

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

HARRISON COUNTY,	:	Case No. ERAC 12-346594
GERMAN TOWNSHIP BOARD	:	
OF TRUSTEES,	:	
	:	
Appellant,	:	
	:	
v.	:	
	:	
JEFFERSON COUNTY GENERAL	:	
HEALTH DISTRICT,	:	
	:	
and	:	
	:	
SPRINGFIELD TOWNSHIP	:	
c/o Dan Stone	:	
Springfield Township Trustee,	:	
	:	
Appellees.	:	

FINDING OF FACTS, CONCLUSIONS OF LAW, AND
FINAL ORDER SUA SPONTE DISMISSING APPEAL FOR
LACK OF SUBJECT MATTER JURISDICTION

Rendered on January 3, 2013

T. Shawn Hervey, for Appellant Harrison County, German Township Board of Trustees

Andrea Salimbene and Michael McMahon, for Appellees Jefferson County General Health District and Springfield Township

{¶1} This matter comes before the Environmental Review Appeals Commission (“ERAC,” “Commission”) upon a Notice of Appeal, filed May 16, 2012, by Appellant Harrison County, German Township Board of Trustees (“German Township”). The appeal challenges an April 26, 2012 Order of the Jefferson County

General Health District (“Board of Health,” “Board”), stating that the Board had voted to “deny the claim of German Township for [payment of] a share of host community fees.”

{¶2} Based upon the following Findings of Fact and Conclusions of Law, the Commission hereby sua sponte dismisses the appeal for lack of subject matter jurisdiction.¹

FINDINGS OF FACT

{¶3} German Township is a township located in Harrison County, Ohio.

{¶4} Springfield Township is a township located in Jefferson County, Ohio.

{¶5} The parties do not dispute that the Jefferson County General Health District is an approved general health district created pursuant to Ohio Revised Code (“R.C.”) Chapter 3709. Among other duties, the Board of Health of the Jefferson County General Health District is responsible for collecting construction and demolition debris disposal fees from facilities located within Jefferson County. Case File Item K.

{¶6} Apex Landfill is a solid waste facility that accepts construction and demolition debris. The record indicates that its property sits predominantly in Springfield Township, Jefferson County, Ohio, but also extends into German Township, Harrison County, Ohio. CR Item 6; Case File Items P, Q.

{¶7} Revised Code 3714.07 governs the collection and distribution of administrative fees levied on the disposal of construction and demolition debris. Of particular relevance to this appeal is R.C. 3714.07(C), which allows a host city or township to appropriate a certain portion of the disposal fee. The statute provides in pertinent part as follows:

¹ The Commission sua sponte moves the Certified Record (“CR”) into evidence for the limited purpose of establishing the facts necessary to reach the instant decision.

(A)(1) For the purpose of assisting boards of health and the environmental protection agency in administering and enforcing this chapter and rules adopted under it, there is hereby levied a fee of thirty cents per cubic yard or sixty cents per ton, as applicable, on both of the following:

(a) The disposal of construction and demolition debris at a construction and demolition debris facility that is licensed under this chapter or at a solid waste facility that is licensed under Chapter 3734. of the Revised Code;

(b) The disposal of asbestos or asbestos-containing materials or products at a construction and demolition debris facility that is licensed under this chapter or at a solid waste facility that is licensed under Chapter 3734. of the Revised Code.

* * *

(C) If a construction and demolition debris facility or a solid waste facility is located within the territorial boundaries of * * * the unincorporated area of a township, the * * * township may appropriate * * * up to eight cents per ton of the disposal fee required to be paid by the facility * * *.

The legislative authority of the * * * township may appropriate the money from the fee by enacting an ordinance or adopting a resolution establishing the amount of the fee to be appropriated. Upon doing so, the legislative authority shall mail a certified copy of the ordinance or resolution to the board of health of the health district in which the construction and demolition debris facility or the solid waste facility is located * * *. Upon receipt of the copy of the ordinance or resolution and not later than forty-five days after receipt of money generated from the fee, the board * * * *shall* transmit to the * * * clerk of the township that portion of the money generated from the disposal fee by the owner or operator of the facility that is required by the ordinance or resolution to be paid to that * * * township.

R.C. 3714.07 (emphasis added).

{¶8} Ohio Administrative Code (“Ohio Adm.Code”) 3745-502-05 governs the appropriation of such fees where a facility is located within multiple municipalities or townships. It provides in relevant part as follows:

For the fee levied under division (A) of section 3714.07 of the Revised Code:

(A) If a solid waste facility is located within the territorial boundaries of more than one municipal corporation or township, each municipal corporation or township may appropriate up to four cents per cubic yard or up to eight cents per ton of the disposal fee divided by the number of municipal corporations and townships within which the facility is located.

* * *

Ohio Adm.Code 3745-502-05.

{¶9} Pursuant to R.C. 3714.07 and Ohio Adm.Code 3745-502-05, German Township passed Resolution 2009-18 on December 24, 2009, establishing a fee of 8-cents per ton, to be appropriated from the disposal fees collected from Apex Landfill. Resolution 2009-18 states that Apex Landfill is located, in part, within German Township. The Board of Health received a copy of the resolution on January 27, 2010. CR Item 1.

{¶10} On April 26, 2012, the Board issued an Order regarding Resolution 2009-18. The Order states that the Board voted to “deny the claim of German Township for a share of host community fees.” CR Item 5.

{¶11} The Order also describes the procedural background relevant to this appeal. It states, in full, as follows:

This matter arises out of a claim by German Township for a portion of the host community fee paid under R.C. Section 3714.07 for the disposal of construction and demolition debris at the Apex Landfill.

Section 3714.07 requires Apex Landfill to collect 8 cents per ton of construction and demolition debris disposed at the landfill. Apex forwards the money to the Board of Health with the other fees on a monthly basis. Since the beginning of this landfill, the funds were transmitted by the Board to Springfield Township in Jefferson County, as the host community of the landfill.

On January 27, 2010, the Board of Health received a resolution from the Trustees of German Township in Harrison County claiming that it was

entitled to a portion of the host community fees because a portion of the land owned by Apex was located in German Township.

Ohio Administrative Code 3745-502-05 provides that the host community fee can be split amongst townships or cities if a solid waste facility is located within the territorial boundaries of more than one municipal corporation or township.

An administrative hearing on the claim by German Township was held on October 19, 2010. The transcript of the hearing indicates that the hearing was suspended in order to allow German Township and Springfield Township to negotiate settlement of the claim.

On January 17, 2012, the Jefferson County Board of Health received a complaint filed in Harrison County Common Pleas Court requesting that court to award host community fees to German Township. Subsequently the Board instructed the administrator to send a letter to T. Shawn Hervey, legal counsel for German Township and Larry Piergallini, legal counsel for Springfield Township to inquire if either party desired to supplement the hearing record or to supplement the record of October 19, 2010. Mr. Piergallini replied that he was prepared to do so if German Township would do so. No response was received from Mr. Hervey.

The issue before the Board is to decide upon the claim of German Township for a portion of the host community fees from the disposal of C&D debris at the Apex Landfill.

The Board votes to deny the claim of German Township for a share of host community fees. While Apex may own some property in German Township, Revised Code Section 3714.07 and OAC 3745-502-05 provide that the fees be paid to the township where the solid waste facility is located. The definition of solid waste facility refers to the site, location, tract of land where the construction and demolition debris is disposed. This refers to the boundaries of the landfill facility, as permitted by Ohio EPA, to receive disposal of construction and demolition debris.

The Department's staff has reviewed the Ohio EPA solid waste permit issued for the Apex Landfill and has confirmed that the permitted boundaries of the Apex Landfill do not extend into German Township. No construction and demolition debris has been or is being disposed of in German Township. Therefore, the applicable statute and regulations require the Board to deny the claim of German Township.

Appeal from this order shall be made within 30 days to the Environmental Review Appeals Commission in accordance with Section 3745.02 to 3745.06 of the Revised Code.

{¶12} German Township filed a Notice of Appeal with this Commission on May 16, 2012, challenging the “Order of the Jefferson County General Health District on April 26, 2012.” Case File Item A.

{¶13} Upon the Board of Health’s motion, the Commission joined Springfield Township as an appellee on September 27, 2012. Case File Item L.

{¶14} On November 1, 2012, German Township filed a Motion for Judgment on the Facts and the Board of Health filed a Dispositive Motion. The Board of Health filed a memorandum in opposition to German Township’s Motion for Judgment on the Facts on November 16, 2012. Neither German Township nor Springfield Township has responded to the Board of Health’s Dispositive Motion. Case File Items P, Q, S.

{¶15} Neither party’s motion, nor the Board of Health’s memorandum in opposition, addressed whether the scope of the Commission’s jurisdiction extends to a review of the Board of Health’s April 26, 2012 Order. *See* Case File Items P, Q, S.

CONCLUSIONS OF LAW

{¶16} Although not strictly bound by the Ohio Rules of Civil Procedure (“Civ.R.”), the Commission has historically applied the rules when appropriate to assist in resolution of appeals. *Meuhlfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010).

{¶17} Ohio Civil Rule 12(H)(3) provides, “[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action.” Thus, subject matter jurisdiction cannot be waived and may be sua sponte raised by the Commission. *See Davis v. Jackson*, 149 Ohio App.3d 346, 2004-Ohio-6735 (4th Dist.).

{¶18} The scope of the Commission’s jurisdiction is outlined by R.C. 3745.04(B), which provides in pertinent part as follows:

Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the *action* of the director or a local board of health, or ordering the director or board of health to perform an act. * * *

(Emphasis added).

{¶19} Thus, the Commission maintains jurisdiction only over appeals of final appealable “actions” of the Director or a local board of health.

{¶20} “Action” is defined in R.C. 3745.04(A):

As used in this section, “action” or “act” includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any *lawful* order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

(Emphasis added).

{¶21} The Commission finds that the Board of Health’s April 26, 2012 Order is not, on its face, a rule or standard, a license, a permit, a lease, a variance, a certificate, or an approval or disapproval of plans and specifications. Of the actions listed in R.C. 3745.04(A), the Board’s Order most closely resembles a “lawful order other than an emergency order.”

{¶22} Significantly, however, although R.C. 3745.04(A) grants the Commission jurisdiction over certain “orders,” the Commission’s jurisdiction is limited to appeals from *lawful*² orders. In other words, the Commission’s jurisdiction extends only to orders issued pursuant to a provision of law.

² The Commission notes that the use of the word “lawful” to modify “order” in R.C. 3745.04(A) is distinct from the Commission’s decisional standard of “lawful and reasonable” as used in R.C. 3745.05 and Ohio Adm.Code 3746-11-01. The Commission would have jurisdiction, for example, over appeals from an order issued pursuant to a valid provision of law (i.e., “lawful” as used in R.C. 3745.04), but for which the issuing party did not, in so issuing the order, act in concert with the pertinent laws and regulations (i.e., “unlawful” as used in R.C. 3745.05 and Ohio Adm.Code 3746-11-01).

{¶23} Here, the Board of Health issued its Order, ostensibly pursuant to R.C. 3714.07 and Ohio Adm.Code 3745-502-05, which together govern the division of construction and demolition debris disposal fees where a facility is located within multiple townships or municipalities. Neither provision, however, expressly grants such authority.

{¶24} Instead, R.C. 3714.07 simply provides as follows:

Upon receipt of the copy of the ordinance or resolution and not later than forty-five days after receipt of money generated from the fee, the board * * * *shall* transmit to the * * * clerk of the township that portion of the money generated from the disposal fee by the owner or operator of the facility that is required by the ordinance or resolution to be paid to that * * * township.

(Emphasis added).

{¶25} Thus, R.C. 3714.07 appears to impose a mandatory duty upon the Board of Health to transmit to the clerk of the township the portion of the disposal fee required by the township's resolution. Its plain language does not authorize the Board of Health to hold an administrative hearing, issue an order, or exercise its discretion to authorize or deny division of the disposal fee. By contrast, and for example, R.C. 3714.12 expressly authorizes local boards of health to issue orders "to a permit or license holder * * * to abate * * * a violation of any section of [Revised Code Chapter 3714]."

{¶26} Moreover, the Commission notes that neither R.C. 3714.07 nor Ohio Adm.Code 3745-502-05 grant express review authority to the ERAC. Again, by contrast, other provisions of the Revised Code expressly authorize appeals from certain orders to the Commission. For example, R.C. 3704.161 authorizes appeals to ERAC from orders issued pursuant to that section.

{¶27} The Commission acknowledges that the Board of Health’s April 26, 2012 Order contains language identifying it as appealable to ERAC. The Commission has consistently found, however, that language identifying a document as an appealable, final action is merely one of several relevant factors in determining whether an action is indeed appealable to the Commission. *E.g., Shelly Materials, Inc. v. Koncelik*, ERAC No. 645775 (Feb. 9, 2010), at ¶17.

{¶28} Because the Board of Health’s April 26, 2012 Order was not issued pursuant to an express grant of authority from the legislature, the Commission finds that it is not a “lawful order” within the meaning of R.C. 3745.04(A). Therefore, the Commission lacks subject matter jurisdiction over this appeal.

FINAL ORDER

{¶29} For the foregoing reasons, the Commission hereby DISMISSES this appeal for lack of subject matter jurisdiction.

{¶30} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

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 the director or other statutory agency. 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**

Entered into the Journal of the
Commission this _____ day of
January 2013.

Melissa M. Shilling, Vice Chair

Shaun K. Petersen, Member

Copies sent to:

HARRISON COUNTY, GERMAN TOWNSHIP
BOARD OF TRUSTEES

[CERTIFIED MAIL]

JEFFERSON COUNTY GENERAL HEALTH
DISTRICT

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SPRINGFIELD TOWNSHIP,
c/o Dan Stone, Springfield Township Trustee

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