

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO,  
COLUMBUS, OHIO**

**TRANS RAIL AMERICA, INC.,** )  
 )  
 Appellant, )  
 )  
 -vs- )  
 )  
 **JAMES J. ENYEART, M.D.,** )  
 **HEALTH COMMISSIONER,** )  
 **TRUMBULL COUNTY HEALTH DEPT.,**)  
 )  
 )  
 Appellee. )

CASE NO. **10-1709**  
  
On Appeal from the Tenth District Court of Appeals, Case Nos. 07AP-273 & 07AP-284  
  
Environmental Review Appeals  
Commission No. 785917

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,  
TRANS RAIL AMERICA, INC.**

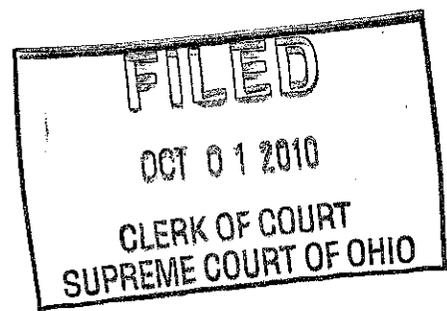
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**EXPLANATION OF WHY THIS CASE IS OF GREAT GENERAL & PUBLIC INTEREST AND CONCERNS SUBSTANTIAL CONSTITUTIONAL ISSUES FOR WHICH LEAVE TO APPEAL TO THIS COURT SHOULD BE GRANTED.**

This matter presents specific issues of first impression in this Court and, yet, this Court and Ohio law have a well-established framework for the issues in general. At the forefront is the issue of what constitutes a final appealable order. While there is no shortage of authority on the subject, including R.C. 2505.02(B), this cause presents question of whether an agencies repeated, unreasonable characterization of a 2004 application to establish a Construction and Demolition Debris landfill as incomplete and/or its repeated, unreasonable requests for further information -- beyond its previous requests - constitutes a final appealable order. Further, this matter concerns the issue of whether the applicant's right to a *de novo* hearing, pursuant to R.C. 3745.05 is violated and due process rights created thereby, are violated where the Environmental Review Appeals Commission (ERAC) find that no final appealable order exists in an appeal from a county health commissioners ruling that said application is incomplete and its repeated requests for further information are "reasonable" **and the applicant is never afforded a hearing before ERAC as required by the aforementioned statute.**

Within the unique facts of this case, this Court will find that both its prior review of this matter in Trans Rail Am. Inc. v. Enyeart (2009), 123 Ohio St.3d 1, 2009-Ohio-3624 and a prior decision by the Tenth District Court of Appeals support Appellant's arguments. All of the findings by this previously made by this Court and previously made by the Tenth District Court of Appeals illustrate the long history of harassment and obstruction by Appellees, in their repeated, unreasonable attempts to delay and otherwise thwart Appellant from exercising its statutory and constitutional rights. Appellant has acted reasonably and with best efforts to comply with every request of the governing agencies in this case.

As previously recognized by this Court in Trans Rail Am. Inc. v. Enyeart, *supra*, significant constitutional and procedural issues arise where repeated findings that an application is incomplete are employed to thwart an applicant's right to seek review with ERAC and, therefore, a final appealable order must at some point exist in that regard. Unfortunately, the Tenth District lost its way in applying this Court's prior holding, indulged itself in speculation concerning facts not addressed in the record and, rather than remand the matter to ERAC for a full hearing so that these facts could be properly developed, simply found that such was beyond the scope of this Court's remand. However, the Tenth District simply ignored the facts that: (1) Appellant had previously raised violation of its hearing rights at all levels, including at the Ohio Supreme Court, and (2) this Court in its decision reversing and remanding this matter to the Tenth District, while quite clear as to the ultimate issue to be decided, did not place any sort of limitations upon the remand proceedings. Although this Court did not find it necessary to address fully the hearing issue in making its prior disposition, that does not mean that the hearing issue is not ripe or has somehow been waived in light of the procedural posture of this case.

Appellant respectfully submits that further clarification of this area of law is absolutely necessary and this Court should accept jurisdiction of this matter.

**I. STATEMENT OF THE CASE/STATEMENT OF FACTS**

This cause arises from the Tenth District Court of Appeals ruling following a remand of this matter by this Court. Because the procedural and factual aspects of the case are inextricably intertwined, the Appellant respectfully submits one Statement concerning 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 initially 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 Demolition 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 denial 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 was vital to the Health Commissioner's true agenda.

Consequently, all such responses were fruitless as the Health Commissioner would

simply attach its outside consultant's report and continued 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 the last request for additional information was reasonable. 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 ruling, finding that the Environmental Review Appeals Commission (ERAC) 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 held 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.

Appellee appealed to this Court, which reversed and remanded the matter with specific instructions to the Tenth District Court of Appeals “for a determination of whether Enyeart’s letter was a final decision appealable to ERAC under the criteria outlined in this Opinion.”

Trans Rail Am. Inc. v. Enyeart (2009), 123 Ohio St.3d 1, 2009-Ohio-3624.

On remand to the Tenth District, the issue of whether a finding that the application was incomplete without a *de novo* evidentiary hearing fell through the cracks. The Tenth District did not consider that issue, as it was not part of the **express** instructions of this Court’s remand. On June 30, 2010, the Tenth District held that the letter in question did not constitute a final order. Appellant filed a Motion for Reconsideration of that decision, pursuant to App. R.26, on July 12, 2010, which was denied in a Judgment Entry and Memorandum Decision dated August 17, 2010. This appeal follows.

## ARGUMENT

**Proposition of Law No. I: Repeated and unreasonable requests for additional information by a licensing agency constitute a final appealable order under R.C. 3745.04(A) where such conduct affects the applicant's substantial rights, privileges and/or property.**

Neither Appellees nor any court has ever disagreed with Appellant's statement as to the standard used to determine whether a final appealable order exists, as the issue of whether a final appealable order has been rendered is hardly novel. In Prakash v. Prakash, 2009 Ohio 1324, this Court wrote:

In pertinent part, R.C. 2505.02(B) defines a final order as: “(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment; [or] (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.”

We focus on R.C. 2505.02(B)(2), which states that an order in a special proceeding that affects a substantial right is a final order, and we consider, first, whether the action underlying this appeal is a special proceeding. A special proceeding is an “action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.” R.C. 2505.02(A)(2).

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R.C. 2505.02(A)(1) defines a substantial right as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.”

In this case, there can be no question that the actions below involved a special proceeding, wholly created by statute. Therefore, the sole question has always been whether Appellee's repeated, unreasonable refusal to consider Appellant's application on its merits affects Appellant's rights under the U.S. Constitution, the Ohio Constitution, a statute, common law, or a rule of procedure.

Further, the last time this matter was before this Court, the Court agreed with nearly every argument made by Appellant as to the question of what constitutes a final appealable order. The Court stated:

The key issue in determining whether a particular decision not listed in R.C. 3745.04(A) is an action or act that may be appealed under R.C. 3745.04(B) is whether it is in some sense a final decision that substantially affects the appellant's property or other legal rights, even if it is not designated as final.

\*\*\*

[t]he requirement of a final decision does not mean that the licensing entity (a board of health or the director of environmental protection) can evade appellate review under R.C. 3745.04(B) simply by deeming a license application incomplete and repeatedly and unreasonably requesting additional information before the licensing entity will consider the application on its merits.

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Even if a decision is not designated a final action, it may be a reviewable final action if it in effect determines any legal right or privilege of the appellant.

Trans Rail Am. Inc. v. Eynear (2009), 123 Ohio St.3d 1, 10, 11, 2009-Ohio-3624, ¶31 & ¶34, citing Dayton Power & Light Co. v. Schregardus (10<sup>th</sup> Dist.1997), 123 Ohio App.3d 476 and Cain Park Apts. v. Nied (1981), 10<sup>th</sup> Dist. 1981 W.L. 3294 (wherein the Tenth District held that actions tantamount to denial are, for purposes of establishing appellant rights, denial). The Tenth District Court of Appeals completely ignored this analysis, and proceeded with an approach that can only be described as bizarre.

In considering whether Eynear's May 31, 2006 letter constitutes a final appealable order, the Tenth District stated:

Significantly, the record is devoid of any evidence that Trans Rail sought and achieved a determination from the director [of the Ohio Environmental Protection Agency] that pre-Am.Sub.H.B. No. 397 law applies to its application. Accordingly, the amended statutes, including amended R.C. 3714.03, govern Trans Rail's application. As the ERAC found, and Trans Rail does not contest, Trans Rail's application fails to address the new siting criteria contained in amended R.C. 3714.03. Without information regarding whether the proposed

construction and demolition debris facility satisfies all the siting criteria, the application remains incomplete. Enyeart's request that Trans Rail supply the necessary information constitutes reasonable enforcement of R.C. 3714.03, not an unreasonable attempt to avoid making an official decision on Trans Rail's application. The May 31, 2006 letter, therefore, is not a de facto denial of Trans Rail's application.

To be clear, Appellant's initial application was submitted on May 21, 2004 and was improperly found to be incomplete on July 16, 2004. The new statutory structure relied upon by Appellees and the Tenth District was not enacted until December of 2005. **Due to the "moratorium" in effect during the intervening period**, in December of 2005 Appellants submitted the materials requested in the July 16, 2004 letter from Appellees, **at the end of the so called moratorium on the issuance of permits**. On February 15, 2006, Appellee sent a letter to Appellant, stating that Appellant's application was still incomplete – because the December, 2005 supplement to the May 21, 2004 failed to address whether the application met the siting criteria for the new statutory scheme, as stated by the Tenth District in the above quoted portion of its Opinion. Clearly, Appellees were intentionally delaying and obstructing Appellant's application, first stating that it was incomplete for lack of information under the old statutory scheme, then that it was incomplete for lack of information under the new statutory scheme *which does not apply to an application that was complete before its enactment*, as is discussed further in Proposition of Law No. II, *supra*. Yet, Appellants continued to play Appellees' games once more, submitting yet further information to supplement its May 21, 2004 application, as requested by Appellee, on March 30, 2006. After yet another letter from Appellee stating that the 2004 application was incomplete, Appellant began the appellate process.

**The fact that the March 30, 2006 letter is the point at which Appellant began the appellate process does not render Appellees' previous, repeated rejections and requests for**

**further information to be a anything other than unreasonable.** The Tenth District seems to hold that, because the February 15, 2006 letter may have been the point at which Appellees' conduct became unreasonable and, therefore appealable, that Appellee's March 30, 2006 letter, again stating that the application was incomplete and requesting further information, – for some unknowable reason- cannot be considered unreasonable. Apparently, by the Tenth District's logic, if one is unreasonable for long enough, his later conduct is deemed reasonable. Such reasoning finds no support in either law or logic. Appellees' conduct has been unreasonable from the beginning. The fact that it might be considered to have been unreasonable prior to March 30, 2006, does not somehow make the same conduct on March 30, 2006 reasonable.

Instead, despite its bizarre reasoning as to the March 30, 2006 letter, the Tenth District does not seem to dispute that Appellees' conduct up to that point was unreasonable. Appellant's application was complete in 2004, and Appellees' characterization of it as incomplete is finds no support in either case law or the statutory structure involved. **The fact that a county authority may request additional information prior to either issuing or denying an application is a separate and distinct consideration from the issue of whether the initial application is “complete” has been totally ignored!** The fact that Appellees have requested further information to determine whether that application should be granted does not render the application incomplete. Rather, the gathering of such information is a process in and of itself. Appellants have repeatedly, consistently, and fully responded to any and every request for further information whenever possible. Appellees continued, ever-changing requests for additional information, like their repeated allegations that the application was incomplete, are unreasonable. Both such acts, viewed individually or collectively, constitute exactly the type of conduct Appellant has argued, *and this Court has previously recognized, could result in a final*

*appealable order.*

**Proposition of Law No. II: Repeated and unreasonable requests for additional information by a licensing agency, concerning a 2004 application for a license to establish a facility for disposal of construction and demolition debris, constitute a final appealable order under R.C. 3745.04(A) where conduct affects the applicant's substantial rights, privileges and/or property, whether or not the applicant has submitted information as to whether or not the director of the Ohio Environmental Protection Agency has determined that pre-Am.Sub.H.B. No. 397 law applies to the application.**

As set forth above, the Tenth District's Decision concludes that amended R.C. 3714.03, govern Appellant's 2004 application, because "the record is devoid of any evidence that Trans Rail sought and achieved a determination from the director that pre-Am.Sub.H.B. No. 397 law applies to its application." Thus, the Tenth District made its ruling, at least in part, as to whether Appellees' unreasonable conduct constituted a final appealable order, based upon information that *it recognized was not in the record*. This information would not be in the record, as it is not part of the 2004 application itself and such determination is actually made in a separate proceeding before a different agency, the Ohio EPA! Certainly, had ERAC conducted the requisite hearing a record in this regard could have been developed.

In its Motion for Reconsideration, Appellant submitted that Appellants, *not because they agree that such is required, but to illustrate their constant attempts to comply with Appellees' unreasonable demands*, had, in fact, written to Ohio's EPA Director, and attached the letter to its Motion. While Appellant maintains that such is not required and is irrelevant to the issues at bar, as its application was complete, Appellant did attempt, in good faith to comply with Appellees' demands, and explained in its Motion that there was no reason for this information to be in the record to ERAC. In denying Appellant's Motion for Reconsideration, the Tenth District stated that the letter attached to Appellant's Motion only illustrates that Appellant requested a

determination from the Director, not that the Director actually determined that Appellant's application was not subject to the new statutory scheme. Yet, in what might be considered tragic irony in a case where one agency makes repeated and unreasonable demands for more information, the Ohio EPA never responded to Appellant's letter.

**Proposition of Law No. III: A finding by the Environmental Review Appeals Commission that the finding of a licensing agency that a 2004 application for a license to establish a facility for disposal of construction and demolition debris is incomplete requires a *de novo* hearing, pursuant to R.C. 3745.05.**

Appellant has consistently argued that decision that its 2004 application was "incomplete" is a "final" affirmative action justifying appellate review, as Appellee's May 31, 2006 letter 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). As stated by this Court "The court of appeals determined that ERAC erred in reaching the merits of the issue of whether Trans Rail's application was incomplete without holding a hearing. 2007-Ohio-7144, ¶ 14." Trans Rail Am. Inc. v. Enyeart (2009), 123 Ohio St.3d 1, 12, 2009-Ohio-3624, at ¶ 35. This Court, however, did not reach the merits of that issue, as it vacated the Tenth District's holding and remanded the matter for consideration of whether there was a final appealable order. The Tenth District stated, in its Entry denying Appellant's Motion for Reconsideration, that it did not reach this issue on the remand, because this Court had not instructed it to do so. Appellant now presents this argument to this Court once again, as it is vital to a full consideration of this case, and certainly a matter of great general and public importance.

The Tenth District previously held that:

{¶14} 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.

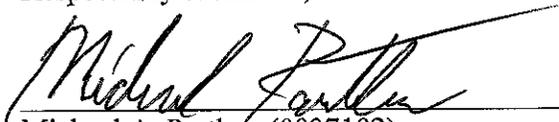
2007-Ohio-7144.

In this case, there can be no question that ERAC failed to conduct a *de novo* hearing on the issue of whether or not Appellant's 2004 application is complete. Appellant respectfully request that this Court reverse and remand this matter, with an order that Appellant finally be afforded its statutory right to a hearing on that issue.

### CONCLUSION

For the reasons set forth above, Appellant prays that this Court accept jurisdiction over this matter and find that the judgment of ERAC and Tenth District Court of Appeals was improper and the matter must be reversed and remanded for further proceedings consistent with Ohio law.

Respectfully submitted,



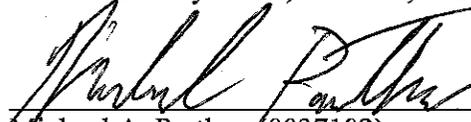
Michael A. Partlow (0037102)

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Attorney for Appellant

**CERTIFICATE OF SERVICE**

A copy of the foregoing **Memorandum in Support of Jurisdiction**, is being served via regular U.S. Mail, postage prepaid on this 1<sup>st</sup> day of October, 2010, upon: Robert C. Kokor, Ronald James Rice Co. LPA, 48 West Liberty Street, Hubbard, Ohio 44425.



Michael A. Partlow (0037102)

**MORGANSTERN, MacADAMS & DeVITO CO., L.P.A.**

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
2010 JUN 30 PM 3:25  
CLERK OF COURTS

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  
(ERAC No. 785917)  
(ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 30, 2010, we hold that the May 31, 2006 letter is not a final action, and we affirm the order of the Environmental Review Appeals Commission.

KLATT, J., TYACK, P.J., & FRENCH, J.

By William A. Klatt  
Judge William A. Klatt

JK

IN THE COURT OF APPEALS OF OHIO

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

TENTH APPELLATE DISTRICT

2010 JUN 30 PM 2:36

CLERK OF COURTS

Trans Rail America, Inc., :

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Health Department, :

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and  
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(ERAC No. 785917)

(ACCELERATED CALENDAR)

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D E C I S I O N

Rendered on June 30, 2010

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*Morganstern, MacAdams, & DeVito Co., and Michael A. Partlow*, for appellant.

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

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APPEAL from the Environmental Review Appeals Commission

KLATT, J.

{¶1} This appeal originally arose from a ruling of the Environmental Review Appeals Commission ("ERAC") that it lacked jurisdiction to review the decision of Dr. James Enyeart, the Trumbull County Health Commissioner, that the application of Trans Rail America, Inc. ("Trans Rail") for a license to establish a construction and demolition debris facility was incomplete. This court reversed that ruling. *Trans Rail America, Inc. v. Enyeart*, 10th Dist. No. 07AP-273, 2007-Ohio-7144 ("*Trans Rail I*"). The Supreme Court

of Ohio accepted Enyeart's appeal of our decision, and it vacated our judgment. *Trans Rail America, Inc. v. Enyeart*, 123 Ohio St.3d 1, 2009-Ohio-3624 ("*Trans Rail II*"). The Supreme Court also remanded the case to this court for us to decide "whether Enyeart's May 31, 2006 letter determining Trans Rail's application to be incomplete was a final decision appealable to ERAC under R.C. 3745.04(B)." *Id.* at ¶36. As explained below, we conclude that the letter is not a final decision.

{¶2} On May 21, 2004, the Trumbull County Health Department received Trans Rail's application for a license to construct a construction and demolition debris facility in Hubbard, Ohio. Enyeart reviewed the application and determined that it did not contain all the information required by Ohio Adm.Code 3745-37-02(E). In a July 16, 2004 letter, Enyeart notified Trans Rail that its application was incomplete and listed the administrative code sections that Trans Rail had not complied with.

{¶3} Trans Rail did not respond to Enyeart's letter until December 2005. During the 16-month period of inactivity, the General Assembly imposed a six-month moratorium on the issuance of licenses to construct construction and demolition debris facilities. This prohibition extended from July 1 to December 31, 2005, and it applied to applications submitted prior to July 1, 2005 that had not been approved before the beginning of the moratorium.

{¶4} Days before the moratorium ended, the General Assembly enacted Am.Sub.H.B. No. 397, which revamped the statutes governing construction and demolition debris facilities. 2005 Ohio Legis.Serv. L-2390. Significantly, Am.Sub.H.B. No. 397 increased the restrictions on where a construction and demolition debris facility could be located. R.C. 3714.03, Am.Sub.H.B. No. 397, 2005 Ohio Legis.Serv. at L-2395.

In uncodified section three of Am.Sub.H.B. No. 397, the General Assembly addressed the applicability of the amended statutes to pending and future applications for construction and demolition debris licenses. 2005 Ohio Legis.Serv. at L-2423-24. In relevant part, the General Assembly stated:

(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.

Id. at L-2423.

{¶5} On December 16, 2005—approximately two weeks before the moratorium ended—CT Consultants, Inc., the engineering firm that Trans Rail had hired to oversee the application process, submitted supplemental information in response to Enyeart's July 16, 2004 letter. Enyeart forwarded the original application and the new materials to

Bennett & Williams Environmental Consultants, Inc. ("Bennett & Williams"), a consulting firm that the Trumbull County Board of Health had engaged to assess Trans Rail's application. Bennett & Williams responded with a 19-page report delineating the inadequacies in the information Trans Rail had thus far supplied. Of particular relevance to this appeal, Bennett & Williams' report noted that Trans Rail had neither requested nor received a determination from the Director of the Ohio Environmental Protection Agency ("director") that the pre-Am.Sub.H.B. No. 397 law applied to its application. Bennett & Williams concluded that:

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 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.

{¶6} In a February 15, 2006 letter, Enyeart notified Trans Rail that its application was still incomplete, and he attached Bennett & Williams' report. On March 30, 2006, CT Consultants and HzW Environmental Consultants, LLC responded to Enyeart's letter on Trans Rail's behalf. Both CT Consultants and HzW Environmental Consultants provided corrected and additional information to address Bennett & Williams' comments and concerns. Enyeart forwarded these responses to Bennett & Williams for review. Despite the supplementary information, Bennett & Williams concluded that the application remained incomplete. In relevant part, Bennett & Williams indicated that the responses failed to address whether the proposed construction and demolition debris facility met the siting criteria contained in amended R.C. 3714.03.

{¶7} In a May 31, 2006 letter, Enyeart again notified Trans Rail that its application was incomplete. Instead of providing more information, Trans Rail chose to file an appeal with ERAC. In its notice of appeal, Trans Rail requested that ERAC find that Trans Rail's license application was complete and order the Trumbull County Health Department to process the application.

{¶8} Enyeart moved to dismiss Trans Rail's appeal, arguing that ERAC lacked jurisdiction over the appeal because the May 31, 2006 letter did not constitute a final act or action. Pursuant to R.C. 3745.04(B), a party may 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." R.C. 3745.04(A) defines "act" or "action" to "include[ ] 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." Enyeart contended that the May 31, 2006 letter did not meet this statutory definition, did not contain the traditional indicia of a final action, and did not adjudicate with finality any legal rights. Consequently, Enyeart maintained that the ERAC's jurisdictional authority did not extend to a review of the letter.

{¶9} The ERAC agreed with Enyeart and dismissed Trans Rail's appeal. Interpreting R.C. 3745.04(B), the ERAC held that a decision that does not constitute a final action of the director or a board of health cannot form the jurisdictional basis for an appeal to it. (R. S. at 12.) The ERAC recognized that the list of actions contained in R.C. 3745.04(A) is not exhaustive, and that a decision can be a final action if it adjudicates with

finality any legal right or privilege of the appealing party. (R. S. at 13.) Although the ERAC acknowledged that a licensing entity's repeated, unreasonable requests for additional information can result in a final action, it found that Enyeart was reasonable in deeming the application incomplete and seeking more information from Trans Rail. (R. S. at 18-19.) The ERAC thus concluded that the May 31, 2006 letter was not a final action, but rather, an intermediate step in a continuing process. (R. S. at 19.)

{¶10} Trans Rail appealed the ERAC's dismissal of its appeal to this court. We held that the ERAC's jurisdiction did not always turn upon whether or not the aggrieved party was appealing from a final action. *Trans Rail I* at ¶11. We concluded that R.C. 3745.04(B) invested the ERAC with jurisdiction over two types of appeals: (1) an appeal from an "action" that the ERAC could vacate or modify, and (2) an appeal requesting that the ERAC order the performance of an "act." *Id.* at ¶9. Because Trans Rail sought an order requiring the performance of an "act," i.e., the issuance or denial of a license, Trans Rail's appeal fit within the latter category of appeals and the ERAC had jurisdiction to review it. *Id.* at ¶10.

{¶11} Enyeart appealed our decision to the Supreme Court of Ohio, which disagreed with our interpretation of R.C. 3745.04(B). The Supreme Court held that R.C. 3745.04(B) limited the ERAC's jurisdiction solely to the review of final actions of the director and local boards of health. Turning to the question of what kind of decision constitutes a final action, the Supreme Court held that an aggrieved party can appeal a decision if "it is in some sense a final decision that substantially affects the appellant's property or other legal rights, even if it is not designated as final." *Trans Rail II* at ¶31. The court went on to state that, generally, "a decision that an application is incomplete,

accompanied by a specification of the precise nature of the deficiencies and a reasonable request for additional information, will not be a final act or action of the licensing agency."

Id. at ¶33. However:

[T]he requirement of a final decision does not mean that the licensing entity (a board of health or the director of environmental protection) can evade appellate review under R.C. 3745.04(B) simply by deeming a license application incomplete and repeatedly and unreasonably requesting additional information before the licensing entity will consider the application on its merits.

Id. at ¶34. An ongoing pattern of ruling an application incomplete, while unreasonably requesting additional information, amounts to a de facto denial of the application, which in turn, qualifies as a determination that substantially affects the appellant's property and legal rights.

{¶12} Now before this court on remand, Trans Rail's appeal presents this court with one question: did Trans Rail base its appeal to the ERAC upon a final action? To answer this question, we must consider whether the May 31, 2006 letter substantially affected Trans Rail's property or legal rights.

{¶13} In its supplemental briefing to this court, Trans Rail asserts two arguments. First, Trans Rail contends that the May 31, 2006 letter substantially affected its legal rights because the letter foreclosed its right to take advantage of the grandfather clause contained in Am.Sub.H.B. No. 397. As we explained above, in uncodified section 3(A) of Am.Sub.H.B. No. 397, the General Assembly specified that license applications filed prior to July 1, 2005 are subject to the provisions of R.C. Chapter 3714 as they existed on July 1, 2005 if the applicant satisfies four criteria. To meet the fourth criterion, an applicant must demonstrate that the licensing entity would have determined that the

application was complete if the moratorium had not been in effect. The moratorium ended on December 31, 2005. Therefore, to have its application considered under pre-Am.Sub.H.B. No. 397 law, Trans Rail must show that Enyeart would have found its application, as it existed on December 31, 2005, was complete. Trans Rail argues that Enyeart's May 31, 2006 letter negates its ability to make the necessary showing, and thus, the letter substantially affects its right to rely on pre-Am.Sub.H.B. No. 397 law.

{¶14} The May 31, 2006 letter, however, did not have any bearing upon whether Trans Rail's application was complete as of December 31, 2005. Enyeart announced his determination regarding the application's completeness as of that date in his February 15, 2006 letter. Thus, the February 15, 2006 letter—not the May 31, 2006 letter—substantially affected Trans Rail's asserted right to have its application adjudged under the law that existed when Trans Rail originally filed it. Because the May 31, 2006 letter did not affect Trans Rail's asserted right to pre-Am.Sub.H.B. No. 397 law, Trans Rail's first argument fails.

{¶15} Second, Trans Rail argues that the May 31, 2006 letter substantially affected its property and legal rights because the letter equated to a denial of its license application. A decision to deem a license application incomplete, in conjunction with repeated and unreasonable requests for additional information, is tantamount to a denial of the application. Because a de facto denial substantially affects an applicant's property and legal rights, it is a final action.

{¶16} Here, the ERAC concluded that Enyeart acted reasonably in determining that Trans Rail's application was incomplete. The ERAC also concluded that Enyeart's requests for additional information and clarification were reasonable. We agree with both

conclusions. Significantly, the record is devoid of any evidence that Trans Rail sought and achieved a determination from the director that pre-Am.Sub.H.B. No. 397 law applies to its application. Accordingly, the amended statutes, including amended R.C. 3714.03, govern Trans Rail's application. As the ERAC found, and Trans Rail does not contest, Trans Rail's application fails to address the new siting criteria contained in amended R.C. 3714.03. Without information regarding whether the proposed construction and demolition debris facility satisfies all the siting criteria, the application remains incomplete. Enyeart's request that Trans Rail supply the necessary information constitutes reasonable enforcement of R.C. 3714.03, not an unreasonable attempt to avoid making an official decision on Trans Rail's application. The May 31, 2006 letter, therefore, is not a de facto denial of Trans Rail's application.

{¶17} Based upon the foregoing, we hold that the May 31, 2006 letter is not a final action, and we affirm the order of the Environmental Review Appeals Commission.

*Order affirmed.*

TYACK, P.J., and FRENCH, J., concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
AUG 17 2010  
7:59 PM  
CLERK OF COURTS

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  
(ERAC No 785917)  
  
(ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on August 17, 2010, it is the order of this court that the application for reconsideration is denied

KLATT, J., TYACK, P J , & FRENCH, J

By: William A Klatt  
Judge William A. Klatt

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
AUG 17 PM 1:36  
CLERK OF COURTS

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

Nos. 07AP-273  
and  
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(ACCELERATED CALENDAR)

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MEMORANDUM DECISION

Rendered on August 17, 2010

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*Morganstern, MacAdams, & DeVito Co., and Michael A. Partlow, for appellant.*

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

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ON APPLICATION FOR RECONSIDERATION

KLATT, J

{¶1} Appellant, Trans Rail America, Inc. ("Trans Rail"), has filed an application for reconsideration pursuant to App.R. 26(A)(1) For the following reasons, we deny the application

{¶2} When presented with an application for reconsideration filed pursuant to App.R. 26(A)(1), an appellate court must determine whether the application calls to the court's attention an obvious error in its decision or raises an issue that the court should

have, but did not, fully consider. *Columbus v. Hodge* (1987), 37 Ohio App 3d 68, 69. An appellate court will not grant an application for reconsideration merely because a party disagrees with the logic or conclusions of the underlying decision. *Callander v. Callander*, 10th Dist. No. 07AP-746, 2008-Ohio-3128, ¶2; *Bae v. Dragoo and Assoc, Inc.*, 10th Dist. No. 03AP-254, 2004-Ohio-1297, ¶2.

{¶3} First, Trans Rail disputes this court's conclusion that R.C. 3714.03, as amended by Am.Sub.H.B. No. 397, applied to Trans Rail's application for a construction and demolition debris facility. See *Trans Rail America, Inc. v. Enyeart*, 10th Dist. No. 07AP-273, 2010-Ohio-3012, ¶16. When amending the statutory scheme governing construction and demolition debris facilities, the General Assembly specified that pre-Am.Sub.H.B. No. 397 law would apply to pending construction and demolition debris facility applications if they met certain requirements. The General Assembly vested the Director of the Ohio Environmental Protection Agency ("director") with the authority to determine whether a particular application satisfied the requirements. Because Trans Rail failed to prove that it had requested and received a determination from the director as to its application, we concluded that the amended statutes, including the new siting criteria contained in amended R.C. 3714.03, applied to Trans Rail's application.

{¶4} In support of its application for reconsideration, Trans Rail attaches a letter from its attorney asking the director to determine whether Trans Rail's application met the requirements to avoid the dictates of the new law. This letter does not alter our conclusion that the statutory amendments applied to Trans Rail's application. Trans Rail could only achieve exemption from the statutory amendments if the director determined

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that its application satisfied the requirements set forth by the General Assembly. The letter does not answer whether the director made this determination.

{¶5} Next, Trans Rail complains that this court did not determine whether or not the Environmental Review Appeals Commission ("ERAC") erred in failing to conduct a hearing before deciding that it did not have jurisdiction over Trans Rail's appeal. When a higher court remands a case to a lower court, the decree of the higher court binds the lower court, and the lower court must execute the decree according to the higher court's mandate. *State ex rel. Heck v. Kessler*, 72 Ohio St.3d 98, 101, 1995-Ohio-304; *State ex rel. Natl. Electrical Contractors Assn. v. Ohio Bur. of Emp. Servs.* (Sept. 16, 1999), 10th Dist. No. 97AP-895 A lower court may not consider the remanded case for any other purpose, may not give any other or further relief, may not review for apparent error, and may not otherwise intermeddle with the case except to settle so much as has been remanded. *Heck* at 101; *Natl. Electrical Contractors Assn.* In remanding the case to this court, the Supreme Court of Ohio tasked this court with determining whether the May 31, 2006 letter was a final decision appealable to ERAC under R.C. 3745.04(B). *Trans Rail America, Inc. v. Enyeart*, 123 Ohio St.3d 1, 2009-Ohio-3624, ¶¶36-37. We fulfilled this mandate. We find no error in our refusal to expand the mandate to consider whether ERAC should have held a hearing.

{¶6} For the foregoing reasons, we deny Trans Rail's application for reconsideration.

*Application denied.*

TYACK, P.J., and FRENCH, J., concur.

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