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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

2016 MAY -6 PM 2:22

DANIEL W. HENNING
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

VILLAGE OF MOSCOW, OHIO :
Plaintiff : **CASE NO. 2015 CVH 00011**
vs. : **Judge McBride**
DENNIS SKEENE, ET AL., :
Defendants : **DECISION/ENTRY**

Strauss Troy Co., L.P.A., Emily T. Supinger, counsel for the plaintiff Village of Moscow, Ohio, 150 East Fourth Street, Cincinnati, Ohio 45202;

T. David Burgess, attorney for the defendants Dennis Skeene and Karen Skeene, 110 North Third Street, Williamsburg, Ohio 45176.

This cause is before the court for consideration of the plaintiff Village of Moscow, Ohio's motion for summary judgment. The parties briefed the issues relative to the motion, and oral argument was heard on January 8, 2016, after which time the court took the motion under advisement.

Upon consideration of the motion for summary judgment, the evidence presented for the court's consideration, the written and oral arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The instant case involves a zoning permit. The defendants' primary residence is located at 81 Broadway Street, Moscow, Ohio 45153.¹ The defendants own property at 58 Elizabeth Street, Moscow, Ohio 45153 ("the Property"), which is the property at issue in this case.² The defendants also own property which is adjacent to the Property and which is located at 505 5th Street, Moscow, Ohio 45153.³ All parties agree that the lots at 505 5th Street and 58 Elizabeth Street are considered to be one lot under the Zoning Code because they are contiguous.⁴

The company Wellex Manufacturing, Inc. (hereinafter referred to as "Wellex") previously owned the land located at 58 Elizabeth Street, as well as the structure on it ("the Structure"), which it sold to the defendants.⁵ Wellex had used the Structure as a machine shop.⁶

The Structure was zoned as a "nonconforming commercial use and structure in a Residential A district."⁷ In 2012 a tornado damaged its metal roof, lifting the roof from the Structure.⁸ After the tornado, Wellex stopped using the Structure.⁹

The defendants purchased the Property from Wellex.¹⁰ The defendants agree that the Structure on the Property lost its designation as a "nonconforming" commercial

¹ D. Skeene Dep., 8:2-11 (9/21/2015).

² D. Skeene Dep., 9:12-16.

³ D. Skeene Dep., 10:17-19.

⁴ S. Ashba Dep., 23:1-9 (9/30/2015).

⁵ D. Skeene Dep., 11:20-25; Ex. 7 to D. Skeene Dep.

⁶ D. Skeene Dep., 12:1-4.

⁷ Ex. 7 to D. Skeene Dep.

⁸ D. Skeene Dep., 13:17-23.

⁹ Ex. 7 to D. Skeene Dep.

¹⁰ D. Skeene Dep., 9:14-16.

structure by the time they purchased it from Wellex because the building had not been used for a non-conforming, commercial use for more than one year.¹¹

On June 3, 2013, the defendant Dennis Skeene submitted an application for a zoning permit for the Property.¹² Skeene designated the "property use" as "residential," and his proposed property use was listed as "same."¹³

In the application, Skeene further proposed making repairs to the Structure.¹⁴ Skeene testified that he was not sure what he wanted to actually use the Property or Structure for at the time he submitted his application.¹⁵

The former Zoning Administrator, Sandra Massey Ashba, testified that she spoke with Skeene regarding his intended use for the Structure, and he indicated it would be used as an "accessory" building.¹⁶

On July 2, 2013, the Zoning Administrator issued a decision denying the application for a zoning permit, and concluding:

"[The] proposed repair to the commercial building for use as an accessory structure for the principal residential structure located at 505 Fifth Street fails to comply with the following sections and is denied: The proposed accessory structure is not 'subordinate to' the primary structure on the lot. The accessory structure, at 3,440 square feet is substantially larger than the principal structure, which is 1,753 square feet. It therefore does not meet the definition of 'accessory structure' under Section 201 of the zoning ordinance."¹⁷

¹¹ D. Skeene Dep., 23:21-24:19.

¹² Ex. 6 to D. Skeene Dep.

¹³ Ex. 6 to D. Skeene Dep.

¹⁴ Ex. 6 to D. Skeene Dep.

¹⁵ D. Skeene Dep., 22:7-20.

¹⁶ S. Ashba Dep., 39:1-9.

¹⁷ Ex. 7 to D. Skeene Dep.

The defendants appealed the Zoning Administrator's adverse decision on July 3, 2013.¹⁸ In his appeal, Dennis Skeene stated that "[t]he building I wish to repair is not going to be used as an accessory structure."¹⁹

On July 5th, the Zoning Administrator sent Skeene a letter asking him to clarify his intended use for the Structure and asked for additional documentation.²⁰ On July 22nd, the Zoning Administrator sent Mr. Skeene a second letter, again asking him to clarify the intended use for the Structure. She explained:

"The zoning application does not state specifically that it is intended to be repaired for use as an accessory structure serving the property located at 505 Fifth Street, however it was analyzed as such based on your verbal representations and lack of any other additional information regarding its intended use. If the intended use is not an accessory structure please clarify and the zoning decision will be amended based on your zoning application."²¹

On July 26, 2013, the defendants withdrew their appeal.²² The defendants then went forward with his repairs to the Structure and afterwards obtained a building permit to make those repairs.²³

On April 22, 2014, the defendants submitted a second application for a zoning permit for the Property.²⁴ The property use was listed as "Residential – Accessory

¹⁸ Ex. 8 to D. Skeene Dep.

¹⁹ Ex. 8 to D. Skeene Dep.

²⁰ Ex. 10 to D. Skeene Dep.

²¹ Ex. 12 to D. Skeene Dep.

²² Ex. 13 to D. Skeene Dep.

²³ D. Skeene Dep., 33:24-35:1.

²⁴ Ex. 9 to D. Skeene Dep.

Building,” and the proposed use was the “same.”²⁵ As with the first application, the defendants indicated that the proposed construction would be for repairs.²⁶

On June 22, 2014, the Law Director for the Village of Moscow responded via letter, indicating that the defendants’ second application, which stated that the Structure would be used as an accessory structure, was “virtually identical” to the earlier June 2013 application.²⁷ The Law Director explained that Mr. Skeene withdrew his appeal of the earlier June 2013 application and that the June 2013 application was “final.”²⁸ Therefore, the letter concluded, the Zoning Administrator’s earlier decision to deny the defendants a permit for the use of the Structure as an accessory building was final and would not be reconsidered.²⁹ Finally, the Law Director warned that the defendants’ use of the Structure on the Property violated the Moscow Zoning Code because there was no permit for its use and that such use must be “discontinued immediately.”³⁰

Skeene sent a letter to the Law Director stating that he did not “think that there is any zoning requirement for repairing the roof” and that the “building is being used as an accessory structure to the home located on the lot with it.”³¹ Mr. Skeene testified that he did not believe he needed a permit to change the use of the building.³² He was under the impression that the use “automatically reverted back to residential.”³³

²⁵ Ex. 9 to D. Skeene Dep.

²⁶ Ex. 9 to D. Skeene Dep.

²⁷ Ex. 14 to D. Skeene Dep.

²⁸ Ex. 14 to D. Skeene Dep.

²⁹ Ex. 14 to D. Skeene Dep.

³⁰ Ex. 14 to D. Skeene Dep.

³¹ Ex. 15 to D. Skeene Dep.

³² D. Skeene Dep., 37:21-38:1.

³³ D. Skeene Dep., 37:21-38:1.

The Law Director responded again via letter, stating that a change "in use without a zoning permit violates the zoning code and must be discontinued immediately."³⁴

Finally, after the commencement of this action, the defendants filed a third application for a zoning permit on July 9, 2015.³⁵ The third permit application indicated that the existing property use was "Residential 'A' District" and that the new use was for a "Private Garage."³⁶ The Law Director again responded that the Zoning Administrator's previous decision was final and that the application would not be reconsidered.³⁷

Currently the defendants claim to use the Structure as an "accessory building."³⁸ In it the defendants store two old trucks, six motorcycles, and various tools and power tools.³⁹ Previously the defendants used the Structure to also store a boat, trailer, and two jet skis.⁴⁰

On January 6, 2015 the plaintiff filed suit against the defendants requesting (1) a judgment declaring that the defendants are using the Property in violation of the Moscow Zoning Code and (2) a preliminary and permanent injunction under R.C. 713.13 to enjoin the defendants from continuing to use the Property in violation of the Zoning Code and to prevent future violations. The plaintiff filed a motion for summary judgment on all issues in its complaint on October 1, 2015. Following the defendants' response and the plaintiff's reply, this court heard oral arguments on the motion on January 8, 2016.

³⁴ Ex. 16 to D. Skeene Dep.

³⁵ Ex. 17 to D. Skeene Dep.

³⁶ Ex. 17 to D. Skeene Dep.

³⁷ Ex. 18 to D. Skeene Dep.

³⁸ D. Skeene Dep., 19:10-12.

³⁹ D. Skeene Dep., 19:15-17.

⁴⁰ D. Skeene Dep., 19:18-20:4.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The court must grant summary judgment, as requested by a moving party when:

"(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."⁴¹

The court must view the evidence in a light most favorable to the nonmoving party.⁴² Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.⁴³ A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."⁴⁴

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?⁴⁵ This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved

⁴¹ *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). See *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

⁴² *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

⁴³ *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998) citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

⁴⁴ *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

⁴⁵ *Id.* at 251-52.

only by a finder of fact because they may reasonably be resolved in favor of either party.”⁴⁶

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.⁴⁷ This burden requires the movant to “specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.”⁴⁸ If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.⁴⁹

However, if the movant satisfies this burden, then the nonmoving party has a “reciprocal burden” to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a “triable issue of fact” remains.⁵⁰ The duty of the nonmoving party is more than that of resisting the motion’s allegations.⁵¹ Instead, this burden requires the nonmoving party to “produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial.”⁵² The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.⁵³ It may not rely on the pleadings or unsupported allegations.⁵⁴

⁴⁶ Id. at 250.

⁴⁷ *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

⁴⁸ *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

⁴⁹ Id. See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

⁵⁰ *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

⁵¹ *Wells Fargo*, 2013-Ohio-855at ¶ 25.

⁵² (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; See *Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

⁵³ *Williams*, 2014-Ohio-3778 at ¶ 8. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

⁵⁴ Id.

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.”⁵⁵ The trial court maintains the sound discretion to admit or exclude relevant evidence.⁵⁶ When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.⁵⁷

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.⁵⁸ “Personal knowledge” is defined as “[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay.”⁵⁹ “Absent evidence to the contrary, an affiant’s statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E).”⁶⁰ Furthermore, if the affiant does not specifically state that he or she has personal knowledge, “personal knowledge may be inferred from the contents of the affidavit.”⁶¹

⁵⁵ See *Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 (“Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.”).

⁵⁶ *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

⁵⁷ *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

⁵⁸ Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

⁵⁹ *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

⁶⁰ *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

⁶¹ *Id.*

By contrast, if certain statements in the affidavit “suggest that it is unlikely that the affiant had personal knowledge” of the facts, then “something more than a conclusory averment that the affiant has personal knowledge would be required.”⁶² Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).⁶³

Civ.R. 56(E) provides that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Thus, documents referenced in the affidavit “must be attached to the affidavit.”⁶⁴ If the affiant “relies” on documents in the affidavit but fails to attach those documents, “the portions of the affidavit that reference those document[s] must be stricken.”⁶⁵

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.⁶⁶ Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.⁶⁷

⁶² Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

⁶³ *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

⁶⁴ *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

⁶⁵ Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. See *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

⁶⁶ *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

⁶⁷ *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

LEGAL ANALYSIS

(I) MOTION FOR DECLARATORY JUDGMENT

A declaratory judgment is used to decide an "actual controversy, the resolution of which will confer certain rights or status upon the litigants."⁶⁸ Hence, the plaintiff must show that the following elements are satisfied: "(1) a real controversy between adverse parties; (2) a controversy which is justiciable in character; and (3) a situation where speedy relief is necessary to preserve the rights of the parties."⁶⁹ These elements are not satisfied if the opinion is advisory or answers a moot question.⁷⁰ A "controversy" exists when the parties have a genuine dispute and adverse legal interests.⁷¹ An issue is justiciable if it is ripe for review.⁷²

In interpreting local ordinances, such as zoning codes, courts apply the rules used in statutory interpretation.⁷³ The interpretation of statutes, and thus zoning codes, is a matter of law.⁷⁴ Courts strictly construe zoning codes because they deprive real property owners of certain property uses.⁷⁵ Although strictly construed, "[a] legislative

⁶⁸ *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 10, quoting *Mid-American*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9.

⁶⁹ *Athens Metropolitan Housing Authority v. Pierson*, 4th Dist. Athens Nos. 01CA28, 01CA29, 2002 WL 851767, *4 (Mar. 12, 2002).

⁷⁰ *Pierson*, 2002 WL 851767, *4.

⁷¹ *Id.* at *5.

⁷² *Id.*

⁷³ *City of Columbiana v. J & J Car Wash, Inc.*, 7th Dist. Columbiana No. 04 CO 20, 2005-Ohio-1336, ¶ 32.

⁷⁴ *Id.* at ¶ 33.

⁷⁵ *W. Chester Twp. Bd. of Trustees v. Speedway Superamerica, LLC*, 12th Dist. Butler No. CA2006-05-104, 2007-Ohio-2844, ¶ 24, citing *Sammons v. Village of Batavia*, 53 Ohio App.3d 87, 89-90, 558 N.E.2d 1246 (12th Dist. 1988).

body need not define every word in its enactment.”⁷⁶ When a term is not defined in a zoning code, courts apply their “common and ordinary meaning.”⁷⁷

“In an action for a zoning violation, a city has the initial burden of proving a violation.”⁷⁸ When the property owner cannot show that the property is being used for some kind of “permitted use,” the use is “nonconforming, and eliminates the property owner’s right to the use.”⁷⁹

The Village of Moscow has in place a zoning code (“Zoning Code”) that, among other purposes, regulates and restricts the use of structures and property in Moscow, Ohio.⁸⁰ It requires the issuance of a zoning permit when there is a change in use of any building, structure, or land. Relevant to the case at bar is Zoning Code 300, which provides:

“No building or other structure shall be erected, moved, added to, structurally altered, nor shall any building, structure, or land be established or changed in use without a permit issued by the Zoning Administrator. Zoning permits shall be issued only in conformity with the provisions of this ordinance unless the Zoning Administrator receives a written order from the Board of Zoning Appeals deciding an appeal,

⁷⁶ *Parma Heights v. Jaros*, 69 Ohio App.3d 623, 629, 591 N.E.2d 726 (8th Dist. 1990).

⁷⁷ *Speedway Superamerica, LLC*, 2007-Ohio-2844 at ¶ 24, quoting *Village of Batavia*, 53 Ohio App.3d at 89-90.

⁷⁸ *Wooster v. Entertainment One, Inc.*, 158 Ohio App.3d 161, 2004-Ohio-3846, 814 N.E.2d 521, ¶ 48 (9th Dist. 2004), citing *Schmidt v. Barton*, 9th Dist. No. 8184 (Jan. 12, 1977).

⁷⁹ *Wooster*, 2004-Ohio-3846 at ¶ 51, citing *Smith v. Wadsworth*, 9th Dist. No. 2550-M, 1996 WL 603849. However, sometimes a non-conforming use may be permitted: “A nonconforming use of land is a use that was lawful before the enactment of a zoning amendment, but one which, although no longer valid under the current zoning rules, may be lawfully continued.” See *Wooster*, 2004-Ohio-3846 at ¶ 45, citing *C.D.S., Inc. v. Gates Mills*, 26 Ohio St.3d 166, 168, 26 OBR 142, 497 N.E.2d 295 (1986). The Ohio Constitution recognizes a property owner’s right to continue a particular use of real property, even if it is non-conforming, so long as it was already in existence at the time of the new enactment that restricted such use. *Id.*, citing Ohio Constitution, Article I, Section 16 and *Dublin v. Finkes*, 83 Ohio App.3d 687, 615 N.E.2d 690 (1992).

⁸⁰ Zoning Code, Preamble, pg. 9.

or variance from Village Council, approving a Planned Unit Development District, as provided by this ordinance.”⁸¹

Moreover, under the Zoning Code, a property owner’s “[f]ailure to obtain a zoning permit or certificate of occupancy shall be a violation of this ordinance * * *.”⁸² A “zoning permit,” as required by Zoning Code 300, is a “document issued by the Zoning Administrator authorizing the use of lots, structures, uses of land and structures and characteristics of the uses[.]”⁸³

The Property in the case at bar is within the bounds of a “Residence ‘A’ District,” which is a residential district.⁸⁴ Under the Zoning Code, only certain listed uses, “and no others, are permitted in Residence ‘A’ Districts.”⁸⁵ Among other enumerated uses, the Zoning Code allows for “[a]ccessory uses, buildings or other structures customarily incidental to any aforesaid permitted use, including private garages and stables* * *.”⁸⁶ The defendants claim that the Structure is being used as an “accessory” structure.

Neither party disputes the fact that the defendants do not have a permit for their use of the Structure, which is also demonstrated by the administrative record. The issue is whether the defendants have violated the Zoning Code by failing to obtain a permit.

The plaintiff argues that the defendants were required to obtain a permit because the Property and Structure changed in use from a non-conforming, commercial use to a new use. The defendants counter that they were not required to obtain a permit

⁸¹ (Emphasis added.) Zoning Code, 300, pg. 25.

⁸² Zoning Code, 320, pg. 27.

⁸³ Zoning Code, 201, pg. 23.

⁸⁴ S. Ashba Aff., ¶¶ 6-7.

⁸⁵ Zoning Code, 820, pg. 48.

⁸⁶ Zoning Code, 820(B), pg. 48. The Zoning Code defines an “accessory use” or an “accessory structure” as “[a] use of a structure on the same lot with, and of a nature that is customarily incidental or subordinate to, the building or dwelling located thereon.” Zoning Code, 201, pg. 13.

because (1) they did not need a permit to make a repair to the Structure and (2) there was no change in use because they are using the Structure as an accessory building (which is a residential use) and the Structure reverted back to a Residence "A" District when the non-conforming use lapsed.

Zoning Code 300 prohibits a change in use of a "building or other structure" unless the property owner has a permit. When a property owner fails to obtain a zoning permit, it is a violation of the Zoning Code.⁸⁷ The court must determine whether the Structure changed in use, therefore necessitating a zoning permit.

The parties agree that the Structure, when owned by Wellex, was used as a machine shop, which was a non-conforming, commercial use. A "non-conformity" under the Zoning Code is "[a] building, structure or use of land existing at the time of enactment of this ordinance and which does not conform to the regulations of the district or zone in which it is situated."⁸⁸ The parties further agree that the Property and Structure are not in a zone that generally permits commercial uses. Rather, because Wellex had been using the structure as a machine shop before the Zoning Code's enactment, Wellex enjoyed the ability to legally continue to operate its machine shop in an otherwise residential district.

The parties agree that before Wellex sold the property to the defendants, it lost its status as a Structure used for a legally non-conforming, commercial use.⁸⁹ The Structure ceased to be legally non-conforming when Wellex stopped using it as a machine shop for more than one year, after which time the Property and Structure was sold to the defendants.

⁸⁷ Zoning Code, 320, pg. 27.

⁸⁸ Zoning Code, 201, pg. 19.

⁸⁹ See Defs. Resp., pg. 6.

The Zoning Code provides:

“When a non-conforming use of a structure, or structure and land in combination is discontinued or abandoned for more than one (1) year * * * the structure or structure and land combination, shall not thereafter be used except in conformity with the regulations of the district in which it is located * * * .”⁹⁰

In sum, it is undisputed that the Structure was legally used as a non-conforming, commercial building before the defendants purchased it. By the time the defendants purchased the property, the parties concur that the Structure could no longer be legally used as a non-conforming, commercial structure. The parties disagree as to whether the defendants needed to receive a permit before then using the Structure.

As quoted above, once the Structure stopped being used as a non-conforming building for over one year, it could not “thereafter be used except in conformity with the regulations of the district in which it is located.”⁹¹ Hence, the defendants must now use the Structure in a way that complies with the regulations for a Residence “A” District.

The defendant Dennis Skeene testified that he uses the Structure as an “accessory building.”⁹² Using the Structure as an accessory building is a permitted use inside of a Residence “A” District.⁹³ However, because an “accessory use” is a change in use from using the Structure as a “non-conforming,” commercial machine shop, the defendants need a permit under Zoning Code 300 to use the Structure.⁹⁴

⁹⁰ Zoning Code, 460(5), pg. 32.

⁹¹ Zoning Code, 460(5), pg. 32.

⁹² D. Skeene Dep., 19:10-12.

⁹³ Zoning Code, 820(B), pg. 48.

⁹⁴ The defendants posit that the Property “reverted back to the original zoning of *Residence “A” District.*” Defs. Resp. pg. 6. However, the court cannot find, and the defendants have not identified, any provision in the Zoning Code that states that property owners automatically receive a new zoning permit by operation of law when a property ceases to be legally used as a non-conforming structure. The court also cannot find any provision stating that a property does

The defendants argue that Dennis Skeene did not know what he wanted to use the Structure for when he applied for his first permit. Whether his intentions have changed over the course of the last three years is irrelevant as to whether he needs a permit to use the Structure as an accessory building. The fact of the matter is that the defendants presently claim to use the Structure as an accessory building, and they accordingly must have a permit to do so because the use of the Structure has changed from a legally non-conforming, commercial use to an alleged accessory use.

The parties also included much discussion in their briefs and during their oral arguments about whether the defendants truly use the Structure as an accessory building within the meaning of the Zoning Code. Because the Structure is located in a Residence "A" District, the Zoning Code allows for "[a]ccessory uses, buildings or other structures customarily incidental to any aforesaid permitted use, including private garages * * *."⁹⁵

Whether the defendants are in fact using the Structure as an accessory building, as they purport to, is relevant to the issue of whether the defendants were wrongfully denied a permit by the Zoning Administrator. However, the instant action is not an administrative appeal by the defendants.⁹⁶ The plaintiff's complaint requests that the

not need a zoning permit if the prior use of a structure was a non-conforming use that lapsed. The defendants also argue that they did not change the use of the property because the Property and Structure lost the non-conforming status before they purchased it. The record indicates that when Wellex stopped using the Structure, no one used it again until the defendants used it. Thus, when the defendants began using the Structure, they were imposing a new use on the Structure.

⁹⁵ Zoning Code, 820(B), pg. 48.

⁹⁶ If the defendants disagree with the plaintiff's "interpretation of the Zoning Code and administrative decision to issue [the defendants] a building permit," then the "proper remedy was to appeal the administrative decision * * *." See *Baruk v. Heritage Club Homeowners' Assn.*, 12th Dist. Warren No. CA2013-09-086, 2014-Ohio-1585, ¶ 44 quoting *Murray Energy Corp. v. Pepper Pike*, 8th Dist. Cuyahoga No. 90420, 2008-Ohio-2818, ¶ 44.

court declare that the defendants are using the Property in violation of the Zoning Code.⁹⁷ The court does not need to reach the question of whether the defendants are actually using the Structure for accessory uses. The record is clear and undisputed that the defendants are no longer using the Structure for its previous non-conforming commercial use, but rather it has been put to some different use. That the Structure is being used differently from its earlier non-conforming use is sufficient to conclude that the defendants need a permit to use the Structure, whatever that new use may be.⁹⁸

The defendants also argue that the Zoning Administrator wrongfully failed to consider their second and third zoning permit applications, and in doing so prevented them from being able to appeal to the Zoning Board. However, as the Twelfth District Court of Appeals advised in *Baruk v. Heritage Club Homeowners' Association*, 12th Dist. Warren No. CA2013-09-086, 2014-Ohio-1585, ¶ 45, if the defendants' "goal was to obtain a court order compelling the [plaintiff] to enforce the Zoning Code, case law indicates that the proper way in which to do so is by a petition for a writ of mandamus."⁹⁹

Finally, the defendants argue that they did not need a permit to repair the roof of the Structure, and therefore they have not violated the Zoning Code. However, whether they needed a permit to make a repair does not change the conclusion that they do need a permit to use the Structure in a way that is different from its prior "non-conforming" use.

⁹⁷ Compl., ¶ 21.

⁹⁸ Even if the defendants are using the Structure for a commercial use, that is still a new use from its prior use as a legally non-conforming, commercial building. All parties agree that the Structure has lost its non-conforming status.

⁹⁹ *Baruk*, 2014-Ohio-1585 at ¶ 45, citing *Throckmorton v. Hills Communities, Inc.* 2d Dist. Greene No. 99CA89, 2000 WL 770554, *3 (June 16, 2000).

Given the foregoing legal analysis, the court finds that the parties do have a real controversy, their controversy regarding the application of Zoning Code 300 and 320 is justiciable in character, and speedy relief is necessary.¹⁰⁰ Thus, the court concludes that a judgment should be entered in favor of the plaintiff, declaring that the defendants are in violation of the Zoning Code.

(II) MOTION FOR INJUNCTIVE RELIEF

Injunctions are designed to prevent future injuries.¹⁰¹ The decision to issue an injunction is "within the sound discretion of the trial court."¹⁰² Pursuant to R.C. 713.13, a court may issue an injunction to prevent or terminate a violation of a zoning ordinance or regulation:¹⁰³

"No person shall erect, construct, alter, repair, or maintain any building or structure or use any land in violation of any zoning ordinance or regulation enacted pursuant to sections 713.06 to 713.12, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution. In the event of any such violation, or imminent threat thereof, the municipal corporation, * * * in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation."

Hence, the first issue is whether the land use violates a zoning ordinance enacted pursuant to R.C. 713.06 to 713.12 or Section 3 of Article XVIII, Ohio Constitution.¹⁰⁴ The parts of the Revised Code identified in R.C. 713.13 "deal with the

¹⁰⁰ *Pierson*, 2002 WL 851767 at *4.

¹⁰¹ *Id.* at *8.

¹⁰² *Id.* at *9, citing *Clark v. Mt. Carmel Health*, 124 Ohio App.3d 308, 315, 706 N.E.2d 336 (10th Dist. 1997)

¹⁰³ *Pierson*, 2002 WL 851767 at *9.

¹⁰⁴ *City of Columbiana*, 2005-Ohio-1336 at ¶ 15.

functions of a planning commission, such as controlling the height, design, and location of the buildings and other structures within a municipal corporation.”¹⁰⁵ The portion of the Ohio Constitution referenced in R.C. 713.13 states: “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”¹⁰⁶

Generally, to gain injunctive relief a party must show that it will suffer great or irreparable injury. However, when a statute provides a specific injunctive remedy for the state, such as R.C. 713.13, the state need not prove that great or irreparable injury will occur absent the injunction.¹⁰⁷ “[S]tatutory injunction remedies, which grant government agents the right to sue to enjoin activities that the General Assembly has deemed to be not in the public interest, have as their *principal* purpose the prevention of harm to the general public, and not the attainment of justice for the individual parties involved.”¹⁰⁸

For this reason, R.C. 713.13 is “a special statute allowing the municipal corporation to obtain an injunction without showing irreparable harm would be incurred for which there is no adequate remedy at law.”¹⁰⁹ When the statutory requirements are met for R.C. 713.13, then the court should grant an injunction.¹¹⁰

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, quoting Ohio Constitution, Article XVIII, Section 3.

¹⁰⁷ *Ackerman v. Tri-City Geriatric & Health Care, Inc.*, 55 Ohio St.2d 51, 148, 378 N.E.2d 145, 9 O.O.3d 62 (1978), quoting *Stephan v. Daniels*, 27 Ohio St. 527, 536 (1875). “The Ohio Supreme Court concluded that traditional rules for granting injunction do not apply to statutory injunctions. *Id.* The Court continued that balancing of the equities is unnecessary where an injunction is permitted by a statute designed to grant the government a remedy to enforce public policy.” *City of Columbiana*, 2005-Ohio-1336 at ¶ 17, citing *Ackerman*, 55 Ohio St.2d at 56-57.

¹⁰⁸ *Wooster*, 2004-Ohio-3846 at ¶ 68, citing *Ackerman*, 55 Ohio St.2d at 57.

¹⁰⁹ *City of Columbiana*, 2005-Ohio-1336 at ¶ 19, citing *Wooster v. Entertainment One Inc.*, 9th Dist. No. 03CA042, 2004-Ohio-3846, ¶ 67.

¹¹⁰ *Wooster*, 2004-Ohio-3846 at ¶ 68.

In turning to the first issue, the Zoning Code was enacted in accordance with Chapter 713 of the Revised Code.¹¹¹ The next question is whether the defendants' use of the Structure violates the Zoning Code. As discussed above, the defendants are violating Zoning Code 300 and 320 because they have failed to get a permit for their use of the Structure after the Structure had a change in use. The plaintiff does not need to prove great or irreparable injury because the statute of R.C. 713.13 provides injunctive relief for the plaintiff. For these reasons, the court finds that the plaintiff has satisfied R.C. 713.13, and therefore the court grants the plaintiff's motion for an injunction against the defendants.

CONCLUSION

The court finds that there is no genuine issue of material fact that remains to be litigated, and the plaintiff is entitled to judgment as a matter of law. For the aforementioned reasons, the court finds the plaintiff's motion for summary judgment well-taken and grants it.

Accordingly, the court declares that the defendants are in violation of the Moscow Zoning Code. The court grants a preliminary and permanent injunction against the defendants pursuant to R.C. 713.13 and orders the defendants Dennis Skeene and Karen Skeene, and their agents, successors, and assigns, to cease continued and

¹¹¹ Zoning Code, Preamble, pg. 9, Ex. D. to D. Skeene Dep.

future use of the Structure located on the Property at 58 Elizabeth Street, Moscow, Ohio 45153, until the defendants come into compliance with the Zoning Code by receiving a zoning permit or a variance.

IT IS SO ORDERED.

DATED: 5-6-2016



Judge Jerry R. McBride

NOTICE TO CLERK:

The Clerk is hereby directed to serve upon all parties not in default for failure to appear notice of this judgment and the date of its entry upon the journal. Within three days of entering this judgment upon the journal, the Clerk shall serve the parties in a manner prescribed by Civ.R.5(B) and note the service in the appearance docket.



Judge Jerry R. McBride