



**STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS**

Ultimate Authority: Fire Prevention and Building Safety Commission

FILED: May 19, 2023

**Harold Ruth Farms
Petitioner**

OALP Case No.: DHS-2210-002077

v.

**Columbia City / Whitley County Joint
Planning and Building Department
Respondent**

NONFINAL ORDER TO DISMISS

On March 10, 2023, the Respondent, Columbia City/Whitley County Planning and Building Department, filed its Motion to Dismiss for lack of subject matter jurisdiction. On March 29, 2023, the Petitioner, Harold Ruth Farms, timely filed its Response and attached Exhibit A. The Petitioner did not file a reply, which was due on May 15, 2023.

This Administrative Law Judge (ALJ) has reviewed Respondent's Motion and Petitioner's Response, including Exhibit A. Petitioner's response referenced the Whitley County Commission hearing dated July 19, 2022, available on YouTube, which the ALJ watched. The ALJ has also reviewed all pleadings, documents, and orders filed in this matter, and has listened to the recordings from the Prehearing Conferences held by ALJ Hahn on October 27, 2022, and January 5, 2023. Based upon the ALJ's review of this case and the laws pertaining to this matter, the ALJ issues a nonfinal order granting Respondent's Motion to Dismiss for lack of subject matter jurisdiction. The prehearing conference scheduled for May 22, 2023, is hereby VACATED.

A. Findings of Fact¹

1. On August 18, 2022, a Complaint was filed with the Respondent against property owned by the Petitioner.
2. Respondent initiated an investigation, and on August 25, 2022, issued an Order to Repair Unsafe Building, 4350 North State Road 9, Columbia City, Indiana (hereinafter

¹ All findings of facts that can be construed as conclusions of law are so deemed.

“Unsafe Building Order”). The Unsafe Building Order is based on the Columbia City-Whitley County Unsafe Building Law Ordinance. The Unsafe Building Order advised the Petitioner that the Petitioner could request a hearing on the order that would be held on September 19, 2022, with the Unsafe Building Hearing Authority, which is the Whitley County Commissioners (hereinafter “Hearing Authority”).

3. On September 2, 2022, the Petitioner’s Registered Agent Karen Hanlen (hereinafter “Hanlen”) emailed Craig Wagner (hereinafter “Wagner”), Chief Building Inspector for Respondent, and Nathan Bilger, Executive Director for Respondent, and included a response to the Unsafe Building Order, a request for a hearing, and a request to extend the time to comply with the Unsafe Building Order.
4. On September 12, 2022, Wagner emailed Hanlen and advised her that a hearing would take place at the September 19, 2022, meeting of the Whitley County Commissioners. Wagner also provided Hanlen with the redacted complaint that led to the investigation.
5. On September 19, 2022, the Hearing Authority held a hearing on Petitioner’s request. All three members of the Hearing Authority were present for the hearing. Hanlen participated in the hearing telephonically. Wagner presented evidence to the Hearing Authority to support the Unsafe Building Order. Hanlen was given an opportunity to cross examine Wagner and provide evidence and argument. The Hearing Authority voted, 2-1, to give Petitioner an extension to November 15, 2022, to comply with the Unsafe Building Order. Hanlen advised the Hearing Authority that Petitioner would be seeking judicial review of its decision.
6. On September 30, 2022, Petitioner filed a Notice of Appeal with the Whitley County Superior Court, Small Claims Division. In the Notice of Appeal, the Petitioner sought judicial review of the Hearing Authority’s decision on the Unsafe Building Order, pursuant to Ind. Code §§ 36-7-4-1016 and 1602. Petitioner also advised the court that there was pending petition for administrative review with the Indiana Department of Homeland Security (DHS) “to initiate an adversarial proceeding before an administrative law judge due to the belief that the application of Indiana Code 36-7-9-1 [t]hrough I.C. 36-7-9-28 was improperly applied” by the Respondent and the Hearing Authority. Petitioner’s Notice of Appeal and request for review was dismissed by the court².
7. On September 30, 2022, the Petitioner filed a Petition for Review with DHS.

² The order dismissing the case was not filed with OALP, however, both parties agree that it was dismissed.

8. October 5, 2022, the Indiana Fire Prevention and Building Safety Commission wrote a letter to Hanlen advising her that it had received her Petition for Review, had granted the Petition for Review pursuant to Ind. Code § 4-21.5-3-7, and was forwarding the Petition for Review to OALP for assignment of an ALJ.
9. On October 5, 2022, OALP filed the Petition for Review and opened a case. An ALJ was assigned to the case on October 12, 2022.

B. Conclusions of Law³

1. The Respondent requests that this matter be dismissed for lack of subject matter jurisdiction pursuant to Indiana Rules of Trial Procedure 12(B)(1).
2. Subject matter jurisdiction is an issue that cannot be waived by a party, can be asserted at any time, and is required to be raised by the court if the parties do not raise the issue. *Stewart v. McCray*, 135 N.E.3d 1012, 1025 (Ind. Ct. App. 2019).
3. “The only relevant inquiry in determining whether any court has subject matter jurisdiction is to ask whether the kind of claim which the plaintiff advances falls within the general scope of the authority conferred upon such court by the constitution or by statute.” *State ex rel. Young v. Noble Circuit Court*, 263 Ind. 353, 356, 332 N.E.2d 99, 101 (1975). Thus, to determine whether OALP and ultimately the Indiana Fire Prevention and Building Safety Commission (FPBSC) has subject matter jurisdiction over this matter, it is imperative to consider the statute that governs the underlying proceedings between the parties.
4. Although the Petitioner did not clearly state the jurisdictional grounds for its Petition for Review, the underlying proceedings are governed by Ind. Code § 36-7-9. The underlying Unsafe Building Order was issued pursuant to the Whitley County Unsafe Building Ordinance, which was established pursuant to Ind. Code § 36-7-9. Furthermore, in Petitioner’s Notice of Appeal filed with the Whitley County Superior Court, Small Claim Division, Petitioner advises the court that there is a pending petition for administrative review with DHS because Petitioner believes that Ind. Code § 36-7-9 was improperly applied and that the Unsafe Building Order was inappropriate and did not meet the requirements of Ind. Code § 36-7-9-4. Therefore, a review of Ind. Code § 36-7-9 is necessary to determine what entity has subject matter jurisdiction.

³ All conclusions of law that can be construed as findings of fact are so deemed.

5. An enforcement authority⁴ may issue order requiring action relative to any unsafe premise. See Ind. Code § 36-7-9-5. Here, the enforcement authority is Respondent. See Whitley County Ordinances, § 150.02. Respondent issued the Unsafe Building Order on August 25, 2022.
6. The order becomes final ten days after notice of the order is given unless a hearing is requested. Ind. Code § 36-7-9-5. If a hearing is requested, as it was here, the hearing authority⁵ is to hold a hearing. Ind. Code § 36-7-9-7(a). At the conclusion of the hearing, the hearing authority is to affirm, rescind, or modify the order. Ind. Code § 36-7-9-7(d). Here, the Hearing Authority held a hearing on September 19, 2022, and modified the Unsafe Building Order to give Petitioner additional time to comply with the order.
7. An action taken by the hearing authority to affirm, rescind, or modify a order related to an unsafe building “is subject to review by the circuit or superior court of the county in which the unsafe premises are located, on request of: (1) any person who has a substantial property interest in the unsafe premises; or (2) any person to whom that order or finding was issued.” Ind. Code § 36-7-9-8. The request for judicial review must be filed within ten days after the date the action was taken. *Id.*
8. Therefore, the Whitley County Circuit or Superior Court has subject matter jurisdiction to review the Hear Authority’s decision to modify the Unsafe Building Order issued by Respondent⁶.
9. To be thorough, this ALJ has also considered whether OALP and ultimately the Indiana Fire Prevention and Building Safety Commission (FPBSC), has concurrent jurisdiction to conduct an administrative review of an order issued pursuant to Ind. Code § 36-7-9-5.
10. OALP was established to appoint ALJs to preside over administrative proceedings to review a disputed agency action for an agency not excluded by Ind. Code § 4-15-10.5-2. See Ind. Code § 4-15-10.5-1.

⁴ Enforcement authority is defined as the chief administrative officer of the executive department authorized by ordinance to administer Ind. Code § 36-7-9.

⁵ A hearing authority is defined as a person or persons designated as such by the executive of a city or county, or by the legislative body of a town. Whitley County Ordinance § 150.02 designates the Whitley County Commissioners as the hearing authority for the purposes of Ind. Code § 36-7-9-7.

⁶ An action to review this decision was filed in and dismissed by the Whitley County Superior Court, Small Claims Division. The dismissal order was not provided to OALP, and therefore, the specific basis for the dismissal is unknown.

11. An agency, for the purposes of Ind. Code § 4-21.5, means “any officer, board, commission, department division, bureau, or committee of *state government* that is responsible for any stage of a proceeding under [Ind. Code § 4-21.5]” Ind. Code § 4-21.5-1-3 (*emphasis added*).
12. DHA and the FPBSC are considered agencies for the purposes of Ind. Code § 4-21.5 and neither are excluded by Ind. Code § 4-15-10.5-2. The Respondent is not considered an agency for the purposes of Ind. Code § 4-21.5.
13. The FPBSC is an eleven-member commission appointed by the Governor. The FPBSC’s responsibilities include reviewing ordinances related to building laws and fire safety laws; adopting administrative rules related to building laws and fire safety laws; enforcing violations of building laws, fire safety laws, and the adopted administrative rules; and reviewing requests for variances of the building laws, fire safety laws, and the adopted administrative rules. *See generally* Ind. Code Articles 22-12 and 13. DHS is required to provide staff and facilities to carry out the responsibilities of the FPBSC. Ind. Code § 22-12-2-7.
14. Building laws and fire safety laws are specifically defined in Ind. Code §§ 22-12-1-3 and 13, and do not include unsafe buildings governed by Ind. Code § 36-7-9.
15. Administrative Adjudications before FPBSC are governed by Ind. Code § 22-12-7. The FPBSC or DHS may issue an Order for specific actions described in Ind. Code § 22-12-7-3 through 8. A person who is aggrieved by an order from DHS may appeal that order by filing a Petition for Review under Ind. Code § 4-21.5-3-7. *See* Ind. Code § 22-12-7-12. If the Petition for Review is filed, the FPBSC is required to conduct administrative proceedings under Ind. Code § 4-21.5. *Id.* Here, the Unsafe Building Order at issue was issued by Respondent, not DHS, and therefore Ind. Code § 22-12-17 is inapplicable to this situation.
16. After a thorough review of the laws relevant to OALP and FPBSC, it is concluded that neither have concurrent jurisdiction with the Whitley County Commissioners, acting as the hearing authority, or the Whitley County Circuit or Superior Court, and therefore, both OALP and FPBSC lack subject matter jurisdiction over this matter.

C. Nonfinal Order

It is recommended that this matter be dismissed for lack of subject matter jurisdiction. This order is not final. This matter is now before the ultimate authority, the Fire Prevention and Building Safety Commission, who has the final authority over this matter and shall review this recommended order then issue a final order to all parties. If you wish to raise an objection to

this order, you must file an objection, in writing, within fifteen (15) days after service of this order. If served only by mail, however, three (3) days will be added to this period to object. See Ind. Code § 4-21.5-3-2 for how to compute the period to object. Your objection must identify the basis of the objection with reasonable particularity and be filed with the ultimate authority by one of the following methods:

Email at: buildingcommission@dhs.in.gov

Personal service or mail to:

Fire Prevention and Building Safety Commission
Indiana Department of Homeland Security
302 W. Washington Street, Room E-208
Indianapolis, IN 46204.

This order will become final if you do not file an objection in accordance with these requirements and you waive your right to judicial review. See Ind. Code § 4-21.5-5-4(b). If a timely and appropriate objection is filed, the ultimate authority will review the matter and issue a final order or remand this matter back to the Office of Administrative Law Proceedings for additional proceedings.

So Ordered: May 19, 2023.



Carrie T. Ingram
Administrative Law Judge
Indiana Office of Administrative Law Proceedings

Distribution:

Petitioner: Harold Ruth Farms served by email to its Owner/Operator Karen Henlen at hancobiz@gmail.com

Respondent: Columbia City / Whitley County Joint Planning and Building Department served by email to Attorney Matthew Shipman at mattshipman@bgswlaw.com

Ultimate Authority: Fire Prevention and Building Safety Commission, served by email to legal@dhs.in.gov.

Department of Homeland Security served by email to Attorney Tyler Burgauer at tyburgauer@dhs.in.gov.