

IN THE SUPREME COURT OF OHIO

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

APPELLEE'S MEMORANDUM OPPOSING JURISDICTION

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**EXPLANATION OF WHY THERE IS NO SUBSTANTIAL CONSTITUTIONAL  
QUESTION INVOLVED IN THIS CASE AND WHY THIS CASE IS NOT OF PUBLIC  
OR GREAT GENERAL INTEREST**

This case involves no constitutional issue. Nor is this case of public or great general interest. This case implicates a very narrow set of factual circumstances, and it is only applicable in that regard. The sole issue in this case is whether the Environmental Review Appeals Commission (“ERAC”) has subject matter jurisdiction, under R.C. 3745.04, to consider whether the Appellant has unlawfully or unreasonably refused to consider and act upon Appellee’s application for a construction and demolition debris (“C&DD”) facility license. The Tenth District Court of Appeals correctly held that the ERAC has authority to consider this question.

This case concerns Appellee’s application for a C&DD facility license (“License Application”) from the Trumbull County Health Department, a local health district authorized by the Director of Environmental Protection (“Ohio EPA”) to issue licenses for C&DD facilities under R.C. Chapter 3714. See R.C. 3714.09(A). The License Application was submitted in the format and with such information required by the Director of Ohio EPA pursuant to Ohio Adm.Code Rules 3745-37-02(A)(1) and 3745-37-02(E). Accordingly, Appellee’s submitted application was complete, and a permit should have been issued or denied based upon the information contained in the License Application. Nevertheless, Appellant, on multiple occasions, refused to consider and act upon the License Application, rejected it as “incomplete” and requested additional information not required by the Ohio EPA. It is clear that Appellant’s continued refusal to consider the License Application is politically motivated to indefinitely forestall the application process, thereby preventing Appellee from constructing the proposed C&DD facility. Appellant’s actions are unreasonable and are in contravention of his mandate as Health Commissioner of the Trumbull County Health Department. With no other legal

alternative provided by the Ohio General Assembly, Appellee sought from the ERAC a determination that the License Application is complete and, if it is, an order that Appellant consider the License Application and issue or deny the C&DD facility license.

The parties disagree whether, under the specific factual circumstances of this case, the ERAC is authorized to hear Appellee's claims and issue such an order. The answer depends upon a proper reading of R.C. 3745.04, which delineates the scope of the ERAC's jurisdiction. Accordingly, this case does not involve a constitutional question, despite Appellant's and the members of Amicus Curiae's conclusory statements to the contrary. The ERAC does not derive its authority from the Ohio Constitution. Rather, its authority comes directly from the General Assembly, and the General Assembly saw fit to vest exclusive, original jurisdiction over environmental matters in the ERAC.

Moreover, the application of the rule of law espoused in Tenth District's decision in this case is not broad and sweeping, as Appellant and members of the Amicus Curiae would have this Honorable Court believe. Rather, it is narrowly applicable to the unusual factual circumstances of this case.

This is not a situation where a staff member of the Health Department has made minor requests for additional information. To the contrary, this is a case where the highest ranking official of the Trumbull County Health Department, Commissioner James J. Enyeart, has unilaterally and repeatedly ruled the License Application to be incomplete. He did this despite waves of additional information provided by Appellee. He did this despite the fact that the application requirements of Ohio Adm.Code Rules 3745-37-02(A)(1) and 3745-37-02(E) have been met. In essence, the Commissioner, in light of immense political pressure, found a way to permanently forestall the establishment of the proposed C&DD facility – by repeatedly ruling the

application to be incomplete. It is telling that that the Health Department has handled multiple C&DD landfill license applications in the past, and it has never, to Appellee's knowledge, hired a consultant to scrutinize those applications. Yet it has chosen to do so in this case. There has been public outcry to prevent the establishment of this facility and there have been various public meetings on the issue. Indeed, following Appellee's purchase of the property upon which the proposed C&DD facility is to be constructed, the local zoning authority attempted to amend its zoning such that the proposed use would no longer be permitted. This effort ultimately failed after the issue was litigated. See *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.

The simple truth is that this case does not represent a challenge to the Trumbull County Health Department's ability to procure adequate information so that it may employ a fair and accurate, substantive evaluation of an application before rendering its decision; it does not involve an intermediate step in the administrative portion of the application process. Rather, this case represents a challenge to the Health Department's power to indefinitely forestall the application process because the Health Commissioner, for political reasons, does not want the proposed C&DD facility to be constructed.

It is without question that this proposed C&DD facility is politically controversial, but the rule of law should never be sacrificed to politics. The Trumbull County Board of Health seeks to secure political discretion to prevent the establishment of Appellee's C&DD facility. According to Appellant and the members of Amicus Curiae, a decision by the local licensing authority that an application is "incomplete" is immune from review and can never be challenged as

unreasonable or unlawful. As the Tenth District correctly held, this is not the law. The local licensing authority's decision on whether the application contains information specified in the Ohio EPA regulations is "final" as to the authority's decision not to consider the application on the merits.

The Tenth District's decision in this case will not create administrative gridlock, as charged by Appellant and the members of the Amicus Curiae. The involved completeness determination required by Ohio Adm.Code Rule 3745-37-02 is limited to landfill applications; it is not broadly applicable to all processes involving administrative agency deliberations subject to ERAC review. This decision does not create a situation where the ERAC is substituting its judgment for that of the local licensing authority. On remand, the ERAC's duties are no different than on any other appeal: the ERAC will determine if Commissioner Enyeart's finding of incompleteness was unlawful or unreasonable and, if so, will, like any other appeal, order the Health Department to consider the application on the merits.

This sole issue in this case is whether, under R.C. 3745.04, the ERAC has subject matter jurisdiction to consider whether the Appellant has unlawfully or unreasonably refused to consider and act upon Appellee's application for a C&DD facility permit. The answer implicates a simple statutory construction analysis. Despite Appellant's and members of the Amicus Curiae's "doom and gloom" forecasting that this decision will undermine administrative authority and expertise, compromise the administrative information-gathering and decision-making process and throw into disarray the statutory scheme for issuance of *all* environmental permits subject to ERAC review, the Tenth District's decision is simply not that far-reaching. The decision is narrowly applicable to the facts of this case. The fact that Trumbull County Health Department, members of the Amicus Curiae and the community in general may not want

Appellee to use its property for the legally permitted use as a C&DD facility does not elevate this case to one of public or great general interest.

### **STATEMENT OF THE CASE AND RELEVANT FACTS**

Appellee's License Application for a new C&DD facility in Hubbard Township, Ohio, was originally submitted to the Appellant Trumbull County Health Department on May 21, 2004. The application was prepared by CT Consultants, an experienced environmental engineering firm with multiple successful license applications for C&DD facilities. The License Application was submitted in the format and with such information required by the Director of Ohio EPA pursuant to Ohio Adm.Code Rules 3745-37-02(A)(1) and 3745-37-02(E). Since Appellant is on the "approved list" pursuant to R.C. 3714.09, Appellee's License Application was required to be submitted to the local Health Department rather than to Ohio EPA. To Appellee's knowledge, at the time of Appellee's application submittal, no health department in the State of Ohio had refused to process a C&DD License Application on the grounds that it was "incomplete." Yet Trumbull County Health Commissioner James J. Enyeart on three occasions determined Appellee's License Application to be incomplete and refused to consider it (notwithstanding waves of additional information provided by Appellee).

On July 16, 2004, after considerable public and political opposition, Commissioner Enyeart wrote to Appellee, rejecting Appellee's initial application because "insufficient information" had been provided to satisfy various administrative rules. Thereafter, Appellee's consultant met with the Appellant, requesting a specific indication of what information was allegedly missing. On November 8, 2005, Appellee provided its formal response. A nine-page letter from CT Consultants set forth a detailed response to each and every item identified by Appellant as "incomplete." Nearly every response also contained a specific description of the

area of the original application in which the so-called “incomplete” information could be found. To clarify the application and to assist in a further review, CT Consultants also submitted various replacement pages and revised maps in an attempt to satisfy Appellant’s request for more information.

While the License Application was pending, Appellant received ex parte comments from third parties claiming an interest in whether or not Appellee’s License Application would be granted. Appellee was unaware of these ex parte communications and was never informed of them or given an opportunity to respond.

Following these ex parte communications, the second rejection of Appellee’s License Application came in a February 15, 2006 letter from Commissioner Enyeart. Once again, Appellant stated that Appellee’s License Application was “incomplete” and that Appellant would not consider it. This time, the rejection letter included a nineteen-page letter from Bennett & Williams, a newly hired consultant to the Health Department. Never before had Appellant retained an outside consultant to review an application for a C&DD landfill to determine whether the application was “complete.” Bennett & Williams summarized its “findings” in a letter.

The letter and its conclusions were fully incorporated and made part of Commissioner Enyeart’s February 15, 2006 letter containing its finding of “incompleteness.” It did not appear that Appellant had conducted any independent examination of the License Application, nor did Commissioner Enyeart’s letter contain any critique or commentary on any of Bennett & Williams’ specific findings. Notwithstanding that CT Consultants had responded to every previous comment of Appellant, Bennett & Williams went on to discuss alleged deficiencies in the data provided by Appellee regarding almost every aspect of the proposed site.

On March 30, 2006, CT Consultants responded to the Appellant's February 15, 2006 finding of incompleteness. The response contained fourteen pages of specific responses and explanations of how Bennett & Williams' letter went far beyond a review of the License Application for completeness and exceeded the requirements of the administrative rules.

On May 31, 2006, Commissioner Enyeart wrote to Appellee for a third time, and, using rote language from the first two letters, rejected the License Application as "incomplete." Appellee has gone above and beyond what is required to submit a complete license application in an effort to appease Commissioner Enyeart. It is clear that, no matter how much information Appellee provides the Commissioner, he will declare the License Application "incomplete." It is for this reason that Appellee appealed to the ERAC on June 30, 2006, seeking a determination that the License Application was, as a matter of law, complete, and an order that the Health Department consider the License Application and issue or deny the C&DD facility license. The Health Department moved to dismiss the appeal for lack of subject matter jurisdiction. On March 3, 2007, the ERAC granted Appellee's motion to dismiss. Appellee appealed the ERAC's decision to Tenth District Court of Appeals. The Tenth District reversed, holding that the ERAC has subject matter jurisdiction over Appellee's claims. Appellant now asks this Honorable Court to accept jurisdiction over a matter that does not involve a constitutional issue and is not of a public or great general interest.

## ARGUMENTS OPPOSING APPELLANT'S PROPOSITIONS OF LAW

**Response to Appellant's Proposition of Law No. 1:** The ERAC has subject matter jurisdiction, under R.C. 3745.04(B), over a claim that the Director of the Ohio EPA or an approved health district has unlawfully or unreasonably refused to consider and act upon an application for a C&DD facility license.

**A. A plain reading of the R.C. 3745.04(B), as written, authorizes jurisdiction over this matter.**

An administrative agency only has those powers that the Generally Assembly confers upon it. *Shell v. Ohio Veterinary Med. Licensing Bd.* (2005), 105 Ohio St.3d 420, 2005-Ohio-2423, 827 N.E.2d 766, at ¶32; *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 vests in an administrative agency the power to hear appeals, the statutory language determines the scope 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.* (2006), 10th Dist. No. 05AP-473, 2006-Ohio-2533, at ¶20. In interpreting a jurisdictional statute, courts cannot ignore portions of the statute, nor can they insert words or phrases into it. *State v. Craig* (2007), 116 Ohio St.3d 135, 2007-Ohio-5752, 876 N.E.2d 957, at ¶14, citing *Morgan v. Ohio Adult Parole Auth.* (1994), 68 Ohio St.3d 344, 347, 1994-Ohio-380, 626 N.E.2d 939 and *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77. Where the statute is plain and unambiguous, courts are obligated to apply it as written. *Davis v. Davis* (2007), 115 Ohio St.3d 180, 2007-Ohio-5049, 873 N.E.2d 1305, at ¶15; *Hubbell v. Xenia* (2007), 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at ¶11. The strongest indication of the General Assembly's intent is the language it uses in the statute. *Shell*, 105 Ohio St.3d at ¶29, citing *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, 29 O.O. 4, 56 N.E.2d 265, paragraph seven of the syllabus ("The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact"). Where "the

meaning of a statute is unambiguous and definite, then it must be applied as written and no further interpretation is appropriate.” *Shell*, 105 Ohio St.3d at 425 (quoting *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995).

The plain, unambiguous language of R.C. 3745.04(B) establishes that the ERAC, specially created in R.C. 3745.02, has exclusive, original jurisdiction over a claim that the Director of the Ohio EPA or an approved health district has unreasonably or unlawfully refused to consider and act upon an application for a C&DD facility license. R.C. 3745.04(B) reads in relevant part:

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.

(Emphasis Added.)

The first phrase of the first sentence in R.C. 3745.04(B) covers the traditional appeal by a party in the circumstance where the director or board of health has “acted,” triggering appellate jurisdiction and authorizing the ERAC to issue “an order vacating or modifying the action” if the action is unreasonable or unlawful.<sup>1</sup> This legal paradigm and the cases to which Appellant and the members of Amicus Curiae cite are not in dispute. There is an entire body of law that defines when a final “act” has occurred, thereby triggering appellate jurisdiction in the ERAC.

However, these cases do not directly address the issue posed in this matter, which concerns the second phrase in the first sentence of R.C. 3745.04(B) authorizing appeals to the ERAC where the Director of the Ohio EPA or an approved health district has unlawfully or unreasonably failed or refused to act, such as considering a C&DD licensing application

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<sup>1</sup> ERAC’s standard of review is whether the action is unreasonable or unlawful. *Texileather Corp. v. Korleski* (2007), 10th Dist. Nos. 06AP-955 and 06AP-956, 2007-Ohio-4129, at ¶23 (citing R.C. 3745.05).

(regardless of whether this constitutes a “final act”). The plain language of R.C. 3745.04(B), supports the conclusion that R.C. 3745.04(B) confers jurisdiction upon the ERAC to find the Appellee’s License Application complete, as a matter of law, and to order the Appellant to act upon Appellee’s License Application on the merits.

The first and second phrase in the first sentence of R.C. 3745.04(B) are separated disjunctively by the word “or.” As written, the plain and unambiguous language of R.C. 3745.04(B) authorizes ERAC subject-matter jurisdiction in two situations: (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. No further inquiry is required; nor is it permitted under the law of statutory construction.

In the present case, Appellee has requested the ERAC to order the Trumbull County Health Department to consider Appellee’s License Application on the merits and either issue or deny the C&DD permit. Under the plain, unambiguous language of R.C. 3745.04(B), the ERAC has authority to consider whether the Health Department has unlawfully or unreasonably refused to consider Appellee’s License Application and, if so, order it to “act.” The analysis does not require consideration of whether the Health Department’s refusal to consider the License Application constitutes a “final action.” Such an analysis is only required where the appellant seeks an order “vacating or modifying” the “action” of the director or board of health. That is not the case here.

**B. Jurisdiction over this matter is congruent with the intent of the General Assembly and with the body of law concerning “actions” of the director or board of health that are subject to ERAC review.**

The grant of exclusive, original jurisdiction to the ERAC evidences a clear intent to provide the ERAC with authority to consider whether the Health Department has unreasonably or unlawfully refused to consider the License Application and, if so, order it to issue or deny the

license. The General Assembly in R.C. Chapter 3745 purposefully took away from the courts of common pleas jurisdiction to hear appeals involving environmental matters. R.C. 3745.04(B) stipulates that “[t]he [ERAC] has exclusive original jurisdiction over any matter that may, under this section, be brought before it.” (Emphasis added.)

As has been recognized by this Honorable Court, the exclusivity of the statutory process outlined in R.C. 3745.04 deprives a court of common pleas of jurisdiction to hear appeals involving environmental regulatory matters. For example, it has been recognized by this Court that the exclusivity of the statutory process outlined in R.C. 3745.04 deprives a court of common pleas of jurisdiction to hear an action seeking declaratory or injunctive relief involving the director’s regulatory programs. See *Warren Molded Plastics, Inc. v. Williams* (1978), 56 Ohio St.2d 352, 10 O.O.3d 484, 384 N.E.2d 253. A court of common pleas does not have jurisdiction to consider setting aside an order of the director. *Cincinnati, ex rel. Crotty v. Cincinnati* (1977), 50 Ohio St.2d 27, 30, 4 Ohio Op. 3d 83, 361 N.E.2d 1340. A party adversely affected by a decision of the director or board of health on a permit or license has no resort to a writ of prohibition or mandamus. See *State ex rel. Sierra Club v. Koncelik* (2005), 10th Dist. No. 05AP-643, 2005-Ohio-6477. Only the ERAC had exclusive, original jurisdiction to determine whether Commissioner Enyeart’s actions or failures to act were reasonable or lawful.

Under these circumstances, R.C. 3745.04(B) must be interpreted to facilitate the General Assembly’s intent that relief from unreasonable or unlawful acts of the director or board of health be vested in the ERAC. This jurisdiction must be accorded to matters in which the director or board of health refuses, as a matter of political discretion, to consider and act upon a C&DD license application. Otherwise, a party required to obtain the mandatory license will have no remedy whatsoever.

The Tenth District's decision in this matter is congruent with the body of law concerning "actions" of the director or board of health that are subject to ERAC review. The definition of an "act" is not specifically defined by statute. Generally, Ohio courts have held that R.C. 3745.04(B) must be liberally construed in favor of recognizing a right to appeal. *Youngstown Sheet & Tube Co. v. Maynard* (1984), 22 Ohio App.3d 3, 8, 22 Ohio B. Rep. 37, 488 N.E.2d 220 ("The General Assembly \* \* \* chose to illustrate rather than define an appealable action, thereby vesting the board with jurisdiction over acts of the director beyond the adoption, modification or appeal of a rule." (Emphasis added.)). The "statutory appeal procedures are remedial in nature and therefore must be liberally construed in favor of permitting appeals to the ERAC." *Dayton Power and Light Co. v. Schregardus* (1997), 123 Ohio App.3d 476, 478, 704 N.E.2d 589 (emphasis added). Therefore, when determining whether a particular decision constitutes a final act or action that is appealable to the ERAC, the substance or form, as well as the circumstances and events, surrounding the decision must be examined. See e.g. *id.* at 478-79. Even without express indicia of finality, e.g., notification of appellate rights or journalization of the decision, a decision will still be considered a final act if it "determines or adjudicates with finality any legal rights and privileges of the appealing party or parties." *Id.* at 479.

For all practical purposes, the Health Department, in repeatedly refusing to consider Appellee's License Application, has "acted" with finality. Appellee cannot engage in the lawful disposal of construction and demolition debris without a license issued by the director or board of health. R.C. 3714.05. Failure to consider the license under the substantive criteria contained in Ohio Adm.Code Rules 3745-37-02(A)(1) and 3745-37-02(E) is equivalent to a denial of the license and adjudicates with finality the Appellee's legal rights and privileges concerning the lawful operation of a C&DD landfill. In this instance, the application process is being utilized as

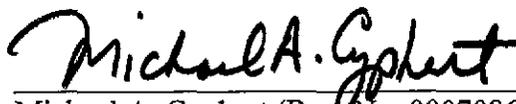
a method for denying the C&DD permit. Appellant should not be allowed to use the application process for his own political ends to avoid a decision on the merits of Appellee's License Application.

While the public may be politically opposed to the establishment of this facility, Appellee has the legal right to have its application considered. The Trumbull County Health Commissioner does not have the authority, under the law, to use his position to indefinitely forestall the application process as a matter of political fiat. If the ERAC does not have subject matter jurisdiction over Appellee's claims, then Commissioner Enyeart, in effect, has the power to act according to his political wishes and is not bound by the rule of law. The General Assembly, in establishing exclusive, original jurisdiction in the ERAC, did not envision a "loophole" where the director or local boards of health could succumb to political pressure and forever deny a license to a lawful business by simply refusing to "act." Because of the conferral of exclusive, original jurisdiction, the ERAC is the only entity that can mandate action by the Health Department. Accordingly, the Tenth District Court of Appeals properly interpreted R.C. 3745.04(B) to provide the ERAC with jurisdiction to correct unreasonable or unlawful conduct.

## CONCLUSION

For all the foregoing reasons, Appellee respectfully requests the Honorable Court not to accept jurisdiction of Appellant's appeal as it involves no constitutional issue and is not of a public or great general interest.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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