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BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

SIERRA CLUB,

and

VILLAGE OF HARBOR VIEW,

Appellants,

v.

CHRISTOPHER JONES, DIRECTOR
OF ENVIRONMENTAL PROTECTION,

and

FDS COKE PLANT, LLC,

Appellees.

Case No. ERAC 255633

Case No. ERAC 485634

DECISION

Rendered on September 29, 2011

E. Dennis Muchnicki, Esq., for appellant Sierra Club

Peter A. Precario, Esq., for appellant Village of Harbor View

Mike DeWine, Attorney General, and *Gary L. Pasheilich, Esq.,* for
appellee Director of Environmental Protection

*Tucker Ellis & West, LLP, Martin H. Lewis, Esq., Nicholas C. York,
Esq.,* and *Eric D. Weldele, Esq.,* for appellee FDS Coke Plant, LLC

The above-captioned case comes before the Environmental Review Appeals Commission ("ERAC," "Commission") on remand from the Tenth District Court of Appeals on the sole issue of whether the binding contractual obligations at issue herein provide for a continuing program of installation to be undertaken and completed within a reasonable time.

On June 15, 2011, Appellants Village of Harbor View ("Harbor View") and Sierra Club jointly filed a Motion for Summary Judgment, and Appellee FDS Coke Plant, LLC ("FDS") filed a Motion for Summary Disposition, which Appellee Director of Ohio Environmental Protection Agency ("Ohio EPA," "Director") joined on June 30, 2011. The parties subsequently filed opposition and responses thereto. The Commission held Oral Argument on August 11, 2011.

Based on a review of the filings and applicable laws and regulations, the Commission finds that the binding obligations at issue provide for a continuing program of installation that will be undertaken and completed within a reasonable time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶1} The underlying matter arises from the Director's issuance of a Permit To Install ("PTI") the "components of coke plant that qualify as air contaminant sources" in a heat-recovery coking facility. *Village of Harbor View v. Jones* (2010), 2010-Ohio-6533, at ¶1. Originally appealed to this Commission in

2004, the instant matter suffers a complex and protracted history. As such, the Commission hereby incorporates the Findings of Fact as issued in our decision rendered March 17, 2010, in which the Commission found that FDS had timely entered into binding obligations to construct a heat-recovery coking facility. The Commission also incorporates into this decision the facts as issued by the Tenth District Court of Appeals in Case Nos. 10AP-356, 10AP-357 ("Appeal Decision"), rendered December 30, 2010, and the facts as issued in the court's Memorandum Decision on Application for Reconsideration ("Reconsideration Decision"), Case No. 10AP-356, rendered March 3, 2011. *Id.*

{12} In December 2010, the court issued its Appeal Decision, in which ERAC's decision was affirmed in part and remanded in part. The court affirmed ERAC's finding that FDS had entered into binding contractual obligations, but found that ERAC failed to analyze whether these binding obligations provide for FDS to undertake and complete them in a reasonable time. Upon receipt of the court's decision, the Commission ordered the parties to advise the Commission as to how they wished to proceed in this matter. On January, 28, 2011, Appellees notified the Commission that they had motioned the court for reconsideration. Upon receiving notice of the court's Reconsideration Decision in March, ERAC ordered the parties to commence discovery prior to filing dispositive motions and that discovery should conclude on or before May 15, 2011. On May 12, 2011, the Commission convened a status conference, during which the parties agreed to file cross dispositive motions and the Commission set out a briefing schedule for the parties. Oral Argument was held on August 11, 2011. ERAC Case No.

255633, Case File Items 8B, 8C, 8D, 8F, 8G, 8Q, 9A; ERAC Case No. 255634, Case File Items 7V, 7W, 7X, 7Z, 8A, 8K, 8U.

{13} Summary Judgment is a procedural mechanism to terminate litigation when a resolution of factual issues is unnecessary. *Roland Sautter, et al. v. Joseph P. Koncelick* (2007), ERAC Case Nos. 175867-595868, 175875-595876. Although not strictly bound by the Ohio Rules of Civil Procedure, the Commission has historically applied Ohio Civil Rule ("Civ.R.") 56(C) when addressing motions for summary judgment. *Waste Management of Ohio, Inc. v. Board of Health of the City of Cincinnati* (2005), ERAC Case No. 315743; *General Electric Lighting v. Jones* (August 21, 2003 Ruling on Summary Judgment; March 1, 2005 Final Order), ERAC Case No. 185017; *Belmont County Defenders, et al. v. Jones* (2001), ERAC Case Nos. 074914-074919.

{14} Ohio Civ.R. 56(C) provides, in relevant part, the following:

* * * Summary 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.

{15} Thus, summary judgment is appropriate upon a demonstration of the 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, supra, citing *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St. 64.

{¶6} In *Elmer and Mary Carter, et al v. City of Columbus, et al.* (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:

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 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 allegation or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth the 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.'

{¶7} After considering the arguments advanced in the pleadings and at oral argument, the Commission finds no genuine issue as to any material fact that would preclude resolution of the instant matter pursuant to summary judgment.

{¶8} As set out in the Appeal Decision, the sole question remaining before the Commission is whether the binding contractual obligations at issue herein provide for those obligations to be undertaken and completed within a reasonable time. Appeal Decision, at ¶65.

{¶9} In its Reconsideration Decision, the court stated:

* * * ERAC held that contracts for the design, management, and engineering aspects of constructing a facility, along with contracts for actual physical construction, all constitute contracts to undertake and complete a continuing program of installation. (ERAC decision, at ¶42-43.) ERAC focused its analysis on determining what type of contract furthered a continuing program of installation, not the timing requirement. Thus, ERAC did not address how the phrase 'within a reasonable time' impacts the meaning of Ohio Adm.Code 3745-31-06(A). Reconsideration Decision, at ¶4.

{¶10} Further, the court noted that the Talon contract, a critical binding obligation at issue, "does not indicate when Talon will commence its work or when it intends to complete its work. Without further evidence, we cannot determine whether Talon will undertake and complete its work within a reasonable time." *Id.* at ¶9.

{¶11} Before analyzing the precise question delineated by the court, the Commission finds it instructive to set out Section B(4) of FDS's original permit:

This permit to install shall terminate within eighteen months of the effective date of the permit to install if the owner or operator has not undertaken a continuing program of installation or modification or has not entered into a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation or modification. This deadline may be extended by up to 12 months if application is made to the Director within a reasonable time before the termination date and the party shows good cause for any such extension.

{¶12} Section B(4) of the original PTI reiterated the rule contained in former Ohio Administrative Code (“Ohio Adm.Code”) 3745-31-06.¹ Pursuant to Section B(4) and former Ohio Adm.Code 3745-31-06, FDS requested that the Director extend the expiration date of its PTI for one year. The Director granted FDS’ request, making the PTI valid until December 14, 2006. FDS entered into major construction contracts for the coke plant on November 1, 2006.

{¶13} Appellees argue that FDS’s permit is valid because FDS’s agreements satisfy the PTI condition and Administrative Code requirement that the owner or operator must have “entered into a binding contractual obligation to *undertake and compete in a reasonable period of time* a continuing program of installation.” In support, Appellees submitted the following five affidavits detailing and describing the terms and operations of the applicable agreements: 1) Rajagopala Venkataramani, Chief Engineer/Project Manager, UHDE Corporation of America (“UHDE”); 2) William Mitchell, President and Chief Executive Officer, Talon Consulting, LLC (“Talon”); 3) Kathleen Jarema, Vice President and Project Manager, FDS; 4) George Webber, President, FDS; and 5) William Garber, former Administrator, Division of Utilities Administration, City of Toledo (2003-2007), now Director of Engineering and Environmental Development, FDS (2007-present). Emphasis added. ERAC Case No. 255633, Case File Items 8R, 8V, 8X; ERAC Case No. 255634, Case File Items 8L, 8P, 8R.

¹ Since the issuance of the original PTI, this regulation has been amended and now appears in Ohio Adm.Code 3745-31-07(A)(1) and (2). Because former Ohio Adm.Code 3745-31-06 was in effect when the Director issued the original PTI, it applies to this matter.

{¶14} Mr. Venkataramani's affidavit focuses on a document attached to his affidavit known as the Project Execution Schedule ("UHDE's Schedule"), which was included in UHDE's May 2005 Proposal. UHDE's Schedule is a 3-page spreadsheet timeline documenting "UHDE's design and build out related activities to the FDS project." Mr. Venkataramani stated that UHDE's Schedule "provides for a two and a half year period of build out activities from the inception of ground breaking activities. The two and a half year period begins to run not later than the time when all permits have been obtained and any appeals thereto have been exhausted." Mr. Venkataramani further averred that 1) UHDE is bound to adhere to this schedule; 2) based on his experience, the two and one-half year build out period is a reasonable time in which to complete FDS's project; and 3) this timeline is consistent with standard industry practice. ERAC Case No. 255633, Case File Item 8R, Affidavit of Venkataramani, at ¶ 6-10; ERAC Case No. 255634, Case File Item 8L, Affidavit of Venkataramani, at ¶ 6-10.

{¶15} Mr. Mitchell's affidavit focuses on Talon's May 2006 Construction Contract entered into between Talon and FDS, and Talon's ability to adhere to UHDE's Schedule as outlined in UHDE's 2005 Proposal. Mr. Mitchell averred that Talon, as the construction manager for this project, is required to abide by the timeframes set out in UHDE's Schedule and that the two and one-half year time period commences "not later than the time when all permits have been obtained and any appeals related thereto have been exhausted." Based on UHDE's Schedule and his own experience, in 2005, Mr. Mitchell began

developing a 16-page construction planning document entitled Total Project Schedule ("Talon's Schedule"). Talon's Schedule, attached to Mr. Mitchell's affidavit, enumerated activities such as "site preparation, site civil work, procurement, delivery of materials and other build out specific tasks, including those related to power generation." Mr. Mitchell also stated that in his experience, the build out period set out in UHDE's Schedule and further refined in Talon's Schedule is a "reasonable time to complete the build out of the FDS project." ERAC Case No. 255633, Case File Item 8R, Affidavit of Mitchell, at ¶¶ 4, 8, 12 - 15, 17; ERAC Case No. 255634, Case File Item 8L, Affidavit of Mitchell, at ¶¶ 4, 8, 12 -15, 17.

{¶16} Ms. Jarema's affidavit focuses on FDS's contractual dealings with UHDE and Talon as they relate to FDS's construction project. Ms. Jarema attested that not only was she involved in the drafting and review of the various construction agreements, she was also involved in developing both the UHDE Schedule and the Talon Schedule. Her affidavit essentially reiterates the statements of Mr. Venkataramani and Mr. Mitchell and confirms that both schedules provide for a "two and a half year period of build out activities from the inception of ground breaking activities. The two and a half year period begins to run not later than the time when all permits have been obtained and any appeals thereto have been exhausted." ERAC Case No. 255633, Case File Item 8R, Affidavit of Jarema; ERAC Case No. 255634, Case File Item 8L, Affidavit of Jarema.

{¶17} Mr. Weber's affidavit focuses on the financing aspect of FDS's project. Mr. Weber averred that "public funds to finance the build out of a coke plant facility through the sale of state bonds would occur upon the expiration of appeals * * *." He further stated that in 2011 he "executed the State of Ohio Air Quality Development Authority ("OAQDA") agreement to issue Bonds Inducement Resolution," which updated the 2006 OAQDA Bond Inducement Agreement. Mr. Weber believes that the OAQDA bonds will be offered to the public upon the expiration of appeals to ERAC in the instant matter. ERAC Case No. 255633, Case File Item 8V, Affidavit of Weber, at ¶ 3, 4, 5, 6; ERAC Case No. 255634, Case File Item 8P, Affidavit of Weber, at ¶ 3, 4, 5, 6.

{¶18} Lastly, Mr. Garber's affidavit focuses on his familiarity with FDS's interaction with the City of Toledo during his employment with the city, as well as his receipt of various documents relating to FDS's pre-construction regulatory activities while employed with FDS. As a city administrator, Mr. Garber "received and reviewed" numerous documents relating to FDS's project including: 1) copies of various permits; 2) a Joint Economic Development Zone agreement; 3) construction site storm water permits; 3) the planning commission's site plan review; and 4) documents relating to various on-site construction activities, such as the installation of a security fence gate to the site, core boring and geotechnical analysis, wetland delineation report, topography site survey, and an updated site boundary survey. As FDS's Director of Engineering and Environmental Development, Mr. Garber averred that he had "received and reviewed" environmental assessment documents, United States Army Corp of

Engineer notifications, and documents relating to the Midwest Interconnection System Organizations and the Ohio Power Siting Board. ERAC Case No. 255633, Case File Item 8V, Affidavit of Garber; ERAC Case No. 255634, Case File Item 8P, Affidavit of Garber.

{¶19} Conversely, Appellants assert that FDS's permit expired because FDS's contractual obligation lacked a "specific start date or method of determining a start date without reference to indeterminate contingencies for initiation construction or related construction activities." In support, Appellants attached the following two affidavits: 1) affidavit of Paul Pavlic, a licensed, practicing attorney specializing in business contracts; and 2) affidavit of Carl Stanoyevic, Mayor of Harbor View. ERAC Case No. 255633, Case File Item 8S, 8T, 8W; ERAC Case No. 255634, Case File Item 8M, 8N, 8Q.

{¶20} Mr. Pavlic's affidavit focuses on a document referred to as the "FDS contact for a Heat Recover Coke-Making Facility," also known as the Talon Contract. Mr. Pavlic noted that that the Talon Contract does not provide a specific start date for initiating construction at the site. Instead, the document details several contingency provisions that may potentially trigger a start date, including a Notice to Proceed provision. The Notice to Proceed provision is tied to obtaining financing at some unspecified time in the future and is a precursor to actual construction at the site. In his conclusion, Mr. Pavlic averred, "[b]ased upon my review of the above-mentioned agreement and documents, I conclude that, with regard to initiating construction, the document as submitted, is contingent and contains no substantive nor definitive information regarding a

start date or completion date. These dates can only be determined after the financial closing which itself has no performance date stated." ERAC Case No. 255633, Case File Item 8S, Affidavit of Pavlic, at ¶¶ 4, 5, 9; ERAC Case No. 255634, Case File Item 8M, Affidavit of Pavlic, at ¶¶ 4, 5, 9.

{¶21} Mr. Stanoyevic's affidavit focuses on local permitting activity and actual construction at the site. He averred that no permits for construction or zoning changes have been filed with the "Lucas County Zoning Commission [or] the Building Department" and that no physical construction of any kind has occurred at the site. ERAC Case No. 255633, Case File Item 8S, Affidavit of Stanoyevic, at ¶¶ 4, 8; ERAC Case No. 255634 Case File Item 8M, Affidavit of Stanoyevic, at ¶¶ 4, 8.

{¶22} It is undisputed that the scope of the FDS project is massive and complex. Significantly, Appellants did not challenge nor did they present evidence that a construction period of two and one-half years, as detailed in both UHDE's and Talon's schedules, is an unreasonable timeframe within which to complete this project. As such, the Commission finds that taken together, UHDE's Schedule and Talon's Schedule set out a well-defined process for construction that, once commenced, will be completed in a reasonable period of time.

{¶23} The question remaining, then, is whether the binding obligations provide for the commencement of the FDS project within a reasonable time period. Affidavits submitted by Appellees state that financing and implementation

of UHDE's and Talon's construction schedules will be triggered by the exhaustion of all appeals.

{¶24} Appellants do not contest that construction will be undertaken once all appeals are exhausted, but contend that the absence of a clear, unambiguous construction commencement date - one without external triggers in the binding agreement, (e.g., Notice to Proceed) - results in the expiration of FDS's PTI. The Commission disagrees and finds that the absence of a definitive commencement date for construction is not fatal to the extension granted by Ohio EPA.

{¶25} Notably, the court did not confine ERAC's review to the four corners of the binding obligations. Thus, the Commission may consider the terms of the binding obligations, as well as the submitted affidavits and attachments thereto to ascertain the parties' understanding of how the obligations will operate in the pre-construction and construction phases of FDS's coke plant project.

{¶26} Unquestionably, FDS's nearly one-billion dollar, multifaceted project is immense in its monetary investment and construction requirements. Affidavits support the notion that, at the exhaustion of appeals related to this project, public bonds will be issued and FDS will begin implementing UHDE's and Talon's time tables for project construction.

{¶27} Indeed, the Ohio General Assembly contemplated the impact of third-party appeals on the expiration of PTIs in Revised Code ("R.C") 3704.03(F)(2)(b)(iv). Though this statute is not applicable to the instant case for

reasons more fully addressed in our March 2010 ruling in the instant matter, the language is clear and provides the following:

(b) An air contaminant source that is the subject of an installation permit shall be installed or modified in accordance with the permit not later than eighteen months after the permit's effective date at which point the permit shall terminate unless one of the following applies:

* * *

(iv) The installation permit is the subject of an appeal by a party other than the owner or operator of the air contaminant source that is the subject of the installation permit, in which case the date of termination of the permit is not later than eighteen months after the effective date of the permit plus the number of days between the date in which the permit was appealed and the date on which all appeals concerning the permit have been resolved. R.C. 3704.03(F)(2)(b)(iv).

{128} Thus, the Commission believes, in certain circumstances it is reasonable, though not common practice, to delay the undertaking of a project until after appeals of the underlying matter have been exhausted.


FINAL ORDER

In light of the foregoing, the Commission finds that the binding obligations at question herein provide for a continuing program of installation to be undertaken and completed within a reasonable time.

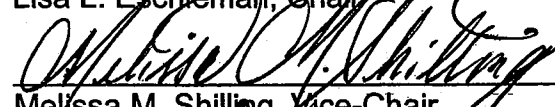
The Commission, in accordance with Ohio Adm.Code 3746-13-01, informs the parties that:

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 all other parties to the appeal. 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



Lisa L. Eschleman, Chair



Melissa M. Shilling, Vice-Chair



Shaun K. Petersen, Member

Entered into the Journal of the
Commission this 24th
day of September 2011.

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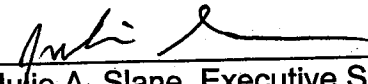
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Nos. 255633, 485634

CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the DECISION in **Sierra Club, and Village of Harbor View v. Christopher Jones, Director of Environmental Protection, and FDS Coke Plant, LLC**, Case Nos. ERAC 255633, 485634 entered into the Journal of the Commission this 29th day of September, 2011.



Julie A. Slane, Executive Secretary

Dated this 29th day of
September, 2011, at Columbus, Ohio.