IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

Shelly Materials, et al.,	:	
Appellants,	:	CASE NO. 23 CV 01428
v.	:	Judge Marcelain
Licking County Planning, Commission, et al.,	:	**JUDGMENT ENTRY**
Appellees.	:	

This matter is before the Court upon an administrative appeal filed on December 18, 2023 from a determination of the Licking County Planning Commission Board of Appeals rendered on November 20, 2023. Appellees filed a certified transcript on February 6, 2023. Appellants, Shelly Materials and Scioto Materials ("Appellants"), filed their Brief on March 11, 2024. Appellees, the Licking County Planning Commission ("Appellees/the Board"), filed their Brief in Opposition on April 1, 2024, and Appellants filed a Reply Brief on April 10, 2024. For the reasons that follow, the determination of the Commission is AFFIRMED.

This case concerns the construction of an asphalt and concrete plant together with an ongoing mining operation on Tharp Road in Licking County. The property is owned by James E. Geiger, leased by Shelly Materials, and subleased by Scioto Materials. It has been the site of commercial activity for many years. On December 15, 2022, the Commission sent a Notice of Violation to Appellants alleging nine (9) violations of various stormwater and flood regulations. A second Notice of Violation—similar but not identical to the first—was sent on March 22, 2023. (Cert. Rec., Exhibit 2, "Statement in Support of Appeal," at pg. 2). Subsequent to the first Notice of Violation, but prior to the second, on February 14, 2023, Shelly Materials applied for a permit to develop the relevant land. (*Id.* at 3). On June 5, the Commission denied the permit. (*Id.* at 3). On June 22, 2023, Shelly Materials appealed to the Board.

Judge
Thomas M. Marcelain
740-670-5777

Judge
W. David Branstool
740-670-5770

Courthouse
Newark, OH 43055

On November 20, 2023, the Board conducted a meeting to consider the appeal. (Cert. Rec., Exhibit 10, at pg. 3). At the conclusion of the proceeding, the Board denied the appeal. (*Id.* at 94-96). The appeal to this Court followed. Here, Appellants assert two (2) assignments of error:

> Assignment of Error No. I: The decision of the Planning Commission in this case was not supported by the preponderance of substantial, reliable, and probative evidence. Commentary from the general public at the Planning Commission meeting was impermissible and was not reliable or probative evidence. No evidence as presented by Appellees to contradict the evidence presented by Appellants.
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> Assignment of Error No. II: The Planning Commission's decision was illegal due to being contrary to the grandfathering provisions of the Revised Code.

(Brief of Appellants, at pg. 3).

Governing Law

"The right to appeal an administrative decision is neither inherent nor inalienable; to the contrary, it must be conferred by statute." *Jrb Holdings v. Stark County Bd. of Revision*, 5th Dist. Stark No. 2021CA00144, 2022-Ohio-1646, ¶ 11, citing *Midwest Fireworks Manufacturing Co. v. Deerfield Township Board of Zoning Appeals*, 91 Ohio St.3d 174, 177, 743 N.E.2d 894 (2001). "R.C. 2506.01 governs [appeals] from decisions of any agency of any political subdivision." *Id.* at ¶ 11. It provides:

> Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 and 2506.04 of the Revised Code, every final order, adjudication, or decision of an officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of this state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505 of the Revised Code.

Jrb Holdings at ¶ 11, quoting R.C. 2506.01(A).

"[T]he scope of review for a common pleas court in an R.C. Chapter 2506 administrative appeal is not *de novo*[, but the appeal] 'often in fact resembles a *de novo*

proceeding.'" *Lind Media Co. v. Marion Twp. Bd. of Zoning Appeals*, 3d Dist. Marion No. 9-21-39, 2022-Ohio-1361, ¶ 16, quoting *Shelly Materials, Inc., v. Streetsboro Planning & Zoning Comm.*, 158 Ohio St.3d 476, 2019-Ohio-4499, ¶ 13, quoting *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984), citing *Cincinnati Bell, Inc. v. Glendale*, 42 Ohio St.2d 368, 370, 328 N.E.2d 808 (1975).

R.C. 2506.04 governs appeals from administrative agencies. Under R.C. 2506.04, a trial court reviews an administrative appeal to determine whether the agency's decision is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of the substantial, reliable, and probative evidence on the whole record." *Kinney v. Bd. Of Zoning Appeals*, 1st Dist. Hamilton No. C-210180, 2021-Ohio-4217, ¶ 15, quoting R.C. 2506.04. R.C. 2506.04 gives the common pleas court "the power to examine the whole record, make factual and legal determinations, and reverse the board's decision if it is not supported by a preponderance of substantial, reliable, and probative evidence." *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, ¶ 24. "'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true." *Trish's Café & Catering, Inc. v. Ohio Dep't of Health*, 10th Dist. Franklin Nos. 10AP-539 & 10AP-540, 2011-Ohio-3304, ¶ 8, citing *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992). "'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.'" *Trish's Café & Catering* at ¶ 8, citing *Our Place, Inc.* at 571. "'Substantial' evidence is evidence with some weight; it must have some importance and value." *Trish's Café & Catering* at ¶ 8, citing *Our Place, Inc.* at 571.

"The common pleas court may affirm, reverse, vacate[,] or modify the decision, or may remand the matter to the Board with instructions to enter a decision consistent with the findings or opinion of the common pleas court." *Barnes Adver. Corp. v. Clinton Twp. Bd. of Zoning Appeals*, 5th Dist. Knox Nos. 07CA28, 07CA29, 2008-Ohio-4176, ¶ 7. The court of common pleas is empowered to weigh the evidence in the record, in addition to whatever additional evidence may be admitted, in order to determine if there exists a preponderance of the reliable, probative, and substantial evidence to support the determination of the agency.

The common pleas court cannot substitute its judgment for that of the relevant agency in areas of administrative expertise. *Barnes Adver. Corp.* at ¶ 8, citing *Dudukovich v. Housing Authority*, 58 Ohio St.2d 202, 389 N.E.2d 1113 (1979). "An administrative agency's reasonable interpretation of [administrative language] is entitled to deference by a reviewing court and is to be presumed valid because the administrative agency possess an area of administrative expertise." *Pro-Tow, Inc. v. Columbus Bd. of Zoning Adjustment*, 10th Dist. Franklin No. 18AP-629, 2019-Ohio-3462, ¶ 30, citing *Saine v. Bexley Bd. of Zoning Appeals*, 10th Dist. No. 97APE06-820, 1997 Ohio App. LEXIS 5398 (Nov. 25, 1997), citing *Four Winners, Inc. v. Columbus Dev. Regulation Div. Admr.*, 83 Ohio App.3d 118, 124, 614 N.E.2d 775 (10th Dist. 1992); *Schomaeker v. First Natl. Bank*, 66 Ohio St.2d 304, 309, 421 N.E.2d 530 (1981).

"'In reviewing an appeal of an administrative decision, a court of common pleas begins with the presumption that the board's determination is valid, and the appealing party bears the burden of showing otherwise.'" *Pro-Tow, Inc.* at ¶ 18, quoting *Hollinger v. Pike Twp. Bd. of Zoning Appeals*, 5th Dist. Stark No. 2009CA00275, 2010-Ohio-5097, ¶ 15. Despite a general deference for the findings of the administrative entity, "the findings of the

agency are by no means conclusive." *Pro-Tow Inc.* at ¶ 18, citing *Kisil v. Sandusky*, 12 Ohio St.3d 30, 35, 465 N.E.2d 848 (1984), citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980). "R.C. 2506.04 allows a common pleas court to determine whether the decision of an administrative body is 'illegal.'" *Greenacres Found. v. Bd. of Bldg. Appeals*, 1st Dist. Hamilton No. C-120131, 2012-Ohio-4784, ¶ 15, citing R.C. 2506.04 and *Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000). "A reviewing court must give deference to an administrative agency's interpretation of its own rules and regulations where such interpretation is consistent with the statutory law and the plain language of the rules." *Cerreta v. Ohio DOC*, 5th Dist. Stark No. 2008 CA 00125, 2009-Ohio-1760, ¶ 79.

Analysis and Conclusion

The relevant hearing took place on the record on November 20, 2023. (*See* Cert. Rec, Exhibit 10). At the beginning of the hearing, Chairman Bishop described the hearing as limited to "the Appellants, the Planning Commission Office, and the [B]oard members." (*Id.* at pg. 3). He then said that the hearing would be conducted in an orderly and "court-like manner" and that the hearing would not involve public testimony. (*Id.* at pg. 4). Chairman Bishop then swore in witnesses. (*Id.* at pg. 5). Mr. Mercer described the subject property as being located in St. Albans Township and as being the site of a "sand and gravel operation." (*Id.* at pg. 5-6). He further explained that the property was within the "Federal Emergency Management Agency [(FEMA)] [f]loodplain." (*Id.* at pg. 6).

Mr. Underhill—counsel for Shelly Materials—introduced himself. (*Id.* at pg. 7-8). He stated that surface mining operations had been ongoing on the relevant site since 1951 and perhaps longer. (*Id.* at pg. 11). Mr. Underhill asserted that the longstanding mining operation

predates any subsequently enacted flood regulations and is thus unaffected by them. (*Id.* at pg. 12). Mr. Underhill said that his clients first received a Notice of Violation in December of 2022—some forty (40) years or more after the adoption of floodplain regulations. (*Id.*). Mr. Underhill then said that he intended to call Glenn Heistand as an expert witness.[1]

Mr. Underhill said that as the area is currently mapped the relevant location is within the FEMA-identified floodplain. (*Id.* at pg. 16). However, he maintained that the rules relied upon by the Commission did not apply because Shelly Materials was grandfathered in under the Revised Code, surface mining having been an ongoing use since at least 1951. (*Id.* at 16-17). Mr. Underhill said that Chapter 303 of the Revised Code addressed "new structures being erected" and that the construction of new structures included the process of excavation. (*Id.* at 18). Mr. Underhill acknowledged that floodplain regulations were put in place in 1983. (*Id.* at 19). He said that he could identify no provision of FEMA's floodplain regulations that permitted grandfathering, but also that no provisions precluded it. (*Id.* at 20-21).

Mr. Heistand then testified, identifying himself as a professional civil engineer specializing in the study of floodplains. (*Id.* at pg. 22). Mr. Heistand testified that he had been studying the property at issue in this case since June of 2023. (*Id.* at pg. 23-24). He averred that mining operations began on the property in 1951, while the floodplain regulations became effective on December 1, 1983. (*Id.* at 24). Mr. Heistand testified that the engineering company Mossbarger, Scott, & May completed a study of the relevant land in 2002 and that the study was integrated into a Flood Insurance Rate Map in 2007. (*Id.* at pg.

[1] It is not obvious how Mr. Underhill's remarks were treated during the proceeding. Mr. Underhill made his remarks after being sworn in, as would be true of a witness. (Cert. Rec., Exhibit 10, at pg. 15-16). Mr. Underhill then declared "[m]y testimony will be ongoing after my expert witness[,]" though he also described himself as "more of an advocate for the clients. (*Id.* at pg. 16). Advocacy through argument is not testimony, though the statement that the testimony would be "ongoing" suggests to the Court that testimony had occurred already and would continue after an expert witness testified. That is not the manner in which testimony generally occurs. However, opposing counsel then proceeded to question Mr. Underhill. (*Id.* at pg. 16).

25). That Flood Insurance Rate Map was then revised in 2015, though it remains based upon the 2002 study. (*Id.*). Studies such as the one referenced above are generally funded by FEMA or by the individual communities in need of them based upon the needs of those communities and the magnitude of potential development that could take place in those communities in the future. Mr. Heistand testified that such studies are often not quickly integrated into Flood Insurance Rate Maps, which means that the maps are often based upon outdated assumptions and information. The witness testified that the presently effective model is based on outdated information and, therefore, does not reflect the current conditions on the property. (*Id.* at 25-26). Mr. Heistand testified that the process for updating such a map begins with the sending of either a letter of map revision or a proposed letter of map revision, depending upon whether the letter relies upon proposed updates or extant updates. (*Id.* at 29). Mr. Heistand averred that the proposed asphalt and concrete plants are "outside of the protected floodway." (*Id.* at 30). Mr. Heistand said that he was in the process of preparing a letter of map revision, a process anticipated to take one (1) month. (*Id.* at 31). Mr. Heistand testified that, in his opinion, once FEMA receives and acts appropriately on the letter of map revision, no permit for the proposed uses would be necessary. (*Id.* at 32). Mr. Heistand testified that he is aware of no FEMA regulation which precludes grandfathering as to the permits sought in this case. (*Id.* at 32).

Upon further questioning from the Board, Mr. Heistand testified that the appeal was initiated parallel to the sending of the letter of map revision so as to begin the construction as quickly as possible. (*See id.* at 33). The State then asked additional questions. (*Id.* at 39). Mr. Heistand testified that the applicable FEMA regulations neither endorse nor preclude grandfathering. (*Id.*). The witness testified that he intended to file a letter of map revision,

but that FEMA had approved no such letter. (*Id.* at 40). Mr. Heistand testified that he intended to submit the letter of map revision within one (1) month, having done substantial necessary work toward the filing already. (*Id.* at 43-44). He testified that the process following a letter of map revision generally takes six (6) to twelve (12) months. (*Id.* at 45).

Mr. Underhill argued again that Appellants do not require a permit due to R.C. 307.37(E). (*Id.* at 46). He argued that the statute's use of the word "construction" includes surface mining activity. (*Id.* at 46-47) Mr. Underhill asserted that the contemplated use—an asphalt or cement plant—is grandfathered because it is accessory to the prior use of surface mining. (*Id.* at 54).

Mr. Mercer, a member of the Commission's staff, testified next. (*Id.* at 60). He testified that the Commission's determination had been based upon Sections 3.3 and 3.4 of the County's Flood Damage Prevention Regulations. (*Id.* at 60). Mr. Mercer said that R.C. 307.37(E) concerns buildings or structures that are either extant or on which construction has begun prior to the adoption of a particular regulation. (*Id.* at 60). He said that the relevant code section did not concern other non-construction activities such as grading, excavating, or filling. (*Id.* at 61). He testified that the National Flood Insurance Program ("NFIP") defines development to include "any manmade change to improved or unimproved real estate, [including] buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials." (*Id.* at 61-62). He said that the same definition applies in the County's Flood Damage Prevention Regulations. (*Id.* at 62). Mr. Mercer described the NFIP as a voluntary program to assist various persons in obtaining flood insurance. (*Id.* at 62). In order for a particular county to participate in the program, that county must adopt and enforce, at minimum, certain standards concerning flood

prevention, though more stringent standards may also be adopted. (*Id.* at 62). The minimum standards require a permit for development activity such as construction, grading, and excavating. (*Id.* at 63). A community's failure to adopt or enforce such regulations may result in that community's expulsion from the NFIP. (*Id.* at 63). The NFIP regulations do not recognize the concept of grandfathering. (*Id.* at 63). Mr. Mercer testified that the relevant regulations here concerned the NFIP, not the zoning authority of a township or county. (*Id.* at 64). Mr. Mercer explained that, while structures that predated the adoption of the regulations generally would not have to comply with those regulations, any additional activity or expansion of such a structure would be subject to the permitting requirement. (*Id.* at 65-66). The Commission's staff spoke with FEMA officials, who agreed with this interpretation. (*Id.* at 65-67). Mr. Mercer testified that the NFIP emphasized, not the use of the property at issue, but rather the development on the property. (*Id.* at 68-69). Mr. Mercer testified that any development in place prior the adoption of the applicable regulations in 1977 would require no permit, but a substantial expansion or improvement would require one. (*Id.* at 69-70).

Mr. Mercer testified that on July 6, 2022, the Commission met with a representative of Anderson Concrete to discuss the construction of a concrete plant. (*Id.* at 71). Between September of 2022 and February of 2023, Anderson Concrete submitted three (3) sets of construction plans as part of requests for necessary permits. Only the third submission included Scioto Materials and contemplated both a concrete plant and an asphalt plant. (*Id.* at 71-72). Mr. Mercer said that in December of 2022, the Commission's staff reviewed various records and imagery and determined that several developments had been undertaken without permits. (*Id.* at 72). A Notice of Violation followed. (*Id.* at 72-73). In February of 2023, another permit request was filed. (*Id.* at 73). On March 22, 2023, another Notice of Violation

was sent.[2] Subsequent to additional meetings among interested parties, the Commission decided on June 5, 2023, that the application could not be processed because of the violations and because the Commission lacked certain necessary information. (*Id.* at 74-75).

Mr. Mercer averred that floodplain regulations were first adopted in 1977. (*Id.* at 75). He said that the earliest permit for surface mining which could be located was granted on May 21, 1980. (*Id.* at 75). Expansions of a sand and gravel quarry operation occurred in 1964, 1981, 1984, 1998, 2003, and 2005. (*Id.* at 75-76). Photographic evidence depicted the site at various stages of its development. (*Id.* at 76-78).

Mr. Mercer further testified that compliance with the County's Flood Damage Prevention Regulations is mandatory. (*Id.* at 78). He testified that the applicable regulations require a permit for new activity. (*Id.* at 79). The witness also testified that at some point during the process the Commission's computer system sent out a letter seeming to grant the permit by mistake and that the error was quickly remedied with a second letter properly sent at approximately the same time. (*Id.* at 89). Mr. Mercer also repeated that the applicable FEMA regulations do not recognize grandfathering. (*Id.* at 90).

The Board stated its conclusion that it could not deviate from presently applicable floodplain regulations. (*Id.* at 93-94). It stated that the applicable regulations made no provision for or against grandfathering. (*Id.* at 94). The Board also stated that the floodplain as currently recognized is not altered by the mere possibility of FEMA's acceptance of a letter of map revision. (*Id.* at 94). The Board found it particularly important that sustaining the appeal might result in the community's being removed from the relevant FEMA program entirely. (*Id.* at 94). The Board then unanimously denied the appeal. (*Id.* at 94-96).

[2] Mr. Mercer testified that both Notices of Violation are always sent to the owners of the property. Appellants here are lessees of it.

In deliberating upon this matter, the Court begins with the assumption that the agency in question interpreted the relevant regulations correctly and that Appellants bear the burden of demonstrating otherwise. *Pro-Tow, Inc.* at ¶ 18, quoting *Hollinger* at ¶ 15. The Court will address the Appellants' various arguments in the order in which they were presented.

Appellants assert that the decision of the Commission was not supported by the preponderance of substantial, reliable, and probative evidence. Specifically, Appellants claim that public commentary offered at the meeting was not substantial, reliable, and probative evidence. The Court first observes that the public commentary Appellants reference does not appear in the transcript. Rather, the transcript begins with a roll call, which is then followed by a general introductory statement concerning the purpose and manner of the proceedings. (Cert. Rec., Exhibit 10, at pg. 2-5). That general introductory statement included the declaration that, because the hearing was adjudicatory rather than public, there would be no public testimony. (*Id.* at 4). Witnesses were sworn, and what followed, as set forth above, was a combination of testimony and argument by witnesses close to the matter and by the parties' counsel, respectively. The Board's summary at the hearing's end focused entirely on the testimony offered by the sworn witnesses, not by any member of the general public. (*Id.* at 93-94). In short, there is absolutely no indication in the record that the Board relied to any extent on testimony offered by the general public. The only reference to any public testimony came in the form of an objection to the same by Mr. Underhill, who did not specify what impermissible statements had been made and admitted that any such statements were "public comment" and were not "during the hearing phase[.]" (*Id.* at 9). Even if it is established that members of the public offered improper testimony, the mere existence of the same is not error where, as here, the Board did not rely on it in reaching its decision. *Hodgins v. North Perry*

Village, 11th Dist. Lake No. 98-L-072, 1999 Ohio App. LEXIS 2943, at * 12-13. *See also John P. Raisch v. Board of Zoning Appeals*, 2nd Dist. Montgomery No. 17561, 1999 Ohio App. LEXIS 2732, * 14.

The evidence relied upon need not be recited in its entirety here, as the Court has discussed it above. It is enough to say that the evidence is substantial, reliable, and probative specifically because it comes from those close to this matter with professional experience in the areas about which they testified, and that testimony supported the findings and ultimate conclusion of the Board.

Appellants also assert, if somewhat parenthetically, that the transcript is incomplete because it does not include the public commentary that is the basis of the error they allege. (Brief of Appellants, at pg. 20-21). Appellants rely on R.C. 2506.02(A)(2)(c) and R.C. 2506.02(A)(3), those sections emphasizing the importance of the opportunity to cross-examine witnesses and of the requirement that witnesses be placed under oath. Reliance upon these provisions is unavailing for reasons already noted. There is no indication that the Board relied upon the remarks complained of, and even counsel for Appellants conceded that those remarks were not "during the hearing phase" of the proceeding. Placing under oath or cross-examining those whose input was not part of the hearing would have been nonsensical. Under these circumstances, such remarks cannot form the basis of an error.

Appellant's first assignment of error is without merit and is overruled.

Appellants also claim that the determination appealed from was illegal as violative of the Revised Code. Specifically, Appellants claim that R.C. 307.37(E) excuses them from the requirement to procure a permit because the present use of the land long predated the adoption of any requirement to secure a permit.

R.C. 307.37(E) provides:

> Regulations or amendments the board adopts pursuant to this section with the exception of an existing structures code, do not affect buildings or structures that exist or on which construction has begun on or before the date the board adopts the regulation or amendment.

Appellant's reliance upon this section is misplaced. By its terms, the language above permits "buildings or structures" that either have been built or on which construction has begun. The focus is on buildings or structures, not uses. The structures Appellants propose to build do not currently exist, and construction of them has not yet begun. This remains the case regardless of the relevance any such proposed structures might have to the current and long-standing use of the property. For that reason, the section does not apply. Moreover, this case concerns the applicability of FEMA regulations, not an act of zoning. Those regulations are not adopted, in the words of R.C. 307.37(E), "pursuant to this section[.]" They are made applicable by the county's participation in the NFIP

Appellant referenced two cases in the hearing before the Board. One such case was *Verbillion v. Enon Sand & Gravel, LLC*, 2d Dist. Clark No. 2021-CA-1, 2021-Ohio- 3850. In that case, Enon Sand & Gravel acquired several parcels of land for the purpose of surface mining and also came to control certain permits governing what could be done on the relevant land. *Verbillion* at ¶ 4-20. Appellants here rely on this case for a relatively general proposition concerning what the proper use of land is in situations where surface mining is involved. They argue that the ability to engage in a particular use of land on one part of said land includes the ability to extend that use to other parts of the land over time, just as purchasers of land for mining begin mining one portion of the land and expand their operations as resources in one portion of the land are exhausted over time. Some portions of

Verbillion may be read to indicate that. *See Verbillion* at ¶ 20 (noting that holding resources in reserve is an ordinary part of mining because miners acquire more land than can be mined all at once) and *Verbillion* at ¶ 125 (holding mining resources in reserve is normal because mining "exhausts available resources as it proceeds"). However, the *Verbillion* holding is not as broad as Appellants assert. The notion that a use active on one portion of land may be expanded to another arose specifically because the county's relevant zoning resolution so provided. *See Verbillion* at ¶ 7, 130. Even if this were a zoning case, the relevant zoning provisions here contain no definition of "use" as broad as the one employed by the relevant provisions in *Verbillion*. Further, the case does not cite R.C. 307.37—the statute upon which Appellants rely. It is for these reasons that reliance on *Verbillion* is misplaced.

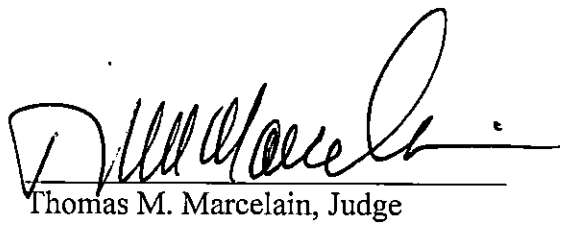
Appellants also reference *Columbus v. Union Cemetery Ass'n*, 45 Ohio St.2d 47 (1976). That case contains some discussion of the meaning of the term "use." *See Union Cemetery Ass'n.* at 50. As this Court has noted, however, R.C. 307.37(E) emphasizes "buildings [and] structures," not uses.

R.C. 307.37(E) does not exempt Appellants from the requirement to obtain a permit in order to build additional structures on the subject property.

Appellant's second assignment of error is without merit and is overruled.

For the reasons articulated above, the decision of the Board is AFFIRMED.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel



Thomas M. Marcelain, Judge

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