

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

BARBARA A. LUND, : Case No. ERAC 15-6844
: :
Appellant, : :
: :
v. : :
: :
PORTSMOUTH LOCAL AIR AGENCY : :
: :
and : :
: :
WAYNE NATIONAL FOREST, : :
: :
Appellees. : :

RULING ON MOTION FOR SUMMARY JUDGMENT

Rendered on October 21, 2015

Barbara A. Lund, pro se Appellant

Michael DeWine, Attorney General, *Adreanne G. Stephenson*, and *Elizabeth Ewing* for Appellee Portsmouth Local Air Agency

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission,” “ERAC”) upon a Notice of Appeal filed by Appellant Barbara A. Lund (“Appellant”) on April 3, 2015. Ms. Lund challenges a Permission to Open Burn issued by Appellee Portsmouth Local Air Agency (“PLAA”) to Appellee Wayne National Forest on March 26, 2015. Specifically, Ms. Lund challenges permission number 150326cds18. Case File Item A.

{¶2} On October 2, 2015, PLAA filed a Motion for Summary Judgment (“Motion”), arguing Ms. Lund lacks standing to pursue this appeal, and the appeal is

now moot because the permission expired on May 31, 2015. Ms. Lund filed a response on October 7, 2015. PLAA did not file a reply. Case File Items U, V.

{¶13} Wayne National Forest did not enter an appearance in this case and did not file a response to PLAA's Motion.¹

{¶14} Based upon a review of the pleadings and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING PLAA's Motion for Summary Judgment.

FINDINGS OF FACT

{¶15} On March 26, 2015, PLAA issued permission number 150326cds18 ("Burn Permission") to Wayne National Forest. The Burn Permission granted Wayne National Forest authority to conduct open burning in a 344 acre burn unit known as Pine Creek Unit G in Lawrence County, Ohio.² Case File Item A.

{¶16} On April 3, 2015, Ms. Lund timely filed a Notice of Appeal challenging PLAA's issuance of the Burn Permission. Ms. Lund raises nine assignments of error and generally asserts that she is aggrieved by various unlawful and unreasonable aspects of the Burn Permission. Case File Item A.

{¶17} Additionally, Ms. Lund states in her Notice of Appeal that she is "a private resident of the state of Ohio and a US citizen who lives about 50 road miles from

¹ On May 20, 2015, the Commission received a letter from Wayne National Forest ("Forest Service") in which the Forest Service construed Ms. Lund's Notice of Appeal as being filed pursuant to the federal Clean Air Act ("CAA"). The Forest Service asserted that ERAC lacks jurisdiction over the federal CAA and thus characterized any participation by the Forest Service as "informal." Case File Item O.

² The PLAA is a local air agency approved by the Ohio Environmental Protection Agency ("Ohio EPA"). Pursuant to Ohio Revised Code ("R.C.") 3704.112, the Director of Ohio EPA has delegated certain powers and duties to the PLAA. Under R.C. 3704.112(D), one such delegated power is the authority to grant or deny permissions to conduct open burning.

the Pine Creek area” and that she “considers herself a responsible and caring owner of [the] federal public land in the Wayne [National Forest].” Case File Item A.

{¶8} On October 2, 2015, PLAA filed a Motion for Summary Judgment, arguing that Ms. Lund lacks standing and that the present appeal is moot. Regarding standing, PLAA’s Motion states as follows:

* * * Appellant acknowledges that her property is 50 miles away from the Pine Creek area. Therefore, the burns will not have a detrimental effect on Appellant’s property, since she is not adjacent to or an occupant of Pine Creek Unit G. * * *

Case File Item U (internal citations omitted).

{¶9} In essence, PLAA argues that because Ms. Lund’s property will not be affected by the burns, she lacks standing in this appeal. Case File Item U.

{¶10} Regarding mootness, PLAA’s Motion³ states the following:

* * * Appellant cannot contest PLAA’s permission because it expired May 31, 2015 and is no longer operative. * * * Moreover, the issues raised by the Appellant are not necessarily capable of repetition, yet evading review. Future burn permissions will likely involve different facts and different reasons for seeking the open burn permission. * * *

Case File Item U (internal citations omitted).

{¶11} On October 7, 2015, Ms. Lund filed her Response to PLAA’s Motion for Summary Judgment. Regarding standing, the Commission finds the following excerpts summarize the crux of Ms. Lund’s Response:

* * *

Appellant has standing as an Ohio citizen as Pine Creek Unit G is in the Wayne in Ohio. Appellant has standing as a U.S. citizen owner of Wayne

³ The Commission notes that in other appeals currently pending before ERAC, PLAA has argued that Ms. Lund’s challenges to certain burn permissions should be dismissed precisely because they involve identical (or nearly identical) facts and issues to those litigated in her previous appeals. Nonetheless, in the present Motion, PLAA characterizes the possibility of repetition as “completely theoretical and remote.” Case File Item U.

National Forest which is administered by Appellant's federal government. Appellant has standing as a member of the biosphere of earth of which Pine Creek Unit G is also a part. The biosphere is a single envelope around the world and is a commons and the basis for Appellant's life support system. A Barry Commoner ecological law is that everything is connected to everything else.

* * *

The emissions from a prescribed fire of 344 acres at Pine Creek Unit G would negatively affect the air quality of that immediate area and everywhere they go downwind in Ohio, the U.S. and the world. Appellant is adversely affected by this polluted air quality directly if not immediately.

* * *

Appellant is aggrieved by the interpretation and application of the open burning laws by Appellee Ohio Environmental Protection Agency in issuing Permission 150326cds18 which allows increased air pollution which jeopardizes respiratory health and contributes to climate change, all affecting Appellant adversely.

* * *

Case File Item V.

{¶12} In essence, Ms. Lund argues that she has standing in this appeal because (1) PLAA's issuance of the Burn Permission was unlawful and unreasonable; (2) she is a resident of Ohio and values the well-being of the Wayne National Forest; and (3) the burns will negatively affect the overall quality of the air. Case File Item V.

CONCLUSIONS OF LAW

I. Motion to Dismiss Standard

{¶13} Although not strictly bound by the Ohio Rules of Civil Procedure ("Civ.R."), the Commission has historically applied those rules when appropriate to assist in the resolution of appeals. *Meuhlfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010).

{¶14} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim is a procedural motion designed to test the sufficiency of a complaint or cause of action. *Thompson v. Central Ohio Cellular, Inc.*, 93 Ohio App.3d 530, 538, 639 N.E.2d 462 (8th Dist. 1994), citing *Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545 (1992).

{¶15} The Ohio Supreme Court has explained, “* * * [a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Obrien v. University Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). Further, “[u]nder Ohio law, when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991), citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3rd 190, 532 N.E.2d 753 (1988).

II. Standing

{¶16} The question of standing is a threshold issue of jurisdiction, which must be resolved before an appellant may proceed with an appeal before the Commission. *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008-Ohio-5073, ¶22, citing *New Boston Coke v. Tyler*, 32 Ohio St.3d 216 (1987). The standing requirement ensures that each appellant has a personal stake in the outcome of the controversy. *Merkel v. Jones*, ERAC Case Nos. 185274-75 (Oct. 23, 2003).

{¶17} Two avenues exist for a person to establish individual standing before the Commission. First, under Ohio Revised Code (“R.C.”) 3745.04, a person may establish standing to appeal a final action of the Director by showing that he or she is “affected” by the Director’s action and that he or she was a “party to a proceeding before

the director.” *Girard Bd. of Health v. Korleski*, 193 Ohio App.3d 309, 2011-Ohio-1385, ¶13. To be a “party to a proceeding before the director,” a person must have “appeared” before the Director. *Id.*

{¶18} Second, pursuant to R.C. 3745.07, certain circumstances allow persons who are merely “aggrieved or adversely affected” by the Director’s final action to establish standing. In such circumstances, a person need not be a “party to a proceeding before the Director.”

{¶19} Here, the parties do not dispute that Ms. Lund properly brought this appeal under R.C. 3745.07. Thus, Ms. Lund need not demonstrate that she was a party to a proceeding before the Director. Instead, Ms. Lund’s standing in this appeal rests on whether she is “affected” or “aggrieved or adversely affected” by PLAA’s action.

{¶20} The Tenth District has stated that a person is “affected,” or “aggrieved or adversely affected,” by the Director’s final action if: “(1) the challenged action will cause injury in fact, economic or otherwise, and (2) the interest sought to be protected is within the realm of interests regulated or protected by the statute being challenged.” *Girard*, at ¶15, quoting *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, 10th Dist. No. 06AP-836, 2007-Ohio-2649.

{¶21} Further, the injury in fact must be “concrete, rather than abstract or suspected.” *Id.* In other words, a party must show “that he or she will suffer a specific injury, even slight, from the challenged action or inaction, and that the injury is likely to be redressed if the court invalidates the action or inaction.” *Id.* The alleged injury may be actual and immediate, or threatened. *Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Waste Servs. of Ohio, II, L.L.C.*, 10th Dist. No. 07AP-599, 2009-Ohio-2143, at ¶24, quoting *Johnson’s Island Property Owners’ Ass’n v. Shregardus*,

10th Dist. No. 96APH10-1330 (June 30, 1997). However, a party who alleges a threatened injury “must demonstrate a realistic danger arising from the challenged action.” *Id.*

{¶22} Finally, “the interest sought to be protected is within the realm of interest regulated or protected by the statute or constitutional right being challenged.” *Franklin Cty. Regional Solid Waste Mgt. Auth. v. Schregardus*, 84 Ohio App.3d 591, 599 (10th Dist. 1992).

III. Analysis

{¶23} Ms. Lund concedes in her Notice of Appeal that she resides approximately 50 “road miles” from the burn unit at issue in this appeal. Accordingly, the Commission finds Ms. Lund’s residence insufficient to establish standing as an adjacent property owner or occupant.

{¶24} The Commission has held, “[a] plain reading of [Ohio Adm.Code 3745-19-05(A)(3)] dictates a finding that the interests protected by this regulation are associated with the level of air emissions generated during a burn and that the burn must not have a detrimental effect on adjacent properties or occupants.” *Lund v. Korleski*, ERAC Nos. 016046, 016047, 016051 (Oct. 11, 2007), at ¶11.

{¶25} Here, because Ms. Lund states that she resides approximately 50 miles from the burn location, she lacks interest as an adjacent property owner or occupant.

{¶26} Further, the Commission finds Ms. Lund’s generalized interest as a citizen of Ohio and the United States is insufficient to establish standing. “[A] *general* interest as a citizen does not convert an individual right into a right which would permit any citizen who suffers no distinct harm to sue a governmental agency.” *Martin v. Schregardus*, 10th Dist. App. Nos. 96APH04-433, 96APH04-434 (Sept. 30, 1996)

(emphasis added), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

{¶27} However, these findings do not end the Commission’s inquiry. As noted above, Ohio’s open burning laws protect not only the interests of adjacent property owners or occupants, but also the level of air emissions generated during a burn. *Lund v. Korleski*, ERAC Nos. 016046, 016047, 016051 (Oct. 11, 2007), at ¶11.

{¶28} Although the regulations do not protect purely recreational or aesthetic interests, the Commission’s prior standing analyses in open burning cases have noted the significance of the likelihood that an appellant would be directly affected by smoke or other air pollutants generated during a burn. See *Montgomery v. Nally*, ERAC No. 12-316590 (Sept. 27, 2012); see also *Lund v. Korleski*, ERAC Nos. 016046, 016047, 016051 (Oct. 11, 2007).

{¶29} For example, in *Lund*, the Commission found significant appellant’s express concession that she “[did not] plan or expect to be immediately and directly affected by the heat and flames and heavy smoke of a prescribed fire on the Wayne.” *Lund*, at ¶12.

{¶30} Similarly, in *Montgomery*, the Commission relied upon an unrebutted affidavit submitted along with appellees’ motion for summary judgment stating that PLAA had analyzed air emissions associated with the requested burns and issued the burn permits in compliance with Ohio’s open burning regulations. *Montgomery*, at ¶31.

{¶31} Here, Ms. Lund does not dispute that the Burn Permission expired without Wayne National Forest having conducted open burning at the Pine Creek location. Therefore, the Commission finds Ms. Lund could not have been directly affected by air emissions from the open burning, as such burning did not occur.

{¶32} Finally, to the extent Ms. Lund alleges she is aggrieved or adversely affected by PLAA's interpretation of Ohio's open burning regulations in issuing the Burn Permission, rather than the actions the Burn Permission authorizes, the Commission finds any injury to Ms. Lund is too abstract as to establish standing in this instance.

{¶33} Having found Ms. Lund has not demonstrated that she is aggrieved or adversely affected by open burning permission number 150326cds18 within the meaning of R.C. 3745.04 and 3745.07, the Commission need not address PLAA's argument regarding mootness.

FINAL ORDER

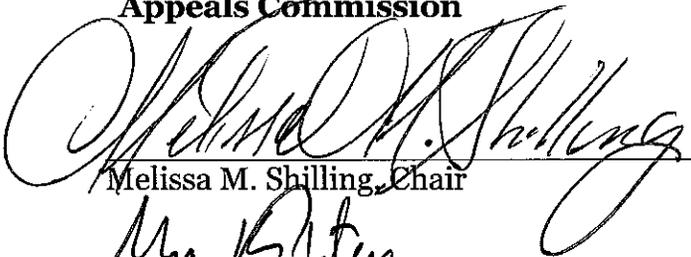
{¶34} For the foregoing reasons, the Commission hereby GRANTS PLAA's Motion for Summary Judgment and ORDERS that the above-captioned appeal be DISMISSED.

{¶35} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

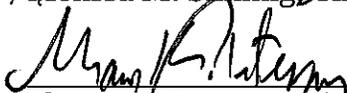
Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing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

**The Environmental Review
Appeals Commission**

Entered into the Journal of the Commission this 21st day of October 2015.



Melissa M. Shilling, Chair



Shaun K. Petersen, Vice-Chair



Michael G. Verich, Member

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