**[Cite as *State ex rel. Stark C&D Disposal, Inc. v. Environmental Rev. Appeals Comm. of Ohio*, 2012-Ohio-1068.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio ex rel. Stark C&D Disposal, Inc., | : | |
| Relator, | : | |
| v. | : | No. 10AP-1110 |
| The Environmental Review Appeals Commission of Ohio, | : | (REGULAR CALENDAR) |
| Respondent, | : | |
| [Osnaburg Township Board of Trustees et al., | : | |
| Intervening Respondents]. | : | |

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D E C I S I O N

Rendered on March 15, 2012

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*Walter & Haverfield LLP, Michael A. Cyphert*, and *Leslie G. Wolfe*, for relator.

*Michael DeWine*, Attorney General, and *William J. Cole*, for respondent The Environmental Review Appeals Commission of Ohio.

*Richard C. Sahli*, for intervening respondent Osnaburg Township Board of Trustees.

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IN PROHIBITION/MANDAMUS
ON MOTION TO DISMISS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

**{¶ 1}** Relator, Stark C&D Disposal, Inc., commenced this original action in prohibition and mandamus seeking an order prohibiting respondent, Environmental Review Appeals Commission of Ohio ("ERAC"), from conducting further proceedings in the actions captioned *Osnaburg Twp. Bd. of Trustees et al. v. Bd. of Health of the Stark Cty. Combined Gen. Health Dist. and Stark C&D Disposal, Inc.*, ERAC case Nos. 766439, 766440, 766441, 766442, and 766443. Relator also seeks an order compelling ERAC to dismiss with prejudice these consolidated actions for lack of jurisdiction. ERAC has filed a motion to dismiss relator's complaint on the ground that relator has failed to state a claim upon which relief can be granted.

**{¶ 2}** Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that because R.C. 3745.04 grants ERAC general statutory subject matter jurisdiction to hear appeals of license modifications granted by the local boards of health, ERAC does not patently and unambiguously lack jurisdiction in this case. Therefore, the magistrate has recommended that we grant ERAC's motion to dismiss relator's complaint.

**{¶ 3}** Relator has filed objections to the magistrate's decision. In its first objection, relator contends that the magistrate erred when she found that the March 19, 2010 action of the Board of Health of the Stark County Combined General Health District ("board of health") was a new appealable order. In its second objection, relator contends that the magistrate improperly grounded her decision on sympathy for the Osnaburg Trustees rather than on the law and undisputed facts of record. Because relator's objections are closely related, we will address them together.

**{¶ 4}** Relator argues that ERAC lacks jurisdiction to hear an appeal of the March 19, 2010 board of health order granting the permit modification because this court ordered the board of health to issue that order following an earlier appeal of ERAC's prior decision in the same case. In essence, relator argues that this court's prior mandate prohibits ERAC from exercising jurisdiction under these circumstances.

**{¶ 5}** Because relator contends that ERAC lacks jurisdiction to hear the appeal based upon this court's prior decision in the same case, relator's argument is based on the

law of the case doctrine. *State ex rel. Jelinek v. Schneider*, 127 Ohio St.3d 332, 2010-Ohio-5986, ¶ 14 (law of the case doctrine prohibits lower tribunal from proceeding contrary to mandate of higher court). ERAC argues that relief in prohibition or mandamus is not available where the party contesting jurisdiction on law of the case grounds has an adequate remedy at law. We agree.

**{¶ 6}** Prohibition is an extraordinary writ that cannot be used as a substitute for an appeal. *State ex rel. Willacy v. Smith*, 78 Ohio St.3d 47, 51 (1997). Because relator has an adequate remedy at law (an appeal pursuant to R.C. 3745.06) to challenge ERAC's exercise of jurisdiction, it is not entitled to a writ of prohibition unless it can show that ERAC "patently and unambiguously" lacks jurisdiction over the appeal. *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, ¶ 16, *see also Fraiberg v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div.*, 76 Ohio St.3d 374, 379 (1996).

**{¶ 7}** Here, we cannot say that ERAC patently and unambiguously lacks jurisdiction to hear this appeal. We recognize that this court previously ordered the board of health to grant relator's license modification. The board of health has granted the license modification. R.C. 3745.04 gives ERAC jurisdiction over appeals from a local board of health's modification of a license. The appeal before ERAC challenges the board of health's grant of relator's license modification. It is possible that ERAC might issue a decision that is arguably in conflict with this court's prior mandate. Nevertheless, a lower tribunal's alleged failure to follow the mandate of a higher court based upon the law of the case doctrine does not rise to the level of a patent and unambiguous lack of jurisdiction justifying relief in prohibition or mandamus. *Jelinek* at ¶ 13-16. The party contesting jurisdiction on law of the case grounds has an adequate remedy at law by way of an appeal. *Id.* at ¶ 15.

**{¶ 8}** Because relator has not shown that ERAC patently and unambiguously lacks jurisdiction, it has an adequate remedy at law. Therefore, relator's prohibition claim fails as a matter of law. Relator's mandamus claim fails for the same reason. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983). For these reasons, we overrule relator's objections to the magistrate's decision.

**{¶ 9}** Following an independent review of this matter, we find that the magistrate has properly determined the facts, and we adopt the findings of fact as our own. We

adopt the magistrate's conclusions of law only to the extent specified. In accordance with this and the magistrate's decision, we grant ERAC's motion to dismiss relator's complaint.

*Objections overruled; motion to dismiss granted; writ of prohibition and writ of mandamus denied.*

FRENCH and TYACK, JJ., concur.

**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio ex rel. Stark C&D Disposal, Inc., | : | |
| Relator, | : | |
| v. | : | No. 10AP-1110 |
| The Environmental Review Appeals Commission of Ohio, | : | (REGULAR CALENDAR) |
| Respondent. | : | |

M A G I S T R A T E ' S D E C I S I O N

Rendered on September 20, 2011

*Walter & Haverfield LLP*, *Michael A. Cyphert*, and *Leslie G. Wolfe*, for relator.

*Michael DeWine*, Attorney General, *William J. Cole*, and *Theodore L. Klecker*, for respondent.

IN PROHIBITION/MANDAMUS
ON MOTION TO DISMISS

**{¶ 10}** Relator, Stark C&D Disposal, Inc. ("C&D"), has filed this original action requesting that this court issue writs of prohibition and mandamus ordering respondent, the Environmental Review Appeals Commission of Ohio ("ERAC"), to refrain from conducting further proceedings in the actions captioned *Osnaburg Twp Bd. of Trustees*,

*et al. v. Bd. of Health of the Stark Cty. Combined Gen. Health Dist. and Stark C&D Disposal, Inc.* ERAC case Nos. 766439, 766440, 766441, 766442, and 766443, and ordering ERAC to dismiss with prejudice the aforementioned listed actions.

Findings of Fact:

**{¶ 11}** 1. The facts giving rise to this case initially arose as a result of C&D filing a request with the Board of Health of the Stark County Combined General Health District ("Board of Health") seeking a license modification to expand its construction and demolition debris facility.

**{¶ 12}** 2. On November 28, 2007, the Board of Health denied C&D's request for license modification.

**{¶ 13}** 3. C&D filed an appeal challenging the Board of Health's November 28, 2007 final action denying the request for the license modification.

**{¶ 14}** 4. The Osnaburg Township Board of Trustees, Donna J. Middaugh, both individually and as a trustee, Michael Shockling, Alan Fuller, and Ronald Mack ("Osnaburg appellants") and the Village of East Canton, filed a notice of appeal challenging the Board of Health's November 28, 2007 final action which denied C&D's request for license modification arguing that the Board of Health should have considered additional valid grounds for denying the license modification.

**{¶ 15}** 5. On January 6, 2010, ERAC issued two final orders disposing of both appeals. ERAC vacated the November 28, 2007 final order of the Board of Health and remanded the matter with instructions that C&D's license modification application should be granted. ERAC further granted the motion of C&D and Board of Health to dismiss the appeal of the Osnaburg appellants finding that, although the Osnaburg appellants

qualified as parties to a proceeding for purposes of R.C. 3745.04, they were not affected by the final action of the Board of Health because the denial of the license modification application was the exact result they sought.

**{¶ 16}** 6. Both the Osnaburg appellants and the Board of Health filed notices of appeal in this court from ERAC's January 6, 2010 final order granting the license modification sought by C&D.

**{¶ 17}** 7. This court consolidated the cases and denied motions to stay ERAC's January 6, 2010 final order pending this court's determination of the appeals.

**{¶ 18}** 8. On March 19, 2010, the Board of Health complied with ERAC's order and granted the license modification.

**{¶ 19}** 9. While the appeals were pending in this court, the Osnaburg appellants filed another series of appeals before ERAC claiming that they were aggrieved and adversely affected by, and participated in the proceedings leading to the March 19, 2010 letter from the Board of Health granting the license modification.

**{¶ 20}** 10. On September 28, 2010, this court overruled all assignments of error and affirmed ERAC's January 6, 2010 final order and remanded the matter to the Board of Health with instructions to grant C&D's application for license modification.

**{¶ 21}** 11. No appeal was taken from this court's September 28, 2010 decision.

**{¶ 22}** 12. C&D and the Board of Health filed a joint motion to dismiss or for summary judgment with ERAC asserting that ERAC lacked subject-matter jurisdiction over the second Osnaburg appeals because an appeal could not be taken from the March 19, 2010 non-discretionary action of the Board of Health on remand from ERAC's January 6, 2010 final order.

**{¶ 23}** 13. On November 3, 2010, ERAC denied the joint motion to dismiss or for summary judgment and ordered the parties to file a proposed joint case management schedule.

**{¶ 24}** 14. On November 24, 2010, C&D filed this complaint for writs of prohibition and mandamus asking this court to prohibit ERAC from conducting further proceedings in the second Osnaburg appeals and ordering ERAC to dismiss those actions.

**{¶ 25}** 15. On December 14, 2010, the Osnaburg appellants filed a motion to intervene in this action which was granted.

**{¶ 26}** 16. On December 29, 2010, ERAC filed a motion to dismiss asserting that C&D failed to state a claim upon which relief could be granted. Specifically, ERAC argues that C&D cannot establish a patent and unambiguous lack of jurisdiction and that proceeding with the second Osnaburg appeals does not violate the law of the case.

**{¶ 27}** 17. C&D has filed a brief in opposition to the motion to dismiss arguing that there can be no appeal from the March 19, 2010 letter which carried out ERAC's decision to grant C&D's application for a license modification following remand from this court. C&D argues that the Osnaburg appellants have no further right to appeal.

**{¶ 28}** 18. The matter is currently before the magistrate on the motion to dismiss.

Conclusions of Law:

**{¶ 29}** For the reasons that follow, it is this magistrate's decision that this court should grant ERAC's motion to dismiss.

**{¶ 30}** A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. In reviewing the complaint, the

court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. Id.

**{¶ 31}** In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that relator can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242. As such, a complaint for writ of mandamus is not subject to dismissal under Civ.R. 12(B)(6) if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for relator with sufficient particularity to put the respondent on notice of the substance of the claim being asserted against it, and it appears that relator might prove some set of facts entitling him to relief. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94. For the following reasons, respondent's motion should be granted and relator's complaint should be dismissed.

**{¶ 32}** A writ of prohibition is an extraordinary judicial writ, the purpose of which is to restrain inferior courts and tribunals from exceeding their jurisdiction. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70. A writ of prohibition is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies. Id. In order to be entitled to a writ of prohibition, relator must establish that: (1) respondent is about to exercise judicial or quasi-judicial powers; (2) the exercise of the power is unauthorized by law; and (3) the denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *State ex rel. Henry v. McMonagle* (2000), 87 Ohio St.3d 543.

**{¶ 33}** The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

**{¶ 34}** As the above facts indicate, the Board of Health originally denied C&D's application for a license modification. C&D filed a notice of appeal with ERAC from the Board of Health's denial of its application. As this court stated in its September 28, 2010 decision, *Stark C & D Disposal, Inc. v. Bd. of Health of Stark Cty. Combined Gen. Health Dist.*, 10th Dist. No. 10AP-51, 2010-Ohio-4607, ¶24, there was only one issue that C&D appealed to ERAC: "The sole issue in that appeal was whether the Board of Health lawfully and reasonably applied Ohio Adm.Code 3701-28-10 to the application for modification filed by C & D."

**{¶ 35}** As indicated in the findings of fact, the Osnaburg appellants also appealed the Board of Health's decision to deny C&D's application in spite of the fact that the outcome they sought, the denial of the application, had been effectuated.

**{¶ 36}** In those appeals, ERAC only considered the issue raised by C&D: whether the Board of Health lawfully and reasonably applied Ohio Adm.Code 3701-28-10 to the application for modification filed by C&D. ERAC did not consider any of the arguments the Osnaburg appellants had raised before the Board of Health because none of those reasons had been considered and the matter was resolved when the Board of Health denied the application. Because the application was denied, ERAC determined that the Osnaburg appellants' reasons and arguments did not need to be considered. Thereafter,

ERAC reversed the decision of the Board of Health and granted C&D's application for modification without ever considering the evidence and arguments the Osnaburg appellants had made to the Board of Health opposing C&D's application.

**{¶ 37}** Appeals before ERAC are governed by R.C. 3745.04 and include modifications of licenses. In a letter dated March 19, 2010, the Board of Health granted C&D's application for a license modification in compliance with ERAC's January 6, 2010 order. The license modification which the Osnaburg appellants seek the opportunity to challenge has been granted by the Board of Health without consideration of the Osnaburg appellants' concerns. Because they were originally dismissed as parties to the appeals to ERAC originally denying the license modification, the Osnaburg appellants' April 5, 2010 appeal of the granting of the license modification is their first opportunity to have their arguments heard.

**{¶ 38}** R.C. 3745.04 grants ERAC general statutory subject-matter jurisdiction to hear appeals of license modifications granted by local boards of health. ERAC has basic general statutory subject-matter jurisdiction to hear the Osnaburg appeal from the granting of the license modification.

**{¶ 39}** C&D argues that the March 19, 2010 Board of Health letter is not appealable because that letter provides as follows:

> In complying with the January 6th, 2010 order of ERAC, the Stark County Board of Health does not waive its pending appeal of that order before the 10th District Court of Appeals. Furthermore, we reserve the right to rescind the license modification in the event that that appeal is successful.

**{¶ 40}** Based upon that paragraph, C&D argues that the Board of Health made it clear that "the issuance of the letter was simply a ministerial act that did not give rise to any new appeal rights." (C&D's Brief in Opposition, at 11.)

**{¶ 41}** C&D's argument ignores the first paragraph in that March 19, 2010 letter which provides:

> This letter is to inform you that pursuant to the January 6, 2010 order by the Environmental Review Appeals Commission your 2010 Construction and Demolition Debris Facility License has been modified to include the expansion of your facility as stated in your September 2005 application for a facility modification filed with the Stark County Health Department.

**{¶ 42}** The magistrate finds that it is the January 6, 2010 order from ERAC ordering the Board of Health to grant C&D's application for a license modification that is at issue. The Osnaburg appellants have never had the opportunity to appeal the granting of the application for license modification and ERAC has not considered any of their arguments. C&D cannot establish that ERAC patently and unambiguously lacks jurisdiction nor that ERAC has a clear legal duty to refrain from actions. Inasmuch as these are requirements for the issuance of a writ of prohibition, the magistrate finds that, based upon and accepting the factual allegations in the complaint as true, C&D cannot meet the requirements for the granting of a writ of prohibition.

**{¶ 43}** In its request for mandamus, C&D asks this court to dismiss the Osnaburg appellants' appeal. Inasmuch as C&D has not shown that ERAC has a clear legal duty to refrain from proceeding with the Osnaburg appellants' appeal, C&D does not have a clear legal right to a writ of mandamus ordering ERAC to dismiss the appeal.

**{¶ 44}** Based on the foregoing, it is this magistrate's decision that this court should grant ERAC's motion and dismiss this action.

s/s Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

**NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).