

IN THE SUPREME COURT OF OHIO

TRANS RAIL AMERICA, INC., :

Appellee, :

v. :

JAMES J. ENYEART, M.D., :
HEALTH COMMISSIONER, :
TRUMBULL COUNTY HEALTH :
DEPARTMENT, :

Appellant. :

Case No. 08-0359

On Appeal from the Franklin County Court
of Appeals, Tenth Appellate District

BRIEF OF AMICUS CURIAE NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION IN SUPPORT OF TRANS RAIL AMERICA, INC.

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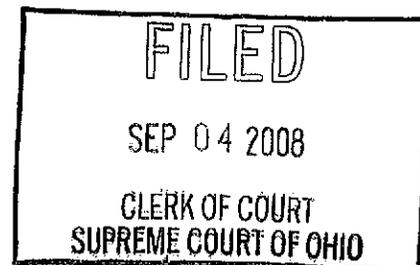


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I. INTRODUCTORY STATEMENT ABOUT SOLID WASTE REGULATION IN OHIO GENERALLY AND THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN PARTICULAR.

The day is long gone in Ohio when solid waste¹ collection and disposal was a largely unregulated business. Today, solid waste disposal in particular is the subject of thousands of environmental requirements contained in hundreds of pages of regulations promulgated by the Ohio Environmental Protection Agency (“Ohio EPA”) pursuant to Section 3734.02 of the Ohio Revised Code (“R.C.”), at to stringent regulations promulgated by the United States Environmental Protection Agency.

Central to Ohio’s regulatory framework governing solid waste disposal facilities are the permitting provisions, which require that a permit be obtained prior to the construction of a solid waste or a construction and demolition debris disposal facility. Permits for solid waste disposal facilities are issued by the Ohio EPA, and permits for construction and demolition debris disposal facilities are issued by the local board of health for the county in which the facility is located. Because of the extensive informational and design requirements of these regulations, this permitting process, from the initial information gathering by the applicant until the ultimate permitting decision by the issuing agency, can last for more than a decade.

The National Solid Wastes Management Association (“NSWMA” or the “Association”) is a not-for-profit trade association whose 1700 members are involved in

¹ Ohio law distinguishes between “solid waste”, which is generally defined in R.C. 3734.01(E) and construction and demolition debris, a sub-category of “solid waste”, which is defined in Section 3745-27-01 (F) of the Ohio Administrative Code. Construction permit facilities that manage solid waste are issued by Ohio EPA, whereas construction permits for construction and demolition debris facilities are issued by the local boards of health. See R.C. § 3714.02.

nearly every aspect of solid waste management, including collection, transportation, disposal and recycling, in all fifty states. NSWMA members (together with non-member solid waste companies) operate nearly one hundred and sixty solid waste management facilities (landfills and transfer stations) throughout Ohio. NSWMA members provide a valuable and essential service to Ohio residents and businesses. Waste disposal at modern state-of-the-art landfills does not even remotely resemble the dumping that took place at municipal dumps in generations past. These sophisticated disposal facilities protect ground water from pollution by waste-driven constituents, capture landfill gas and convert it into useable electricity, thereby reducing America's (and Ohio's) dependence on foreign oil and its contribution toward greenhouse gas emissions and global warming, and generally minimize the environmental impact of these facilities. In addition, NSWMA members recycle millions of tons of recyclables (paper, plastic, glass) nationwide, reducing dependence on landfills.

The Ohio Chapter of the Association consists of companies large and small, including Waste Management of Ohio, a wholly-owned subsidiary of Waste Management, the United States' largest provider of solid waste services, and J&J Refuse, Inc., a family business that provides solid waste services in the northeast and north central portion of the State of Ohio. NSWMA members in Ohio have invested hundreds of millions of dollars in Ohio's environmental infrastructure for equipment and facilities located throughout the state and employ thousands of men and women state-wide.

The Association's Ohio members have a direct interest in the issue central to this case; i.e. whether a local board of health (or Ohio EPA) can insulate its decision not to grant a permit authorizing the construction of a solid waste or demolition debris disposal

facility from review by the Ohio Environmental Review Appeals Commission (“ERAC”) by merely finding that the applicant has failed to provide necessary information. For that reason, the NSWMA submits this amicus curiae brief for this Court’s consideration.

II. STATEMENT OF THE CASE AND STATEMENT OF FACTS

The NSWMA hereby incorporates by reference the Statement of the Case and Statement of Facts set forth in Appellee Transrail America, Inc.’s Answer Brief in this case.

III. ARGUMENT

Proposition of Law No. I:

R.C. 3745.04(B) confers upon the ERAC jurisdiction over appeals asking that the ERAC order a board of health or Ohio EPA to issue or deny a license or permit.

(A) The plain language of R.C. 3745.04(B) confers upon the ERAC jurisdiction to hear two types of appeals: (a) appeals from “actions” the ERAC is empowered to vacate or modify; and (b) appeals asking that the ERAC order the performance of a specific “act”.

It is a familiar canon of statutory interpretation that, where the language of a statute is plain and unambiguous, courts are obligated to apply the statutory language as written. *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049. Courts are not free to ignore portions of a statute, or insert words or phrases into a statute. *State v. Craig*, 116 Ohio St.3d 135, 2007-Ohio-4640.

R.C. 3745.04(B) provides in pertinent part:

[A]ny person ...may participate in an appeal to the environment review appeals commission for an order vacating or modifying [an] 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 term “action” or “act” as it appears in R.C. 3745.04(B) is defined in R.C. 3745.04(A) 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 or modification or revocation of a license, or certificate, or the approval or disapproval or detailed plans and specifications...

Therefore, the plain language of R.C. 3745.04(B) confers upon the ERAC jurisdiction to hear appeals seeking either (1) an order vacating or modifying an action of the director of Ohio EPA or a local board of health or (2) an order requiring the director of Ohio EPA or a local board of health to perform some “act”. Since “act” is defined in R.C. 3745.04(A) to include the issuance or denial of a license, permit, or variance, it necessarily follows that R.C. 3745.04(B) authorizes appeals to the ERAC seeking an order compelling the Ohio EPA director or a local board of health to issue or deny a license, permit or variance.

Thus, R.C. 3745.04(B) grants the ERAC the power to order the director or a local board of health to act when he (or it) has not, as well as the power to overturn or modify a decision of the director or board once he (or it) has acted. Were the law otherwise, the director (or board) could forever refrain from acting on a permit application on the pretext that the application was incomplete, as did the board of health in the case at bar, and the legitimacy of his (its) refusal to act would be forever insulated from ERAC review because the director (or board) had not taken an “action” the ERAC could vacate or modify.

(B) In an appeal asking the ERAC to order the director or a local board of health to grant or deny a permit application, finality is not an issue.

Necessarily, in cases where the director or a local board of health has refused, for whatever reason, to act upon a license or permit application, and the applicant seeks to

challenge the lawfulness of that refusal before the ERAC, the director or board will not have taken a final action which can be vacated or modified by the ERAC – quite the opposite. In cases such as these, the director (or board) has refused to take such an action. The unambiguous language of R.C. 3745.04(B) granting the ERAC the authority to hear cases asking the ERAC to order the director or board to take an action – e.g., grant or deny a permit application – plainly shows that the Ohio General Assembly intended that the ERAC have power to review the legitimacy of a refusal to act, as well as the legitimacy of an action once taken. To limit the ERAC’s jurisdiction to instances in which the director or a board of health has finally acted upon a license or permit application would effectively nullify the language of R.C. 3745.04(B) granting the ERAC the authority to hear cases asking the ERAC to review the director’s or board’s refusal to act upon a permit application. A court may not adopt an interpretation of a statute which nullifies a portion of the statute being interpreted. *State v. Craig, supra.*

Proposition of Law No. II

After repeated submissions by the applicant, a refusal to act upon a permit or license application by the permitting authority is the functional equivalent of a denial of the application, and is, therefore, reviewable by the ERAC.

Even if this Court rejects the proposition that R.C. 3745.04(B) vests in the ERAC jurisdiction to review anything short of a final denial of a permit application, it should acknowledge that, as a matter of law, at some point in time repeated refusals to act upon a permit application constitutes a final denial for purposes of R.C. 3745.04(B). That was the holding in *Cain Park Apartments v. Neid* (June 25, 1981), 10th Dist. Nos. 80AP-817, 80AP-852, 80AP-867 – 80AP-869, 1981 Ohio App. LEXIS 12873. The fact pattern of that case is similar to the facts at issue in the case at bar. In *Cain Park Apartments*, the

appellant apartment complexes had submitted multiple air pollution permit applications for trash incinerators used by the complexes to dispose of their residents' trash, only to have those applications denied by Ohio EPA because the applicants had failed to include with their applications test data demonstrating that the incinerators met applicable emission standards. The appellant apartment houses then submitted registration status applications for the incinerators in question, only to have those applications rejected as incomplete because of the failure of the applicants to include test data. When the applicants appealed to the ERAC², the ERAC dismissed their notices of appeal for lack of subject matter jurisdiction, finding that the rejection of the applications as incomplete was not a final action. The Court of Appeals reversed.

Writing by the Court below, Judge Strausbaugh found that:

[T]he issue before this court for determination is whether the return of an application ...by EPA...[as] incomplete or defective constitutes an "action" which can serve as a basis for an appeal to the [ERAC]. Appellants contend that the decision of the [ERAC] 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 §3745-35-05(F)(1). Appellants also contend that the decision of EPA to treat the applications...as if they had never been filed is, in fact, a denial of said applications, and, therefore, reviewable by the [ERAC]. We agree.

1981 Ohio App. LEXIS 12873, *4 (emphasis added).

Ohio EPA argued, as the Appellee does in this case, that the return of the appellants' applications as incomplete did not amount to a final denial reviewable by the ERAC. The Franklin County Court of Appeals emphatically disagreed, as the following portion of Judge Strausbaugh's opinion makes plain:

[T]here can be no question that the EPA may return defective applications...and treat the application as if it had never been filed. However, the decision to treat

² Then called the Environmental Board of Review.

this application...as if it had never been filed is a denial...and may serve as the basis for an appeal to the [ERAC]. We find no distinction between a denial of an application...and a decision to treat the application as if it had never been filed...[I]n the eyes of the applicant, the return of a defective application has the same legal significance and effect as a denial...

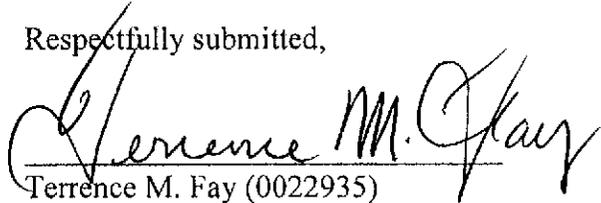
1981 Ohio App. LEXIS 12873, *7 (emphasis added)

As was stated above, preparing a solid waste facility permit application is an expensive, complex and time consuming undertaking. These facilities provide a critical public service – environmentally sound and cost-effective waste disposal for millions of Ohio residents and businesses. This Court should not allow Ohio EPA or a local board of health to exercise a “pocket veto” of such an application. Neither the director nor the boards should be allowed to insulate a decision not to grant a permit application from ERAC review by the simple expedient of characterizing the application as ‘deficient’ or “incomplete”.

CONCLUSION

Too much time, effort and money is invested in the preparation of a solid waste facility permit application to allow the Ohio EPA director or a local board of health to effectively deny an application by refusing to act upon it, and claim that its decision not to grant (or deny) the application is not reviewable because it was not a final action. Since the plain language at R.C. 3745.04(B) allows the ERAC to review a decision by the director or a local board not to act upon a permit application, the Court of Appeals decision should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

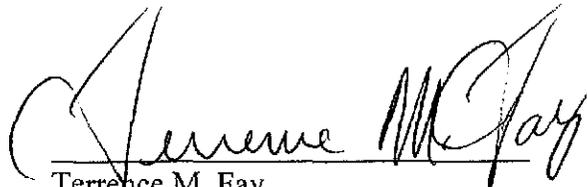
I hereby certify that a true and accurate copy of the foregoing was served by regular U.S. Mail this 4th day of September, 2008, upon:

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**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

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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 together 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 uncontroled 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.