

**IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE**

LIDLAW ENVIRONMENTAL )  
SERVICES OF NASHVILLE, INC., )

Plaintiff/Appellant, )

VS. )

METROPOLITAN BOARD OF )  
HEALTH FOR NASHVILLE AND )  
DAVIDSON COUNTY, )

and )

ROBERT ORR/SYSCO FOOD )  
SERVICES COMPANY, )

and )

BRING URBAN RECYCLING TO )  
NASHVILLE TODAY, )

Defendants/Appellees. )

<p><b>FILED</b></p> <p><b>March 13, 1996</b></p> <p><b>Cecil W. Crowson</b> <b>Appellate Court Clerk</b></p>
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Davidson Chancery  
No. 94-2747-III

Appeal No.  
01-A-01-9507-CH-00310

**CONCURRING OPINION**

This appeal involves the judicial review of the Metropolitan Board of Health's decision to reverse the decision to the Director of Health to renew six operating permits for a solid waste disposal plant located in Cockrill Bend Industrial Park. Although I concur completely with the results of the majority's opinion, I concur with only two portions of its reasoning.

First, I concur with the majority's conclusion that the board's decision must be reviewed using the standard of review associated with a common-law writ of certiorari. Even though Tenn. Code Ann. § 7-7-105(b) (Supp. 1995) required the board to conduct its own proceedings substantially in accordance with the contested case provisions of the Uniform Administrative Act, the statute does not alter the traditional method for seeking judicial review of the board's decision. The vehicle for this review is the common-law writ of certiorari that permits the

reviewing court to determine whether the board's action was illegal, in excess of its jurisdiction, or arbitrary or capricious. *McCallen v. City of Memphis*, 786 S.W.2d 633, 638 (Tenn. 1990).

I also concur with the conclusion that the board acted arbitrarily and capriciously when it reversed the Director of Health's decision to renew Laidlaw's six operating permits. While the appeal from the director's decision was pending, the director and the board entered into a consent agreement with the permit holder. In return for the permit holder's agreement to spend approximately \$2,679,302 to upgrade its facility, the director and the board agreed that the permit holder would be deemed to be in full compliance with Metropolitan Code § 10.56.170 as long as the construction of the improvements to the facility remained on schedule.

The record shows (1) that the permit holder's improvements were on schedule, (2) that the board's vote to reverse the director's decision to renew the operating permits occurred before the consent decree's deadline for the completion of the improvements, and (3) that the facts on which the board's decision was based are essentially the same incidents covered by the consent decree. Under the facts of this case, the board certainly acted arbitrarily by inducing the permit holder to expend \$2.6 million on one hand and then refusing to grant it operating permits on the other.

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WILLIAM C. KOCH, JR., JUDGE