IN THE COURT OF APPEALS OF OHIO

Attachment

FOURTH APPELLATE DISTRICT

PICKAWAY COUNTY

FILED--CT. OF APPEALS
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SHARON K. CLINE
CLERK OF COURTS
PICKAWAY COUNTY

VILLAGE OF KINGSTON :

Plaintiff-Appellant : Case No. 93CA04

-vs- :

MARION JONES, ET AL. : DECISION AND JUDGMENT ENTRY

Defendants-Appellees :

APPEARANCES:

James K. Cutright, Chillicothe, Ohio, for Appellant.

Lee Fisher, Attorney General, Retanio Aj Rucker, Assistant Attorney General, for *Amicus Curiae* the State of Ohio.

Leo J. Hall, Ashville, Ohio, for Appellees Jones.

P. Randall Knece, Pickaway County Prosecuting Attorney, for Appellee Pickaway Township Trustees.

Stephen P. Samuels, Columbus, Ohio, for Appellee Scippo Sewer District.

Stephenson, J.

This is an appeal from a judgment of the Pickaway County Court of Common Pleas denying the appropriation of an easement sought by the Village of Kingston, plaintiff below and appellant herein, for sewerage and sewage treatment outfall. Appellant assigns the following errors for our review:

> "I. ASSIGNMENT OF ERROR #1: THE TRIAL COURT IMPROPERLY BASED ITS DECISION ON THE VALIDITY OF KINGSTON'S PERMIT TO INSTALL ITS SEWAGE TREATMENT FACILITY."

> "II. ASSIGNMENT OF ERROR #2: THE TRIAL COURT'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE."

A review of the record reveals the following facts pertinent to this appeal. Since the early 1980s, the Village of Kingston

(hereinafter referred to as "the village") has experienced difficulties with its sanitary sewer system. In December 1986 the Ohio Environmental Protection Agency (hereinafter referred to as "OEPA") issued a finding that the village was not in compliance with environmental laws and regulations pertaining to its wastewater treatment facilities. As a result of the village's noncompliance, the state, on behalf of the OEPA, filed a civil enforcement action against the village. This resulted in an agreed disposition of the case and on October 27, 1989 a consent order was filed in the Ross County Court of Common Pleas settling the state's enforcement action against the village. An amended consent order was filed May 29, 1990. The consent order provided, inter alia, that the village must obtain a permit to install ("PTI") from the OEPA for improvements to its wastewater treatment plant and sanitary sewer system, complete construction of said improvements by August 2, 1993, and attain compliance with final effluent limits contained in its National Pollutant Discharge Elimination System (NPDES) permit by September 2, 1993. The consent order provides substantial penalties for noncompliance.

In late spring 1992, the OEPA issued to the village a PTI to install the improvements to the village's wastewater treatment plant. The village council adopted a plan for compliance and passed a resolution for sewer assessments, obtaining grants and low interest loans and the construction of wastewater treatment plant improvements. A critical portion of the plan is the village's ability to discharge the effluent from its wastewater treatment plant into Congo Creek, which is located in Pickaway County. The village has been discharging effluent into Blackwater Creek in Ross County. The most direct route to Congo Creek is across appellees Jones' real estate.

On September 1, 1992, the village filed a complaint against Marion and Helen Jones in the Pickaway County Court of Common Pleas pursuant to R.C. Chapter 163, seeking an easement across the Jones' land.[1] The Jones' filed an answer denying, inter alia, the necessity for the appropriation "because the recently created Scippo Sewer District has indicated its willingness to include the village of Kingston in its service area thus obviating the necessity for any expansion or improvement of the sewage treatment facilities of the Village of Kingston."

Subsequently, on October 28, 1992, the Scippo Sewer District and Board of Trustees of Pickaway Township requested leave to intervene as defendants in the action. Their proposed answer also denied necessity in that the village's sewage treatment plant could continue to discharge into Blackwater Creek or its sewage could be treated at the sewage treatment plant proposed by the Scippo Sewer District. By entry of November 23, 1992, the court granted the Scippo Sewer District and the Board of Trustees of Pickaway Township leave to intervene in the matter.

The court held a hearing on November 6 and 7, 1992 on the necessity of the appropriation requested by the village. On January 29, 1993, the court issued a very thorough and carefully reasoned twenty-two (22) page opinion dismissing appellant's complaint. In determining whether necessity had been established, the court relied on the recently decided case of Columbus & Franklin Cty. Metro. Park Dist. v. Shank (1992), 65 Ohio St.3d 86. The court stated that "[a]nalyzing the Kingston facility in the face of the Supreme Court

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1) On October 29, 1992, the village filed a similar complaint against Sharon Jones after determining that she had an interest in the subject property. The court ordered the two cases consolidated by entry dated December 7, 1992.

decision, this court must determine whether it measures up to the requirements as set forth by the Supreme Court." The court further stated:

> "In this case the OEPA issued the permit [PTI] which has been previously referred to in this opinion. In reviewing this permit, this Court concludes that it fails to meet the requirements which the Supreme Court of Ohio has set forth in the Columbus Metropolitan Park decision. This permit clearly considered the major emphasis on cost control as was testified to by a number of OPEA (sic) officials and did not consider the stringent requirements of the Supreme Court in the Columbus-Franklin County Metropolitan case.
>
> The Court realizes that there was considerable testimony relative to the Village being penalized if it did not meet the deadline requirements as set forth in the consent decree in Ross County. Certainly, in view of the fact that the OEPA did not perform their duty in issuing the permit, as the Supreme Court of Ohio has announced, the responsibility for delay in this case must rest entirely with the OEPA and not on the Village of Kingston, as the Village was acting under direction of the OEPA. Certainly, this would be basis (sic) for the Ross County Court to consider in granting an extension so that proper pollution requirements can be met as announced by the Supreme Court of Ohio.
>
> It would appear to this Court that the proper procedure for the Village of Kingston in this case would be to seek an extension of time from the Ross County Common Pleas Court under the consent decree, and then to make a new application to the OEPA so they may consider the overall project and make the necessary finding if that can be done, which the Supreme Court has indicated must be met. If the OEPA did make the necessary findings and that order becomes final, then the matter of necessity in this case could be established and appropriation could proceed. Until that is done, the Court in this case must hold that under the decision of the Columbus Metropolitan Park case, that the Village of Kingston did not establish necessity as required under Section 163.09(B) of the Revised Code, and that the Village Council did abuse their discretion in seeking to proceed under the permit issued by the OEPA, which necessitated the matter of the appropriation.
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> The Court, having made the above finding, will find that the Village has not established the

> matter of necessity and will order that this case be dismissed."

On February 22, 1993, the court entered judgment in favor of appellees "for the reason stated in the Court's Opinion filed herein on January 29, 1993." Appellant filed a timely notice of appeal. The State of Ohio was subsequently granted leave to file an amicus curiae brief on behalf of appellant Village of Kingston.

In its first assignment of error, appellant asserts the court erred in predicating its judgment on its opinion as to the validity of the PTI. Appellant asserts that, pursuant to R.C. 3745.04, the Environmental Board of Review (hereinafter referred to as "EBR") has exclusive original jurisdiction over such matters and that common pleas courts do not have authority to pass judgment on the appropriateness of OEPA actions.

Similarly, the state asserts that only the EBR has the express statutory authority to overturn an action of the Director of the OEPA. Only appellee Scippo Sewer District has availed itself of the administrative review process provided in R.C. Chapter 3745 by filing an appeal from the granting of the PTI.[2] The Jones' and the Pickaway Township Trustees have not taken an appeal from the granting of the PTI. Thus, the state argues, these remaining appellees are precluded from raising a "sufficiency of the PTI" argument in the instant case, i.e., collaterally attacking the granting of the permit.

In addition, the state asserts the court below usurped the EBR's authority in engaging in an analysis of the lawfulness of the PTI. While conceding the court has jurisdiction over the appropriation issue presented by the village's complaint, the state

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2) The parties represent that as of the time of the filing of their briefs in the case, this appeal had not yet been decided.

asserts that the EBR has exclusive subject matter jurisdiction over issues related to the acts or actions of the Director of the OEPA. The state requests that this matter therefore be reversed and remanded.

R.C. 3745.01 provides for the creation of the environmental protection agency headed by the director of environmental protection. Ordinarily, appeals to the EBR arise under either R.C. 3745.04 or 3745.07. Jackson Cty. Environmental Commt. v. Shank (1990), 67 Ohio App.3d 635, 638. R.C. 3745.04 provides in relevant part:

> "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, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.
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> "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."

R.C. 3745.07 provides in pertinent part:

> "If the director issues, denies, modifies, revokes, or renews a permit, license, or variance without issuing a proposed action, an officer of an agency of the state or of a political subdivision, acting in a representative capacity, or any person who would be aggrieved or adversely affected thereby, may appeal to the environmental board of review within thirty days of the issuance, denial, modification, revocation, or renewal."

Thus, an appeal may be taken to the EBR where there is an "act" or "action" taken by the director and the appellant was either a party to the proceeding before the director or, if the director's

action was done without issuing a proposed action, any person who would be aggrieved or adversely affected by the director's action. R.C. 3745.04 and 3745.07; Jackson Cty. Environmental Commt., supra.

The Supreme Court of Ohio has held that the statutory procedure for review of OEPA actions set forth in R.C. Chapter 3745 is exclusive, State ex rel. Tyler v. McMonagle (1986), 25 Ohio St.3d 13, 15; Warren Molded Plastics, Inc. v. Williams (1978), 56 Ohio St.2d 352, 353-4; State ex rel. Williams v. Bozarth (1978), 55 Ohio St.2d 34, 37; Cincinnati ex rel. Crotty v. Cincinnati (1977), 50 Ohio St.2d 27, 30, and deprives the courts of subject matter jurisdiction in actions for declaratory and injunctive relief involving controversies under R.C. Chapter 3745. Id.

While the case sub judice does not present an action for declaratory or injunctive relief, we find the aforementioned authorities persuasive, as the court's action in this case had the same effect. In essence, the court below reviewed and purported to invalidate the PTI granted to appellant by the director of the OEPA, a matter within the exclusive jurisdiction of the EBR. Based upon the foregoing, we find the court below was without jurisdiction to review and invalidate the PTI. Accordingly, appellant's first assignment of error is sustained.

In its second assignment of error, appellant asserts the court's judgment was against the manifest weight of the evidence. Appellant asserts that implicit in the court's ruling is the finding that if the validity of the PTI is not considered by the trier of fact, appellant has proved the necessity of the easement in accordance with R.C. 163.09(B). Thus, appellant maintains, should this court sustain its first assignment of error, it should also find that the village has proven necessity and allow this case to proceed to the

valuation of the easement sought to be appropriated.

In finding that the village had not established the matter of necessity, the court stated the following:

> "*** If the OEPA did make the necessary findings and that order becomes final, then the matter of necessity in this case could be established and appropriation could proceed. Until that is done, the Court in this case must hold that under the decision of the Columbus Metropolitan Park case, that the Village of Kingston did not establish necessity as required under Section 163.09(B) of the Revised Code, and that the Village Council did abuse their discretion in seeking to proceed under the permit issued by the OEPA, which necessitated the matter of the appropriation.
>
> The Court, having made the above finding, will find that the Village has not established the matter of necessity and will order that this case be dismissed."

The court determined, in essence, that because the PTI was invalid under Columbus & Franklin Cty. Metro. Park Dist., supra, appellant could not establish necessity under R.C. 163.09(B). We do not agree with appellant's interpretation of the court's ruling, i.e., that given a valid PTI, the village had demonstrated necessity. Instead, it appears the court found that if, upon reapplication, the OEPA made the findings required by the Columbus & Franklin Cty. Metro. Park Dist. decision, then the matter could proceed to a determination of necessity under R.C. 163.09(B).

Inasmuch as the trial court did not address the question of necessity on its merits, we decline to do so for the first time on appeal. See Reiter v. Fultz (June 29, 1993), Athens App. No. 92CA1555, unreported, p. 5. This case will be remanded for a determination of whether appellant can establish the necessity of the easement sought to be appropriated pursuant to R.C. 163.09(B). See Mills-Jennings of Ohio, Inc. v. Liquor Control Comm. (1984), 16 Ohio App.3d 290; see, also, Whiteside, Ohio Appellate Practice (1991) 70, T

7.02(C).

Based upon the foregoing, the judgment of the trial court is reversed and the cause is remanded to the trial court for further proceedings.

JUDGMENT REVERSED
AND REMANDED

GREY, J., Concurring:

I concur in the judgement and opinion, but, frankly, I must concede that I am not all that sure that this court is completely right or that the trial court is completely wrong.

The majority opinion is absolutely correct in holding that under R.C. Chapter 3745 the trial court in this case was without jurisdiction to review or invalidate the PTI granted by the agency. But a careful reading of the court's decision shows that it did not invalidate the PTI, per se. The trial court seemingly caught between the rock of R.C. 3745 and the hard place of Columbus & Franklin Cty. Metro Park Dist. v. Shank, supra, held that appellant could not prove necessity with an invalid permit. It is one thing for a court to attempt to exceed it's jurisdiction by declaring a PTI to be invalid for all purposes. It is quite another for the court to say: "Do not attempt to prove necessity in my court by reliance on a PTI which is at odds with the holding in Columbus and Franklin Cty. Metro Park Dist. v. Shank." If a court has jurisdiction to decide the question of necessity, and if the claim of necessity is rooted in a permit granted by an agency, it is not unreasonable for the court to insist on proof that the permit is in accord with the clear public policy mandates of Supreme Court decisions. I think this is what the trial court attempted to do.

On the other hand, the ultimate function of any legal system is to resolve controversies. Once a matter is finally resolved administratively, it ought not to be subjected to interminable judicial review where first one contests the application for the permit, then contests the granting of the permit, then contests

the implementation of the permit and on and on. One can interpret Columbus and Franklin Cty. Metro Park Dist. v. Shank to mean that the Supreme Court insisted on stringent adherence to standards at the OEPA level because those administrative decisions were to be the final word on the subject. I believe that is the intent of that opinion and this why I concur.

The majority opinion shies away from adopting the rule advocated by appellant, i.e. that proof of a permit is proof of necessity. I agree with the reluctance to do so. It may be a good rule of law, but even if it is, it is one that ought to be adopted by the Supreme Court.

Thus, I concur in judgment and opinion.

No. 93CA04 - Pickaway Co.

(Village of Kingston v. Jones)

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND REMANDED and Appellant recover of Appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J., Concur in Judgment & Opinion:
Grey, J., Concur with Attach Concurring Opinion:

For the Court

BY: Earl E. Stephenson
Earl E. Stephenson, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.