

IN THE SUPREME COURT OF OHIO

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

Case No. 08-0359
 On appeal from the Franklin County
 Court of Appeals, Tenth District
 Case Nos. 07AP-273 and 07AP-284

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STATEMENT OF CASE AND FACTS

The factual and procedural aspects of this matter are inextricably intertwined and, therefore, Appellee, Trans Rail America, Inc., respectfully submits one statement addressing both.

This case arose from Trans Rail America, Inc.'s (TRA) purchase of 6415 Mt. Everett Road, Hubbard, Ohio. TRA purchased the property with the intention of establishing a Construction and Demolition Debris landfill. The address consists of 243 acres, of which TRA planned to use 20 acres of for the facility. However, Hubbard Township Trustees objected to TRA's plans and took numerous and varied actions to prevent TRA from establishing the facility. When the township undertook zoning reclassification to block licensing the facility, TRA sought relief in the Trumbull County Court of Common Pleas.

The Court of Common Pleas agreed with TRA and held the zoning classification, "heavy" industrial use, was proper and TRA's proposed facility was appropriate for such zoning, with proper licensure. The Eleventh District Court of Appeals affirmed the Common Pleas Court's decision and this Court declined to hear the matter. See *Trans Rail America, Inc. v Hubbard Twp.* Ohio Supreme Court Case No. 07-1549. All concerned appear to agree that before TRA could build their facility a Construction and Demonolation Debris license was required from Appellant, James Enyeart, Health Commissioner for the Trumbull County Health Department.

TRA submitted a license application to Health Commissioner on May 21, 2004. With regard to TRA's application, the Health Commissioner denied such application and

merely stated that the application did not conform to Ohio Admin. Code Chapter 3745-400.

An expert environmental engineering firm, that had on several occasions successfully sought and received licenses for Construction and Demolition Debris facilities, had prepared TRA's application. TRA, along with their engineering consultant attempted to respond to the initial and, to say the least, unlawfully vague issues presented by the Health Commissioner. Subsequently, the Health Commissioner sought an outside consultant, apparently for the sole purpose of finding "incompleteness" with the application. Such a finding is vital to the Health Commissioner's true agenda, as is more fully addressed *infra*.

Consequently, all such responses were fruitless as the Health Commissioner would simply attach its outside consultant's report and continue to find the application to be "incomplete." Upon a third attempt by TRA to respond to the outside consultant's allegations concerning its application, the Health Commissioner's consultant identified additional problems **not mentioned previously** in the consultant's report and continued to advise that the application was "incomplete." Naturally, the Health Commissioner agreed.

Upon the realization that the Health Commissioner would continue to indefinitely request additional information and rule the application incomplete, TRA sought review of the rejection with the Environmental Review Appeals Commission. TRA sought a legally required *de novo* hearing and requested an Order requiring a final denial or approval of TRA's license application. The Commission first determined that the Health Commissioner's rejection was not a final appealable order. However, the Commission

then went on to determine that TRA's application was incomplete. This determination was made without any evidentiary hearings and despite the fact that Health Commissioner's decision was found by Appellee to be not final or appealable. The inconsistency with finding a lack of a final appealable order, yet continuing forward with additional findings was quite clear and TRA responded by appealing the decision to the Tenth District Court of Appeals.

The Tenth District Court of Appeals reversed the Appellant's ruling, finding that the Environmental Review Appeals Commission has exclusive jurisdiction to order performance by the Health Commissioner. The Court specifically held that the Commission has the power to rule on the completeness of such an application and, after a *de novo* hearing, order the Health Commissioner to issue or deny TRA's application for a commercial and demolition debris facility. Consequently, the Court of Appeals ruled that the Commission's finding that the application was incomplete without any evidentiary hearings improperly decided the merits of the appeal, without the required *de novo* hearing.

This appeal followed.

ARGUMENT

APPELLEE, TRANS RAIL AMERICA, INC.'S RESPONSE TO PROPOSITION OF LAW NUMBER ONE: BY VIRTUE OF THE PROVISIONS CONTAINED IN R.C. 3745.04(B), THE ENVIRONMENTAL REVIEW APPEALS COMMISSION HAS EXCLUSIVE ORIGINAL JURISDICTION OVER APPEALS OF ALL ACTIONS, ACTS OR FAILURES TO ACT OF A LICENSING AUTHORITY, INCLUDING, BUT NOT LIMITED TO, THE AUTHORITY TO DETERMINE WHETHER A LICENSE APPLICATION IS COMPLETE AND THE AUTHORITY TO ORDER A LICENSING AUTHORITY TO ACT ON A COMPLETE LICENSE APPLICATION.

The Appellant has submitted one Proposition of Law to this Court, to wit:

Pursuant to R.C. 3745.04(B), ERAC (The Environmental Review Appeals Commission) may review only final actions of statutorily designated agencies, such as approved boards of health. Letters in which said agencies request additional information from license applicants are not final actions and, therefore, cannot be reviewed by ERAC.

In support of this Proposition of Law the Appellant essentially argues: (1) an "incompleteness determination letter" is not a "final action" specifically addressed in the statute as reviewable and does not determine legal rights with finality; therefore, (2) such a letter is not subject to review by Appellant; and, finally, (3) mandamus is the appropriate remedy for review of such a determination. For the reasons which follow, the Appellee submits that such reasoning finds no support in either law or logic.

R.C. 3745.04(B) empowers the Environmental Review Appeals Commission ("ERAC") with exclusive original jurisdiction to review decisions of the Director of the Ohio EPA or other authorized authority. There appears to be no controversy that this includes the authority to review decisions by Appellant, Health Commissioner James J. Enyeart. The Ohio General Assembly created the ERAC under R.C. 3745.02 and it appears from R.C. 3745.04(B) that it was the Assembly's intent that the ERAC's power

to review decisions would extend to the Director of Environmental Protection and all local health districts under the Director. R.C. 3745.04(B) provides for appeal seeking,

[A]n order vacating or modifying the action of the director or local board of health, or ordering the director or board of health to perform or act.

Therefore, Appellant's refusal to act on a license application was properly brought before the ERAC, on appeal. Further, the ERAC, following a de novo hearing, had jurisdiction to order Appellant to either approve or deny the Appellee's application if ERAC found that the Appellant's refusal to rule on the application was not well founded.

The Appellant's decision that Trans Rail's application was "incomplete" is a "final" affirmative action justifying appellate review, as Appellant did not indicate that it was willing to give Trans Rail further opportunity to discuss and/or supplement the application to meet the requirements of Ohio Adm. Code 3745-37-02(E).

With regard to the first two prongs of Appellant's argument, there appears to be no controversy as to the heart of the issue: whether an "incompleteness determination letter" constitutes an "act" or "action" reviewable under the statute by Appellant. The terms "act" and "action" are not limited to the mere "issuance, denial, modification or revocation" of the license. In drafting R.C. 3745.04, 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 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. 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.

TRA's right to construct and operate a C&DD facility was effectively terminated when Appellant, through its highest ranking official, refused to consider the license application. The cases relied upon by the Appellant where appeals have not been allowed all concerned decisions made by low-level staff employees that did 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.

In *Cain Park Apartment v. Nied* (June 25, 1981), Tenth Dist. Nos. 80AP-817, 80AP-852, 80AP-867, 80AP-868, 80AP-869, 1981 Ohio App. LEXIS 12873, unreported, the court held that a ruling that an application is incomplete is, in essence, a denial of the application which creates an appealable action to ERAC. An applicant is entitled to an opportunity to demonstrate that the local licensing authority has acted unreasonably or unlawfully in repeatedly rejecting an application as "incomplete." A *de novo* hearing before ERAC is the proper mechanism to afford TRA the opportunity to obtain a ruling that the licensing authority's decision was unreasonable or unlawful and to demonstrate that the information required by Ohio Adm. Code 3745-37-02(E) is contained within the application made by Trans Rail.

A license is required by R.C. 3714.06 in order to establish and operate a C&DD facility in Ohio. Failure to obtain such a license prior to operating a C&DD facility is a violation of R.C. 3714.13 and subjects the operator to severe civil penalties. In *Dayton Power and Light Co.*, supra, the Tenth District Court of Appeals determined that the decision of the Director of Ohio EPA was a "final action" under R.C. 3745.04 because

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the decision affected a valuable property right and did not give the electric company involved any opportunity to contest the Director's findings.

Just as the decision in *Dayton, supra*, affected a valuable property right, in the instant case the Appellant's decision that the TRA application would not be considered for lack of completeness significantly affects the value of the applicant's property, as that decision prevents Trans Rail from realizing a return on its investment backed expectations in the property. Delaying Trans Rail's progress by determining that its application was not complete further harmed the company because an amended of R.C. 3714.03 enacted by the General Assembly gave different status to applications filed before and after July 1, 2005.

Applications made prior to July 1, 2005 were completely "grandfathered" from the new amendments, but applications made after that date were subject to much more restrictive siting criteria and a more complicated application handling process. In order for the "grandfather" clause of R.C. 3714.03 to apply to a particular applicant, the application must have been "complete" at the time submitted. **Denying TRA an ERAC hearing to demonstrate that its application was actually complete destroys its filing date status and moves its application from receiving the grandfathered status to being subject to harsher restrictions.** Thus, the issuance of an "incompleteness determination letter", in and of itself, is an action affecting the substance of an applicant's rights in a most dispositive fashion! With respect, the Dissent at the Tenth District, as well as Appellant, chose simply to ignore this vital aspect of the law. Thus, under the Dissent's analysis, it is inarguable that the incompleteness determination affects Appellee's "rights, privileges or property."

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Finally, with regard to Appellant's position that mandamus is the appropriate remedy, TRA respectfully submits that this argument most fail for several reasons.

First, the General Assembly has the power to vest exclusive initial jurisdiction in ERAC to order Appellant to act upon an applicant's license application where Appellant has unreasonably or unlawfully refused to do so. In *State ex rel. Ohio Democratic Party v. Blackwell* (2006), 111 Ohio St. 3d 246, this Court held that the General Assembly has the authority to grant exclusive original jurisdiction to an administrative tribunal, such as ERAC, to initially review an agency's actions or to order an agency to act. *Blackwell*, *supra*, went on to state that the General Assembly's use of "broad and sweeping" language indicated a clear intent to vest exclusive jurisdiction in the administrative tribunal over the subject matter of the mandamus petition, rather than give original jurisdiction over the subject matter to the courts or other tribunals. Regardless of whether the action is in declaratory judgment and injunction or in mandamus, the first step in seeking a remedy was to file with the administrative tribunal.

This Court's ruling in *Blackwell* effectively prevented TRA from petitioning an Ohio court for an extraordinary writ in the form of mandamus. R.C. 3745.04(B) provides ERAC with original 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.

TRA appropriately sought relief through ERAC in this case, as there is no existing precedent recognizing mandamus as an appropriate remedy for the issues presented. "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.

TRA could not have filed a petition for a writ of mandamus. 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. 3 191, 2000-Ohio-130, 729 N.E.2d 743. In *State ex. rel. Northeast Ohio Regional Sewer District v. Ohio EPA*, the Eighth District affirmed the trial court's dismissal of the relator's mandamus petition to order the director of Ohio EPA to issue a permit because the relators did not demonstrate that they had a clear legal right to the relief sought. However, the court in that case did not address circumstances specific to the case at bar, such as whether R.C. 3745.04(B) provides an adequate remedy at law, or 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.

In light of the clear provisions in the statute addressed *supra* which provide TRA with an "adequate remedy at law", mandamus would not lie in the case at bar. The Tenth District correctly determined in this matter that the 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.

CONCLUSION

The Ohio General Assembly gave the exclusive original jurisdiction over appeals and de novo hearings of actions, acts, or failure to act to ERAC with the authority to protect persons against unreasonable or unlawful rulings or inactions by local licensing authorities that have been delegated authority to issue C&DD licenses. A determination that an application is "incomplete" is an action, act or failure to act within the authority and exclusive original jurisdiction of ERAC.

To recognize a writ of mandamus in Ohio's Courts ignores the General Assembly's decision to vest exclusive original jurisdiction in ERAC over these matters. The General Assembly did not intend the issue of "completeness" to be used as a weapon by the licensing authority to prevent the establishment of unpopular C&DD facilities. See *CECOS International, Inc. v. Shank* (1991), 74 Ohio App.3d 43, 598 N.E.2d 40. The exclusive original jurisdiction was intended to give a knowledgeable tribunal with specialized expertise the authority to resolve disputes over such acts or failures to act in a more cost-effective manner than the voyage through the Ohio court system.

Once a C&DD facility has received its initial license to operate it is thereafter required to file applications for annual licenses to continue operations. With 56 licensed C&DD facilities throughout Ohio currently listed on the Ohio EPA's official website, timely review of C&DD license applications is essential to maintain orderly operation of these facilities, as they are mandated to have applied for license renewal during the month of September and been granted license renewal by January 1.

A refusal to process an application on the grounds of incompleteness must be subject to an appeal to a knowledgeable tribunal with expertise in these regulatory matters. The process suggested by the Appellant and its Amicus Curiae in this matter would subject a legitimate business to condemnation through an endless succession of non-appealable decisions thereby frustrating an unpopular facility in hopes that the business will give up their attempt for licensure. Placing these appeals in the already overburdened Ohio court system instead of with the ERAC, as intended by the General Assembly, would deny applicants a forum that is knowledgeable and experienced in licensing matters. The position of Appellant and its Amicus Curiae ignore the exclusive original jurisdiction vested by the General Assembly in ERAC and attempt to frustrate the rights given to Trans Rail and other similarly situated applicants 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 in accordance with the intent of the General Assembly and therefore should be affirmed.

Respectfully submitted,



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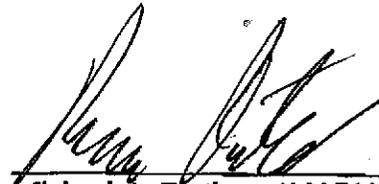
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