

BEFORE THE RECLAMATION COMMISSION

ELISA YOUNG,
MEIGS CITIZENS ACTION NOW,

Appellants,

-vs-

DIVISION OF MINERAL RESOURCES
MANAGEMENT,

Appellee,

and

GATLING OHIO LLC,

Intervenor.

Case No. RC-08-015

Review of Issuance of Permit D-2317;
Gatling Ohio LLC

**ORDER OF THE
COMMISSION DISMISSING
APPEAL FOR LACK OF
STANDING OF ELISA YOUNG
AND MEIGS CITIZENS
ACTION NOW**

Appearances: Elisa Young, Appellant *pro se* and on behalf of Appellant Meigs Citizens Action Now; Molly Corey, Mark G. Bonaventura, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management; Brian A. Glasser, Counsel for Intervenor Gatling Ohio LLC.

BACKGROUND

On June 2, 2008, Appellant Elisa Young ["Ms. Young"] and Appellant Meigs Citizens Action Now ["Meigs CAN"]¹ [jointly known as the "Appellants"], filed a notice of appeal with the Reclamation Commission from the Division of Mineral Resources Management's [the "Division"] issuance of coal mining and reclamation permit D-2317 to Gatling Ohio LLC ["Gatling"]. Included within the notice of appeal was a request for Temporary Relief, wherein Appellants asked that site preparations and mining activities pursuant to permit D-2317 be suspended during the pendency of this appeal. Ms. Young is not represented by counsel, and acts as the representative of both herself and Meigs CAN.

Permit D-2317 was issued to Gatling by the Division on or about May 2, 2008. Permit D-2317 allows underground mining, and the surface installations associated with this mining. The permit area is located in Meigs County, Ohio, near the community of Racine. Gatling has been granted Intervenor status in this appeal.

¹Meigs CAN is not an incorporated entity.

The appeal filed by Ms. Young and Meigs CAN generally alleges that activities on the permit D-2317 area could cause environmental harm, or harm to public health and safety. Ms. Young claims that the community located near the mine site could be negatively impacted by various mining activities. Specifically, Ms. Young has concerns regarding mining's potential impact to: health, local finances, cemeteries, gravesites, hydrology, aesthetics, possible archeological sites, community values, highway maintenance and highway safety.² Ms. Young has also cited concerns about future waste disposal from this mine site³ and concerns about the permit review process followed by the Division in issuing permit D-2317. The Commission has considered each of these concerns in rendering its decision relating to the standing of the Appellants.

On June 27, 2008, the Division filed a Motion for Clarification of Standing of the Appellants. Within this Motion, the Division articulated the legal requirements, which must be addressed in order to establish individual or associational standing. On July 3, 2008, the Commission **granted** the Division's motion, and issued an Order requiring the Appellants to clarify their standing. Within this Order, the Commission also set forth the legal requirements necessary to establish standing, and made recommendations as to how Appellants might prove standing, suggesting specific items of proof which could be submitted by Appellants to make this showing.

Even though Appellants' standing had not been clarified, the Commission Chair decided to proceed on Appellants' request for Temporary Relief in an expeditious manner, and a hearing on Temporary Relief was scheduled before the Chairman for July 3, 2008. On July 2, 2008, a site view was conducted, with all parties and the Commission in attendance. On July 3, 2008, a hearing on Appellants' request for Temporary Relief was conducted before the Commission Chair, in accordance with O.R.C. §1513.13(C) and O.A.C. §1513-3-08.

² Some of the concerns alleged by Appellants are not within the jurisdiction of the Division or the Reclamation Commission.

³ While waste disposal may be in issue in the future, there is no waste disposal plan associated with the approved permit, and therefore waste disposal issues are not within the jurisdiction of this appeal.

The Chairman, during the Temporary Relief hearing, specifically informed the parties that his ruling on Temporary Relief would be withheld until the matter of standing was clarified. During the July 3, 2008 hearing, the Appellants expressed the need for a rapid decision on the request for Temporary Relief, and indicated that they would quickly address the issue of standing. Thus, the Commission expected the Appellants to establish their standing expeditiously.

When information addressing standing was not timely submitted, the Commission, through its Hearing Officer, issued a memorandum on July 15, 2008, encouraging the Appellants to submit documentation on the standing issue, and reminding the Appellants that a ruling on Temporary Relief would not be rendered until standing was established to the satisfaction of the Commission Chair.⁴ On July 25, 2008, when no filing on the standing issue had been received from Appellants, the Commission Chair, with the full Commission's concurrence, issued a memorandum to Ms. Young stating that the Commission "is requiring that your documentation relating to standing be filed on or before August 4, 2008." Between July 3, 2008 and August 4, 2008, the Commission twice provided Appellants with documents from previous Commission appeals regarding standing. These documents, including some fourteen affidavits, provided multiple examples of how one might establish individual and associational standing.

On August 4, 2008, Ms. Young, on behalf of the Appellants, filed a clarification of standing, which stated in its entirety:

As founding member of Meigs Citizens Action Now and resident of Meigs County living near Racine who would be adversely impacted, I have requested temporary relief from all mine site preparation and mining activity until after our appeal is heard for permit No. D-2317 granted to Gatling Ohio, LLC. We believe that if this permitted activity is allowed to proceed it will cause irreparable harm to our community members and community and want to have our request for temporary relief heard before the Reclamation Commission. I am filing these requests both as an individual and a spokesperson for Meigs Citizens Action Now.

⁴ Pursuant to O.R.C. §1513.13(C), a request for Temporary Relief is heard and decided by the Commission Chair. The Chairman indicated at the July 3, 2008 Temporary Relief hearing, that in light of the issues raised by the Division's Motion for Clarification of Standing, the Commission Chair did not intend to issue a ruling on Temporary Relief until the Appellants had made at least a preliminary showing that standing existed in their favor. At the time of the Temporary Relief hearing, a Motion to Dismiss for Lack of Standing had not yet been filed. On August 7, 2008, Intervenor Gatling filed such a Motion. Ultimately, the issue of whether standing exists, is an issue for the full Commission, not just the Chairman, to determine. Therefore, this ruling on the pending Motion to Dismiss is made by the full Commission.

On August 7, 2008, Intervenor Gatling filed a Motion to Dismiss this appeal, asserting that Ms. Young and Meigs CAN lack standing to appeal the issuance of permit D-2317.

On August 15, 2008, after considering the Appellants' clarification of standing filed on August 4, 2008,⁵ the Commission Chair issued an Order on Temporary Relief, finding that Appellants had waived their right to Temporary Relief, citing O.A.C. §1513-3-08(E), which provides:

If at any time after the initiation of the temporary relief procedure, the appellant acts in a manner so as to frustrate the expeditious nature of this proceeding, such action shall constitute a waiver of right to temporary relief.

In his Order on Temporary Relief the Commission Chair set forth in detail, the efforts made by the parties, and by the Commission, to resolve the issue of standing in this appeal. The Chair then held:

As a result of the Appellants Ms. Young/MCAN's [Meigs CAN's] multiple and continuing lack of diligent, timely, and appropriate actions and communications, and due to Appellants' failure to properly address the issue of standing, as fully described within this Order, **the Chairman FINDS that Appellants have waived their right to Temporary Relief.**

The Chairman went on to say:

This decision by the Chairman only affects the Temporary Relief aspect of this appeal. Therefore, the issue of standing continues to be unresolved, and standing must be demonstrated by the Appellants, to the satisfaction of the full Commission, before this appeal can proceed.

In response to Intervenor's Motion to Dismiss, the Commission scheduled an oral argument and evidentiary hearing to address standing. The hearing was set for September 4, 2008. In its Notice of Oral Argument and Evidentiary Hearing on Standing, issued on August 8, 2008, the Commission reiterated the items necessary to establish standing, stating:

⁵ Appellants' August 4, 2008 clarification of standing is quoted on page 3 of this decision.

PLEASE NOTE THE FOLLOWING: (1) the evidentiary hearing will be conducted in accordance with O.A.C. §1513-3-16 (copy attached); (2) the Appellants will be expected to present evidence to establish their standing to bring the immediate appeal before the Commission; (3) evidence which may be presented to establish standing may include, but not be limited to, information regarding the interests of Elisa Young in the matter under appeal, the charter or goals of Meigs Citizens Action Now; information relating to the membership of Meigs Citizens Action Now; notarized affidavits, documents or live testimony establishing the interests of the members of Meigs Citizens Action Now (if notarized affidavits are to be utilized, please comply with the provisions of O.A.C. 1513-3-16(E) (copy attached)).

Also, in response to Intervenor's Motion to Dismiss, the Commission requested that the parties submit any written responses to said Motion by August 28, 2008. In response to this request, on August 28, 2008, Ms. Young submitted a document, without support of an affidavit, setting forth her interests in this matter, and describing Meigs CAN as follows:

Meigs Citizens Action Now, of which I am a member and spokesperson, is an unincorporated group of local citizens who seek to protect their homes, health, and environment from the expansion of further polluting industries, which includes the proposed mining and concentration of coal-dependent technologies. Rather, we seek to recruit or create healthy, sustainable economic development that do[es] not sacrifice the health and well being of future generations. We have members living within the current proposed mine site, and whose land is being evaluated for future mining activity by Gatling Ohio LLC.

On September 4, 2008, an oral argument and evidentiary hearing on standing was conducted by the Commission. At this hearing, Ms. Young appeared for the Appellants. No other identified member of Meigs CAN appeared or testified. No documentary evidence, as to the structure, goals or membership of Meigs CAN, was presented by Appellants. Two documents, relating to possible health concerns associated with mining, were proffered by Appellants. These documents did not address the goals or structure of the association, known as Meigs CAN. Testimony regarding this association will be described in the proceeding pages.

DISCUSSION

O.R.C. §1513.13 sets forth the method by which an appeal is perfected to the Reclamation Commission. That section of law provides in pertinent part:

(A)(1) Any person having an interest that is or may be adversely affected by a notice of violation, order, or decision of the chief of the division of mineral resources management, . . . may appeal by filing a notice of appeal with the reclamation commission . . .

The issue of standing is a threshold test that, once met, permits a tribunal to determine the merits of the questions presented. Wiley Organics, Inc. v. Ankrom, Coschocton App. No. 03 CA 12, 2004-Ohio-6362. para 15, citing Tiemann v. Univ. of Cincinnati (1998), 127 Oho App. 3d 132, 325, 712 N.E.2d 1258. "Standing" to bring an action requires that a person have a sufficient stake in the outcome of a justiciable controversy. Engineering Technician Association, Inc. v. Ohio Dept. of Transportation, 72 Ohio App 3d 106, 110 (1991); citing Racing Guild of Ohio, Local 304 v. Ohio State Racing Commission, 28 Ohio St. 3d 317 (1986). To determine whether Ms. Young or Meigs CAN have standing to appeal the Chief's issuance of permit D-2317, the Commission must consider whether either of these persons possess an "interest," which is, or may be, adversely affected by the Chief's decision to issue permit D-2317.

To qualify as possessing standing to appeal, the Appellants' interest, must be sufficiently direct and present. O'Shea v. Littleton, 414 U.S. 488, 493-94 (1974);⁶ Chad Kister & Dysart Defenders vs. DMRM & Ohio Valley Coal, RC-00-026 (October 19, 2000).⁷ If the Commission finds that either Ms. Young or Meigs CAN possess an "interest" addressed under Chapter 1513, then the Commission must examine the potential for adverse affect thereon.

⁶ In addressing standing, the Supreme Court held:

There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Nor is the principle different where statutory issues are raised. *Cf.* United States v. SCRAP, 412 U.S. 669, 687, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973). Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' Golden v. Zwickler, 394 U.S. 103, 109-110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941); United Public Workers v. Mitchell, 330 U.S. 75, 89-91, 67 S.Ct. 556, 564-565, 91 L.Ed.754 (1947).

O'Shea, at 493-94.

⁷ In Chad Kister & Dysart Defenders vs. DMRM and Ohio Valley Coal Co., the Commission found that Mr. Kister, who had visited a potentially impacted area for "study and [to] seek spiritual refuge" lacked standing to appeal the issuance of a mining permit, and that the Dysart Defenders, whose goal was to preserve Dysart Woods lacked standing to appeal a permit, which was located 4.3 miles upstream from Dysart Woods.

The Standing of Ms. Young:

Ms. Young resides in Meigs County, Ohio, as has her family for several generations. The home in which Ms. Young resides is approximately 2½ miles from the closest proposed shadow area of the underground mine,⁸ and about 4 miles from the mine's surface installations. The mine's surface installations are not visible from Ms. Young's home. However, Ms. Young has testified that she possesses a deep and genuine concern about the community surrounding the mine, and the aesthetics and history associated with this locale. While the Commission appreciates Ms. Young's dedication and concern, these interests do not establish legal standing to appeal the issuance of permit D-2317. It is highly unlikely, if not impossible, that this mining operation will have any direct impact upon, or cause any physical damage or harm to, the property where Ms. Young resides. Ms. Young's home is not within the mine's shadow area. Additionally, the approved permit under appeal does not include a mining plan that causes subsidence. Therefore, subsidence would not have any potential effect upon the property where Ms. Young resides.

Significantly, the concerns articulated by Ms. Young are not specific to the issuance of permit D-2317, but rather address a generalized concern about the potential impacts of any "polluting industry," including a mining operation, upon Ms. Young's "community." During cross-examination by Assistant Attorney General Mark G. Bonaventura ["Mr. Bonaventura"], who represented the Division, the generalized nature of Ms. Young's concerns was set forth as follows:

MR. BONAVENTURA: O.K. Would it be a fair characterization to say that the concerns that you're expressing here today, and apparently, I think, even the concerns that are being expressed by these articles that you have given to the Commission, with regards to impacts from coal mining operations, these concerns, your concerns, they would be concerns you would have no matter if it's the Gatling mining operation, or some other mining operation, in your community?

MS. YOUNG: Any mining operation that would come in and impact our health, I would have the same, I would have the same concerns. Yes.⁹

⁸ The shadow area of an underground mine is the surface area beneath which underground mining operations take place.

⁹ Testimony of Ms. Young, evidentiary hearing on standing, September 4, 2008.

The Ohio Supreme Court in Midwest Fireworks Manufacturing Company, Inc. v. Deerfield Township Board of Zoning Appeals, 91 Ohio State 3d 174, in addressing whether a party had a sufficient "interest" at issue to appeal an administrative decision, set forth the law in Ohio as follows:

In Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm. (1942), 140 Ohio St. 160, 23 O.O. 369, 42 N.E.2d 758, this court held: "Appeal lies only on behalf of a party aggrieved by the final order appealed from." *Id.* at syllabus. An "aggrieved" party is one whose interest in the subject matter of the litigation is "immediate and pecuniary, and not a remote consequence of the judgment." *Id.* at 161, 23 O.O. at 369, 42 N.E.2d at 759, quoting 2 American Jurisprudence (1936) 942, Appeal and Error, Section 50. Thus, in order to have standing to appeal, a person must be "able to demonstrate a present interest in the subject matter of the litigation which has been prejudiced" by the judgment appealed from. Willoughby Hills v. C.C. Bar's Sahara, Inc. (1992), 64 Ohio St.3d 24, 26, 591 N.E.2d 1203, 1205. See, also, Black's Law Dictionary (7 Ed. 1999) 114 (defining "aggrieved party" as one whose "personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment"). A future, contingent, or speculative interest is not sufficient to confer standing to appeal. Ohio Contract Carriers, 140 Ohio St. at 161, 23 O.O. at 369, 42 N.E.2d at 759.

Id. at 177.

Based upon the foregoing evidence, Ms. Young, in her individual capacity, has not articulated specific "personal, pecuniary, or property rights" that would be affected by activities associated with the permit D-2317 area. In making this conclusion, it must be noted that the permit at issue does not contain a waste disposal plan. Because waste disposal is not at issue in this permit, waste disposal concerns are not within the jurisdiction of this appeal. Nor will the activities allowed by permit D-2317 physically affect the real property upon which Ms. Young resides. Based upon the foregoing, the Commission **FINDS** that Ms. Young has, for purposes of establishing legal standing to challenge permit D-2317, failed to establish a specific legal interest in the permit D-2317 area sufficient to support her claim of standing to appeal.

The Standing of Meigs CAN:

O.R.C. §1513.01, incorporating the language of O.R.C. §1.59, defines a "person" to include an "association." Therefore, pursuant to O.R.C. §1513.13, an association may appeal to the Reclamation Commission.

To establish associational standing, Ohio courts have applied a three-prong test. Ohio Contractors Association v. Bicking 71 Ohio St. 3d 318 (1994). Each of the three prongs must be met, in order for an association to possess legal standing. R.I.D.G.E., Inc., et al. v. DOR & Adrian Sand & Stone, Inc., RBR-8-96-030 & 031 (May 21, 1997). Under this three-prong analysis, an association has standing on behalf of its members if:

- its members would otherwise have standing to sue in their own right;
- the interest the association seeks to protect are germane to its purpose; and
- neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Ohio Contractors Association v. Bicking, 71 Ohio St. 3d 318, 320 (1994).

The Commission has repeatedly requested information relative to the goals and membership of Meigs CAN. Meigs CAN has been described to the Commission as an unincorporated group of individuals organized as an association. In her August 28, 2008 filing, made in response to Intervenor's Motion to Dismiss, Ms. Young without evidentiary support described Meigs CAN as:

Meigs Citizens Action Now, of which I am a member and spokesperson, is an unincorporated group of local citizens who seek to protect their homes, health, and environment from the expansion of further polluting industries, which includes the proposed mining and concentration of coal-dependent technologies. Rather, we seek to recruit or create healthy, sustainable economic development that do[es] not sacrifice the health and well being of future generations. We have members living within the current proposed mine site, and whose land is being evaluation for future mining activity by Gatling Ohio LLC.

Despite this description of the association, no sworn statement, or official charter, or written statement, setting forth the goals or purposes of this organization, has ever been submitted to the Commission. Furthermore, despite repeated requests, no evidence of the actual membership of Meigs CAN has been presented to the Commission.¹⁰

At the September 4, 2008 evidentiary hearing to address standing, the following testimony was given, regarding the organization known as Meigs CAN:

MR. BONAVENTURA: O.K. And do you have like a membership roster?

MS. YOUNG: No, we don't.

MR. BONAVENTURA: O.K. Do you have bylaws of any sort?

MS. YOUNG: We are in the process of putting those together.

MR. BONAVENTURA: So, at this time, you don't have any?

MS. YOUNG: No...

MR. BONAVENTURA: Do you have a mission statement?

MS. YOUNG: We have talked about our mission statement, and we don't have it specifically written out....

MR. BONAVENTURA: O.K. And is it your statement that no affidavits from other members of this group have been submitted to the Commission at this time?

MS. YOUNG: The reason I didn't do that is because I do not have legal representation for myself or for these other people. And when I went through filing an appeal against one of the power plants in our community, I was put through a deposition process where they actually took my personal property and they violated just about every right that I thought I had.... I don't know that I want to put other community members through that....¹¹

¹⁰ During the July 3, 2008 Temporary Relief hearing, Ms. Young mentioned the names of Al Proffitt, Lola Proffitt and Lois Allen; however, no evidence of the association's actual membership was provided to the Commission.

¹¹ Testimony of Ms. Young, evidentiary hearing on standing, September 4, 2008.

The Commission need only look to the second prong of the Bicking test to determine that Meigs CAN lacks standing to appeal the issuance of permit D-2317. To establish associational standing, the Bicking case requires that the interests, which an association seeks to protect through participation in a legal proceeding, are germane to that association's stated purpose. In this matter, no evidence of the membership or interests of Meigs CAN was presented. Further, despite repeated requests from the Commission, no formalized statement of purpose, or charter, has been presented to the Commission. Indeed, the testimony of Ms. Young indicates that no written charter or goals currently exist for this organization. Moreover, without testimony from members of Meigs CAN, or even the presentation of any documentation indicating that a membership in this group exists, it is unproven that Meigs CAN has any identity apart from Ms. Young.

In her filing of August 28, 2008, Ms. Young did articulate her thoughts on the goals and purposes of Meigs CAN.¹² However, Ms. Young's statement does not constitute a formalized charter, or mission statement, for this organization. In fact, her comments may not reflect the goals of other members of this group, if, indeed, this group exists. Moreover, at the evidentiary hearing on standing, Ms. Young presented no evidence regarding any specific interest of Meigs CAN that would be directly affected by permit D-2317.

Without evidence of the goals and purposes of this association, or evidence that this association has an affected membership, the Commission cannot find that Meigs CAN has an interest that it seeks to protect, which is germane to the issuance of permit D-2317. Therefore, the Commission **FINDS** that Meigs CAN has failed to establish an interest in the issuance of permit D-2713 sufficient to support its standing to appeal this permit.

¹² The language from Young's August 28, 2008 filing is quoted on pages 5 and 9 of this decision.

ORDER

Based upon the foregoing, the Commission hereby **GRANTS** the Intervenor's Motion and **DISMISSES** the instant appeal for Appellant Ms. Young's and Appellant Meigs CAN's lack of standing.

October 16, 2008
DATE ISSUED


JAMES K. McWILLIAMS, Chairman
Reclamation Commission

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Appeals, within thirty days of its issuance, in accordance with Ohio Revised Code Section 1513.14 and Ohio Administrative Code Section 1513-3-22.

DISTRIBUTION:

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