

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

JOHNSON'S ISLAND PROPERTY OWNERS :
ASSOCIATION, ET AL. :
 :
Appellants : Case No. EBR 623757-623758
 :
v. :
 :
DONALD SCHREGARDUS, DIRECTOR OF :
ENVIRONMENTAL PROTECTION, ET AL. : Issued on: August 6, 1997
 :
Appellees. :

RULING ON MOTION FOR SUMMARY JUDGMENT,
FINDINGS OF FACT, CONCLUSIONS OF LAW AND
FINAL ORDER

Issued By:

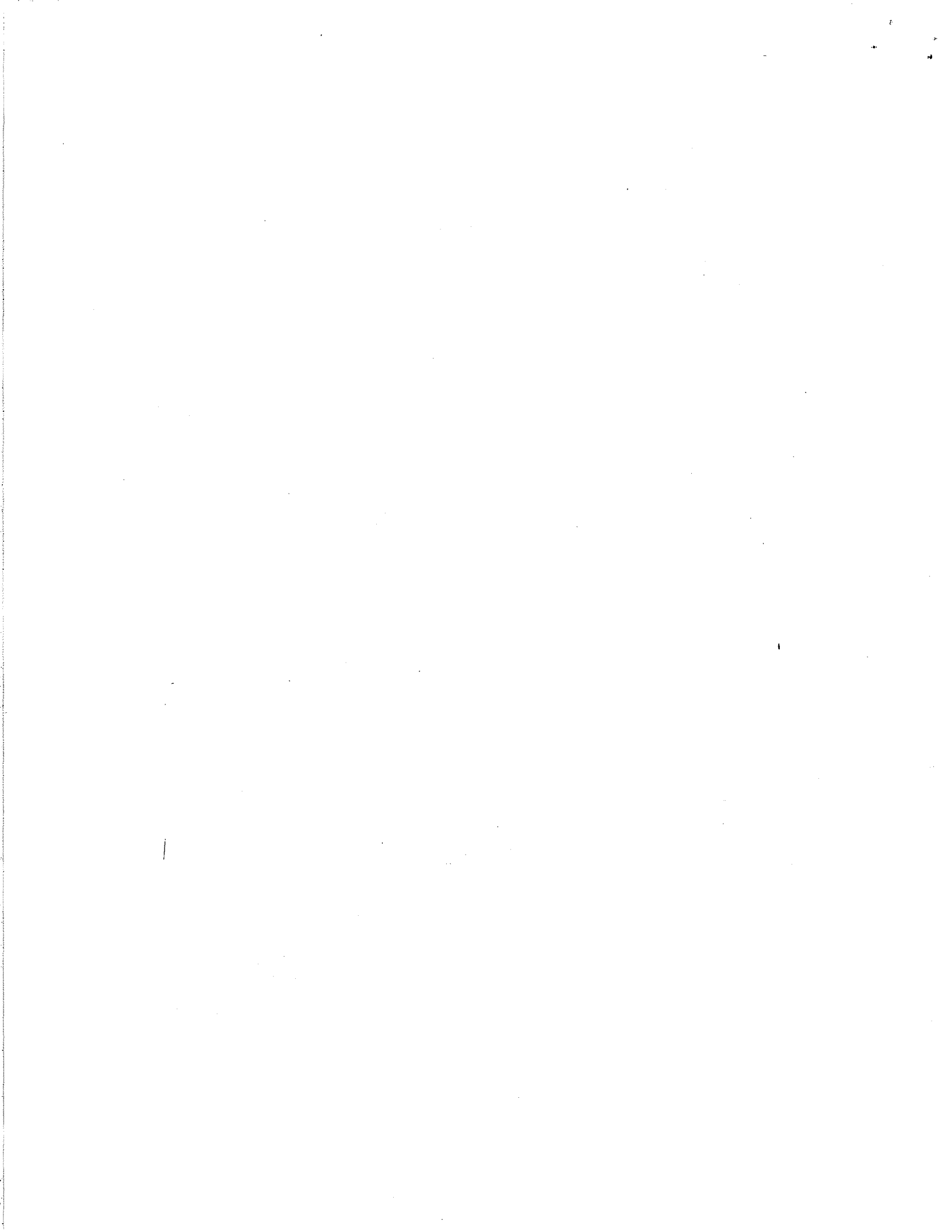
ENVIRONMENTAL REVIEW APPEALS
COMMISSION
Toni E. Mulrane, Chairman
Julianna F. Bull, Vice-Chairman
Jerry Hammond, Member

236 East Town Street, Room 300
Columbus, Ohio 43215
Telephone: 1/614/466-8950

COUNSEL FOR APPELLANTS:
Stephen P. Samuels, Esq.
SAMUELS & NORTHROP CO., LPA
180 East Broad Street, Suite 816
Columbus, Ohio 43215

COUNSEL FOR APPELLEE DIRECTOR:
James O. Payne, Jr., Esq.
Jane S. Arata, Esq.
Assistant Attorneys General
Environmental Enforcement
Section
30 E. Broad St., 25th Floor
Columbus, Ohio 43215

COUNSEL FOR APPELLEE JISDA:
Donald J. McTigue, Esq.
MCTIGUE & BROOKS
4921 Dierker Road
Columbus, Ohio 43220



This matter comes before the Environmental Review Appeals Commission ("ERAC" or "the Commission") upon a Motion for Summary Judgment filed on July 24, 1997 by Appellants Johnson's Island Property Owners' Association and The Individual Trustees of Johnson's Island Property Owners' Association ("JIPOA"). Appellee Johnson Island Sanitary Disposal Association, Inc. ("JISDA") filed a Motion in Opposition on August 4, 1997 and Appellee Director of the Ohio Environmental Protection Agency ("Director", "OEPA" or "the Agency") filed a Motion to Vacate and Remand on August 5, 1997. Appellants JIPOA were represented by Mr. Stephen P. Samuels, Samuels & Northrop Co., LPA, Columbus, Ohio. Appellee JISDA was represented by Mr. Donald J. McTigue, McTigue & Brooks, Columbus, Ohio. Appellee Director was represented by Mr. James O. Payne, Jr., Assistant Attorney General. Based upon the pleadings of the parties and the Certified Record which the Commission moves into evidence upon its own motion, we grant Appellants' Motion for Summary Judgment and make the following Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. In an action previously decided by this Commission and appealed to the Franklin County Court of Appeals (ERAC¹ Case No. 623062-623063; Franklin

¹ At the time this previous matter was decided, the Commission was called the "Environmental Board of Review" and our cases were designated as

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Case No. EBR 623757, etc.

County Court of Appeals Case No. 96APH10-1330), Appellants JIPOA appealed an action of the Director issuing a Permit to Install ("PTI") to Baycliffs Corporation. The PTI authorized the construction of a Pump Station, Force Main and Gravity Sanitary Sewers in conjunction with the development of Baycliffs' Subdivision No. 1, an 88 lot subdivision on Johnson's Island, Danbury Township, Ottawa County, Ohio by Baycliffs Corporation.² (Johnson's Island Property Owners' Association v. Schregardus, [June 30, 1996], Franklin App. No. 96APH10-1330, unreported.)

2. Prior to the issuance of the PTI in ERAC 623062-623063, the Public Utilities Commission of Ohio ("PUCO") had not issued a certificate of public convenience and necessity to Baycliffs as required by R.C. 6112.03. In that case, Baycliffs argued that a certificate of public convenience and necessity was not required because the jurisdiction of the PUCO is limited to regulating "public utilities" as defined in R.C. 4905.02 and this definition specifically

"EBR" cases. For purposes of ease, all of our cases will now be referred to as "ERAC" cases, even if they were decided prior to the name change.

² It appears the PTI at issue herein is for the same Pump Station, Force Main and Gravity Sanitary Sewer reviewed by the Commission in ERAC No. 623062-623063, however, the PTI in the earlier action was issued to Baycliffs Corporation and the instant PTI has been issued to JISDA. JISDA is a not-for-profit corporation formed by Baycliffs on or about April 26, 1996. At the time of its creation, JISDA's trustees were Baycliff's president, Carl Zipfel and two of Baycliff's attorneys; none of the trustees were residents of Johnson's Island. As stated in the Court of Appeals opinion, "Appellant [Baycliffs] transferred the proposed sewer system to JISDA, and purportedly transferred all of its right, title and interest in the PTI to JISDA '[f]or One Dollar (\$1.00) and other valuable consideration received * * * .' (Johnson's Island Property Owners' Association v. Schregardus [June 30, 1997], Franklin App. No. 96APH10-1330, unreported.)

excludes public utilities "that are owned and operated exclusively by and solely for the utilities' customers", which Baycliffs contended this would be. (Johnson's Island, Supra.)

3. Despite Baycliffs assertions, on September 10, 1996, the Commission issued a decision in which it stated that "Revised Code Section 6112.03 is clear and unambiguous that the Director must receive written notice that a certificate of public convenience and necessity has been issued before he may approve plans for a sewage disposal system." In light of this conclusion, the Commission found that the action of the Director in issuing the PTI to Baycliffs was unlawful and the action was vacated. (Emphasis in original; Johnson's Island Property Owners' Association v. Schregardus, ERAC Case Nos. 623062-623063 [Issued September 10, 1996].)

4. On October 9, 1996, Baycliffs appealed the decision of the Commission to the Franklin County Court of Appeals. (ERAC Case Nos. 623062-623063, File Item LLLL)

5. On or about November 8, 1996, JISDA, the Appellee herein, applied for a PTI for a Pump Station, Force Main and Gravity Sanitary Sewers. (ERAC Case Nos. 623757-623758, Case File Item J, Exhibit C attached to affidavit of Margaret E. Lehrer.)

6. On January 15, 1997, the Director issued a PTI to JISDA. In the correspondence which accompanied the PTI, Martha D. Spurbeck, the Supervisor of the Permit Processing Unit of the Division of Surface Water of the OEPA, stated as follows:

You should note that ORC 6112.03 requires the Director to ensure that the Public Utilities Commission of Ohio (PUCO) has issued a certification of public convenience and necessity prior to approving a plan for installing a private sewage disposal system. The PUCO has not issued such a certification with respect to the above referenced system. In accordance with the decision of the [Environmental Review Appeals Commission] in Johnson's Island Property Owners' Association v. Schregardus, Case No. [ERAC] 623062-623063 (September 10, 1996) (see footnote 3), however, the Director has accepted written notification from the PUCO that such a certification is not necessary in this case. Please be advised that the Johnson's Island decision is currently under appeal to the Franklin County Court of Appeals, which may ultimately decide such notifications of exemption are not adequate for issuing permits to install private sewage disposal systems. (Certified Record ["CR"] Item 1)

7. Specifically, "footnote 3" of our earlier decision, to which Ms. Spurbeck referred in her letter, provided:

We would like to emphasize that we do not read the law in a vacuum so as to require a PUCO certificate of public convenience and necessity where there has been an affirmative indication from the PUCO that a facility is exempt from the requirement. Clearly, this would be a contortion of the statute's intent. However, Baycliffs never availed itself of the opportunity to present the [Commission] with definitive facts that such a certificate was not required. (Johnson's Island Property Owners' Association v. Schregardus, ERAC Case Nos. 623062-623063 [Issued September 10, 1996].)

8. Additionally, as all parties agree, the "written notification" which the Director accepted in issuing the instant PTI is correspondence of Ms. Sue Daley, an employee of the PUCO, who stated that JISDA would not be required to obtain a certificate of public convenience and necessity if JISDA were organized and operated as Baycliffs' attorney, Boyd Ferris, had indicated.

9. On May 2, 1997, Appellants filed a Motion for Summary Reversal in the instant case in which they argued that JISDA's failure to have obtained a certificate of public convenience and necessity from the FUCO bars the Director from issuing a PTI. (Case File Item J)

10. On May 21, 1997, Appellee JISDA filed a Motion in Opposition to Appellant's Motion for Summary Reversal in which they urged the Commission to deny Appellant's Motion for Summary Reversal on the following three grounds:

- 1) The merits of an appeal to the Commission may not be decided by motion;
 - 2) The issue raised by the motion has previously been decided by this Commission; and
 - 3) Appellants' position on the merits is erroneous.
- (Case File Item N)

11. On May 28, 1997, the Director filed his response to Appellants' Motion for Summary Reversal in which he stated, in effect, that the Director had issued the instant permit in reliance upon the Commission's decision in the previous Johnson's Island case wherein we had stated that, "[w]e do not read the law in a vacuum so as to require a FUCO certificate of public convenience and necessity where there has been an affirmative indication from the FUCO that a facility is exempt from the requirement." The Director concluded with the statement, "This is such a case." (Case File Item P)

12. On June 25, 1997, the Commission issued its ruling denying Appellants' Motion for Summary Reversal. (Case File Item R)

13. On June 30, 1997, the Franklin County Court of Appeals rendered the decision in Johnson's Island Property Owners' Association, et al., v. Schregardus, et al. Case No. 96 APH10-1330 alluded to by the OEPA in the

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correspondence accompanying the PTI. (Para. 6, supra) The Court affirmed the decision of the Commission.

14. On July 24, 1997, Appellants filed the following with the Commission:

1. A Notice of Withdrawal of Assignments of Error, in which they withdrew assignments of error 1, 2 and 4 (leaving only assignment of error number 3 relating to the requirement for obtaining a certificate of public convenience and necessity);
2. A Motion of Appellants for Summary Judgment and for Expedited Consideration; and
3. A Motion of Appellants for Stay and for Expedited Procedure. (Case File Items T, U)

15. In its Motion for Summary Judgment, Appellants assert that there are "no facts disputed by any party" regarding the remaining issue and that reference to the Franklin County Court of Appeals decision in Johnson's Island Property Owners' Association v. Schregardus, supra, makes it clear that Appellants are entitled to judgment as a matter of law. (Case File Item T)

16. On August 4, 1997, Appellees JISDA filed a response in opposition to Appellants' Motion for Summary Judgment and, on August 5, 1997, Appellee Director filed a Motion to Vacate and Remand. In its response, Appellee JISDA once again contends that JISDA is a consumer owned utility which is not subject to FUCO jurisdiction. In addition, JISDA further argues that the Court in Johnson's Island Property Owners' Association, supra., "recognized that the consumer-owned utility issue was not before it in that case" and that the "juristic landscape has not changed" because of the Court's decision in that case.

17. In lieu of a response to Appellants' Motion for Summary Judgment, the Director filed a Motion to Vacate and Remand based on Johnson's Island

Property Owners' Association v. Schregardus, supra.

CONCLUSIONS OF LAW

1. When any party to a proceeding believes there is no genuine issue of material fact and he is entitled to prevail as a matter of law, a motion for summary judgment is an appropriate avenue for disposition of the action. In the instant actions, all relevant facts necessary for the Commission to dispose of these cases through a ruling on purely legal issues are undisputed. Therefore, we feel the motion for summary judgment filed by Appellants presents an appropriate mechanism for addressing the matter before us, (See Federal Civil Rules of Procedure 56[C])

2. Pursuant to R.C. 3745.05, the statutory duty of review imposed on the Commission is a determination of whether the action of the Director which is under appeal is "unlawful" or "unreasonable."

3. "Unlawful" means that the action taken by the Director is not in accordance with the relevant, applicable law. "Unreasonable" means that the action is not in accordance with reason, or that it has no factual foundation. Only when the Commission can find that there is no valid factual foundation for the Director's action, or that the action was not in accordance with law, can the action under appeal be found to be unreasonable or unlawful.

(Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61 [1977].)

4. Chapter 6112 of the Ohio Revised Code sets out the statutory requirements relating to private sewer systems.

5. Specifically, R.C. 6112.02 requires that any person proposing to construct and install a disposal system for the disposal of sewage, industrial waste, or other wastes submit an application for approval to the Director of the OEPA.

6. "Person" is defined in R.C. 6112.01(H) as "a person, firm, partnership, association, or corporation, other than a county, township, municipal corporation, or other political subdivision."

7. "Disposal system" is defined in R.C. 6112.01(F) to include "sewerage systems."

8. "Sewerage systems" is defined in R.C. 6112.01(D) as "pipe lines or conduits, pumping stations, and force mains . . . used for collecting or conducting water-borne sewage . . . to a point of disposal or treatment."

9. Ohio Revised Code Section 6112.03, which deals with approval by the Director of applications for approval of plans for the construction and installation of sewage disposal systems, provides in relevant part as follows:

. . . No final detailed or construction plans shall be approved by the director before he has received written notice from the public utilities commission that a certificate of public convenience and necessity has been issued by it authorizing the construction, installation and operation of such facilities.

10. Ohio Revised Code Section 4933.25 requires that a sewage disposal system company obtain a certificate of public convenience and necessity from

the PUCO prior to the constructing of any disposal facility.

11. Ohio Revised Code Section 4905.03 defines sewage disposal system companies as public utilities, and explicitly states that associations may be considered to be sewage disposal system companies. R.C. Section 4905.04 then vests the PUCO with the general authority to regulate and supervise such public utilities. One exception to PUCO regulation is a utility which is owned and operated exclusively by and solely for the utilities' customers 4905.02(B).

12. Appellee JISDA cites 4905.02 and asserts that the PUCO is limited to regulating "public utilities" as defined in R.C. 4905.02. As noted above, this definition specifically excludes public utilities "that are owned and operated exclusively by and solely for the utilities' customers." Consequently, Appellee argues that a "customer owned" sewage system, which Appellee claims the Johnson's Island system will be, is outside of the jurisdiction of the PUCO and, therefore, a certificate of public convenience and necessity is not required pursuant to R.C. 4905.03. Further, Appellee points out that the PUCO has affirmatively indicated, through the correspondence of its employee, Sue Daley, that a certificate of public convenience and necessity is not required in the instant matter. Finally, JISDA asserts that the Court in Johnson's Island Property Owners' Association, supra, did not address the issue currently before this Commission and that the "juristic landscape has not changed" as a result of that decision. We disagree.

13. Specifically, we feel the court in Johnson's Island does discuss the situation currently before the Commission as follows:

. . . JISDA was not in existence at the time the director originally issued the PTI; instead, appellant created JISDA merely as a way to circumvent the certificate requirement. Were this court to sanction appellant's attempted evasion of the certificate requirement through the creation of JISDA, it would pave the way for any developer in appellant's position to do likewise. As a result, the certificate requirement could be effectively nullified.

Moreover, we question the dicta in Lorch v. Whitman, supra, which stated that if plans to have the county operate the facility failed to materialize, then the certificate would be required, and that otherwise such a certificate is a 'meaningless piece of paper.' Id. at 436. If appellant's plan to have JISDA operate the sewer system fails to materialize, the certificate requirement realistically would not be enforced at some future time, as few courts if any, would order the sewerage system shut down, even if it is eventually determined that residents of the subdivision were never required to become members of JISDA. Further, the PUCO certificate is not meaningless; the requirement aids the director in determining whether construction of a proposed sewage disposal system 'will be conducive to the public health, safety, convenience, and welfare,' as required under R.C. 6112.02. (Emphasis added; Id. at pp. 2831-2832.)

14. Thus, while we are reluctant to ignore the pronouncement of an employee of the agency which has ultimate authority for the issuance of certificates of public convenience and necessity, we feel we are compelled to do so in light of the recent decision of the Franklin County Court of Appeals in Johnson's Island Property Owners' Association v. Schregardus, supra.

15. In sum, the Commission feels the direction from the court regarding

the proposed system is unambiguous, and, that, for the reasons stated in the opinion at pages 2831-2832, Appellee JISDA would be required to obtain a certificate of public convenience and necessity from the PUCO before the Director could lawfully issue a PTI for this project. Since such a certificate was not obtained in this case, the Director should not have issued the instant PTI and we find that he acted unlawfully in doing so.

FINAL ORDER

In light of the above, the Environmental Review Appeals Commission finds Appellants' Motion For Summary Judgment well taken. Accordingly, the matter is hereby remanded to the Director for further proceedings in conformance with this ruling. Further, in view of our ruling on Appellants' Motion for Summary Judgment, there is no need for the Commission to rule upon Appellant's pending Motion for Stay.

The Commission, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the Environmental Review Appeals 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. Any party desiring to so appeal shall file with the Commission a Notice of Appeal designating the order appealed from. 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 of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Commission by certified mail of the making of an order appealed

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from. No appeal bond shall be required to make an
appeal effective.

Entered in the Journal of the
Commission this 6th day
of August, 1997.

THE ENVIRONMENTAL REVIEW
APPEALS COMMISSION

Toni E. Mulrane
Toni E. Mulrane, Chairman

Juliana R. Bull
Juliana R. Bull, Vice-Chairman

Jerry Hammond
Jerry Hammond, Member

COPIES SENT TO:

JOHNSON'S ISLAND PROPERTY OWNERS
ASSOCIATION

[CERTIFIED MAIL]

INDIVIDUAL TRUSTEES OF THE JOHNSON'S
ISLAND PROPERTY OWNERS' ASSOCIATION

[CERTIFIED MAIL]

DONALD SCHREGARDUS, DIRECTOR.

[CERTIFIED MAIL]

JOHNSON'S ISLAND SANITARY
DISPOSAL ASSOCIATION

[CERTIFIED MAIL]

Stephen P. Samuels, Esq.

James O. Payne, Jr., Esq.

Jane S. Arata, Esq.

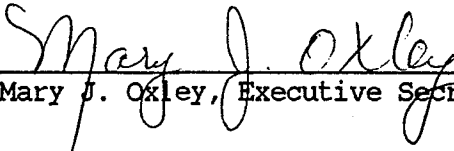
Donald J. McTigue, Esq.

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C E R T I F I C A T I O N

I hereby certify that the foregoing is a true and accurate copy of the RULING ON MOTION FOR SUMMARY JUDGMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in JOHNSON'S ISLAND PROPERTY OWNERS' ASSOCIATION, ET AL. v. DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL., Case No. EBR 623757-623758, entered into the Journal of the Commission this 6th day of August, 1997.



Mary J. Oxley, Executive Secretary

Dated this 6th day of
August, 1997, at Columbus, Ohio.

