. The court continued as follows:

While the director has the authority to direct a permit applicant to submit additional or more detailed information in order to comply with the statutory requirement that a 'completed application' be submitted, *it is the director's obligation to specify the information sought.* An applicant cannot be faulted for attempting to comply with the director's request for additional information which is nonspecific or ambiguous. * * * The submission of a completed application should not require an applicant to guess what information is being requested. To the extent the director intends to utilize his power to require an applicant to submit additional information, the director should specify the precise and particular information sought to enable an applicant to comply. The application process should not be utilized, as it appears to have been utilized in this case, as a method for denying a permit. Rather, it is the director's function to ensure, rather than to frustrate, compliance with the statutory requirement that an applicant submit a 'completed application.' (Emphasis added.)

13. Similar to the regulations addressed in *CECOS, OAC § 3745-37-02(A)(2)* [*35] and (3) provide as follows:

(2) *An incomplete application shall not be considered.* Within thirty days of the receipt of an incomplete application or sixty days in the case of an incomplete construction and demolition debris facility license application, the applicant shall be notified of the nature of the deficiency and of refusal by the director or the board of health to consider the application until the deficiency is rectified and the application completed; and

(3) For construction and demolition debris facilities, *if the licensing authority determines that information in addition to that required by this rule is necessary to determine whether the application satisfies the requirements of Chapters 3745-400 and 3745-37 of the Administrative Code, the license applicant shall supply such information as a precondition to further consideration of the license application.* (Emphasis added.)

14. On its face, *OAC § 3745-37-02(A)(3)* appears to afford a licensing authority a wide degree of latitude to request additional information when considering a C&DD license application. The report prepared by Ms. Aller and Mr. Robison of Bennett [*36] & Williams specifically cited a number of items in Trans Rail's application that required clarification or supplementation. n8 Although it is clear that Mr. Karickhoff of CT Consultants and Mr. Tomkins of HzW Environmental Consultants, Inc. attempted to respond to these concerns, it is equally clear that Ms. Aller and Mr. Robison considered their responses inadequate. The Commission believes it is appropriate for the Health Department to seek outside review of technical matters and to rely on such an assessment conducted by an independent environmental consulting firm with extensive experience relative to C&DD facilities, *e.g.*, Bennett & Williams. Thus, applying *OAC § 3745-37-02(A)(2)* and (3) and the court's reasoning in *CECOS, supra,* to the facts presented herein, the Commission finds the Health Department's determination that Trans Rail's application was incomplete was reasonable and its request

for additional information was well within its regulatory authority. n9 See also, *Harmony Environmental Ltd. v. Morrow County District Board of Health and Washington Environmental Ltd. v. Morrow County District Board of Health (2005), 2005 Ohio App. LEXIS 2920,* [*37] in which the Franklin County Court, of Appeals affirmed the Commission's finding that C&DD license applications filed by Harmony Environmental Ltd. and Washington Environmental Ltd. were incomplete and should not have been considered by the Morrow County District Board of Health.

n8 Perhaps most troubling, in the view of the Commission, is the portion of the report which indicates that the information provided by Trans Rail is completely devoid of any discussion regarding the potentially significant effect of the siting criteria changes enacted by H.B. 397 on Trans Rail's application. Specifically, it appears Trans Rail must either document that the new siting criteria are inapplicable to its application because the Director has determined that Section 3.(A)(1) -- (4) of H.B 397 have been satisfied, or it must provide information demonstrating that the siting criteria have been met.
n9 In its ruling today, the Commission does not intend to imply that repeated, unreasonable requests for additional information by a licensing authority could never be found to rise to the level of a final appealable action, however, we find that that is not the factual situation presented today.

[*38]

15. In keeping with the above, the Commission finds the Health Department's determination regarding Trans Rail's application was not a final appealable action, but rather, represents an intermediate step in a continuing process. Accordingly, Appellee Health Department's Motion to Dismiss is hereby granted.

FINAL ORDER

Based on the foregoing, the Commission hereby GRANTS Appellee Trumbull County Health Department's Motion to Dismiss and further ORDERS Appellant Trans Rail America, Inc.'s appeal DISMISSED.

The Commission, in accordance with *Ohio Administrative Code Section 3746-13-01*, informs the parties that:

> Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail [*39] to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewAdministrative LawJudicial ReviewReviewabilityFinal Order Requirement

1 of 1 DOCUMENT

Caution
As of: Aug 28, 2008

Trans Rail America, Inc., Appellant-Appellant, v. James J. Enyeart, M.D., Health Commissioner, Trumbull County Health Department, Appellee-Appellee.

Nos. 07AP-273 and 07AP-284

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2007 Ohio 7144*; *2007 Ohio App. LEXIS 6247

December 31, 2007, Rendered

SUBSEQUENT HISTORY: Discretionary appeal allowed by *Trans Rail Am. v. Enyeart, 2008 Ohio 2595, 2008 Ohio LEXIS 1565 (Ohio, June 4, 2008)*

PRIOR HISTORY: [**1]

APPEAL from the Environmental Review Appeals Commission. (ERAC No. 785917).

DISPOSITION: Order reversed and matter remanded.

COUNSEL: Walter & Haverfield, LLP, Michael A. Cyphert, Leslie G. Wolfe, and Jonathan R. Goodman, for appellant.

Ronald James Rice Co., LPA, and Robert C. Kokor, for appellee.

JUDGES: KLATT, J. TYACK, J., concurs. FRENCH, J., dissents.

OPINION BY: KLATT

OPINION

(ACCELERATED CALENDAR)

OPINION

KLATT, J.

[*P1] Appellant, Trans Rail America, Inc. ("Trans Rail"), appeals from an order of the Environmental Review Appeals Commission ("ERAC") dismissing its appeal against appellee, James J. Enyeart, M.D., Health Commissioner of the Trumbull County Health Department ("Commissioner"). For the following reasons, we reverse.

[*P2] On May 21, 2004, Trans Rail applied to the Trumbull County Health Department ("Health Department") for a license to establish a construction and demolition debris facility in Hubbard, Ohio. [1] In a July 16, 2004 letter, the Commissioner stated that the Health Department could not consider Trans Rail's application because it was incomplete. To assist Trans Rail in the application process, the Commissioner identified the parts of the application that did not comply with *Ohio Adm.Code 3745-37-02(E)*, which enumerates the [**2] items that a construction and demolition debris facility license application must include.

1 Former *R.C. 3714.06(A)* required applicants to submit their construction and demolition debris facility applications to the local board of health if that local board of health appeared on the "approved list." If it did not, then former *R.C. 3714.06(A)* directed applicants to apply to the

Director of the Ohio Environmental Protection Agency. As the Health Department is on the "approved list," Trans Rail applied there.

[*P3] Representatives of CT Consultants, Inc. ("CT Consultants"), an engineering firm that Trans Rail hired to oversee the application process, met with the Commissioner to discuss the application. On December 16, 2005, CT Consultants delivered to the Commissioner written responses and additional documents to resolve the deficiencies in Trans Rail's application. In a letter dated February 15, 2006, the Commissioner acknowledged receipt of the additional information, but he again found that the application was incomplete and refused to consider it. The Commissioner attached to the February 15, 2006 letter a report generated by Bennett & Williams Environmental Consultants, Inc. ("Bennett & [**3] Williams"), a firm that the Health Department hired to evaluate Trans Rail's application. The Commissioner directed Trans Rail to address those areas of the application that the report found were lacking the necessary information.

[*P4] In two letters dated March 30, 2006, CT Consultants replied to the comments in Bennett & Williams' report and submitted further information regarding the proposed construction and demolition debris facility. In a response letter dated May 31, 2006, the Commissioner concluded that Trans Rail's application still failed to comply with *Ohio Adm.Code 3745-37-02(E)*, and he again deemed the application incomplete. The Commissioner attached to his letter a second report from Bennett & Williams that characterized CT Consultants' March 30, 2006 replies as an inadequate answer to the concerns listed in the first report.

[*P5] On June 30, 2006, Trans Rail filed an appeal before the ERAC asserting one assignment of error:

> The Health Department erred in determining that Trans Rail's [Construction Demolition and Debris] License Application was incomplete and could not be considered under the requirements of *Ohio Administrative Code ("O.A.C.") Rule 3745-37-02(A)(2)*.

Trans Rail asked [**4] the ERAC to find that its application was complete and to order the Health Department to consider it. The Commissioner moved to dismiss Trans Rail's appeal for lack of subject matter jurisdiction. The Commissioner argued that the May 31, 2006 letter was not an appealable action under *R.C. 3745.04*, which delineates the scope of the ERAC's jurisdiction. The ERAC agreed with the Commissioner's argument, concluding that the May 31, 2006 letter was an intermediate step in the continuing application process (and not an appealable action). In reaching this conclusion, the ERAC evaluated the evidence and held that it was reasonable for the Commissioner to determine that Trans Rail's application was incomplete. Pursuant to its decision, the ERAC issued a final order dismissing Trans Rail's appeal on March 8, 2007.

[*P6] Trans Rail now appeals from the March 8, 2007 final order and assigns the following errors:

> 1. THE ENVIRONMENTAL REVIEW APPEALS COMMISSION ERRED IN FINDING THAT IT LACKED SUBJECT MATTER JURISDICTION TO HEAR THE APPEAL ON THE GROUNDS THAT THE APPELLEE HEALTH DEPARTMENT'S DETERMINATION OF INCOMPLETENESS OF APPELLANT'S LICENSE APPLICATION WAS NOT A FINAL APPEALABLE ACT OR ACTION.
>
> 2. THE [**5] ENVIRONMENTAL REVIEW APPEALS COMMISSION ERRED IN FINDING THE APPELLEE HEALTH DEPARTMENT'S DETERMINATION OF INCOMPLETENESS TO BE REASONABLE DESPITE THE COMMISSION'S FINDING THAT IT LACKED JURISDICTION TO HEAR THE APPEAL.

[*P7] By its first assignment of error, Trans Rail argues that the ERAC erred in dismissing its appeal for lack of subject matter jurisdiction. We agree.

[*P8] An administrative agency has only those powers that the General Assembly expressly confers upon it. *Shell v. Ohio Veterinary Med. Licensing Bd., 105 Ohio St.3d 420, 2005 Ohio 2423, at P32, 827 N.E.2d 766*; *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio*

Environmental Protection Agency (2000), 88 Ohio St.3d 166, 171, 2000 Ohio 282, 724 N.E.2d 411. When the General Assembly invests an administrative agency with the power to hear appeals, statutory language determines the parameters of the agency's jurisdiction. *Waltco Truck Equip. Co. v. Tallmadge Bd. of Zoning Appeals (1988), 40 Ohio St.3d 41, 43, 531 N.E.2d 685*; *Cordial v. Ohio Dept. of Rehab. & Corr., Franklin App. No. 05AP-473, 2006 Ohio 2533, at P20.* In interpreting a jurisdictional statute, courts cannot ignore portions of the statute, nor can they insert words or phases into the statute. *State v. Craig, 116 Ohio St.3d 135, 2007 Ohio 5752, at P14, 876 N.E.2d 957*; [**6] *Hall v. Banc One Mgt. Corp., 114 Ohio St.3d 484, 2007 Ohio 4640, P24, 873 N.E.2d 290.* Rather, where the statute is plain and unambiguous, courts are obligated to apply it as written. *Davis v. Davis, 115 Ohio St.3d 180, 2007 Ohio 5049, at P15, 873 N.E.2d 1305*; *Hubbell v. Xenia, 115 Ohio St.3d 77, 2007 Ohio 4839, at P11, 873 N.E.2d 878.*

[*P9] The parameters of the ERAC's jurisdiction are set forth in *R.C. 3745.04(B)*, which reads:

> Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act.

We have previously found that this provision allows the appeal of "actions" to the ERAC. *Dayton Power and Light Co. v. Schregardus (1997), 123 Ohio App.3d 476, 478, 704 N.E.2d 589.* However, in addition to empowering the ERAC with the ability to review actions, the statute also authorizes the ERAC to order the performance of acts. Thus, the statute invests the ERAC with jurisdiction over two types of appeals: (1) an appeal from an "action" that the ERAC may vacate or modify, and (2) an appeal requesting that the ERAC [**7] order the performance of an "act." *R.C. 3745.04(A)* defines "action" and "act" to include "the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate."

[*P10] In the case at bar, Trans Rail's appeal requests that the ERAC order the Health Department to either issue or deny it a license to establish a construction and demolition debris facility. *R.C. 3745.04(B)* grants the ERAC the power to order the Health Department to perform an "act," which includes the ability to order the issuance or denial of a license. Therefore, the ERAC has the authority to consider whether the application is complete and, if it is, to order the Health Department to issue or deny Trans Rail a license.

[*P11] Our analysis does not require consideration of whether the Commissioner's May 31, 2006 letter constitutes a "final" action. The ERAC and, if necessary, this court must determine whether an action is final only if the aggrieved party requests that the ERAC vacate or modify the action. See *US Technology Corp. v. Korleski,Ohio 6087, 173 Ohio App. 3d 754, 880 N.E.2d 498.* Because Trans Rail seeks an order requiring the performance of an act, i.e., the issuance or denial of a license, [**8] Trans Rail's appeal does not depend upon the finality of the May 31, 2006 letter.

[*P12] Having concluded that the ERAC has jurisdiction over Trans Rail's appeal, we sustain Trans Rail's first assignment of error.

[*P13] By Trans Rail's second assignment of error, it argues that the ERAC prematurely determined the merits of its appeal. We agree.

[*P14] If neither the Director of the Ohio Environmental Protection Agency nor a board of health conducts an adjudicatory hearing, then the ERAC must conduct a hearing de novo on the appeal. *R.C. 3745.05.* In the case at bar, no hearing has ever occurred. Nevertheless, the ERAC ruled upon the merits of Trans Rail's appeal, holding that Trans Rail's application was incomplete. We conclude that the ERAC erred in making a substantive ruling without a hearing, and thus, we sustain Trans Rail's second assignment of error.

[*P15] For the foregoing reasons, we sustain Trans Rail's first and second assignments of error. Further, we reverse the March 8, 2007 final order of the Environmental Review Appeals Commission, and we remand this matter to that commission for further proceedings in accordance with law and this opinion.

Order reversed and matter remanded.

TYACK, J., concurs.

FRENCH, [**9] J., dissents.

DISSENT BY: FRENCH

DISSENT

FRENCH, J., dissenting.

[*P16] In its opinion, the majority concludes that the Environmental Review Appeals Commission ("ERAC") has jurisdiction over an appeal from a letter finding a license application incomplete. The majority reaches this conclusion based solely on ERAC's authority under *R.C. 3745.04(B)* to order the director of the Ohio Environmental Protection Agency ("director" or "Ohio EPA") or a board of health "to perform an act" and with no consideration as to whether the letter constitutes a final act or action appealable under *R.C. 3745.04*. Because I strongly disagree with the majority's interpretation of applicable law, I dissent.

[*P17] The specific question in this case is whether ERAC has jurisdiction over an appeal by appellant, Trans Rail America, Inc. ("appellant"), from a finding by appellee, James J. Enyeart, M.D., Health Commissioner, Trumbull County Health Department ("appellee"), that appellant's application for a license to establish a construction and demolition debris ("C&DD") facility was incomplete. As detailed in the majority opinion, appellant first applied for the license in May 2004. Over the next two years, appellee twice found the application [**10] to be incomplete, despite appellant's submissions of additional information. Finally deciding that it had no remedy but to appeal to ERAC, appellant filed an appeal from appellee's May 31, 2006 letter, which indicated for the third time that appellant's application was incomplete.

[*P18] On appeal, ERAC analyzed whether the May 31, 2006 letter was a final action appealable under *R.C. 3745.04*. ERAC ultimately determined that appellee's requests were reasonable and that the letter was not appealable, and ERAC dismissed the appeal for lack of jurisdiction.

[*P19] Before this court, appellant's first assignment of error asserts that ERAC erred in finding that it had no jurisdiction. In support, appellant asserts that the letter constituted a final action appealable under *R.C. 3745.04* because the circumstances surrounding the letter were indicative of a final appealable order and because it materially and adversely affected appellant's property rights. Following submission of briefs and oral argument, this court asked the parties to submit supplemental briefing regarding the jurisdictional impact of ERAC's authority under *R.C. 3745.04(B)* to issue an order "ordering the director or board of health to [**11] perform an act." In the end, without considering whether appellee's letter constituted a final action under *R.C. 3745.04*, the majority relies solely on ERAC's authority under *R.C. 3745.04(B)* and concludes that ERAC had jurisdiction. I disagree.

[*P20] *R.C. 3745.04(B)* provides, in pertinent part:

> Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to [ERAC] for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. [ERAC] has exclusive original jurisdiction over any matter that may, under this section, be brought before it.

[*P21] Clearly, *R.C. 3745.04(B)* gives ERAC authority to order the director or board of health "to perform an act." This grant of power is not in isolation, however. References throughout *R.C. 3745.04* make clear that there must first be a final "act" or "action" to trigger ERAC jurisdiction.

[*P22] For example, *R.C. 3745.04(D)* requires appeals to be in writing and to "set forth the action complained of." That same subsection provides that appeals must be filed within 30 days after notice of the "action," and the filing of an appeal [**12] does not automatically suspend "the action appealed from."

[*P23] *R.C. 3745.04(A)* also provides that, as used in *R.C. 3745.04*:

> * * * "[A]ction" or "act" includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval

> of plans and specifications pursuant to law or rules adopted thereunder.

[*P24] For decades, this court has recognized that the terms "act" and "action" include, but are not limited to, the actions enumerated in *R.C. 3745.04(A)*. As this court stated in *Youngstown Sheet & Tube Co. v. Maynard (1984), 22 Ohio App.3d 3, 6, 22 Ohio B. 37, 488 N.E.2d 220*:

> The General Assembly * * * in drafting *R.C. 3745.04* chose to illustrate rather than define an appealable action, thereby vesting [ERAC's predecessor, the Environmental Board of Review] with jurisdiction over acts of the director beyond the adoption, modification or repeal of a rule. Past decisions of this court illustrate that the broad definition of appealable acts contained in the statute is to be liberally construed in favor of appeals [**13] to [ERAC]. See, e.g., *Cain Park Apts. v. Nied (June 25, 1981), Franklin App. No. 80AP-817 et seq., 1981 Ohio App. LEXIS 12873, unreported.*

[*P25] When faced with an action not enumerated in *R.C. 3745.04(A)*, this court has analyzed the challenged action or failure to act and considered whether it affects the appellant's rights, privileges or property. For example, in *Dayton Power & Light Co. v. Schregardus (1997), 123 Ohio App.3d 476, 704 N.E.2d 589*, this court considered whether ERAC properly dismissed an appeal from the director's decision to place a site on a master site list of contaminated properties. The court found that the site owner had no opportunity to contest the listing, which government officials and businesses would rely on when evaluating property. The court ultimately remanded the matter to ERAC for a hearing to determine whether the listing "affected a substantial legal right with finality and/or that Ohio EPA exceeded its authority by promulgating" the list. *Id. at 481.*

[*P26] This court recently distinguished *Dayton Power & Light* in *US Technology Corp. v. Korleski, 2007 Ohio 6087, 173 Ohio App. 3d 754, 880 N.E.2d 498*. In *US Technology*, this court considered whether a letter issued by an Ohio EPA employee was a final action appealable [**14] to ERAC under *R.C. 3745.04*. While concluding that "the letter, in form," was not a final action, the court acknowledged "that the letter nonetheless may constitute final action if in substance it finally adjudicates [the appellant's] legal rights." *Id. at P7*. After considering the course of conduct between Ohio EPA employees and the appellant, the content of Ohio EPA's communications with the appellant, and the status of Ohio EPA's findings with respect to alleged violations of environmental laws, the court concluded that the letter was not a final action appealable to ERAC. Rather, it "was the latest in a series of meetings and letters addressing issues" between the two parties. *Id. at P11*. Therefore, ERAC had no jurisdiction to review it.

[*P27] In contrast, here, the majority does not analyze whether ERAC properly determined that it lacked jurisdiction over appellee's May 31, 2006 letter because it was not a final action appealable under *R.C. 3745.04*. Instead, the majority relies solely on ERAC's authority under *R.C. 3745.04(B)* to order the director or the board "to perform an act." Not only is this interpretation contrary to past decisions of this court, it creates a dangerous precedent [**15] for interference in the comprehensive statutory scheme for the issuance of environmental licenses and permits, a precedent with the potential to extend well beyond the facts of the case before us.

[*P28] *R.C. 3745.07* establishes the process Ohio EPA must follow when issuing, denying, modifying, revoking or renewing a license, including a C&DD facility license under *R.C. Chapter 3714*. *R.C. 3745.07* provides that the director may issue a "proposed action" indicating the director's intended action. If the director receives an objection to the proposed action, the director must hold an adjudication hearing before issuing a final decision, which triggers appeal rights under *R.C. 119.09*. If the director issues or denies a license without first issuing a proposed action, then "any person who would be aggrieved or adversely affected thereby" may appeal to ERAC within 30 days of the issuance or denial. *R.C. 3745.07*.

[*P29] *R.C. 3714.09* grants to approved boards of health the specific authority to issue, deny, suspend, and revoke C&DD facility licenses. *R.C. 3714.10* states: "Appeal from any suspension, revocation, or denial of a license shall be made in accordance with" *R.C. 3745.02 to 3745.06*.

[*P30] Nowhere in [**16] these statutes authorizing the issuance and denial of licenses generally, or even C&DD facility licenses specifically, is there authority for an appeal to ERAC before a final action by Ohio EPA or the board of health, and allowing a premature appeal, i.e., an appeal prior to a final action that adjudicates the rights of the applicant, interferes with this legislative scheme. Rather than requiring an applicant to complete the statutory process, the majority opinion allows an applicant to circumvent the process by prematurely appealing an agency's request for additional information or finding that an application is incomplete.

[*P31] Here, ERAC clarified that it did "not intend to imply that repeated, unreasonable requests for additional information by a licensing authority could never" give rise to a final appealable action under *R.C. 3745.04*. (Final Order at 19, fn. 9.) In fact, the appropriate analysis for determining whether such repeated requests do give rise to a final action appealable under *R.C. 3745.04* is the analysis used by this court in its prior decisions and articulated by ERAC in this case, i.e., consideration of whether the form of the action indicates finality and whether the [**17] action materially and adversely affects the rights of the appellant, not simple reliance on ERAC's authority to order the director or the board "to perform an act."

[*P32] In my view, the better reading of *R.C. 3745.04(B)* is that the General Assembly intended to grant ERAC authority to order the director or the board of health to perform an act where, for example, the director or board denied an approval that ERAC determines should have been granted. In that scenario, ERAC would not rely on its authority to issue an order "vacating or modifying the action," but would rely on its authority to issue an order "ordering the director or board of health to perform an act," i.e., to grant the approval it deems appropriate. This reading of *R.C. 3745.04(B)* maintains the integrity of both the legislative scheme and the administrative process for considering license and permit applications, and it ensures that ERAC will not be burdened with premature appeals.

[*P33] In the end, I would find that ERAC properly identified the factors it must consider in determining whether it has jurisdiction over the appeal. Specifically, having concluded that the May 31, 2006 letter did not reflect an "act" or "action" enumerated [**18] in *R.C. 3745.04(A)*, ERAC considered the form and substance of the document. I agree with ERAC's determination that, in form, the letter does not constitute a final action: the letter does not indicate that it is a final action; it does not advise appellant of a right to appeal; and it contains no indication that appellee understood, journalized or documented the letter as a final action.

[*P34] ERAC also recognized correctly that the May 31, 2006 letter still could constitute a final action if it met certain substantive criteria, as follows:

> Even if a document does not, in form, constitute a final action it may still be a final action if the substance of the document adjudicates with finality any legal right or privilege of the appealing party. Conversely, if the document represents an intermediate step in a continuing process, or if the contents of the document indicate that it is only a segment of an evaluation that will ultimately lead to a final action, then, at that juncture, no final appealable action has occurred. Thus, the final inquiry [ERAC] must make is whether [appellee's] May 31, 2006 letter adjudicates with finality any legal right or privilege of [appellant]. * * *

(Final Order [**19] at 14, P8.)

[*P35] I concur in ERAC's articulation of the test for determining whether the letter was appealable under *R.C. 3745.04*. Nevertheless, I would remand this matter to ERAC for further consideration of the jurisdictional question. Specifically, I would conclude that ERAC improperly relied on *CECOS Internatl., Inc. v. Shank (1991), 74 Ohio App.3d 43, 598 N.E.2d 40*, to conclude that appellee's "determination that [appellant's] application was incomplete was reasonable and its request for additional information was well within its regulatory authority." (Final Order at 18-19, P14.) In *CECOS*, the director had denied a hazardous waste permit renewal, in part because the director found that CECOS had failed to submit a complete and adequate application in compliance with administrative rules. ERAC's predecessor affirmed the determination, and this court affirmed. Here, ERAC relied on *CECOS* to conclude in this case that appellee has discretion to determine whether an application is complete and that

appellee's requests for additional information were reasonable under the circumstances.

[*P36] In contrast to the case before us, however, in *CECOS,* neither ERAC nor this court had to determine whether the director's [**20] finding that the application was incomplete was a final action appealable under *R.C. 3745.04.* Rather, in *CECOS,* ERAC and this court considered the merits of that finding on appeal from the director's final action denying the application. See, also, *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health, Franklin App. No. 04AP-1338, 2005 Ohio 3146* (decision regarding completeness of C&DD license application on appeal from board's final action denying application).

[*P37] Here, ERAC correctly stated that, in order to determine whether it has jurisdiction over appellant's appeal, ERAC must first determine whether the May 31, 2006 letter "adjudicates with finality any legal right or privilege" of appellant. Only after finding jurisdiction proper may ERAC proceed to the merits, i.e., deciding whether the application is complete.

[*P38] Admittedly, ERAC concluded that the May 31, 2006 letter "was not a final appealable action, but rather, represents an intermediate step in a continuing process." (Final Order at 19, P15.) However, ERAC reached that conclusion without analyzing the factors it had identified previously. Therefore, while I would overrule the substance of appellant's first assignment [**21] of error, I would remand this case for further consideration in accordance with the appropriate jurisdictional test, as articulated by ERAC and this court.

[*P39] In its second assignment of error, appellant asserts that ERAC erred by finding the May 31, 2006 incompleteness determination to be reasonable without an evidentiary hearing. Having concluded that ERAC must consider the jurisdictional question further, I would conclude that appellant's second assignment of error is moot.

[*P40] In conclusion, the majority having determined that ERAC has jurisdiction under the express terms of *R.C. 3745.04(B)* and having sustained appellant's assertion that ERAC erred by addressing the merits of the appeal without a hearing, I respectfully dissent.

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

TRANS RAIL AMERICA, INC.,	)	
	)	CASE NO. 04CV1767
Plaintiff	)	
	)	JUDGMENT ENTRY
-vs-	)	
	)	JUDGE W. WYATT McKAY
HUBBARD TOWNSHIP,	)	
	)	
Defendant.	)	

This action for declaratory relief is before the Court on the written Stipulations of Facts and the briefs of Plaintiff Trans Rail America, Inc. (hereinafter, "Plaintiff") and Defendant Hubbard Township (hereinafter, "Defendant").[1]

The issue before the Court concerns the present zoning classification of 243 acres of land located at 6415 Mt. Everett Road in Hubbard Township (hereinafter, the "Property"). The original Hubbard Township Zoning Resolution adopted in 1954, together with a corresponding Zoning Map, zoned the Property under the classification "Industrial." In 1983, Defendant amended the Zoning Resolution, creating within the "Industrial" zoning classification (Section 830) a "Light Industrial" classification (Section 831) and a "Heavy Industrial" classification (Section 832). Defendant did not, however, separately enact any legislation at the time specifically rezoning the Property, nor has it enacted any such legislation since that time. Furthermore, from November 1954 until November 2003, the Property was identified on Defendant's Zoning Map as being zoned "I" for "Industrial." Also, the Secretary of the Township Zoning and Planning Commission stated in a February 1997

[1] Although Defendant has identified its briefs here as being memoranda in support of a motion for summary judgment, the January 13, 2006 Joint Motion of the parties reflects that the parties had agreed to submit this matter by stipulations and briefs rather than at trial. Thus, the Court has considered this matter as having been submitted for final determination based upon the stipulations and briefs, and not as being before the Court in a summary judgment exercise.

letter that the Property, then owned by Mid West Steel Corporation, was "zoned for heavy industry."[2]

Sometime in 2002, township trustees learned that the Property might be sold and that a prospective purchaser wanted to use the property for a Construction and Demolition Debris ("C&DD") facility. Further discussion of the matter took place at a February 20, 2003 meeting of the Township Zoning Commission and is recounted in the minutes of the meeting as follows:

> [Commission Secretary] McClain reported that at the Trustee's meeting on February 10th, Trustee Hanley reported on an advertisement for a "Landfill Operation" site at the former Coalburg railroad yard [i.e. the Property] and said that since it was already classified for Heavy Industry he had been informed that the township zoning could not block it. Members discussed this pending problem. Secretary suggested that an amendment be added to the sentence in Section 832, (I-2) after the word nuisance, thus reading "or an imminent threat to the public health safety or welfare." Delete the words "beyond the conditions set up by the Zoning Commission." To be reviewed.

Despite this discussion, no such legislative action was ever taken. Plaintiff then purchased the property from Midwest Steel and Alloy Corporation, the deed for which was recorded on July 3, 2003.

In October 2003, Township trustees adopted a revised comprehensive land use plan for the township. In connection therewith, the trustees signed and approved a revised township Zoning Map on November 10, 2003.[3] Defendant's property is identified on the revised map as being zoned "I1" for "Light Industrial."

Thereafter, on May 21, 2004, Township Trustee Chairman Jonathan Dowell sent a letter to a representative of Plaintiff regarding an application Plaintiff had made to the Trumbull County Board of Health for a permit to operate a landfill. Dowell stated in the letter that Plaintiff's property was "currently zoned LIGHT INDUSTRIAL" and that in order to utilize the property as a landfill,

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[2] The statement appeared in a letter sent to the Trumbull County Planning Commission in connection with a then-pending petition by the owner of a nearby parcel who sought to have the zoning classification of his property changed from Residential/Agricultural to Light Industrial.

Plaintiff would be "required to apply for a zone change to HEAVY INDUSTRIAL."

Plaintiff then commenced this action for declaratory relief in July 2004, and Defendant filed a counterclaim likewise seeking declaratory relief in September 2004. More particularly, Plaintiff in its brief requests declarations that the zoning classification of its property is "Industrial," which includes all uses permitted under either the "Light Industrial" or "Heavy Industrial" classifications set forth in the Hubbard Township Zoning Resolution, and that, under the "Industrial" classification, Plaintiff would be permitted to operate a C&DD facility on the property upon obtaining a license for the same from the proper state authorities. In its brief, Defendant seeks a declaration that Plaintiff's property is zoned "Light Industrial" under the Hubbard Township Zoning Resolution.

Addressing Defendant's arguments first, the Court wholly rejects the notion that Defendant ever effectuated a rezoning of Plaintiff's property from its original "Industrial" classification to the "Light Industrial" classification. Defendant acknowledges, and in fact, has stipulated, that it never enacted legislation specifically rezoning Plaintiff's Property from the "Industrial" classification. Defendant claims, however, that the 1983 zoning amendment, by which the *text* of the zoning resolution was revised to create the Light and Heavy Industrial classifications within the Industrial classification, also had the effect of *rezoning* all parcels in the township which previously had been zoned "Industrial" (including Plaintiff's Property) to the "Light Industrial" classification. The statute governing amendments to a township zoning resolution, R.C. §519.12, explicitly distinguishes between amendments which alter the text of a zoning resolution and those which rezone or redistrict particular parcels of property. See R.C. 519.12(D) & (G). It is self-evident here that the 1983 Amendment was of the former type, as the amended provision simply altered the resolution's text regarding "Industrial" districts.

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[3] The Map includes a notation stating that it was last updated on April 4, 2003

Moreover, contrary to Defendant's suggestion, nothing in the amended text even remotely hints at a legislative intent to rezone any particular property, much less an intent to bring about a wholesale rezoning of all parcels in the township then zoned "Industrial". Indeed, the "Light Industrial" sub-classification enacted in 1983 manifestly does not, as Defendant claims, "bear a striking similarity" to the "Industrial" classification enacted in 1954 and, even if it did, this still would not support treating what obviously was a text amendment as one rezoning particular parcels of land.

In light of the foregoing, it is plain that Defendant's November 2003 revision of the township zoning map had no legal effect with respect to the zoning classification of Plaintiff's property. Defendant's claim that a zoning map revision is generally an administrative rather than legislative act, while accurate, is irrelevant, as the Court wholly rejects the premise that 1983 text amendment can be construed as having rezoned Plaintiff's Property. Indeed, the sole pertinence of the November 2003 map revision here appears to be that it constituted the first public notice ever given that Plaintiff's property had been supposedly been "rezoned" 20 years earlier. In this regard, the present situation is clearly distinguishable from the situation in *Kroeger v. Standard Oil*, (Aug. 7, 1989), Clermont App. Nos. CA88-11-087. First, the belated revision of the zoning map in that case was based upon an amendment which had expressly rezoned the particular property at issue to a different zoning classification. Second, the *Kroeger* Court expressly found that no prejudice had resulted from the township's failure to strictly comply with the notice provisions of R.C. §519.12 since the affected landowners had still received ample notice of all public hearings on the rezoning amendment. Here, it is plain that no public notice was given at the time of the 1983 amendment that would have alerted any citizen that any properties were being rezoned. Thus, the Court concludes that Defendant's Counterclaim for declaratory relief is not well-taken and should be dismissed.

The foregoing discussion likewise demonstrates that Plaintiff is entitled to a declaration that its property remains zoned "Industrial," and thus, the sole remaining issues are whether Plaintiff is entitled to remainder of the declaratory relief requested, i.e., a declaration that the "Industrial" classification applicable to Plaintiff's property includes all uses permitted under either the "Light Industrial" or "Heavy Industrial" classifications set forth in the Hubbard Township Zoning Resolution, and that, under the "Industrial" classification, Plaintiff would be permitted to operate a C&DD facility on the property upon obtaining a license for the same from the proper state authorities.

It is well-settled that, because zoning ordinances are in derogation of the common law and deprive a property owner of uses of his land to which he otherwise would be entitled, courts are to liberally construe the terms and language of zoning provisions in favor of property owners. *Nelson Twp. Bd. of Trustees v. Soinski*, 11TH Dist. No. 2002-P-0130, 2003-Ohio-6418. Further, ambiguities in zoning provisions restricting the use of land must be construed against the zoning resolution because the enforcement of such a provision is an exercise in police power that constricts property rights. *Freedom Twp. Bd. of Zoning Appeals v. Portage Cty. Bd. of Mental Retardation and Developmental Disabilities* (1984), 16 Ohio App.3d 387, 390. Here, it is not even necessary to liberally construe the provisions at issue in favor of Plaintiff to conclude that the present zoning classification of Plaintiff's property as "Industrial" permits all uses permitted under the "Light Industrial" and "Heavy Industrial" classifications that were created within the "Industrial" classification by the 1983 amendment.

Finally, the foregoing conclusion considered in conjunction with Defendant's express acknowledgement that operation of a C&DD facility would be a permitted use in property subject to the "Heavy Industrial" zoning classification makes clear that Plaintiff is entitled to the remainder of

the declaratory relief sought.

For the reasons thus stated, it is therefore ORDERED, ADJUDGED, and DECREED that Plaintiff claim for declaratory relief is well-taken and that Plaintiff is entitled to the following declaratory judgment:

That the present zoning classification under the Hubbard Township Zoning Resolution of the 243 acres of land owned by Plaintiff and located at 6415 Mt. Everett Road in Hubbard Township is "Industrial," which classification includes all uses permitted under either the "Light Industrial" or "Heavy Industrial" classifications set forth in the Hubbard Township Zoning Resolution, and further, that, under the "Industrial" classification, Plaintiff would be permitted to operate a C&DD facility on the property upon obtaining a license for the same from the proper state authorities.

It is further ORDERED, ADJUDGED, and DECREED that Defendant's Counterclaim for declaratory relief is not well-taken and that the same is hereby DISMISSED, and further, that the Costs of this action are to be assessed against Defendant.

IT IS SO ORDERED.

7/3/06
DATE

W. WYATT McKAY, Judge
Court of Common Pleas
Trumbull County, Ohio

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTHWITH BY ORDINARY MAIL.

W. WYATT McKAY, JUDGE

KAREN INFANTE ALLEN
CLERK OF COURTS
TRUMBULL COUNTY

2006 JUN 13 P 1 10:12

TRUMBULL COUNTY
CLERK OF COURTS

LEXSEE 2002 OHIO ENV LEXIS 6

WHEELING-PITTSBURGH STEEL CORPORATION, Appellant, v. CHRISTOPHER JONES, DIRECTOR OF ENVIRONMENTAL PROTECTION, Appellee

Case No. ERAC 995015

Ohio Environmental Board of Review

2002 Ohio ENV LEXIS 6

September 24, 2002, Issued

[*1]

COUNSEL FOR APPELLANT: Kenneth S. Komoroski, Esq., Charles E. McChesney, II, Esq., KIRKPATRICK & LOCKHART LLP, Pittsburgh, Pennsylvania. COUNSEL FOR APPELLEE DIRECTOR: Gregory J. Poulos, Esq., David G. Kern, Esq., Assistant Attorneys General, Environmental Enforcement Section, Columbus, Ohio.

PANEL: Julianna F. Bull, Chair; Toni E. Mulrane, Vice-Chair; Jeff Cabot, Member.

OPINION:

RULING ON MOTION TO DISMISS AND FINAL ORDER

This matter comes before the Environmental Review Appeals Commission ("ERAC" or "the Commission") upon the June 28, 2002 Motion to Dismiss filed by the Appellee Director of the Ohio Environmental Protection Agency ("Director," "OEPA," "the Agency"). The basis for the Motion is Appellee's contention that: 1) the Commission lacks the requisite subject matter jurisdiction to entertain the instant appeal filed by Appellant Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pitt" or "WPSC") on the basis that it is not an appeal from a final action of the Director; and 2) that Wheeling-Pitt lacks standing to litigate this appeal because it has not been aggrieved or adversely affected by the matter under appeal.

Appellant filed a Memorandum in Opposition to Appellee's Motion to Dismiss [*2] on July 26, 2002. Appellee filed a Reply to Appellant's Memorandum in Opposition to Appellee's Motion to Dismiss on August 9, 2002.

Appellants are represented by Mr. Kenneth S. Komoroski, Esq. and Mr. Charles E. McChesney II, Esq. (admitted *pro hac vice*) of Kirkpatrick & Lockhart LLP, Pittsburgh, Pennsylvania. Appellee Director is represented by Mr. Gregory J. Poulos, Esq. and Mr. David G. Kern, Esq., Assistant Attorneys General, State of Ohio.

Based upon a review of the filings and attachments, the relevant law and regulations, and the Certified Record, which the Commission sua sponte moves into evidence, the Commission hereby makes the following Findings of Fact, Conclusions of Law, and Final Order dismissing the instant matter for lack of subject matter jurisdiction.

FINDINGS OF FACT

1. Appellant owns and operates a hot dipped galvanized steel manufacturing plant in Martins Ferry, Ohio (the "Plant"). (Notice of Appeal, Case File Item A.)
2. On September 19, 2001, Richard Stewart, an Ohio EPA District Representative for the Division of Hazardous Waste Management, wrote a letter to Harry Page, Wheeling-Pittsburgh Steel Company's Vice President for Engineering, Technology [*3] and Metallurgy. It is this letter which Appellant has appealed as a final action of the Director.

(Certified Record "CR" Item 1.)
3. In his letter, Mr. Stewart noted, among other things, that an inspection which occurred from June 8 to June 11, 1999, resulted in the issuance to Appellant of four Notices of Violation of Ohio's hazardous waste laws and regulations. The letter discussed Appellee's responses, if any, to the Notices of Violation and expressed concern over the lack of response to the fourth notice, issued on August 2, 2001. Specifically, Mr. Stewart informed Mr. Page that:

> If an appropriate response is not received within 15 days, this office *will seek* escalated enforcement action for these violations. (Notice of appeal, Exhibit A, emphasis added.)

4. The remainder of the letter enumerates in considerable detail the information the Agency believed to be necessary to be submitted by Appellant and concludes by stating:

> The above information is to be provided to this office within 15 days of the date of this letter. Should you have any questions concerning the above, please call me at this office. (Notice of appeal, Exhibit A.)

5. On October 19, 2001, Wheeling-Pitt [*4] timely filed an appeal of this letter with the Commission. (Case File A.)
6. On June 28, 2002, Appellee Director filed a Motion to Dismiss the appeal in which he asserted that the Commission lacks subject matter jurisdiction to hear the instant appeal because Mr. Stewart's letter does not constitute an action of the Director, and that the Appellant lacks standing to litigate this action because it has not been aggrieved or adversely affected by Mr. Stewart's letter. (Case File M.)
7. On July 26, 2002, Appellee filed a Memorandum in Opposition to Appellee's Motion to Dismiss. (Case File N.)
8. On August 9, 2002, the Appellee filed a Reply to Appellant Wheeling-Pittsburgh Steel Corporation's Memorandum in Opposition to Appellee's Motion to Dismiss. (Case File Q.)

CONCLUSIONS OF LAW

1. Ohio Revised Code ("R.C.") Section 3745.04 outlines the scope of the Commission's jurisdiction in relevant part as follows:

> Any person who was a party to a proceeding before the director may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director of environmental protection or local board of health, or ordering the [*5] director or board of health to perform an act.

2. An "act" or "action" of the Director which may be appealed to the Commission is defined in *R.C. 3745.04* as follows:

> ... 'action' or 'act' includes the adoption, modification or repeal of a rule or standard, the issuance, modification or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

3. This same definition of "action" or "act" is reiterated in the pertinent regulation found at *Ohio Administrative Code ("OAC") Section 3745-1-01(A).*
4. In the instant case, we are asked to determine whether the September 19, 2001 letter from Mr. Richard Stewart, District Representative of Ohio EPA, to Mr. Harry Page, Vice President, Wheeling Pittsburgh Steel Corporation, is a final act or action of the Director which may be appealed to this Commission, and, if so, whether Wheeling Pittsburgh Steel Corporation was aggrieved or adversely affected by the letter and, therefore, has standing to bring this action.
5. First, [*6] the Commission finds that the letter at issue does not fall within the specifically enumerated appealable "acts" or "actions" set out in *R.C. 3745.04* and *OAC 3745-1-01(A)*. However, since there are actions which are appealable beyond those which are explicitly enumerated in the statute and regulation, our inquiry does not end here.

(Ohio Lime, Inc. v. Jones, et al., ERAC Case No. 744754, issued February 14, 2001.)
6. Historically, when a question is raised as to whether a document, including a letter, constitutes a final action of the Director which is appealable to this Commission, we examine both the form and substance of the letter, as well as the circumstances and events surrounding the sending of the document. (Coalition for a Safe Environment and Citizens Action, et al. v. Schregardus, et al., ERAC Case No. 483934-483936, issued October 5, 1999; County Waste Company, Inc. v. Schregardus, et al., ERAC Case No. 043952, issued August 6, 1998; Cleveland Auto Livery v. McNamee, ERAC Case No. 183330, issued March 5, 1996; Temple v. Schregardus, ERAC Case No. 183327, issued November 21, 1995.)
7. With regard to the form of the letter from Mr. Stewart, the Commission [*7] notes the following: 1) It is signed by the District Representative of the Division of Hazardous Waste Management, not by the Director; 2) It contains no language identifying it as a "final action"; 3) It does not contain any of the customary information outlining the recipient's right to appeal the substance of the letter; and, 4) It does not indicate that the letter has been entered into the Director's journal as a final action. In sum, the letter contains none of the indicia traditionally found in final actions of the Director. (See e.g. National Lime and Stone Co. v. Shank, ERAC Case No. 321960, issued January 17, 1990; Aristech Chemical Corporation v. Shank, ERAC Case No. 441977, issued July 25, 1989.)
8. With regard to the substance of a document or letter and whether it constitutes a final appealable action of the Director, the Commission must consider, among other things, the events and circumstances which surround the document in question and examine the substance of the letter itself. (Ohio Lime, Inc. v. Jones, et al., ERAC Case No. 744754, issued February 14, 2001.)
9. If a document adjudicates with finality any legal right or privilege of the appealing party [*8] or it mandates that the affected party take some action, it may be a final appealable action. Conversely, if the letter simply represents an intermediate step in a continuing process, or if the subject matter of the document indicates that it is part of a contemplated review or evaluation which will ultimately lead to a final action by the Director, then no final action which may be appealed to this Commission has occurred. (See e.g., Inorganic Recycling of Ohio, Inc. v. Shank, ERAC Case No. 252011, issued November 30, 1989; Auburn Community Church v. Schregardus, ERAC Case No. 284060, issued February 11, 1999.)
10. In the letter in question, Mr. Stewart explicitly refers to previous attempts on the part of the agency to communicate with Wheeling-Pitt regarding compliance with Ohio's hazardous waste laws and regulations, and the ways in which information provided by Appellant to the Agency has been incomplete or unsatisfactory. More than once, Mr. Stewart explicitly invites Wheeling-Pitt to provide that information. (Notice of Appeal, Exhibit A.)
11. Appellant argues that Mr. Stewart's statement that "If an appropriate response is not received within 15 days, this office will [*9] seek escalated enforcement action" for the violations makes the letter a final appealable action. We disagree.
12. We find that the letter, on its face, does not purport to be independently or separately enforceable apart from the notices of violation. The letter contains no indicia of being an order of the Agency which would render its own terms or conditions enforceable. In fact, the only reference in the letter to enforcement is the statement that the failure to provide more information could lead to an enforcement action on the part of the agency. The letter does not mention what the nature of that action might be. The letter does reflect a clear and unequivocal statement of the writer's belief that Wheeling-Pitt is not currently in compliance with applicable laws and regulations. It also represents a clear and unequivocal statement of the steps the writer believes must be taken in order to rectify the situation. (Notice of Appeal, Exhibit A; See also Champion International Corporation v. Shank, ERAC Case No. 092033, Issued February 22, 1990.)
13. The Commission finds that the Stewart letter does not adjudicate with finality any legal right or privilege of Appellant, and, [*10] instead, represents the continuation of an ongoing process between Ohio EPA and Wheeling-Pittsburgh Steel and an attempt on the part of the agency to communicate with Wheeling-Pitt regarding what information and action is necessary to ensure compliance with Ohio's hazardous waste laws and regulations.
14. Appellant argues that the letter is an action because it involved the use of mandatory language ("will seek", "is to be provided") rather than permissive language. (Citing *Northeast Ohio Regional Sewer District v. Tyler, 34 Ohio App.3d 129.)* However, Appellant's brief also cites Champion International Corporation v. Shank, (ERAC Case No. 092033, issued February 22, 1990), in which a letter from an Ohio EPA employee noted that "... failure to conform to the approved PTI may lead to enforcement action being taken...", which was found by the Commission not to constitute an appealable action. The Commission finds that the statements in the Stewart letter that " ...this office will seek escalated

enforcement action for these violations" and setting a deadline within which "...information is to be provided..." make clear the importance of supplying the information but that the use [*11] of mandatory language alone does not make the letter an order as described in *R.C. 3745.04*.

15. In its Notice of Appeal, Wheeling-Pitt asserts that Mr. Stewart's comments regarding the facility's contingency plan are tantamount to a disapproval of that plan, and, thus, that this disapproval constitutes an appealable action of the Director. We disagree. Mr. Stewart refers to *OAC 3745-65-51* and OAC 3745-64-52(E) in his letter. *Ohio Administrative Code Section 3745-65-51* delineates the purposes of contingency plans, and the conditions under which they should be implemented. It makes no mention of the approval of these plans by the Director of the Ohio EPA. Further, *OAC 3745-65-52*, entitled "Contents of Contingency Plan," enumerates in some specificity the information and directives that should be contained in the plans, but, again, does not make any mention of an approval requirement on the part of the Director.

16. It is the opinion of the Commission that while Wheeling-Pitt is required by regulation to prepare a Contingency Plan, such regulations do not provide for a mechanism for approval or disapproval of such a plan by the Director. *Ohio Administrative Code Section 3745-65-54* does [*12] provide that:

> The contingency plan shall be reviewed and immediately amended, if necessary, whenever:
>
> (A) Applicable rules are revised;
>
> (B) The contingency plan fails in an emergency;
>
> (C) The facility changes - in its design, construction, operation, maintenance, or other circumstances - in a way that materially increases the potential for fires, explosions, or releases of hazardous waste or hazardous waste constituents, or changes the response necessary in an emergency;
>
> (D) The list of emergency coordinators changes;
>
> (E) The list of emergency equipment changes; or
>
> (F) As required by the director.

Mr. Stewart's letter did not cite *OAC Rule 3745-65-54*, and did not require amendment of the plan by the director. Rather, it cited sections of the plan which Mr. Stewart considers to be in violation of the rule.

17. As part of this argument that the Stewart letter is a disapproval of a plan under *R.C. 3745.04*, and, therefore, a final appealable action of the Director Appellant cites *Cain Park Apartments v. Neid, 1981 WL 3294* (Ohio App. 10 Dist.). In Cain Park (supra), an application for a permit to operate was returned as incomplete by Ohio EPA, effectively denying the [*13] permit. A salient point in Cain Park (supra) was that the applicant was left "... without further hearing or the procedure required in a denial of an application," whereas in the instant matter the Agency has noted deficiencies and requested clarification on certain points. Wheeling-Pitt will clearly have a remedy at law if and when any enforcement action is commenced.

18. In sum, for the foregoing reasons, the Commission finds that Mr. Stewart's correspondence of September 19, 2001, does not constitute a final act or action of the Director which is appealable to this Commission.

19. Finally, Appellee has raised the issue in its Motion to Dismiss that Appellant lacks standing to litigate this appeal before ERAC based upon the fact that Appellant has not been aggrieved or adversely affected by this letter. Since we find that the letter being appealed is not an act or action of the Director, and, therefore, that this matter is not within the jurisdiction of the Commission, the Commission need not reach the issue of standing.

20. For the foregoing reasons, we hereby find the Appellee Director's Motion to Dismiss well taken and dismiss the instant action for lack of subject matter [*14] jurisdiction.

FINAL ORDER

Based upon the foregoing discussion, the Commission rules to grant Appellee Director's Motion to Dismiss and hereby ORDERS this matter DISMISSED.

The Commission, in accordance with *Section 3745.06 of the Revised Code* and the *Ohio Administrative Code*

3746-13-01, informs the parties that:

> Any party adversely affected by an order of the Environmental Review Appeals Commission may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulations to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Commission a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which the Appellant received notice from the Commission by certified mail of the making of an order appealed from. No appeal [*15] bond shall be required to make an appeal effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityFinal Order RequirementAdministrative LawJudicial ReviewReviewabilityStanding

heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

The court shall affirm the order complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. When the court finds an ambient air quality standard, an emission standard, or a water quality or discharge standard to be deficient, it shall order the director of environmental protection to modify the standard to comply with the laws governing air or water pollution. The court shall retain jurisdiction until it approves the modified standard. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. Such appeals may be taken by any party to the appeal pursuant to the Rules of Practice of the Supreme Court and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

SECTION 2. That existing sections 3714.01, 3714.02, 3714.03, 3714.04, 3714.05, 3714.06, 3714.07, 3714.071, 3714.073, 3714.09, 3714.11, 3714.12, 3714.13, 3734.281, 3734.57, 3745.04, 3745.05, and 3745.06 of the Revised Code are hereby repealed.

SECTION 3. (A) Notwithstanding the amendments to Chapter 3714. of the Revised Code by this act, an application for a license to establish or modify a construction and demolition debris facility submitted to a board of health or the Director of Environmental Protection, as applicable, prior to July 1, 2005, shall be reviewed and the license shall be issued or denied in accordance with the provisions of that chapter as they existed on July 1, 2005, if all of the following apply to the applicant for the license:

(1) The applicant has acquired an interest in the property on which the facility will be located on or before May 1, 2005.

(2) The applicant has begun a hydrogeologic investigation pursuant to section 3745-400-09 of the Ohio Administrative Code prior to submitting the application.

(3) The applicant has begun the engineering plans for the facility prior to submitting the application.

(4) The application submitted by the applicant would have been determined to be complete if a moratorium had not been in effect.

The director shall determine whether this division applies to an applicant within forty-five days after receiving an applicant's request for a determination under this division.

(B) Notwithstanding the amendments to Chapter 3714. of the Revised Code by this act and except as otherwise provided in this division, an application for a license to establish or modify a construction and demolition debris facility submitted to a board of health or the Director, as applicable, on or after July 1, 2005, but prior to or on December 31, 2005, shall be reviewed and the license shall be issued or denied in accordance with the provisions of that chapter as they existed on July 1, 2005. However, unless division (G)(2) of section 3714.03 of the Revised Code, as amended by this act, applies to the facility, a board of health or the Director, as applicable, may apply any of the siting criteria established in section 3714.03 of the Revised Code by this act to such an application and may deny the application if the facility that is the subject of the application will not comply with that siting criterion.

(C) Notwithstanding the amendments to Chapter 3714. of the Revised Code by this act and except as otherwise provided in this division, beginning January 1, 2006, and until the effective date of the rules adopted under division (A) of section 3714.02 of the Revised Code, as amended by this act, a person may submit an application to a board of health or the Director, as applicable, for a license to establish or modify a construction and demolition debris facility, and such an application shall be reviewed and the license shall be issued or denied in accordance with the provisions of that chapter as they existed on July 1, 2005. However, unless division (G)(2) of section 3714.03 of the Revised Code, amended by this act, applies to the facility, a board of health or the Director, as applicable, shall apply all of the siting criteria established in section 3714.03 of the Revised Code by this act to such an application and shall deny the application if the facility that is the subject of the application will not comply with any of those siting criteria. In addition, the applicant for the license shall submit the information that is required from applicants for permits to install under section 3714.052 of the Revised Code, as enacted by this act. An application for a license may be denied if the information regarding the applicant indicates any of the reasons specified in division (B) of that section for the denial of an application for a permit to install.

SECTION 4. Section 3734.57 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 66 and Sub. S.B. 107 of the 126th General Assembly. The General Assembly,

applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.