IN THE SUPREME COURT OF OHIO

08-0359

TRANS RAIL AMERICA, INC.,	:	CASE NO. 2007-1549
Appellee,	:	
	:	On Appeal from the Franklin County
v.	:	Court of Appeals, Tenth Appellate
	:	District
JAMES J. ENYEART, M.D., HEALTH COMMISSIONER, TRUMBULL COUNTY HEALTH DEPARTMENT	:	
Appellant.	:	

REPLY BRIEF OF *AMICUS CURIAE* HUBBARD ENVIRONMENTAL AND LAND PRESERVATION IN SUPPORT OF APPELLANT JAMES J. ENYEART, M.D., HEALTH COMMISSIONER

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INTRODUCTION

Trans Rail submitted its original application for a construction and demolition debris ("C&DD") facility license on May 21, 2004. (App. p. 21, ¶ 4.) On July 16, 2004, the Trumbull County Health Department determined the application to be incomplete and requested that Trans Rail remedy the deficiencies before the Health Department could process the application. (App. p. 21, ¶ 5.) Trans Rail did not dispute the Health Department's determination that the application was incomplete, but rather, submitted additional information to the Health Department on December 19, 2005. (App. pp. 22-23, ¶¶ 7 & 9.) The Health Department determined that the application was still incomplete and outlined the deficiencies remaining in the application. (App. p. 26, ¶ 12.) Again, Trans Rail did not dispute the Health Department's incompleteness determination but submitted supplemental information to the Health Department on April 6, 2006. On May 31, 2006, the Health Department determined that Trans Rail's application was still incomplete. (Supp. p. 1.) In particular, the Health Department noted that the application lacked the siting criteria required by the C&DD program amendments effective December 31, 2005. (Supp. p. 104.)

The propositions of law brought before this Court concern only the Health Department's May 31, 2006 determination that Trans Rail's application is incomplete. The completeness of the prior applications was not an issue appealed to ERAC in the underlying action. The issues before this Court are (1) whether R.C. 3745.04 grants ERAC jurisdiction over appeals alleging that the director or local board of health has failed to act; and (2) if ERAC has jurisdiction over only final actions of the director or board, whether the Health Department's May 31, 2006 incompleteness determination is a final appealable action.

REPLY ARGUMENT

R.C. 3745.04 grants ERAC with jurisdiction over appeals from final actions of the director or local board of health; it does not provide ERAC with jurisdiction over the director or local board of health's failure or refusal to act. The statute does grant ERAC with the power to issue an order ordering the director or local board of health to act, but such power does not imply that ERAC has unfettered jurisdiction to accept any appeal. ERAC may order the director or local board of health to act only after ERAC has determined that the director or board's prior "final action" was unlawful or unreasonable. ERAC's power to order the director or local board of health to perform an act must be distinguished from its jurisdiction, which is only established when the director or board has taken a final action. The Trumbull County Health Department's determination that Trans Rail's construction and demolition debris ("C&DD") facility license application is incomplete is not a final action appealable to ERAC.

I. R.C. 3745.04 Does Not Grant ERAC Jurisdiction over the Director or Local Board of Health's Failure or Refusal to Act.

As a statutorily-created administrative review board, ERAC's jurisdiction is confined by the parameters set forth in its authorizing statutes, including R.C. 3745.04. In interpreting the statutory scheme set forth in R.C. 3745.04, the courts have consistently held that ERAC's jurisdiction is limited to appeals from final acts or actions of the director or board of health. *US Technology Corp. v. Korleski* (2007), 173 Ohio App. 3d 754, 2007-Ohio-6087, 880 N.E.2d 498; *Dayton Power and Light Co. v. Schregardus* (1997), 123 Ohio App.3d 476, 704 N.E.2d 589. In this case, the amici curiae arguing in support of Trans Rail urge this Court to hold that the phrase, "or ordering the director or board of health to perform an act" in R.C. 3745.04 means that ERAC has jurisdiction over instances in which the director or local board of health has failed or refused to act. The amici curiae rely on the Supreme Court decision, *State ex*

rel. Ohio Democratic Party v. Blackwell (2006), 111 Ohio St.3d 246, to support its argument that the General Assembly has the authority to grant an administrative tribunal, such as ERAC, with jurisdiction over an agency's failure to act. The General Assembly grants exclusive original jurisdiction to an administrative tribunal by statute, and the General Assembly in R.C. 3745.04 did not grant ERAC jurisdiction over the director or local board of health's failure to act.

The *Blackwell* case involved the jurisdiction of the Ohio Elections Commission as established in R.C. 3517.151, which provides in part, "[C]omplaints with respect to **acts or failures to act** under the sections listed in division (A) of section 3517.153 of the Revised Code shall be filed with the Ohio elections commission." (Emphasis added.) The Ohio Elections Commission's jurisdiction over failures to act is further detailed in the statutes setting forth the procedures for filing a complaint and holding a hearing before the commission. For example, a complaint must be filed with the commission within two years after the occurrence of **the act or failure to act**. R.C. 3517.157. The commission's attorney reviews the complaint to determine whether it sets forth a **failure** to comply. R.C. 3517.154. At the hearing, the commission determines whether the **failure to act** or violation alleged in the complaint has occurred. R.C. 3517.155.

The statutory scheme for appeals and hearings before ERAC is quite different from the statutes establishing the Ohio Elections Commission. An appeal to ERAC must be in writing and set for the **action** complained of. R.C. 3745.04(D). R.C. 3745.04(D) provides that an appeal to ERAC must be filed within thirty days of the director or board's **action**. The words "failure to act" are conspicuously absent from R.C. 3745.04. If the General Assembly had intended to give ERAC jurisdiction over the director or board's failure to act, as it did intend with the Ohio Elections Commission, then the General Assembly would have specifically stated

it in the statute establishing the procedure for filing appeals to ERAC. Because R.C. 3745.04 provides that the appeal must set forth the **action** complained of and must be filed within thirty days of the **action**, the General Assembly intended for ERAC to have jurisdiction over only final **actions** of the director or local board of health, and not the director or board's failures to act.

The phrase "or ordering the director or board of health to perform an act" is not negated by the interpretation that ERAC has jurisdiction over only final actions. In reconciling the language in the phrase with the rest of R.C. 3745.04, the courts have held that the phrase authorizes ERAC to order the director or board to perform an act in cases in which ERAC has found the director or board's prior action to be unreasonable or unlawful. See, *Ontario v. Whitman* (1973), 47 Ohio App. 2d 81, 352 N.E.2d 162. (R.C. 3745.04 provides ERAC power to order the director to perform an act, such as to issue a permit when the board finds the final action of the director to be unreasonable and unlawful.) The phrase grants ERAC with the power to order the director or local board of health to perform an act, but it does not grant ERAC with jurisdiction beyond appeals from final actions. The phrase "or ordering the director or board of health to perform an act" cannot be isolated from the entire statute set forth in R.C. 3745.04, which as explained above, clearly establishes that ERAC has jurisdiction over final actions of the director or local board of health.

II. The Trumbull County Health Department's Determination that the Application Was Incomplete Is Not a Final Appealable Action Because It Is Not a Denial of the C&DD License and Trans Rail's Legal Rights Have Not Been Determined with Finality.

As set forth above, ERAC has jurisdiction over final actions of the director or board of health. Thus, ERAC has jurisdiction over Trans Rail's appeal only if the Health Department's May 31, 2006 incompleteness determination was a final action. Trans Rail argues that the incompleteness determination is a final action because it is equivalent to a denial of

Trans Rail's C&DD facility license. (Appellee's Merit Brief, p. 6.) Trans Rail's argument fails, however, because the denial of a C&DD license must be made on the merits of a complete application. A board of health can neither issue nor deny the license until after "all the statutorily and regulatorily enumerated and mandatory components of the application have been reasonably and fully answered." *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health* (2005), 2005-Ohio-3146 citing *CECOS Internatl., Inc. v. Shank* (1991), 74 Ohio App.3d 43, 598 N.E.2d 40. Licensing authorities are not to consider incomplete applications, and if an application is incomplete when received, the licensing authority must notify the applicant of any deficiencies contained therein. *Harmony Environmental Ltd.* at ¶ 9 citing OAC 3745-37-02(A)(2) & (A)(3).

In compliance with the holding of *Harmony Environmental Ltd.*, the Health Department reviewed Trans Rail's license application, determined it to be incomplete and notified Trans Rail of the deficiencies. The Health Department's incompleteness determination is not a denial of Trans Rail's C&DD license because, as the court in *Harmony Environmental Ltd.* made clear, the Health Department is precluded from denying the license until the application is complete.

This case is distinguishable from *Cain Park Apartments v. Nied* (June 25, 1981), 10th App. No. 80AP-817, 1981 Ohio App. LEXIS 12873, because the Health Department did not return the C&DD license application to Trans Rail but requested Trans Rail to submit additional information to complete the application. See also, *City of Cleveland v. Martin* (2005), 2005-Ohio-6482 (Letter from Ohio EPA stating that it could not process permit to relocate until evidence of compliance with city's zoning regulation was provided was not a final action that could be appealed.). In *Cain Park Apartments*, the Tenth District Court of Appeals had held that

Ohio EPA's return of a defective application for registration status to the applicant under Ohio Adm. Code 3745-35-02(B)(9) constituted an appealable action. The court emphasized that "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 would thus serve as the basis for an appeal to ERAC. Id. at *7 (emphasis added). In the present case, the Health Department did not treat Trans Rail's application has having never been filed. Instead, the Health Department informed Trans Rail that its application was not complete and outlined for Trans Rail the missing statutory and regulatory components of the application. The Health Department did not return the application, but rather, requested Trans Rail to submit the missing information so that the Health Department could process the application.

Once Trans Rail has completed its application, the Health Department will then determine whether to issue or deny the C&DD license to Trans Rail. Contrary to Trans Rail's arguments, Trans Rail's legal rights and privileges have not been determined or adjudicated with finality by the issuance of the incompleteness determination letter because Trans Rail has the opportunity to respond to the letter and remedy the deficiencies in its application. Cf., *Dayton Power & Light Co. v. Schregardus* (1997), 123 Ohio App.3d 476, 704 N.E.2d 589. In *Dayton Power & Light*, the court had held that the listing of property on Ohio EPA's Master Sites List (a listing of contaminated and suspected-contaminated sites) was a final action because it affected the property rights of DP&L with finality. DP&L did not have prior notice of the listing or an opportunity to comment on the listing. Because no mechanism existed for removing sites from the list, the court determined that a property owner's only recourse was to appeal to ERAC. In this case, Trans Rail received notice that its application was incomplete and has the opportunity to comment and submit additional information to the Health Department. Trans Rail's rights

have not been determined with finality, and, thus, the Health Department's incompleteness determination is not a final appealable action.

Trans Rail has also argued that the Health Department's incompleteness determination has affected its legal right to have its application "grandfathered" from the new C&DD program amendments. This argument is without merit. Only applications submitted prior to July 1, 2005, and deemed complete by December 31, 2005, can qualify for the grandfathering provision. *Sautter v. Koncelik* (January 18, 2007), Case No. ERAC 175867-595868; 175875-595876, 2007 Ohio ENV LEXIS 17 (The grandfathering provision is set forth in Section 3.(A) of Am. Sub. H.B. 397. During the six-month period between July 1, 2005, and December 31, 2005, a moratorium had been enacted prohibiting the issuance of any C&DD facility licenses during that period.).

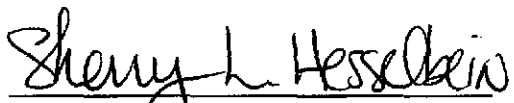
Trans Rail's application fails to qualify for the grandfathering provision because, although its initial application was submitted prior to July 1, 2005, the application was not deemed complete by December 31, 2005. In fact, the Health Department found the initial application submittal to be incomplete on July 16, 2004, almost one year before the moratorium was enacted. Trans Rail did not attempt to complete its application until December 19, 2005, months after the moratorium had commenced. On February 15, 2006, the Health Department determined that the additional information submitted on December 19, 2005, did not complete the application. Because the application was not deemed complete by December 31, 2005, the application does not qualify to be grandfathered from the new amendments[1].

[1]Additionally, Trans Rail never requested a determination from the Director of Ohio EPA whether the grandfathering provision applies to Trans Rail. See, Section 3.(A) of Am. Sub. H.B. 397.

CONCLUSION

For all of the reasons set forth above, amici curiae respectfully urge this Court to reverse the decision of the Court of Appeals and reinstate the order of dismissal entered by the Environmental Review Appeals Commission.

Respectfully submitted,



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UNPUBLISHED DECISIONS

LEXSEE 1981 OHIO APP. LEXIS 12873

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

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

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

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

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

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

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

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

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

In the unreported decision of this court in *Thompson Apartments* v. *John F. McAvoy, Director of Environmental Protection*, No. 80AP-382, rendered September 11, 1980 (1980 Decisions, page 2894), appellant applied for a permit to operate an incinerator without submitting any information of the emission from its incinerator by

stack tests, mass balance tests or any other methods. Rather than return the application as being defective, as in the case now before us, the EPA determined the amount of emissions by using emission factors from a federal publication and denied the application finding that the applicant did not bear its burden of proof of compliance with Ohio Adm. Code, Sec. 3745-35-02(C). Said denial was affirmed by the EBR and this court. The return of the application for registration by the EPA, in the case now before us, has the same legal significance as the denial of the application in *Thomson Apartments*. In fact, the decision to treat the applications for registration as if they had never been filed cannot be distinguished from a denial [*9] of the applications for registration status based on the failure of appellants to bear the burden of proof that the incinerators in question qualify for registration as defined by Ohio Adm. Code, Sec. 3745-35-05(F)(1).

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

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

LEXSEE 2007 OHIO ENV LEXIS 17

ROLAND SAUTTER, ET AL., Appellants, v. JOSEPH P. KONCELIK, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL., Appellees

Case No. ERAC 175867-595868; 175875-595876

Ohio Environmental Board of Review

2007 Ohio ENV LEXIS 17

January 18, 2007, Issued

[*1]

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COUNSEL FOR APPELLEE MORROW COUNTY BOARD OF HEALTH: Joseph R. Durham, Esq., Albin Bauer II, Esq., EASTMAN & SMITH, LTD., Columbus, Ohio.

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

OPINION:

RULING ON MOTION FOR SUMMARY JUDGMENT AND FINAL ORDER

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon Motions for Summary Judgment filed by Appellee Washington Environmental, Ltd. ("Washington") and Memoranda in Opposition filed by Appellants Roland Sautter, Michael G. Struck, Tom R. Hall and Edward Stickmiller ("Appellants"). n1 The action underlying the motion is Appellants' appeal of a February 6, 2006 letter of the [*2] Director of the Ohio Environmental Protection Agency ("Director," "Ohio EPA," "OEPA," "the Agency") in which he determined that uncodified Section 3.(A) of Amended Substitute House Bill ("Am. Sub. H.B.") 397 applies to the construction and demolition debris ("C&DD") license application Washington submitted to Appellee Morrow County District Board of Health.

n1 More specifically, on March 30, 2006, Appellee Washington filed a Motion for Summary Judgment relating to the two assignments of error set out in Appellants' original and First Amended Notice of Appeal. Appellants' First Amended Notice of Appeal added Tom R. Hall and Edward Stickmiller as appellants and corrected the spelling of Appellant Roland Sautter's first name. On May 18, 2006, the Commission granted Appellants' Motion for Leave to File Second Amended Notice of Appeal, which expanded the number of assignments of error to six. On May 22, 2006, Washington filed a Motion for Summary Judgment on Second Amended Notice of Appeal, in which it incorporated by reference its first Motion for Summary Judgment, and addressed the new assignments of error presented in Appellants' Second Amended Notice of Appeal. Hereafter, the two motions will be referred to collectively as Appellee's Motion for Summary Judgment or "the motion."

[*3]

Appellants are represented by Mr. Curtis F. Kissinger, Esq., Mr. John G. Cobey, Esq. and Mr. Joseph M. Huston, Esq., Cohen, Todd, Kite & Stanford, LLC, Cincinnati, Ohio. Appellee Washington is represented by Ms. Kristen L. Watt, Esq., Vorys, Sater, Seymour and Pease LLP, Columbus, Ohio and Ms. Summer J. Koladin Plantz, Esq., Vorys, Sater, Seymour and Pease LLP, Cincinnati, Ohio. Appellee Morrow County District Board of Health is represented by Mr. Joseph R. Durham, Esq. and Mr. Albin Bauer II, Esq., Eastman & Smith Ltd., Columbus, Ohio. Appellee Director is represented by Mr. John F. Cayton, Esq. and Mr. George Horvath, Esq., Assistant Attorneys General, State of Ohio.

Based upon the pleadings of the parties and attached exhibits, and relevant statutes, regulations and case law, the Commission issues the following Findings of Fact, Conclusions of Law and Final Order, granting Appellee Washington's Motion for Summary Judgment.

FINDINGS OF FACT

1. Appellee Washington is a wholly owned subsidiary of C&DD Acquisitions, Ltd., a limited liability company engaged in the business of establishing C&DD landfills. (Case File Item P [Motion for Summary Judgment of Appellee Washington Environmental, [*4] Ltd.], Exhibits 1, 2.)

2. In August of 2003, Washington submitted a C&DD license application to the Morrow County District Board of Health ("Board," "Board of Health"), an approved health district authorized, pursuant to Ohio Revised Code ("R.C.") Chapter 3714, to license and inspect C&DD facilities in its jurisdiction. Specifically, the application proposed the construction and operation of a C&DD facility to be located in Washington Township, Morrow County, Ohio. (Case File Item P, Exhibits 1, 2.)

3. Between August 2003 and February 2004, various revisions and supplements to the original application were submitted. The Board held a hearing on the application on February 23, 2004. At the conclusion of the hearing, the Board unanimously voted to deny Washington's application. The Board issued its written Findings & Orders denying the application on February 27, 2004 and Washington appealed this order to the Commission (ERAC case No. 255582). On December 16, 2004, the Commission vacated and remanded the action to the Board of Health, after determining that the Board had acted unlawfully in considering and basing its decision on an incomplete application, in violation of Ohio Administrative [*5] Code Section ("OAC") 3745-37-02(A)(2). The Board of Health timely appealed the Commission's decision to the Tenth District Court of Appeals. On June 23, 2005, the court of appeals affirmed the Commission's decision in *Washington Environmental, Ltd. v. Morrow Cty. Dist. Bd. of Health* (June 23, 2005) Franklin App. No. 04AP-1367. (Case File Item P, Exhibits 1, 2.)

4. One week after the court issued its decision, on July 1, 2005, the Ohio General Assembly passed the State's Biennial Budget Bill (Am. Sub. H.B. 66). The budget bill included a provision establishing a six-month moratorium, from July 1, 2005 to December 31, 2005, in which certain C&DD licenses for new facilities could not be issued. n2 The moratorium provision also created the Construction and Demolition Debris Facility Study Committee to "study the laws of this state governing construction and demolition debris facilities and the rules adopted under those laws and . . . make recommendations to the General Assembly regarding changes to those laws . . . ." (Case File Item P, Exhibit 3.)

> n2 None of the exceptions to the moratorium, *e.g.*, for a new facility to be located adjacent or contiguous to a previously licensed C&DD facility, *etc.*, are applicable herein. (Case File Item P, Exhibit 3.)

[*6]

5. A July 13, 2005 Ohio EPA Interoffice Memorandum from Mandi Graham of the Division of Solid and Infection Waste Management, to District Office Supervisors and C&DD Licensing Authorities, discussed the moratorium provision in Am. Sub. H.B. 66, as follows:

> The Division of Solid and Infectious Waste Management (DSIWM) has received many inquiries on the review of construction and demolition debris (C&DD) license applications in light of the recently enacted legislation that imposes a six-month (July 1 to December 31, 2005) moratorium on the issuance of C&DD licenses for new facilities. . . .

Sixty-day Time Frame for Review for Completeness

The first inquiry is in regard to the sixty-day time frame to notify the applicant of an incomplete application. This requirement, found in *Ohio Administrative Code (OAC) rule 3745-37-02*, states that, within sixty days from the date of receipt of an application for a C&DD facility license, the licensing authority shall notify the applicant if the application is incomplete. The licensing authority must also state the nature of the deficiencies, and that the license application will not be considered [*7] until it is complete.

The moratorium, found in section 513.03 of Am. Sub. H.B. 66, does not change this requirement. Therefore the licensing authority should review a license application for completeness and notify the applicant as necessary.

Ninety-day Time Frame for Issuance of License

The second inquiry is in regard to the ninety-day time frame for the issuance or denial of the license after a complete application is received, in accordance with *OAC rule 3745-37-04*. The question is whether or not the licensing authority must review a complete license application for a new facility during the moratorium.

While the moratorium prevents a licensing authority from issuing licenses for new facilities (unless certain conditions are met), it is clear that the moratorium does remove this time frame requirement from the licensing authority. Complete applications should continue to be reviewed with the expectation to either grant or deny the licenses at the end of the moratorium. . . . (Case File Item P, Exhibit 4.)

6. On September 20, 2005, the Morrow County Health Commissioner, Krista R. Wasowski, MSW, MPH, sent correspondence notifying [*8] Washington that its application had been determined to be complete as of September 9, 2005. n3 Further, consistent with the advice in Ms. Grahams' memorandum, Ms. Wasowki stated:

Pursuant to *Ohio Administrative Code Section 3745-37-04(D)*, the Board of Health shall either grant or deny a license within ninety (90) days of the date upon which a complete application is received. As . . . the application[s] is complete, the Board has 90 days from September 9, 2005, or December 8, 2005 to either grant or deny the licenses. However, Am. Sub. H.B. 66, effective July 1, 2005, imposes a six-month moratorium on the issuance of Construction and Demolition Debris Licenses. Guidance from the Ohio Environmental Protection. Agency, in a July 13, 2005 memorandum, suggests that 'complete applications should continue to be reviewed with the expectation to either grant or deny the licenses at the end of the moratorium.' Thus, the Board of Health will continue to review the application[s] with the expectation to either grant or deny the license[s] after December 31, 2005. . . . n4 (Case File Item P, Exhibit 5.)

n3 Subsequent to the Commission's earlier decision finding Washington's application to be incomplete, Washington filed amended applications to address noted deficiencies on December 27, 2004, June 28, 2005, July 11, 2005 and September 9, 2005. (Case File Item P, Exhibit 11.)

[*9]

n4 When Ms. Wasowski refers to "applications" and "licenses" it appears she is referring not only to the application filed by Appellee Washington, but also to an application filed with the Board of Health by Harmony Environmental, LTD. ("Harmony"), another wholly owned subsidiary of C&DD Acquisitions, Ltd. During this same operative time period, Harmony was seeking to construct and operate a C&DD facility in Harmony Township, Morrow County, Ohio. An appeal relating to the application submitted by Harmony, containing nearly identical issues to those under consideration herein, was filed with the Commission by the same Appellants. Pursuant to a

Motion to Dismiss filed by Appellants on December 7, 2006, the Commission dismissed the Harmony appeal on December 12, 2006. (ERAC Case Nos. 175860-175861, ERAC Case Nos. 175873-595874.)

7. On December 22, 2005, Am. Sub. H.B. 397, became effective as an emergency measure. This legislation amended a number of provisions in the state's construction and demolition debris program. Further, uncodified Section 3.(A) of the act contained the following grandfather [*10] clause:

> **Section 3.** (A) Notwithstanding the amendments to Chapter 3714. of the Revised Code by this act, an application for a license to establish or modify a construction and demolition debris facility submitted to a board of health or the Director of Environmental Protection, as applicable, prior to July 1, 2005, shall be reviewed and the license shall be issued or denied in accordance with the provisions of that chapter as they existed on July 1, 2005, *if all of the following apply* to the applicant for the license:
>
> (1) The applicant *has acquired an interest in the property on which the facility will be located on or before May 1, 2005.*
>
> (2) The applicant *has begun a hydrogeologic investigation pursuant to section 3745-400-09 of the Ohio Administrative Code prior to submitting the application.*
>
> (3) The applicant *has begun the engineering plans for the facility prior to submitting the application.*
>
> (4) The application submitted by the applicant *would have been determined to be complete if the moratorium had not been in effect.*
>
> The Director shall determine whether this division applies to an applicant within forty-five [*11] days after receiving an applicant's request for a determination under this division. (Case File Item P, Exhibit 14, emphasis added.)

8. On December 19, 2005, three days prior to the effective date of Am. Sub. H.B. 397, the Board of Health adopted Resolution No. 012-05 ["RESOLUTION TO APPROVE/DENY THE ISSUANCE OF A CONSTRUCTION AND DEMOLITION DEBRIS FACILITY INSTALLATION AND OPERATION LICENSE TO WASHINGTON ENVIRONMENTAL, INC.], which provided, in relevant part:

> **WHEREAS**, pursuant to H.B. 397 the Applicant has indicated that it will apply to the director of the Ohio Environmental Protection Agency for a determination as to whether or not the applicant meets the following criteria exempting it from the new siting criteria:
>
> . The applicant submitted the application to the board of health prior to July 1, 2005;
>
> . The applicant has acquired an interest in the property on which the facility will be located on or before May 1, 2005;
>
> . The applicant has begun a hydro-geological investigation pursuant to section *3745-400-09 of the Ohio Administrative Code* prior to submitting the application;
>
> . The applicant has begun the engineering [*12] plans for the facility prior to submitting the application; and
>
> . The application submitted by the applicant would have been determined to be complete if a moratorium had not been in effect.
>
> Now, therefore, upon motion of Board Member Woodward, seconded by Board Member Ghazi,
>
> BE IT RESOLVED BY THE MORROW COUNTY BOARD OF HEALTH, BOARD MEMBERS;
>
> 1. In anticipation that the Governor will sign H.B. 397 prior to January 1, 2006, the Board will take no action to approve or deny the Washington Environmental, Inc. license appli-

> cation for 2006 to install and operate a construction and demolition debris facility until the director of the Ohio Environmental Protection Agency makes a final determination that the applicant is entitled to the 'grandfather clause' in Section 3 of H.B. 397. . . . (Case File Item P, Exhibit 6; Certified Record ["C.R."] Item 6. n5)

n5 Exhibit 6 to Appellee Washington's Motion for Summary Judgment was incomplete. Therefore, in making its determination today, the Commission utilized the complete copy of Board of Health Resolution No. 012-05 found at CR Item 6.

[*13]

9. As stated in Resolution 012-05, on December 23, 2005, Washington sent a formal request, including supporting documentation, to the Director of the Ohio EPA for "a determination pursuant to ORC 3745.063(A) [*sic*] that its Application for a construction and demolition debris facility meets the criteria set forth in subsections (1) through (4) of the statute." Of particular relevance for purposes of the instant motion, were the following passages from Washington's request:

> **(2) The applicant has begun a hydro-geologic investigation pursuant to section *3745-400-09 of the Ohio Administrative Code* prior to submitting the application.**
>
> The license application was originally submitted on August 15, 2003. Prior to the submission, a hydro-geologic investigation was conducted, as reflected in the soil boring and groundwater monitoring well data submitted with the initial license application. I have enclosed a complete copy of the application for your review. Please note that the Site Characterization Report, under Tab 3, at Appendix 3, the Boring Logs indicate that the boring labeled B1 was completed on June 11, 2003; the boring labeled [*14] B2 was completed on June 11, 2003; the boring labeled B3 was completed on June 12, 2003; the boring labeled GB 1 was completed on June 18, 2003; the boring labeled GB2 was completed on June 18, 2003; the boring labeled GB3 was completed on June 18, 2003; the boring labeled GB4 was completed on June 18, 2003; the boring labeled GB5 was completed on June 18, 2003; and the boring labeled GB6 was completed on June 18, 2003; and the boring labeled GB8 was completed on June 18, 2003, all prior to submission of the initial license application on August 15, 2003. . . .
>
> **(4) The application submitted by the applicant would have been determined to be complete if the Moratorium had not been in effect.**
>
> The Morrow County Board of Health found the Washington Environmental, Ltd. application to be complete, on January 30, 2004. I have enclosed a copy of the Morrow County Board of Health's letter confirming the completeness of the application as of January 30, 2004. n6 (Case File Item P, Exhibits 8, 9, 15.)

n6 Washington's request to the Director was sent by Mr. Kitt C. Cooper. In his correspondence, it appears Mr. Cooper is referencing a finding of completeness made by the Board of Health prior to its February 23, 2004 denial of Washington's license application. As discussed above, Washington appealed the Board of Health's denial of its license application to the Commission, which vacated and remanded the action after finding that the Board had based its decision on an incomplete application. The Commission's decision was affirmed by the Franklin County Court of Appeals. As such, Mr. Cooper's statement that "[t]he Morrow County Board of Health found the Washington Environmental, Ltd. application to be complete, on January 30, 2004," while technically correct,

is inaccurate to the extent that it fails to acknowledge the subsequent decision rendered by this Commission and affirmed by the Franklin County Court of Appeals, finding the application to be incomplete.

[*15]

10. On January 23, 2006, Ms. Wasowski sent a letter to Dan Harris, Ohio EPA, DSIWM, in which she indicated, "[i]n response to our conversation and inquiry, the Morrow Board of Health has not taken a position regarding whether or not the grandfather provision in HB 397 applies to these Applicant(s)." (Case File Item P, Exhibit 11.)

11. On February 6, 2006, Joany Snider, Ohio EPA, DSIWM, Processing and Engineering Unit, sent a memorandum and attached letter for signature to the Director regarding "Washington Environmental, Ltd., Morrow County Director's Determination Pursuant to Uncodified Section 3.(A) of H.B. 397." Ms. Snider's memorandum discussed the four criteria that must be satisfied for Section 3.(A) to apply to an applicant and applied those criteria to information submitted by Mr. Cooper on behalf of Washington. Of particular relevance for purposes of the instant motion, was the following:

> A request for a Director's determination was submitted by Mr. Kitt Cooper, on behalf of Washington Environmental, Ltd., regarding Washington Environmental, Ltd.'s license application to establish a new C&DD facility in Washington Township, Morrow County. . . . The request contained [*16] information regarding each of the four criteria listed in Section 3.(A):
>
> 1. . . .
>
> 2. **Hydrogeologic investigation:** The license application was originally submitted on August 15, 2003. Prior to submission, a hydrogeologic investigation was completed, and is reflected in the soil boring and ground water monitoring well data submitted with the initial license application.
>
> 3. . .
>
> 4. **Complete application:** Washington Environmental, Ltd. submitted a revised license application to the Morrow County Health Department (MCHD) on September 9, 2005. In a letter dated September 20, 2005, MCHD informed the applicant that, after review of the revised application, the license application was determined to be complete. To satisfy this criterion, the application was not required to be deemed complete prior to July 1, 2005; a completeness determination is only required sometime during the moratorium period. (Case File Item NN [Supplemental Memorandum of Appellants in Opposition to Motion for Summary Judgment of Appellee Washington Environmental, Ltd.], Exhibit F.)

12. That same day, February 6, 2006, the Director sent the following correspondence notifying Washington of his determination [*17] that Section 3.(A) of Am. Sub. H.B. 397 applies to its license application:

> Ohio EPA has reviewed your request and associated information, and has determined that uncodified Section 3.(A) of Amended Substitute House Bill 397 applies to Washington Environmental, Ltd. Therefore, the license application to establish a C&DD facility submitted by Washington Environmental, Ltd. shall be reviewed and the license shall be issued or denied pursuant to the provisions of ORC Chapter 3714 as they existed on July 1, 2005. (Case File Item P, Exhibit 12.)

13. On February 27, 2006, Appellants timely filed an appeal of the Director's determination letter. Specifically, the assignments of error alleged by Appellants, as set out in their Second Amended Notice of Appeal, may be summarized:

> 1. The Director's determination that the grandfather provisions of Am. Sub. H.B. 397 apply to Washington's application for a C&DD license is unreasonable and unlawful in the following regards: 1) the Director erroneously concluded that a hydrogeologic investigation complying with *Ohio Administrative Code*

("OAC") 3745-400-09 had sufficiently "begun" prior to July [*18] 1, 2005; and 2) the Director erred in concluding that the application submitted by Washington was complete prior to July 1, 2005.

2. The Director's determination that the grandfather provision of Am. Sub. H.B. 397 applies to the application submitted by Washington is unreasonable and unlawful because it does not set forth the facts upon which the Director relied in making his determination.

3. The Director unreasonably and unlawfully substituted his judgment regarding the completeness of Washington's application for that of the Tenth District Court of Appeals and the Morrow County Board of Health, both of which had determined that Harmony's application, as it existed July 1, 2005, was incomplete.

4. The grandfather provision set out in uncodified Section 3.(A) of Am. Sub. H.B. 397 is unconstitutional. (Case File Item W [Second Amended Notice of Appeal].)

14. This matter is now before the Commission pursuant to Washington's Motion for Summary Judgment, Appellants' Memorandum and Supplemental Memorandum in Opposition, Appellee Director's Response, and all exhibits appended to those filings. n7 (Case File Items P, HH [Appellee Washington Environmental, Ltd.'s Motion for Summary [*19] Judgment on Appellants' Second Amended Notice of Appeal], AA [Appellants' Memorandum in Opposition to Appellee, Washington Environmental, Ltd.'s Motion for Summary Judgment], NN and UU.)

n7 In addition to the previously discussed documents, Appellants' Supplemental Memorandum in Opposition to Motion for Summary Judgment relied heavily on an undated Certified Record document (C.R. Item 4) captioned, "Procedure for Evaluating H.B. 397 'Grandfather' Provision Requests". The first portion of the document, entitled "Background," contained the following statement: "To qualify for consideration under this provision, the applicant must demonstrate to the Director of Ohio EPA . . . (4) that the application submitted to the board of health would have been deemed complete by the board *at the time of submission.*" (Emphasis added.) Appellee Director filed a Supplemental Appellee's Response to Appellants' Motion Opposing Washington's Motion for Summary Judgment, with the Affidavit of Dan Harris, Chief of the Division of Solid and Infectious Waste Management, attached. In his Affidavit, Mr. Harris discussed this document, as follows:

10. The document does not contain any official letterhead, is not an Ohio EPA policy or Ohio EPA rule.

11. Specifically, the document that is titled 'Procedure for Evaluating HB 397 "Grandfather" Provision Requests' was simply a result of preliminary discussions by my personnel in an attempt to identify responsibilities of my staff in processing 'Grandfather' provision requests.

12. The subject document is and remains a draft. Specifically, the portion of this draft under the heading 'Background' *is incorrect and not consistent with statute. This preliminary and incorrect background summary is not and was not finalized or utilized in determining the applicability of the statute. . . .*

The Commission notes that Mr. Harris' Affidavit invalidates the portion of this document which was extensively relied upon by Appellants in their Supplemental Memorandum in Opposition to Motion for Summary Judgment. (Case File Items NN, UU [Supplemental. Appellee Director's Response to Appellants' Motion Opposing Washington's Motion for Summary Judgment]; CR Item 4; emphasis added.)

[*20]

CONCLUSIONS OF LAW

1. Summary judgment is a procedural mechanism to terminate litigation when a resolution of factual issues is unnecessary. Although not strictly bound by the Ohio Rules of Civil Procedure, the Commission has historically applied *Civil Rule 56* ["Summary judgment."] when addressing motions for summary judgment. (*Waste Management of Ohio, Inc. v. Board of Health of the City of Cincinnati*, Case Nos. ERAC 315713, 315743 [September 29, 2005]; *General Electric Lighting v. Jones*, ERAC Case No 185017 [August 21, 2003]; *Belmont County Defenders, et al. v. Jones*, ERAC Case Nos. 074914-074919. [November 21, 2001].)

2. *Ohio Civil Rule 56* provides, in part, ". . . [s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

3. Thus, summary judgment is appropriate upon a demonstration of the [*21] following three factors: "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." (*Waste Management of Ohio, Inc. v. Board of Health of the City of Cincinnati, supra*, citing *Harless v. Willis Day Warehousing Co., Inc., 54 Ohio St. 64* [1978].)

4. In *Elmer and Mary Carter, et al. v. City of Columbus, et al. (August 15, 1996) 1996 WL 465252* (Ohio App. 10 Dist.), the Franklin County Court of Appeals discussed the relative burdens upon the making of a motion for summary judgment, as follows:

> A party seeking summary judgment on the ground that the nonmoving party cannot prove its case bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving [*22] party's claim. The burden then shifts to the nonmoving party, as outlined in *Civ. R. 56(E)*, to set forth specific facts showing that there is a genuine issue for trial. *Dresher v. Burt (1996), 75 Ohio St. 3d 280, 293. Civ. R. 56(E)* provides:
>
> > '*** When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.'

5. The Commission finds a careful reading of the various pleadings and appended exhibits reveals that there are no genuine issues as to any material fact which would preclude resolution of the instant matter pursuant to summary judgment. As such, the Commission will now analyze Section 3.(A) of Am. Sub. H.B. 397, and apply its provisions to the facts established herein.

6. Section 3.(A) of Am. Sub. H.B. 397 provides:

> **Section** [*23] **3.** (A) Notwithstanding the amendments to Chapter 3714. of the Revised Code by this act, *an application* for a license to establish or modify a construction and demolition debris facility *submitted* to a board of health or the Director or Environmental Protection, as applicable, *prior to July 1, 2005, shall be reviewed and the license shall be issued or denied in accordance with the provisions of that chapter as they existed on July 1, 2005, if all of the following apply* to the applicant for the license:
>
> (1) The applicant *has acquired* an interest in the property on which the facility will be located on or before May 1, 2005.
>
> (2) The applicant *has begun a hydrogeologic investigation* pursuant to section *3745-400-09 of the Ohio Administrative Code prior to submitting the application.*
>
> (3) The applicant *has begun the engineering plans* for the facility *prior to submitting the application.*

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

The director shall determine whether this division applies to an applicant within forty-five [*24] days after receiving an applicant's request for a determination under this division. (Emphasis added.)

7. Pursuant to a request by Washington, the Director determined that Section 3.(A) of Am. Sub. H.B. 397 applies to Washington's license application. Appellants initially challenge the propriety of the Director's determination relative to the following two specific criteria in Section 3.(A): 1) the Director erroneously concluded a hydrogeologic investigation complying with *OAC 3745-400-09* had "sufficiently 'begun' prior to July 1, 2005; and 2) the Director erred in concluding that the application submitted by Harmony was complete prior to July 1, 2005.

8. First, Appellants' assert that the Director erroneously concluded a hydrogeologic investigation "had sufficiently 'begun' prior to July 1, 2005." In fact, the relevant inquiry under the plain language of Section 3.(A)(2) is whether such an investigation had begun "prior to submitting the application," not prior to July 1, 2005. Further, contrary to Appellants' assertion, Section 3.(A)(2) does not require that the investigation have "sufficiently begun," only that it have "begun." [*25]

9. *Ohio Revised Code § 1.42* [Common and technical use.] instructs, in part: "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. . . ." "Begin" is defined in *Webster's II New Riverside University Dictionary* as "to start to do something" or to "commence." Applying this definition to the documents appended to Washington's Motion for Summary Judgment, which were presented to the Director for him to make his determination, clearly establish that a hydrogeologic investigation had more than "started" or "commenced" prior to the application's submission. For example, the Site Characterization Report, submitted with the initial application on August 18, 2003, contains an extensive discussion of the hydrogeologic investigation that had been conducted at the site, including an analysis of eleven soil borings. As such, the Commission finds the uncontroverted evidence establishes that the Director acted lawfully and reasonably in determining that the application filed by Washington met the criterion set out in Section 3.(A)(2).

10. Appellants next challenge the Director's determination under Section [*26] 3.(A)(4) that "[t]he application submitted by [Washington] would have been determined to be complete if the moratorium had not been in effect." It is Appellants' contention that, in order to satisfy this provision, Washington's application must have been complete as of July 1, 2005, when the moratorium commenced. Conversely, it is Washington's assertion, and the Director's finding, that the relevant consideration is whether the application would have been determined to be complete at any point during the moratorium period, such that a licensing decision could have been made, if not for the moratorium.

11. To resolve this challenge, the Commission must carefully examine the language of Section 3.(A)(4), in light of the relevant rules of statutory construction. In addition to the requirement in *R.C. § 1.42*, discussed above, that words should be read in context and construed according to the rules of grammar and common usage, *R.C. 1.47* [Intentions in the enactment of statutes.] states:

In enacting a statute, it is presumed that:
(A) Compliance with the constitutions of the state and the United States is intended;
[*27] (B) The entire statute is intended to be effective;
(C) A just and reasonable result in intended;
(D) A result feasible of execution is intended.

12. The Ohio Supreme Court discussed these fundamental tenets of statutory construction in *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health (2002), 96 Ohio St.3d 250,* as follows:

A basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant, nor should any words be ignored.' *E. Ohio Gas Co. v. Pub. Util. Comm. (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875.* Statutory language 'must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.' *State ex rel. Myers, 95 Ohio St. at 372-373, 116 N.E. 516.*

13. In keeping with this guidance, the Commission finds the only reasonable interpretation of Section 3.(A)(4) which gives effect to every word in [*28] Section 3, is that it applies in those circumstances where an application, submitted prior to July 1, 2005, is determined to be complete at any point during the six month moratorium period. n8 We reach this conclusion for several reasons.

n8 In addition to the factual scenario presented herein, *i.e.*, the Board of Health determined the application was complete during the pendency of the moratorium, the Commission notes that the criterion found in Section 3.(A)(4) would also be satisfied in those circumstances where the regulating entity refrained from formally deeming an otherwise complete application complete, solely due to the existence of the moratorium.

14. First, the plain and unambiguous wording of Section 3.(A)(4) reveals that its terms are satisfied when an application, submitted prior to July 1, 2005, would have been determined to be complete but for the moratorium ("[t]he application submitted by the applicant *would have been determined to be complete if the moratorium had not been in effect.*") [*29]

15. A reading of the remainder of Section 3.(A) underscores the validity of this interpretation. More specifically, the first sentence of Section 3.(A) explicitly states that its provisions apply to applications *submitted* to a board of health prior to July 1, 2005, which satisfy the criteria in Sections 3.(A)(1) -- (4). If the Ohio General Assembly had intended the provisions of Section 3 to pertain only to *complete* applications submitted prior to July 1, 2005, it would have certainly included the word "complete" in this opening sentence.

16. Further, as discussed above, to come within the auspices of the grandfather clause, Section 3.(A)(2) requires only that "[t]he applicant *has begun* a hydrogeologic investigation . . . prior to submitting the application." Additionally, Section 3.(A)(3) provides "[t]he applicant *has begun* the engineering plans for the facility prior to submitting the application." Both of these subsections, by their plain wording, anticipate processes which have been started prior to the submission of the application, but not necessarily completed. It would be nonsensical to read Section 3.(A) to require that an application be complete prior to [*30] July 1, 2005, while simultaneously requiring that the hydrogeologic investigation and engineering plans, both of which are necessary for a complete application, only to have begun. As such, the Commission finds the facts establish that the Director lawfully and reasonably determined that Washington's license application satisfied the requirements of Section 3.(A)(4) of Am.Sub. H.B. 397.

17. Appellants next assert that the Director's determination is unreasonable and unlawful because it does not set forth the facts upon which the Director relied in reaching his determination. The Commission finds no merit to this claim. Nothing in Section 3.(A) of Am. Sub. H.B. 397 indicates the Director is required to enunciate the facts upon which his determination is based. In the absence of such a requirement, the Director's failure to provide such information can not render his decision unreasonable or unlawful.

18. Appellants further contend that the Director unreasonably and unlawfully substituted his judgment regarding the completeness of Washington's application for that of the Tenth District Court of Appeals and the Morrow County Board of Health, which had determined the application, as it [*31] existed on July 1, 2005, to be incomplete.

19. As discussed above, the Commission finds, to satisfy, Section 3.(A)(4) of Am. Sub. H.B. 397, a determination regarding the completeness of an application could have been made at any time during the six month moratorium period. The Tenth District Court of Appeals' decision affirmed an order of this Commission that Washington's application was incomplete as of December 14, 2004, a date well before the moratorium period, and thus irrelevant. Further, although Washington's application remained incomplete as of July 1, 2005, the Board of Health determined that it was complete as of September 9, 2006, a date squarely within the moratorium timeframe. Accordingly, in light of these facts, the Commission finds no merit to Appellants' claim that the Director unreasonably and unlawfully substituted his judgment for that of the Court of Appeals and the Board of Health.

20. Finally, Appellants contend the grandfather provision set out in uncodifed Section 3.(A) of Am. Sub. H.B. 397 is unconstitutional. It is well-settled that the Commission does not possess the requisite jurisdiction to determine the constitutional validity of a statute. (*Canton* [*32] *v. Whitman*, ERAC Case Nos. 74-6 through 74-10 [September 13, 1974]; *Environmental Services Inc. v. Schregardus*, ERAC Case No. 843354 [February 5, 1997]; *Kays v. Schregardus*, ERAC Case No. 673885 [May 26, 1999]; *State ex rel. Columbus S. Power Co. v. Sheward [1992], 63 Ohio St. 3d 78;*

AirTouch Paging v. Tracy [1996], 111 Ohio App.3d 202.) As such, Appellants' assignment of error challenging the constitutionality of Section 3.(A) of Am. Sub. H.B. 397 is hereby dismissed.

21. In sum, having found no genuine issues of material fact regarding Washington's satisfaction of the criterion set out in Section 3.(A) of Am. Sub. H.B. 397, the Commission further finds the Director acted both reasonably and lawfully in determining Washington's application complied with all provisions of this section. Thus, Washington's license application should be reviewed in accordance with the provisions of ORC Chapter 3714 as they existed on July 1, 2005. Accordingly, Washington's Motion for Summary Judgment is hereby granted.

FINAL ORDER

Based on the foregoing, the Commission hereby AFFIRMS the Director's determination that uncodified [*33] Section 3.(A) of Am. Sub. H.B. 397 applies to the C&DD license application filed by Washington Environmental, Ltd. In keeping with this finding, the Commission GRANTS Washington's Motion for Summary Judgment and DISMISSES Appellants' Appeal.

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

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationBinding EffectAdministrative LawJudicial ReviewReviewabilityFactual DeterminationsTortsVicarious LiabilityCorporationsGeneral Overview