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Administrative Procedure: EPA Refusal to Issue Wetlands Building Permit is Not Final Order Which Triggers Appeal under APA

Marquette County Road Commission v. U.S. Environmental Protection Agency, No. 17-1154 (6th Cir. Mar. 20, 2018).

The EPA's refusal to issue a wetlands construction permit to a Michigan County and the subsequent Army Corps of Engineers oversight of the permitting process did not constitute a "final agency action" which would allow appeal under the APA.

The Marquette County Road Commission (Commission) sought to build County Road 525 and needed a permit to fill 25 acres of wetland to do so. It applied for the permit through the Michigan Department of Environmental Quality (MDEQ), which wanted to issue it, but the U.S. Environmental Protection Agency (EPA), which oversees state-run permitting, objected to it under the Clean Water Act (CWA). The Road Commission tried to address the EPA's concerns, to no avail, and eventually the permit came under the purview of the Army Corps of Engineers (Army Corps). Frustrated and not willing to engage in the Army Corps process, the Road Commission declined to go through the process and instead filed claims under the Administrative Procedure Act against both EPA and the Army Corps. The district court held that

neither EPA's refusal to approve the application nor the Army Corps' requirement that the Road Commission re-submit its application materials to continue the process were appealable "final agency action" and dismissed the suit. The Road Commission appealed.

Dredging and filling wetlands is regulated by Section 404 of the Clean Water Act and is, usually, administered by the Army Corps. The CWA, however, also allows states to run their own permitting process - which only two states do and Michigan is one of them - with significant and powerful oversight from the EPA. If EPA objects to a permit issuance, the state "shall not issue the permit unless [it] has taken the steps required by [EPA] to eliminate the objection," regardless of how much time has passed. Once the objection is lodged, the state can request a public hearing, after which EPA can issue the permit with modifications or eliminate them, or just deny the permit. If EPA's objections remain after the hearing the state has the option to issue a revised permit addressing the objections or deny the permit. If the state takes neither course of action, the Army Corps takes over responsibility for the permit issuance.

Here EPA's objections remained after the public hearing, leaving MDEQ and the Road Commission 30 days to address the objections before authority transferred to the Army Corps under the CWA. They missed the deadline, and once authority transferred, the Army Corps required a new application. The Road Commission gave up at this point given the admittedly lengthy process and filed suit. However, to be appealable, agency action must be "final," which under the APA has two conditions: "First, the action must mark the consummation of the agency's decision-making process-it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." The Road Commission's argument that the EPA objections operated as a "veto" that concluded EPA's involvement was denied by the Circuit since, as the facts showed, the Road Commission continued to press its case attempting to eliminate them - and tellingly, did so as dictated by statute. This included revising the application, then seeking a public hearing, and ceding review to the Army Corps thereafter. Its argument that ending *EPA's portion of the decision-making* and passing it off to the Army Corps fared no better, as the Circuit noted the two are statutorily tasked to work together on permits - including a single permit application in succession. Since the transfer of authority to the Army Corps clearly did not "mark the consummation of the agency's decision-king process," the Circuit did not evaluate the second prong and affirmed the lower court's dismissal of the case.

LINK

Aviation: FAA Route Changes Must Be Challenged Within 60 Days after Initial "Final Order"-Subsequent Challenges are Untimely

Citizens Association of Georgetown v. FAA, no. 15-1285 (D.C. Cir. Mar. 27, 2018).

Rebuffing complaints about modified flight paths which sent more air traffic near Georgetown (a neighborhood likely populated with more aviation lawyers per capita than most others in the US), the DC Circuit has held that the FAA's initial publication of revised flight paths--even if only sent directly to 2 DC officials-- constituted a "final" order and required challenges within 60 days; the petitioners' later actions after FAA publication of a catalog illustrating the new flight paths were not timely.

National Airport (National), once described by President Franklin D. Roosevelt as "one of the world's greatest facilities, surely its most convenient and, some of us like to think, probably its most beautiful," has served the Washington, D.C. metropolitan area for more than 75 years, and now accommodates 550 flights a day (more than 24 million passengers yearly). For decades,

planes departing National have followed a route that took them over northern Virginia and the west bank of the Potomac River.

In December 2013, after several years of studying proposed route changes along the Potomac that would bring planes closer to the homes in Georgetown, the Federal Aviation Administration (FAA) completed its environmental assessment (EA) and prepared a Finding of No Significant Impact and Record of Decision (FONSI/ROD), which formalized its determination that the new patterns "not significantly affect the quality of [the] human environment." Published in December 2013, the FONSI/ROD stated that it "constitutes a final order of the FAA Administrator and is subject to . . . judicial review under 49 U.S.C. §46110." The FAA sent the FONSI/ROD to 450 recipients (only 2 of whom were Washington DC officials), published the notice in area newspapers, and made the document available on the internet.

In the following months, pilots only occasionally departed from National along the new routes. In June 2015, after conducting additional flight trials, the FAA published charts depicting the approved routes in a catalog it maintains of approved departure and approach procedures.

Georgetown University and six local neighborhood associations (collectively, Georgetown) then petitioned for review, alleging that the FAA failed to comply with environmental and historic preservation laws when assessing the noise impacts of the new departure procedures. Federal law requires that petitions seeking review of FAA actions be filed within 60 days after the agency's "final order" unless the petitioner had "reasonable grounds" for delay.

To determine when the FAA issued its final order, the Circuit followed the Supreme Court's well-established two-part test for assessing finality. First, to qualify as final, an order must "'mark the consummation of the agency's decision-making process,'" and second, it must "either determine 'rights or obligations' or [be] a source of 'legal consequences.'" (citations omitted).

The court looked to its own precedent in *City of Phoenix v. Huerta* to ascertain finality. There, the FAA had developed next-generation flight procedures for Phoenix's Sky Harbor International Airport. After evaluating the environmental impact of the proposed routes, the FAA published them and put them into immediate use in September 2014. Following swift public outcry, the FAA suspended the new routes and began a dialogue with the city of Phoenix about developing alternative departure procedures. In April 2015, after several months of back-and-forth and having convened a working group to study the issue, the FAA issued a final report, which, although making a few adjustments, "reaffirmed the agency's decision not to conduct further review of the new flight paths' environmental impact." The FAA's September 2014 publication was therefore a "final order" for review purposes-the court noted that the FAA had completed lengthy environmental studies as documented in that report, and no additional studies were ever conducted. And the pilots in Phoenix had begun using the new routes in 2014.

The other element of the finality inquiry-whether the agency's order determined "rights or obligations" or was the source of "legal consequences," was also largely controlled by *City of Phoenix*. To decide whether this element was satisfied, the court asked which document-the initial publication of new routes or the subsequent reaffirmance-"led to the effects petitioners [sought] to reverse: increased noise in certain areas of Phoenix." According to the court, it was the former because that document led to the utilization of next-generation procedures and the resulting increased noise; in fact, it was the very document petitioners sought to vacate. So too in Georgetown-the subject of its argument was the initial December 2013 flight plan, not the 2015 catalogue. Vacating the charts would not have yielded the relief that Georgetown sought.

Here, because the FAA's December 2013 announcement of the new routes -- not its later publication of the route charts -- qualified as the agency's "final action," and because Georgetown failed to challenge it within the 60-day statutory time limit and had no "reasonable grounds" for the delay, the petition was untimely.

The FAA's efforts to inform the residents of Georgetown about the evaluation of the D.C.

Metroplex were hardly a model of sound agency practice. But neither the FAA's stumbles nor those of its contractor excuse Georgetown's failure to timely file a petition for review given that the agency provided adequate notice of the EA process and never indicated that it might change its position. Filing deadlines, replete throughout the United States Code, promote prompt and final judicial review of agency decisions and ensure that agencies and affected parties can proceed free from the uncertainty that an action may be undone at any time. The petition for review is dismissed.

LINK

Damages: Court Award of Attorney's Fees Limited where Recovery was Modest

Thorncreek Apartments III, LLC v. Mick, Nos. 15-2295/2303 & 16-3556 (7th Cir. Mar. 27, 2018).

Upholding the district court of and concluding, for the moment, a massive litigation between an apartment complex and an Illinois Village, the Seventh Circuit has agreed that nominal attorneys' fees were appropriate as to one portion of the litigation where only modest damages were returned to the plaintiff-but other portions of the award, including prejudgment interest, were also appropriate.

Thorncreek Apartments (Thorncreek) is a substantial housing complex in the Village of Park Forest, Illinois (Village). It was constructed initially in 1989 and, ultimately, divided into three separate corporations running each building - Thorncreek I, Thorncreek II, and Thorncreek III. In 2007 the leasing office needed to move buildings, requiring a Conditional Use Permit but, before that was issued, Thorncreek began operating the leasing office, prompting the Village to cite Thorncreek for a zoning violation. The Village then filed suit in state court, prompting counterclaims for alleged constitutional violations, all of which ultimately led to, in the Circuit's summation, a "sprawling" case. Ultimately, there was a thirteen-day jury trial, from which the Village and its manager were found liable under § 1983 for a class-of-one equal-protection violation, and the Village manager and director of community development were found liable for conspiracy in violation of § 1985(3). Post-verdict motions were made and the district court "tossed out the jury's liability finding against the community development director" but approved everything else, granted Thorncreek's motion for prejudgment interest, and entered judgment accordingly. Appeals followed.

The first appeal was from the Village manager arguing that he could not be liable on the § 1985(3) conspiracy claim since the jury rejected the race-based and class-based equal-protection violation - the predicate of the conspiracy claim. The Circuit disagreed, pointing out that the lower court *was not* holding him liable on the § 1985(3) conspiracy claim, but rather because the jury found him (and the Village) liable on *§ 1983 claim* alleging a class-of-one equal-protection violation and he failed to challenge that portion of the verdict. His appeal failed.

Next, the Court addressed Thorncreek's complaint that the jury's nominal awards were "inconsistent and contrary to reason" and thus it was an abuse of discretion for the trial court to refuse its request for a new trial on damages. The Circuit also disagreed here with this party, noting that the three buildings - separate entities - suffered differently at the hands of the Village, making the different awards appropriate. Thorncreek I sold before most of the legal actions against the development by the Village took place and, though there was dwelling testimony from experts, the Circuit held the jury was entitled to believe the Village's expert's testimony that the selling price was right and did not necessitate damages (rather than Thorncreek's expert that it sold at too low a price based on the Village's actions). Thorncreek II, on the other hand, was

"uniquely affected" as the jury found the Village unequally enforced an electrical-upgrade ordinance against it and the jury, again as entitled, credited Thorncreek this time in holding that it was undervalued when it sold (and awarding $2 million). Thorncreek III, finally, was not subjected to harassment over electrical upgrades and did not face an enforcement action by the Village in state court, and the jury treated it differently as well for damages purposes. The Court found these jury decisions consistent and reasonable and affirmed the lower court.

Last, as to prejudgment interest, the Circuit restated its long-held rule that a "prevailing plaintiff can't double dip by providing the jury with a damages estimate that includes interest and also moving for prejudgment interest." The court noted the trial judge correctly began with the presumption that *no prejudgment interest* should be issued because Thorncreek's damages estimate to the jury included interest, *and also correctly overcame that presumption* by analyzing the jury's award of a little over $2 million and found it had reached the award by simple subtraction. Namely, the jury looked at the value a willing buyer was prepared to pay for Thorncreek II (before the Village's actions) and what remained on the mortgage, and subtracted the latter from the former. Since the prejudgment interest estimate was between $1.3 million and $1.6 million, it was evident the jury did *not incorporate* it in the award, leading the Circuit to affirm the lower court's decision to award it.

LINK

Education: South Carolina School Disturbance Laws are Unconstitutionally Vague

Kenny v. Wilson, No. 17-1367 (4th Cir. Mar. 15, 2018).

Overturning a lower court determination that students' fears of future arrest and prosecution were too speculative, the Fourth Circuit has found two South Carolina laws intended to limit disruptive behavior in schools are so vague as to be unconstitutional.

A host of South Carolina students - former and current - filed suit alleging two South Carolina laws - S.C. Code Ann. § 16-17-420 (the "Disturbing Schools Law") and S.C. Code Ann. § 16-17-530 (the "Disorderly Conduct Law") - are unconstitutionally vague. The district court held the students lacked standing because their fear of future arrest and prosecution was speculative, but the Fourth Circuit disagreed, noting not all the students' alleged harms were conjecture or speculation.

The first law at issue is South Carolina's Disturbing Schools Law, which states:

> It shall be unlawful: (1) for any person willfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon; or (2) for any person to (a) enter upon any such school or college premises or (b) loiter around the premises, except on business, without the permission of the principal or president in charge.

The second law at issue is the Disorderly Conduct Law, which states:

> Any person who shall (a) be found on any highway or at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner, (b) use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church . . . shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one

hundred dollars or be imprisoned for not more than thirty days.

Every plaintiff in the case alleged the Disturbing Schools Law was unconstitutionally vague on its face, and two students also challenged the Disorderly Conduct Law was unconstitutionally vague as applied to elementary and secondary public school students in the state. The plaintiff's claims about the laws ran the gamut from alleging they criminalize typical youth behavior (refusing to follow directions, cursing, etc.) to their being enforced in a discriminatory manner against minority students and, based on these, the student plaintiffs argued they feared future arrest and/or prosecution.

The Fourth Circuit found that the students satisfied both ways in which injury-in-fact could be shown: that is, they alleged 1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and the[] exist[ence of] a credible threat of prosecution thereunder," and 2) a "sufficient showing of self-censorship, which occur[ed] when [the] claimant[s are] chilled from exercising [their] right to free expression." For the first test, the Circuit found it sufficient that some of the students alleged that they attend school and do so without knowing what, if any, of their conduct could lead to criminal prosecution and that there had been past enforcement as well as the refusal to disavow enforcement. As for the second test, the students alleged, plausibly, that "the two statutes are regularly enforced against students like [the plaintiffs]; [that] they restrict students' expressive activity, including anything perceived as "disturbing," "obnoxious," "disorderly," or "boisterous"; and [that] they tend to chill students' engagement in the classroom as well as their ability to speak out against police and participate in conversations about policing."

The defendants, which included the state Attorney General and a host of sheriffs, first argued the standing tests could not be met because the South Carolina courts had put limiting interpretations on the statutes. The Circuit reviewed the precedent supporting this argument and rejected it because the case was confined to interpreting one phrase in the law, specifically that profane language alone cannot constitute a violation it, but never addressed other vague portions, including what "conducting [oneself] in a disorderly or boisterous manner" is. The defendants also argued a critical flaw was that the plaintiffs failed to allege an intent to engage in a specific course of conduct proscribed by the statutes. The Circuit turned this argument on its head, noting "it is precisely because the statutes are so vague that plaintiffs can't be more specific. Plaintiffs allege that they can be criminally prosecuted for just about any minor perceived infraction and that they can't predict the type of conduct that will lead to an arrest." The lower court opinion was vacated, and the case remanded for further proceedings.

LINK

Employment: Employer Is Not Liable for Discrimination where Third Party Fails to Qualify Employee for Job Promotion

Hughes v. Allegheny County Airport Authority , No. 17-2535 (3d Cir. Mar. 15, 2018).

An Airport Authority which did not promote an employee to a driver position because the candidate had not obtained the requisite licensing was not liable for discrimination where a different governmental entity was responsible for the licensing.

Lonnell Hughes (Hughes) began working with the Allegheny County Airport Authority (Airport Authority) in 2001 as a laborer. In 2013 two driver positions became available, each of which required a Class A Commercial Driver's License (CDL) with a tank/hazmat and a passenger endorsement. Hughes, a 51-year-old black male filed suit against the Airport Authority alleging he

was "not permitted to take a test needed to qualify for a driver position, that two white employees were permitted to take the test, and that one of these employees received the job." After the parties filed cross motions for summary judgment, the district court ruled in favor of the Airport Authority and Hughes appealed.

The Third Circuit agreed that the lower court correctly employed the *McDonnell Douglas* burden-shifting framework and appropriately carried it out in denying Hughes' established a prima facie case. The stumbling block for Hughes revolved around the test-taking necessary to get the driver's license endorsements needed to apply for the job. Hughes had a CDL with a tank/hazmat endorsement but needed a passenger endorsement and, in order to obtain that, needed to take a road test. While Hughes alleged he was not permitted to take the test and two white employees were, the Circuit found he alleged these wrongs against a party not liable for them. The Airport Authority's HR director testified that the Pennsylvania Department of Transportation issues CDLs and manages all endorsements for them and that the Airport Authority *only provides* inquiring employees with the contact information for an instructor who *does not* work for the Airport Authority. Thus, while Hughes insisted he tried to schedule a test with this instructor and was given various excuses as to why he could not take it - from scheduling troubles to the bus necessary for the test not being available - the Circuit agreed with the lower court that this was not something for which the Airport Authority could be held accountable.

Simply put, Hughes alleged the Airport Authority discriminated against him by arguing he was denied the opportunity to take a test, but the Airport Authority lacked control over the testing and only, and lawfully, did not hire him because he did not have the driving endorsement required for the position. Thus, he could not make out a prima facie case and the lower court was affirmed.

LINK

Public Contracting: No Constitutional Interest in Bids; Temporary Prohibition on Bidding until Correction of Non-Responsible Bidder Status is Not Debarment

Rouse v. City of Pittsburgh, No. 17-2587 (3d Cir. Mar. 15, 2018).

Affirming the district court, the Third Circuit holds that a contractor has no property interest in bids until awarded, and that denial of the contractor's right to bid until it corrects flaws depriving it of "responsible bidder" status is not tantamount to debarment.

Jocelyn Rouse (Rouse) is the vice president of ROAC, Inc., (ROAC) a minority-owned contractor in Pittsburgh (City). It was awarded numerous contracts from the City, but in November 2015 it "caused damage to the wrong building" while executing a demolition contract. Since then, and despite submitting the lowest bid in numerous instances, the City did not award ROAC any contracts. ROAC contacted the City inquiring about this issue and, though staff internally discussed ROAC not being a "responsible bidder," ROAC was not advised of those discussions nor told it was debarred. ROAC filed suit in state court, alleging Pittsburgh arbitrarily and unlawfully debarred ROAC in violation of its due process rights. At that point the City sent a letter informing ROAC that it was not debarred, but instead deemed a "non-responsible contractor." Once removed to federal district court, it ruled in favor of the City and ROAC appealed.

The court began with the due process claim - ROAC arguing it was denied such because it was debarred without any process - and affirmed the lower court. Pennsylvania law, the underpinning of the federal due process claim, holds that "one who bids on a public contract has no legitimate expectation of receiving it until the contract is actually awarded," meaning ROAC lacked any

property interest in its bids, constitutionally speaking. On appeal ROAC argued it was constructively debarred because it was deemed a non-responsible bidder based on a "one-time" determination and that this determination applied to all future contracts. The Circuit first looked to the Pittsburgh City Code, which notes that debarment prohibits a contractor *from bidding* and participating in City contracts and is *for an established time period.* It then reviewed the letter sent from the City to ROAC explaining its status, and noted the City clarified that ROAC was not debarred, but was a non-responsible bidder and as such could win contracts again once the City deemed it to "have taken affirmative steps . . . to prevent the kind of mistake it made in [November 2015]."

ROAC had not been prohibited from bidding or from winning contracts for any specific time period, and was thus not debarred, constructively or otherwise.

LINK

Qualified Immunity: Deputies Did Not Have Probable Cause to Arrest Photographers in Hallway outside Courtroom, Giving Rise to First and Fourth Amendment Violations

Enoch v. Hogan, No. 17-3571 (6th Cir. Mar. 23, 2018).

Ohio deputies who arrested two African Americans who were filming activities in a hallway outside a courtroom could not claim qualified immunity based on probable cause, because the judge had not forbidden such filming in the hallway.

In June 2014 a local judge in Hamilton County, Ohio (County) had a pretrial hearing, garnering local attention. Vanessa Enoch (Enoch) and Avery Corbin (Corbin) - who did not know each other - were both there, the former reporting for a local paper, the latter out of interest since he was the judge's former bailiff. Roughly 20 people attended what turned out to be an impromptu press conference outside the courtroom in the "public hallway" of the building. Many of them, like Corbin and Enoch, were filming the happenings on mobile phones and the like. Enoch and Corbin allege they were singled out because of their race. For Enoch, a County sheriff's deputy "stopped her, demanded the password for her iPad under threat of arrest, searched it, and shortly thereafter forcibly handcuffed and arrested her," while for Corbin a deputy ordered he "cease recording under threat of arrest, searched his iPad, and forcibly handcuffed and arrested him." Both were charged with disorderly conduct but all charges were subsequently dropped.

The two filed a §1983 suit against the deputies involved, the County Sheriff's Office and the Sheriff, alleging violations of their constitutional rights under the First and Fourth Amendments. The district court held the deputies involved were not eligible for qualified immunity and they appealed.

The Circuit began by laying out the deputies' defense: that Enoch and Corbin violated Local Rule 33(D)(6) of the County Court of Common Pleas by recording in the courthouse hallway without permission and they were entitled to enforce against the violation when they saw it occur, including searching, arresting and prosecuting the two offenders. As for the Local Rule, the Circuit noted the language in it says judges have the sole discretion to determine what "ancillary areas" of the courthouse (in addition to the courtroom) may not be recorded in without permission. The Circuit noted, however, that Enoch and Corbin addressed this *fact issue* by highlighting that the judge instructed attendees of the pretrial hearing that there was no recoding in the *courtroom*, and was silent as to the hallway. Crediting the plaintiffs' facts as true, the Circuit analyzed the Fourth Amendment qualified immunity claim assuming they were searched, arrested, and prosecuted based on their race despite *not* violating the Local Rule or any law.

Beginning with the deputies contacting Enoch and Corbin, the Circuit pointed out their only answer to the issue of whether their actions met the standards for a *Terry* stop was that they had "probable cause to believe that Enoch and Corbin were violating Local Rule 33(D)(6)." This was disregarded, as previously addressed, and the Circuit easily found merit in the plaintiffs' claims that their Fourth Amendment rights were plausibly violated. The Court had no trouble with the second prong, noting with an underwhelming statement that the right to be free of search, seizure, and prosecution based on nothing more than race is "published precedent."

As for the First Amendment claim, the Circuit did not favor the deputies' argument that the right to record was not clearly established. The Circuit noted it has "long and clearly held that newsgathering qualif[ies] for First Amendment protection," and that even if trial-related newsgathering has some applicable reasonable restriction, the Local Rule was not violated by the plaintiffs and thus was not a relevant consideration. The Circuit put it succinctly: "The Deputies could not constitutionally prevent Enoch and Corbin from or punish them for gathering news about matters of public importance when their actions violated neither rules nor laws." The lower court was affirmed, and the case remanded.

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