

**Petition for Administrative Review and Request for Stay,
Largura, Inc./Action Sewer & Septic.
2000 OEA 80 (99-W-J-2370)**

TOPICS:

summary judgment
license
revocation
waiver
ratification
septic
reissue
renewal
inspection
vehicle

PRESIDING JUDGE:

Penrod

PARTY REPRESENTATIVES:

Petitioner: Lori Kyle Endris
IDEM: Robert Keene

ORDER ISSUED:

December 13, 2000

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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Subsequently, on November 10, 1999, the same Robert Lamprecht conducted an inspection of Largura's original truck in order that Largauu could apply for its renewals. On or about February, 2000, Largura reapplied for its permit renewal. On March 23, 2000, the IDEM, by Jerome Rud, chief Solid Waste Permits Section, Office of Land Quality, reissued both Largura's Wastewater Management Vehicle License and its Permit.

On July 25, 2000, Largura applied for a permit and license for a second vehicle. On August 11, 2000, the IDEM granted Largura's Application.

4. The purpose of summary judgment is to terminate litigation of issues for which there can be no factual dispute and which can be determined as a matter of law. Ad Craft, Inc. v. Area Plan Comm'n of Evansville and Vanderburgh County, 716 N.E.2d 6, 16 (Ind.Ct.App. 1999). "[W]here material facts are not in dispute, the issue is the application of the law to the facts." Fidelity Financial Services v. Sims, 630 N.E.2d 572, 574 (Ind.App. 1994); Halbe v. Weinberg, 646 N.E.2d 995, 997 (Ind.App. 1995). Moreover, "a fact is 'material' for summary judgment purposes of it bears on the ultimate resolution of relevant issues." Fortmeyer v. Summit Bank, 565 N.E.2d 1118, 1120 (Ind.App. 1991). "When the pleadings present no material issues of fact, and the facts shown by the pleadings clearly entitle a party to judgment, a motion for judgment on the pleadings is appropriate." Mirka v. Fairfield of America, Inc., 627 N.E.2d 449,450 (Ind.App. 1994). Where the facts are not in dispute, summary judgment is inappropriate only when the fact finder may reasonably draw conflicting inferences from the undisputed facts. Kaghann's Korner, Inc. v. Brown & Sons Fuel Co., Inc., 706 N.E.2d 556, 565 (Ind.Ct.App. 1999), *clarified on reh'g on other grounds*, 711 N.E.2d 1286(1999).
5. The IDEM has waived the revocation of Largura's permit and license. Waiver has been defined by Indiana Courts as the "intentional relinquishment of a known right involving both knowledge of the existence of the right and intention to relinquish it." van de Leuv v. Methodist Hosp. of Indiana, Inc., 642 N.E.2d 531,533 (Ind.Ct.App. 1994) *citing Indianapolis v. Twin Lakes Enterprises*, 568 N.E.2d 1073, 1077 (Ind.Ct.App. 1991), *trans denied*. Waiver has been further characterized as the election to forego some advantage that might otherwise have been insisted upon. Salem Community School Corp. v. Richman, 406 N.E.2c1 269 (Ind.App. 1980). The existence of waiver is ordinarily determined from the conduct of the party making it. *Id.*
6. While the existence of facts necessary to constitute waiver is ordinarily a question of fact, the question of what facts are necessary to constitute waiver is a matter of law. Pohle v. Cheatham, 724 N.E.2d 655, 658 (Ind.Ct.App. 2000) *citing Jackson v. DeFabis*, 553 N.E.2d 1212, 1217 (Ind.Ct.App. 1999). The Court in Pohle further stated,

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When only the inferences and legal conclusions to be drawn from the facts are argued, the question of waiver is proper for the court to consider as a matter of law on summary judgment. (citation omitted). Finally, when the material designated by the parties is conclusive, summary judgment may be appropriate even if the dispositive issue turns on intent.

724 N.E.2d 655, 658, *citing* Manly v. Van Keppel, 714 N.E.2d 707, 709 (Ind.Ct.App. 1999).

7. The facts here are not in dispute and the intent of the IDEM to reissue Largura's permit and license is not in dispute.
8. Following its issuance of the revocation of Largura's permit and license, the IDEM, in turn, reissued an identical permit and license for the same vehicle. To reissue Largura's renewal, it was first necessary for the IDEM to inspect Largura's vehicle. That inspection was conducted by the same IDEM employee who found Largura had violated its 1999 permit and license, which was the basis for which the IDEM had revoked Largura's permit and license. As the inspection showed no problems, the IDEM thereafter reissued Largura's permit and license. In sum, because the same employee was involved in both the events leading to the revocation and the renewal inspection, there is no question of fact here that the IDEM knew of the revocation and that its actions in reissuing Largura's permit and license constitute waiver.
9. Moreover, there is no question of fact regarding the IDEM's intent to reissue the permit and license on Largura's vehicle. Lastly, the IDEM again inspected and renewed Largura's operation for the purposes of issuing a second permit and license for a subsequently purchased vehicle. The original license was amended to include this second vehicle thereby ratifying it a second time. Clearly, the IDEM elected to forego the revocation that it might otherwise have pursued. *See Salem supra*.

IT IS THEREFORE ORDERED that the Petitioner/Permittee's Motion is hereby **GRANTED**.

You are further notified that pursuant to the provisions of S.E.A. 156 (P.L. 4 1-1995 amending Ind.Code § 4-21.5-7), which became effective on July 1, 1995, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative reviews of decisions of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with the applicable provisions of Ind.Code § 4-2 1.5. Pursuant to Ind.Code § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date of this notice is served.

Dated this 13th day of December, 2000.

Wayne Penrod
Chief Administrative Law Judge