

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

MARK CHESLER,

Appellant

v.

CHRIS KORLESKI, DIRECTOR
OF ENVIRONMENTAL PROTECTION, et al.,

Appellees

Case No. ERAC 476257

RULING ON MOTION TO DISMISS AND FINAL ORDER

Rendered on June 16, 2009

Mark Chesler, pro se Appellant

Chester Willcox & Saxbe, LLP, Nathaniel S. Orosz, Esq. and John W. Bentine, Esq.; Law Director City of Oberlin, Eric R. Severs, Esq. for Appellee City of Oberlin

Richard Cordray, Attorney General, Jessica B. Atleson, Esq. and Lauren C. Angell, Esq. for Appellee Chris Korleski, Director of Environmental Protection

ESCHLEMAN, COMMISSIONER

This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon a Joint Motion to Dismiss filed on March 11, 2009, by Appellees Director of the Ohio Environmental Protection Agency ("Director," "Agency," "Ohio EPA") and City of Oberlin ("Oberlin").¹ In the Joint Motion to Dismiss, Appellees

¹ On December 9, 2008, the Commission ruled to join Oberlin as a party-Appellee to the Appeal. (Case File Item B.)

ask this Commission to dismiss Appellant Mark Chesler's appeal of the Director's November 5, 2008 approval of detail plans for a proposed drinking waterline extension in Oberlin, Ohio ("Plan Approval"). (Case File Item A.)

On June 3, 2009, the Commission heard oral argument on Appellees' Joint Motion to Dismiss. Upon conclusion of oral argument, the Commission informed the parties that it would take the matter under advisement. The Commission, after a careful review of the pleadings, relevant statutes, regulations, and case law, issues the following Findings of Fact, Conclusions of Law, and Final Order.

FINDINGS OF FACT

{¶1} On November 5, 2008, the Director issued the Plan Approval to Oberlin for a drinking waterline replacement and extension project incorporating approximately "525 feet of 8-inch pipe in an easement extending west from South Pleasant Street and connecting with East College Street for a project entitled East College St. Project."² (Case File Item A.)

{¶2} The Plan Approval was issued pursuant to Ohio Revised Code ("R.C.") 6109.07 [Approval of construction or installation plans; notice of violation.].³ (Case File Item A.)

² The East College Street Project is mixed use development project under construction in downtown Oberlin, Ohio. Sustainable Community Associates (SCA) is the developer. The East College Street Project includes the redevelopment of 2.3 acres of abandoned brown field into a complex for 33 residential units and 22,500 square feet of commercial space. www.sustainableca.com

³ Revised Code 6109.07 provides, in relevant part:

(A) No person shall begin construction or installation of a public water system, or make any substantial change in a public water system, until plans therefore have been approved by the director of environmental protection under division (A)(1) or (2) of this section.

{13} On December 5, 2008, Appellants Mr. Chesler and Galen Boyd⁴ timely filed an appeal of the Plan Approval with the Commission. Although no specific Assignments of Error were delineated in the Notice of Appeal, Appellants asserted a right to appeal as follows:

Under the remedial provisions of subtitle 'c' [sic] of the Resource Conservation and Recovery Act of 1976 (RCRA), the 1984 RCRA Hazardous and Solid Waste Amendments; Ohio Revised Code chapters [sic] 3704, 3734, 3746 (Voluntary Action Program) and 6111; Ohio Administrative Code chapters [sic] 3745-50 thru 59, 65 thru 300; the codified Ohio Environmental covenant (O.R.C. 5301.80 thru 92) and section 3745.04 of the Ohio Revised Code this letter serves [sic] formal notice of appeal of Ohio Environmental Protection Agency Director Chris Korleski's November 5, 2008, conditional approval of Ohio EPA Lorain County Application No. 671568 wa [sic], a proposed waterline extension incorporating 'about 525 feet of 8-inch pipe in an easement extending west from South Pleasant Street and connecting with East College Street for a project entitled East College St. Project.'

Additionally, Appellants claimed that Ohio EPA failed to comply with "the storm water discharge and public notice requirements of the federal Water Pollution Control Act as amended (33 U.S.C. Section 1251) and the Ohio Water Pollution Control Act (ORC 6111) in issuing an October 14, 2008 construction facility storm water discharge permit to Sustainable Community Associates (SCA) by ignoring significant, credible laboratory evidence of acute, unmitigated environmental contamination * * * posing a systemic threat to the vitality of the Black River, Plum Creek and the Cleveland municipal water supply furnished by Lake Erie." The Notice of Appeal identified and referenced a number of documents in support of Appellants' claims of "unmitigated environmental

(1) Upon receipt of a proper application, the director shall consider the need for compliance with requirements of the Safe Drinking Water Act [R.C. Chapter 6109], and generally accepted standards for the construction and equipping of water systems, and shall issue an order approving or disapproving the plans * * *

⁴ On March 18, 2009, Appellant Boyd filed a Notice of Dismissal, and on March 19, 2009, the Commission ruled to dismiss Appellant Boyd as a party. (Case File Items U, V.)

contamination" including laboratory analysis of groundwater monitoring and soil testing, data submissions to municipal officials, Ohio EPA publications, a filing with the Ohio Bureau of Underground Storage Tanks Regulations, City of Oberlin communications, and communications from the Ohio Department of Development. The Notice of Appeal requested that the Commission "rescind" the Plan Approval. (Case File Item A.)

{¶4} Appellants' Notice of Appeal listed two addresses for Mr. Chesler; one in Amherst, Ohio and the second in Oberlin, Ohio. During a January 13, 2009 preliminary prehearing conference, the Commission was advised that Appellant Boyd's address, as listed in the Notice of Appeal, may have changed. Accordingly, on January 13, 2009, the Commission ordered Appellants to file, by January 20, 2009, a Notice of their appropriate mailing addresses. Appellants failed to file a Notice of their appropriate mailing address as ordered by the Commission.⁵ (Case File Items A, H.)

{¶5} On March 11, 2009, Appellees filed a Joint Motion to Dismiss contending that Mr. Chesler "lacks standing and fails to satisfy the statutory criteria to pursue his appeal." Specifically, Appellees argue that Mr. Chesler failed to "raise any assignments of error with respect to the Plan Approval" and did not "alleg[e] that he is or will be affected by issuance of the Plan Approval." (Case File Item T.)

{¶6} On March 23, 2009, Mr. Chesler filed a Motion requesting an extension of time until April 7, 2009 to reply to Appellees' Joint Motion to Dismiss ("Motion for Extension"). On March 24, 2009, the Commission granted the Motion for Extension and

⁵ In all pleadings filed with the Commission subsequent to January 20, 2009, Mr. Chesler identifies his address as "P.O. Box 342 14880, State Route 58, Oberlin, Ohio 44074." The Commission notes that this address is the same as the address identified by Mr. Chesler as the location of a vintage nautical equipment dealer he contends he owns and operates. (Case File Items M, Q, N, W, Y, AA, CC, DD, EE.)

ordered Mr. Chesler to file a response to Appellees' Joint Motion to Dismiss by April 7, 2009. (Case File Items W, X.)

{¶7}. Mr. Chesler did not file a response to Appellees' Joint Motion to Dismiss by April 7, 2009, as ordered by the Commission. However, on April 7, 2009, Mr. Chesler filed a Motion to Amend the Notice of Appeal. Mr. Chesler's Motion to Amend the Notice of Appeal included a proposed Amended Notice of Appeal ("Amended Notice of Appeal") that was subsequently filed with the Commission on April 23, 2009.⁶ (Case File Items Y, DD.)

{¶8} The claims raised by Mr. Chesler in the Amended Notice of Appeal are nearly identical to the claims raised by Appellants Chesler and Boyd in the original Notice of Appeal. However, the Amended Notice of Appeal deletes any reference to RCRA, R.C. Chapters 3704, 3734, 3746, 6111; R.C. 5301.80 through 92; Ohio Administrative Code ("Ohio Adm.Code") Chapter 3745 Sections 50 through 59, Chapter 3745-50 Sections 65 through 69, and Chapter 3745-50-300. In addition, although raised in the original Notice of Appeal, the Amended Notice of Appeal deletes a claim that the Director erred in issuing "an October 14, 2008 construction facility storm water discharge permit" to SCA. The Amended Notice of Appeal claims the Plan Approval "opens the heavy metal petrochemical Pandorian [sic] floodgates, facilitating pandemic, unhygienic [sic] systemic exposure to contaminated subsurface soils and toxic groundwater." Further, the Amended Notice of Appeal adds R.C. 3745.07 as a basis of

⁶ Mr. Chesler's proposed Amended Notice of Appeal identified the Plan Approval application as "No. 671567." On April 22, 2008, Mr. Chesler filed a Motion seeking to correct the Plan Approval application number contained in the proposed Amended Notice of Appeal due to a "scrivener error" and noted that the correct Plan Approval number is "No. 671568" as set forth in the December 5, 2008 Notice of Appeal. Based upon our review of the pleadings filed herein, the Commission is satisfied that Mr. Chesler's incorrect reference to the Plan Approval application number was an inadvertent error and not, as Appellees contend, an effort to appeal a final action of the Director that "was never mentioned in Appellants' original Notice of Appeal." (Case File Items YY, BB.)

appeal to the Commission and contends that Mr. Chesler is the owner and operator of a "vintage nautical equipment dealer on the South Main St./State Route 58 Oberlin commercial corridor, within walking distance of the Oberlin downtown business district." Specifically, the Amended Notice of Appeal claims that Mr. Chesler's retail marine business will be adversely impacted by the "cornucopia of benzene, cadmium, cyanide and arsenic laden effluent generated by the instant project - - projected to cascade directly into the navigable West Branch of the bucolic Black River." Finally, the Amended Notice of Appeal contains two separate requests for relief. First, as in the original Notice of Appeal, Mr. Chesler requests that the Commission "rescind" the Plan Approval. Second, Mr. Chesler contends that the Plan Approval should be "voided for negligence." (Case File Items A, DD.)

{¶9} On April 9, 2009, the Commission acknowledged the filing of the Amended Notice of Appeal and further ordered Mr. Chesler to file his response to Appellees' Joint Motion to Dismiss on or before April 17, 2009. (Case File Item Z.)

{¶10} On April 17, 2009, Mr. Chesler filed a Reply to Appellees' Joint Motion to Dismiss. Mr. Chesler's Reply attached an affidavit in support of his claim that he has standing to pursue the appeal before the Commission. In particular, Mr. Chesler contends that he has been adversely impacted by the Director's issuance of the Plan Approval because his retail nautical equipment business, "dependent on the aesthetic and recreational attractions of the West Branch of the Black River - - will suffer economic injury." (Case File Item AA.)

{¶11} On April 20, 2009, Appellees filed a Joint Response to Mr. Chesler's Reply to Appellees' Joint Motion to Dismiss. Appellees' argue that Mr. Chesler's claims

regarding the adverse affects on his retail marine business are vague and non-specific and Mr. Chesler cannot demonstrate a concrete, specific harm that is fairly traceable to his appeal of the Plan Approval. Accordingly, because Mr. Chesler cannot demonstrate that he has been adversely affected by the issuance of the Plan Approval for a drinking waterline extension project, Appellees contend that Mr. Chesler does not have standing to pursue the within matter. (Case File Item BB.)

CONCLUSIONS OF LAW

{¶1} The question before the Commission is whether Mr. Chesler possesses the requisite standing to pursue this appeal.

{¶2} Standing, as a threshold jurisdictional issue, must be resolved before an appellant may properly proceed with an appeal. *Village of Canal Winchester v. Jones* (April 14, 2004), ERAC Case No. 255235 AT *8; *New Boston Coke v. Tyler* (1987), 32 Ohio St. 3d 216, 513 N.E. 2d 302.

{¶3} Appellant bears the burden of demonstrating standing to maintain an Appeal. *City of Olmstead Falls, Ohio v. Jones* (2003), 152 Ohio App. 3d 282, 2003 Ohio 1512. The critical importance of a positive finding regarding a party's standing to pursue an appeal is that such an examination ensures that the party challenging an order has a personal stake in the outcome of the controversy and that the litigant is the proper party in the lawsuit. It is not a determination of whether the issue itself is justiciable. *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus* (1992), 84 Ohio App. 3d 591, 617 N.E. 2d 761; *Merkel v. Jones* (October 23, 2003), ERAC Case Nos. 185274-185275.

{¶4} The Ohio Revised Code authorizes two avenues of appeal to the Commission, either through R.C. 3745.04 or R.C. 3745.07, both of which require an appellant to possess the requisite standing. One avenue, found in R.C. 3745.04, provides, in pertinent part, as follows:

Any person who was a party to a proceeding before the Director of the environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director * * *.

{¶5} To establish standing pursuant to R.C. 3745.04, an appellant must have been a party “to a proceeding before the Director.” For purposes of R.C. 3745.04, a “party” has been defined as “any person affected by the proposed action who appears in person, or by his attorney, and presents his position, arguments, or contentions orally or in writing * * *.” *New Boston Coke v. Tyler*, 32 Ohio St. 3d at 218. To establish standing pursuant to R.C. 3745.04, one must allege both that he appeared before the Director, presenting arguments in writing or otherwise and that he was affected by the final action of the Director. *Id.* at 286.

{¶6} In this case, the original Notice of Appeal filed on December 5, 2008 asserted rights to appeal the Plan Approval only pursuant to R.C. 3745.07. In his Amended Notice of Appeal, filed on April 23, 2009, Mr. Chesler asserts appeal rights pursuant to both R.C. 3745.04 and R.C. 3745.07. However, no evidence has been presented that Mr. Chesler participated in any “proceeding before the Director” prior to the Director’s issuance of the Plan Approval. Significantly, Mr. Chesler has not demonstrated, that prior to the issuance of the Plan Approval, he submitted any oral or written comments or participated in a public hearing related to the Plan Approval at issue in the instant appeal. Accordingly, the Commission concludes that Mr. Chesler

was not a party to a proceeding before the Director and thus, cannot establish standing pursuant to R.C. 3745.04.

{¶7} Revised Code 3745.07 also authorizes appeals to the Commission and provides, in pertinent part, as follows:

If the Director issues, denies, modifies, revokes, or renews a permit, license, or variance without issuing a proposed action, * * * any party who would be aggrieved or adversely affected thereby, may appeal to the environmental review appeals commission within thirty days of the issuance, denial, modification, revocation, or renewal.

{¶8} Pursuant to R.C. 3745.07, any person who would be “aggrieved or adversely affected” by the director’s issuance of a permit, not preceded by a proposed action, may appeal to the Commission within thirty days of the issuance. In determining whether a party has been “aggrieved or adversely affected” for purposes of R.C. 3745.07, the principles of traditional standing analysis apply. *Johnson’s Island Prop. Owner’s Assn. v. Schregardus* (June 30, 1997), 10th Dist. No. 96 APH10-1330.

{¶9} To establish standing, a party must demonstrate that the challenged action “has caused or will cause him or her injury in fact, economic or otherwise, and that the interest sought is within the sphere of interests protected or regulated by the statute in question.” *Johnson’s Island*, citing *Franklin Cty. Regional Solid Waste Mtg. Auth. v. Schregardus* 84 Ohio App. 3d at 599. The alleged injury must be concrete, rather than abstract or suspected; a party must show that he or she has suffered or will suffer a “specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction.” *Johnson’s Island*, quoting *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App. 3d 420, 424, 457 N.E. 2d 878, 882. The alleged injury may be actual and

immediate, or threatened. *Id.*, citing *State ex Rel. Connors v. Ohio Dept. of Transp.* (1982), 8 Ohio App. 3d 44, 455 N.E. 2d 1331. A party, who alleges a threatened injury, must demonstrate a “realistic danger” arising from the challenged action. *Id.*, citing *Babbitt v. United Farm Workers Nat’l Union* (1979), 442 U.S. 289, 99 S.Ct. 2301; *City of Olmsted Falls, Ohio* (2003), 152 Ohio App. 3d 282. Proximity alone is insufficient to demonstrate standing. *Id.*

{¶10} At the oral argument, Mr. Chesler clarified his claims in this appeal and argued that installation of the drinking waterline replacement and extension, as set forth in the Plan Approval, is the “link” that will allow, what he describes in the Amended Notice of Appeal as the “cornucopia of benzene, cadmium, cyanide and arsenic-laden effluent,” he believes will be “generated” by the East College Street Project and will “cascade directly into the neighboring, navigable West Branch of the bucolic Black River” and poses “a systemic threat to the vitality of the Black River, Plum Creek and the Cleveland municipal water supply furnished by Lake Erie.” In the Amended Notice of Appeal, Mr. Chesler contends that discharge of the “effluent” into the Black River will “precipitate a detrimental economic effect on local maritime interests.”

{¶11} Initially, the Commission notes that although Mr. Chesler contends that “the Director failed to comply with stormwater discharge and public notice requirements of the Federal Water Pollution Control Act as amended * * * and the Ohio Water Pollution Control Act (ORC 6111) * * *,” he fails to identify any provision of R.C. 6109.07, the statutory basis upon which the Director issued the Plan Approval, that has been violated. In fact, there is no reference to R.C. 6109.07 anywhere in the Amended Notice of Appeal. In addition, although Mr. Chesler may have significant concerns

related to the environmental impact of any effluent discharge resulting from SCA's East College Street mixed use development project, the Plan Approval at issue in this appeal is not a discharge permit and does not authorize Oberlin, SCA, or any other entity to discharge any effluent into either the Black River or Plum Creek.⁷ Rather, the Plan Approval at issue is limited to authorizing Oberlin to replace and extend a drinking waterline in downtown Oberlin.

{¶12} Appellees contend that Mr. Chesler has failed to allege any facts showing that he would be aggrieved or adversely affected as a result of the installation of the drinking waterline replacement and extension. The Commission agrees and finds that Mr. Chesler failed to satisfy the standing requisites prescribed in R.C. 3745.07. Specifically, Mr. Chesler has not demonstrated any "injury in fact," or provided any evidence of a realistic danger arising from the Director's action in issuing the Plan Approval for the drinking waterline replacement and extension.

{¶13} Mr. Chesler argues that as a result of the "systemic threat" to the Black River and Plum Creek, his retail nautical equipment business, located approximately one mile from the East College Street Project, will sustain economic injury as a result of the loss of tourism to the area. Mr. Chesler's general claims regarding any alleged adverse impact to his retail business are speculative and at best described as "threatened injuries". Mr. Chesler provided no evidence regarding the manner, extent, or nature that any loss of tourism will have on his retail business. Mr. Chesler also did

⁷ In the original Notice of Appeal, Appellants contended that the Ohio EPA failed to comply with certain storm water discharge and public notice requirements and the Ohio Water Pollution Control Act "in issuing an October 14, 2008 construction facility storm water discharge permit" to SCA. However, the October 14, 2008 construction facility storm water discharge permit issued to SCA is not the final action at issue in the instant appeal. In addition, since the original Notice of Appeal of the Plan Approval was not filed until December 5, 2008, any claims Appellants would have arising from the Director's October 14, 2008 permit to SCA are time-barred.

not demonstrate that there is realistic danger that such economic injury will be sustained. Quite simply, other than generalized claims of threatened economic harm relating to effluent discharge, Mr. Chesler provided no evidence regarding how his retail business will be impacted and failed to connect any alleged impact to his business to the Director's issuance of the Plan Approval for the drinking waterline replacement and extension project.

{¶14} In sum, the Commission finds that Mr. Chesler failed to meet his burden of establishing a realistic or concrete danger that he has been adversely affected as a result of the Director's action. Therefore, Mr. Chesler has not established standing as required by R.C. 3745.07.

SHILLING, COMMISSIONER CONCURS

FINAL ORDER

In light of the foregoing the Commissioner finds that Mr. Chesler lacks standing to pursue the instant Appeal. Accordingly, Appellees' Joint Motion to Dismiss is GRANTED.

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

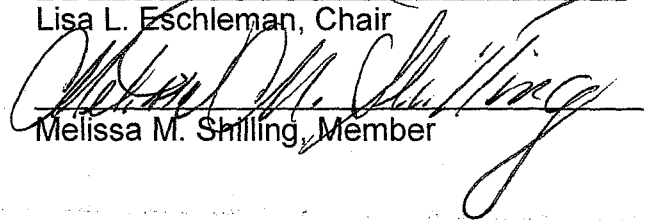
Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing 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.

ENVIRONMENTAL REVIEW
APPEALS COMMISSION



Lisa L. Eschleman, Chair



Melissa M. Shilling, Member

Entered in the Journal of the
Commission this 16th
Day of June, 2009.

COPIES SENT TO:

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RULING ON MOTION TO DISMISS
AND FINAL ORDER

Case No. ERAC 476257

CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the RULING ON
MOTION TO DISMISS AND FINAL ORDER in **MARK CHESLER V. CHRIS**
KORLESKI, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL. Case No.
ERAC 476257 entered into the Journal of the Commission this 16th day of
June, 2009.



Mary J. Oxley, Executive Secretary

Dated this 16th day of
June, 2009, at Columbus, Ohio.

RECEIVED

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ATTORNEY GENERAL OFFICE