

**IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO**

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|---|---|------------------------------|
| CONCORD TOWNSHIP TRUSTEES, <i>et al.</i> |) | CASE NO. 94CV001463 |
| |) | |
| Plaintiffs |) | |
| |) | |
| vs. |) | JUDGE EUGENE A. LUCCI |
| |) | |
| HAZELWOOD BUILDERS, <i>et al.</i> |) | |
| |) | |
| Defendants |) | |

OPINION AND JUDGMENT ENTRY

INTRODUCTION

{¶1} Where: (1) the owner of residential real estate constructs a large residence without a permit, and constructs the residence in a way that violates the side set-back requirements of a township’s zoning resolution, and (2) the township trustees seek and obtain an injunction prohibiting future construction violations and compelling the owner to remove the portions of the structure that violate the zoning resolution, and (3) a zoning permit is issued years later to a legally non-existent entity (falsely purporting to be a corporation) to allow the legally non-existent entity to engage in animal husbandry on the owner’s property, and (4) it is clear to the finder of fact that any such animal husbandry would be incident to the dominant use of the property as a residence and not vice versa, the provisions of R.C. §519.21 – exempting land that is used for agricultural purposes from the zoning authority of a township – do not apply to bring the owner’s violations into compliance.

{¶2} The plaintiffs filed a request for enforcement of this court’s contempt finding against the defendants, and the defendants alleged that they are in substantial compliance with this court’s orders and should be relieved from any sanction of contempt from and after June 21, 2000. The court held an evidentiary hearing on November 24, 2003. For the reasons stated in this order, the defendants remain in contempt of this court, and the plaintiffs are entitled to appropriate relief.

PROCEDURAL POSTURE

{¶3} A complaint was filed on October 24, 1994, by the Concord Township Trustees and Russell D. Schaedlich, its zoning inspector, against Hazelwood Builders, Inc. and Robert E. Gibbs, for a

temporary restraining order, and preliminary and permanent injunction, under R.C. Chapter 519, and seeking an order: (1) prohibiting future construction that violates sections 11.01A (no construction without a permit) and 15.06A (a fifteen foot side yard clearance requirement) of the Concord Township zoning resolution, and (2) compelling defendants to remove structures that violate the zoning resolution. Trial to the court was held on March 26, 1996. Findings of fact and conclusions of law were requested and submitted. The defendants argued laches, hardship, and that the existence of open space between actual buildings met the substance of the zoning requirements. The court found that defendants failed to obtain a zoning permit for the construction and that additions to the west and north sides of the structure violated the side yard clearance requirements of the Concord Township zoning ordinance.

{¶4} By journal entry filed April 23, 1996, the court held: (1) because no timely appeal was brought from the Board of Zoning Appeals' decision, the court is without jurisdiction to decide arguments that would have been raised in such an administrative appeal (those issues are res judicata); (2) this is a statutory injunction proceeding under R.C. §519.24, so plaintiffs are entitled to the injunction if the statutory requirements are met; (3) plaintiffs are not required to show irreparable harm or an inadequate remedy at law; (4) "Defendants are enjoined for continuing construction of the additions to the west and north sides of the residence located at 10447 Johnnycake Ridge Road, Concord Township, Ohio, until they have obtained a zoning permit from Concord Township, Lake County, Ohio;" and (5) "Defendants are ordered to remove those portions of the west and north side additions that violate the fifteen foot side yard clearance as required in Concord Township Zoning Resolution section 15.06(A)."

{¶5} A motion for stay of the April 23, 1996 journal entry was filed on May 17, 1996. The court granted it on May 20, 1996, contingent on a \$100 supersedeas bond being deposited with the clerk of courts. The \$100 was paid to the clerk on May 24, 1996. The court entered an order: "Any and all proceedings to enforce the Judgment Entry filed herein on April 23, 1996 be and the same hereby are stayed until such time as all appellate proceedings with regard to said Judgment have been concluded."

{¶6} Defendants filed their appeal, in Case No. 96-L-075, to the Eleventh District Court of Appeals, on May 17, 1996, appealing the judgment of April 23, 1996. On May 19, 1997, the court

of appeals affirmed the trial court's judgment. Defendants then attempted a discretionary appeal, in Case No. 97-1356, to the Ohio Supreme Court, on July 8, 1997, appealing the decision in Case No. 96-L-075. The Ohio Supreme Court declined jurisdiction on October 20, 1997.

{¶7} Plaintiffs filed a motion to show cause on October 17, 1997. The trial court issued an order to defendants, on October 20, 1997, to show cause why they failed to appear and obey a previous order of this court and why they should not be held in contempt for such failure.

{¶8} Defendants filed a motion to stay all proceedings on October 30, 1997. On February 20, 1998, the court denied the motion and scheduled a hearing on plaintiffs' motion to show cause for March 18, 1998.

{¶9} On April 15, 1998, the trial court entered a judgment finding Defendants Robert E. Gibbs and Hazelwood Builders, Inc. failed to remove the violations of the fifteen-foot side yard clearance requirements, and as a result, defendants failed to abide by the order of this court filed April 23, 1996, and failed to show sufficient cause why they should not be held in contempt for failing to abide by this court's order. The court found Defendants Hazelwood Builders, Inc. and Robert E. Gibbs in contempt, and that the defendants may purge themselves of the contempt by correcting the violations within 90 days from the date of the April 15, 1998 judgment entry. The court further ordered that if defendants fail to remove the violations within 90 days, they shall be fined the sum of \$5,000, which shall be increased at an additional \$100 a day for each day the violations remain uncorrected, and that defendants pay the costs of this action.

{¶10} The defendants filed another appeal, in Case No. 98-L-110, to the Eleventh District Court of Appeals, on May 14, 1998, appealing the order filed April 15, 1998. The court of appeals dismissed the appeal on its own on August 17, 1998.

{¶11} Defendants filed a motion to stay proceedings on June 18, 1998, based on Hazelwood Builders, Inc. filing a Chapter 7 bankruptcy. The motion was denied on July 14, 1998.

{¶12} While the latest appeal was pending, on July 15, 1998, defendants then filed a motion, under Civil Rule 60(B)(4) and (5), for relief from the judgments entered on April 23, 1996, and April 15, 1998. The court denied the motion on October 16, 1998, as the motion was premature until relief from the bankruptcy filing of Hazelwood Builders, Inc. was granted.

{¶13} On July 21, 1998, plaintiffs filed a motion to impose sentence ordered in the court's judgment of April 15, 1998.

{¶14} Defendants filed an appeal, in Case No. 98-L-176, to the Eleventh District Court of Appeals, on August 13, 1998, appealing the order filed April 15, 1998. The appeal duplicated the appeal filed in Case No. 98-L-110. The case was remanded to the trial court so that it may consider the Civil Rule 60(B) motion for relief from judgment, which was filed on September 16, 1998. A motion to dismiss the appeal was granted because this appeal was not taken from a final appealable order, was not timely, and was duplicitous.

{¶15} Plaintiffs filed a motion to strike and motion for attorney fees on August 19, 1998.

{¶16} Defendants filed an appeal, in Case No. 98-L-249, to the Eleventh District Court of Appeals, on November 13, 1998, appealing from the order dated October 16, 1998 denying the Civil Rule 60(B) motion for relief from judgment. The court of appeals affirmed the trial court on July 24, 2000.

{¶17} Defendants filed a motion to stay proceedings on April 16, 1999, because of the appeal. The motion was granted on April 21, 1999. The court required a supersedeas bond of \$10,000; otherwise the motion to impose sentence would proceed on May 3, 1999. The bond was not posted.

{¶18} The court entered judgment on May 21, 1999, finding both defendants in contempt of the April 23, 1996 order, granting the motion to impose sentence, imposing a fine in the amount of \$5,000, plus \$100 per day, giving defendants a stay of execution until May 27, 1999 to correct the violations; otherwise, ordering that the fines shall be imposed, beginning on May 28, 1999; and setting a supersedeas bond to stay execution upon appeal at \$150,000.

{¶19} The defendants filed an appeal, in Case No. 99-L-083, to the Eleventh District Court of Appeals, on May 25, 1999, appealing from the orders of April 15, 1998 and the May 21, 1999 finding defendants in contempt and imposing sentence. The appeal was dismissed on January 4, 2000.

{¶20} This court issued a judgment on February 2, 2000, imposing fines of \$5,000 and \$100 per day beginning on May 28, 1999.

{¶21} Defendants filed another appeal, in Case No. 2000-L-040, to the Eleventh District Court of Appeals, on February 28, 2000, appealing the orders filed on April 15, 1998, May 21, 1999, and February 2, 2000. The court of appeals affirmed the trial court on March 26, 2001.

{¶22} The defendants attempted a discretionary appeal, in Case No. 01-887, to the Ohio Supreme Court, on May 14, 2001, appealing the court of appeals' judgment in Case No. 2000-L-040. The Supreme Court declined jurisdiction and the appeal was dismissed on August 9, 2001.

{¶23} This case was assigned to the undersigned judge on January 24, 2003.

{¶24} The defendants filed a notice of compliance in this court, on March 3, 2003, alleging that substantial compliance with the order of April 23, 1996, has been achieved because plaintiff has issued a zoning permit to defendants' agent, North Shore Kennels, Inc., for the use of the property for agricultural purposes, under R.C. §519.21, and alleging that plaintiff has no statutory authority to enforce its zoning ordinance with regard to property being used for agricultural purposes

{¶25} Plaintiffs filed their response to defendants' notice of compliance on March 25, 2003.

{¶26} This court held a trial on November 24, 2003. The parties submitted briefs on November 20, 21, and 24, 2003.

ISSUES

{¶27} The issues presented in this case are: (1) whether the application and receipt of an agricultural use permit by North Shore Kennels, Inc. operates to bring defendants' zoning violations into compliance; (2) whether the structure is being used incident to an agricultural purpose; and (3) whether defendants remain in contempt of the court's prior orders, and if so, what is an appropriate remedy.

LAW

The Law of the Case

{¶28} This court has previously determined that the defendants are in violation of the Concord Township zoning ordinance because of their failure to obtain a zoning permit and because portions of the west and north walls of the structure violate the fifteen-foot side yard clearance requirements of the zoning resolution, and because the defendants have failed to remove the offending portions of the structure, and that the defendants are in contempt of court for their failure to abide by the court's

original order of April 23, 1996. These matters are settled as a matter of law, and are the law of the case pursuant to the doctrine of res judicata.

Agricultural Use

{¶29} Revised Code Section 519.21, entitled Prohibition of Agricultural Uses Limited, states, in pertinent part:

[S]ections 519.02 to 519.25 of the Revised Code confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located . . . and no zoning certificate shall be required for any such building or structure.

{¶30} A “kennel owner” is defined by statute, as a “person . . . professionally engaged in the business of breeding dogs for hunting or for sale.”¹ The breeding, raising, boarding, and care of dogs constitutes animal husbandry and is an agricultural use for purposes of R.C. §519.21.² The factual question in this case is whether the structure is incident to the agricultural use. Both parties stipulated that this is a factual question to be determined by the court.

¹ R.C. Section 955.02.

² *Harris v. Rootstown Twp. Zoning Board of Appeals* (1975), 44 Ohio St.2d 144, 73 O.O.2d 451, 338 N.E.2d 763; *Lewis v. Board of Zoning Appeals of Newark Twp.* 1995 WL 434287 (Ohio App. 5 Dist.).

{¶31} The word “incident,” used adjectively, means “(*in Law*) dependent upon or involved in something else.”³ “Incident to” means “closely related to; naturally appearing with.”⁴ Black’s defines “incident” as “used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy.”⁵

{¶32} The words, “incident to” have not been defined by statute or case, as best as this court has determined. In fact, some courts have stated that those words do not require definition, because their meaning is plain.⁶

{¶33} In the context of the facts of this case, the court hereby defines “incident to” to mean “closely or inseparably related to, dependent upon, and/or naturally appearing with, a dominant or more worthy thing or purpose.” This court, therefore, construes the words “incident to” as used by the legislature in R.C. §519.21(A), and as applied to the facts of this case, to mean that the township cannot prohibit the construction or use of the structure in question if the structure is incident to (closely or inseparably related to, dependent upon, and/or naturally appearing with) the (dominant or more worthy purpose of) agricultural use of animal husbandry, specifically the breeding and raising of dogs. This statute confers no power on the township to prohibit structures incident to the use for agricultural purposes. The statutory exemption from zoning regulation *will not apply* to the situation

³ Webster’s New World Dictionary of American English, Third College Edition, 682 (1991).

⁴ Bryan A. Garner, A Dictionary of Modern Legal Usage, Second Edition, 430 (1995). Garner distinguishes the terms “incident to” and “incidental to.” The former is properly used here: “In an action for fraud, exemplary damages are *incident to* and dependent on the recovery of actual damages.”

⁵ Black’s Law Dictionary, Revised Fourth Edition, 904 (1968).

⁶ See, for example, *U.S. v. Mack* (1998), 159 F.3d 208 (6th Cir. Ohio), where the court said: “Furthermore, we are satisfied that the district court was not required to include a definition of “incident to” in its instructions. A district court need not define familiar English words when the jury can appreciate their meaning without special knowledge. See *U.S. v. Dugan*, 150 F.3d 865, 867 (8th Cir.1998) (rejecting the defendant’s contention that the court should have defined the words “agent” and “network” for the jury in connection with the defendant’s charges under the mail-fraud and wire-fraud statutes (§§ 1341 and 1343)). Similarly, we find that the words “incident to” require no definition.”

where the *agricultural purpose is incident to* the building or structure, or the legislature would have said so. An example of this would be where a homeowner plants a garden in her back yard – the garden is *incident to* the residence (the dominant or more worthy purpose), not vice versa, and that homeowner cannot avoid the zoning regulations on that basis.

{¶34} Therefore, as applied in this case, the statutory exemption from zoning regulation will not apply to the situation where the breeding and raising of dogs is incident to (closely or inseparably related to, dependent upon, and/or naturally appearing with) the structure in question; but defendants will be exempt if the structure is incident to the breeding and raising of dogs.

{¶35} Accordingly, the factual question in this case turns on whether the structure is incident to the kennel or the kennel is incident to the structure.

Contempt of Court

{¶36} The power of the common pleas court to punish contemptuous conduct is derived from its inherent authority,⁷ as well as from statute.⁸

{¶37} Contempt of court is an act or omission that interferes with the administration of justice or law or impedes and perverts the course of justice, or undermines the guarantees of fair trial, results in disrespect for the rule of law, or causes lack of public confidence in the administration of justice, by way of conduct that disregards judicial orders, shows disregard and disrespect for the authority and dignity of the law, or tends to embarrass, impede, or obstruct the court in the performance of its functions.⁹

{¶38} Contempt may be classified as (a) direct contempt and (b) indirect contempt. Direct contempt is a contumacious act primarily directed at the court, and is punished as criminal contempt.

⁷ *Cincinnati v. Cincinnati Dist. Council 51* (1973), 35 Ohio St.2d 197, 299 N.E.2d 686; *Ex parte Terry* (1888), 128 U.S. 289, 303; Edward M. Dangel, Contempt 14 (National Lawyers' Manual Company 1939); William F. Chinnock and Mark P. Painter, The Law of Contempt of Court in Ohio, The University of Toledo Law Review, Vol. 34, No. 2, 317.

⁸ Revised Code Section 2705.01, *et seq.*

⁹ *In re Green* (1961), 172 Ohio St. 269, 175 N.E.2d 59; *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815; *Denovchek v. Trumbull County Board of Comm'rs.* (1988), 36 Ohio St.3d 14, 520 N.E.2d 1362.

Indirect contempt is a contumacious act primarily directed at the opposing party, and is usually punished as civil contempt.¹⁰ Contempt of court is also classified as (a) civil contempt and (b) criminal contempt. Civil contempt calls for an indefinite sanction until the contemnor purges; its purpose is remedial, to coerce the contemnor to perform for the benefit of the opposing party. Criminal contempt calls for a definite punitive sentence, for the purpose of punishing the contemnor for defying the court's authority; its purpose is punitive, to uphold the authority of the court, and vindicate the law.¹¹

{¶39} R.C. §2705.02, entitled Acts in Contempt of Court, states, in pertinent part, “A person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer” R.C. §2705.05 provides statutory penalties for a first offense of a fine of not more than \$250, a definite term of imprisonment of not more than 30 days in jail, or both.

{¶40} Although R.C. §2705.05 sets forth sanctions for indirect contempt, due to their inherent contempt authority, Ohio courts may impose sanctions “without regard” to statutory penalties.¹²

{¶41} This case involves indirect, civil contempt, and the court has the power to order an indefinite sanction until the contemnor purges himself of the contempt. A finding of civil contempt requires clear and convincing evidence that the alleged contemnor has failed to comply with the court's prior orders.

{¶42} In order for evidence to be clear and convincing, it must leave the trier of fact with a firm conviction or belief that the allegations involved are true.

{¶43} The court has the authority to fashion a punishment that will induce the contemnor to remedy the contempt involved. When the court determines that a fine is the appropriate remedy for contempt, the court may order that the fine be paid to the opposing party if it serves the purpose of

¹⁰ William F. Chinnock and Mark P. Painter, *The Law of Contempt of Court in Ohio*, *The University of Toledo Law Review*, Vol. 34, No. 2, 321.

¹¹ William F. Chinnock and Mark P. Painter, *The Law of Contempt of Court in Ohio*, *The University of Toledo Law Review*, Vol. 34, No. 2, 326.

¹² William F. Chinnock and Mark P. Painter, *The Law of Contempt of Court in Ohio*, *The University of Toledo Law Review*, Vol. 34, No. 2, 331-32.

remedying the contempt.¹³ Although attorney's fees generally cannot be taxed as costs in a contempt proceeding, the court has the discretionary authority to include fees as part of the costs taxable to a defendant who is found guilty of civil contempt.¹⁴

FINDINGS OF FACT AND ANALYSIS

{¶44} The court bases its opinion on the testimony of the parties, the exhibits admitted during the hearing this court held on November 24, 2003, namely, Plaintiffs' Exhibits 1, 2, 3, 4, 5, and 6, and Defendants' Exhibits A, B, C, D, and E, the transcripts of the hearings held on March 21, 1996, May 17, 1999, and January 31, 2000, Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 11, 18, and 19, and Defendants' Exhibits A, B, C, and D, which were admitted at the March 21, 1996 trial, and on the court's in-person viewing of the premises with the consent of the parties and in their presence.

Contempt of Court

{¶45} The court finds that the west and north sides of the residence located at 10477 Johnnycake Ridge Road, Concord Township, Lake County, Ohio remain in violation of the fifteen-foot side yard clearance requirement and that no permit was obtained for the construction. The defendants admit that the structure at 10477 Johnnycake Ridge Road, Concord Township, Ohio remains in substantially the identical condition as it was when this court issued its order on April 23, 1996.

{¶46} The defendants admit that they were not in compliance with this court's orders through June 21, 2000, a period of four years and two months after this court's initial order was entered.

{¶47} The only issue is whether: (1) as of June 21, 2000, North Shore Kennel, Inc.'s application and receipt of a zoning permit for the premises for the agricultural use of animal husbandry, for breeding and raising of Shitzu dogs, brings the real property in substantial compliance with this

¹³ *City of Moraine v. Steger Motors, Inc.* (1996), 111 Ohio App.3d 265, 269-70; 675 N.E.2d 1345.

¹⁴ *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., General Commodities Division* (1996), 109 Ohio App.3d 786, 794-95, 673 N.E.2d 182.

court's order of April 23, 1996; and (2) whether Concord Township now has any power to prohibit the construction and use of the structure, or to require a zoning certificate for the structure.

Agricultural Use

{¶48} The parties stipulated that it is a question of fact whether the defendants will construct or use the structure *incident to* the stated agricultural purposes: animal husbandry and the breeding and raising of Shitzu dogs.

The Application for Agricultural Use Permit

{¶49} The defendants contend that a corporation “North Shore Kennels, Inc.” filed for and obtained a zoning permit for agricultural use (animal husbandry, breeding and raising of dogs) on the property at 10447 Johnnycake Ridge Road, Concord Township, Ohio on June 21, 2000. They produced Exhibit A, which the court admitted.

{¶50} Exhibit A is an application for zoning permit for agricultural use (animal husbandry, breeding and raising of dogs), filed on June 21, 2000, for the real property in issue and an adjacent lot.

{¶51} The “Land Owner” is identified on Exhibit A as “Northshore Kennels, Inc.” The “Occupant” is identified on Exhibit A as the same (Northshore Kennels, Inc.). On the application signature line is printed, “Northshore Kennels, Inc.” but it is not signed by any natural person in his or her own name or in any representative capacity; there is no corporate signature. The court cannot determine who “signed” the application or who to hold accountable for any misstatements in the application.

{¶52} The application for zoning permit (Exhibit A) states in plain language on the application:

[T]he statements herein are made a part hereof. It is understood and agreed by the applicant, that any error, misstatement or misrepresentation of fact or expression of fact, either with or without intention on the part of the applicant, such as might, or would operate to cause the issuance of a permit in accordance with this application, shall constitute sufficient ground for the revocation of such permit at any time. . . .

{¶53} Above the signature line, the application for zoning permit states in bold letters, “I have read the statements made herein and certify that they are true.”

{¶54} The defendants produced Exhibit D, which the court admitted. Exhibit D is the Ohio Secretary of State's certificate, document no. 200213302906, that “North Shore Kennels, Inc.” was

incorporated on May 13, 2002 as a domestic for profit corporation, and is also a receipt for the \$125.00 incorporation fee.

{¶55} Pursuant to Evidence Rule 201, the court takes judicial notice of the records of the Ohio Secretary of State. Internet research of the public records kept in the usual course of business by this public office reveals that the Articles of Incorporation of North Shore Kennels, Inc. and the original appointment of (the defendants' attorney) Donald A. Richer as statutory agent, were both signed by the incorporator, Donald A. Richer, on May 9, 2002. The principal office is identified as 10447 Johnnycake Ridge Road, and the purpose is stated in the most general terms. Nowhere in the articles is the purpose for the corporation narrowly stated as having anything to do with animal husbandry or the breeding and raising of dogs. The court has identified two public records it obtained, as the court's exhibits in this case, numbered Court's Exhibits 1 and 2, and has provided copies of these exhibits to counsel for the parties.

{¶56} The court finds that neither "North Shore Kennels, Inc." nor "Northshore Kennels, Inc." was in existence (as a corporation or legal person) at the time of the application for zoning permit on June 21, 2000; North Shore Kennels, Inc. came into existence on May 13, 2002, almost two years after the application was made.¹⁵

{¶57} R.C. Section 1701.05 requires that the corporate name of a domestic corporation:

[S]hall end with or include the word or abbreviation "company," "co.," "corporation," "corp.," "incorporated," or "inc."

{¶58} On June 21, 2000, North Shore Kennels, Inc. was not the land owner (Hazelwood Builders, Inc. was and is) or occupant of 10447 Johnnycake Ridge Road, Concord Township, Ohio, nor did the defendants introduce any evidence that North Shore Kennels, Inc. had any interest of record in that real property.

{¶59} No agent or representative of the defendants or North Shore Kennels, Inc. signed the application for zoning permit. No person in existence signed the application, and no person signed

¹⁵ R.C. §1701.04(E) provides that "[t]he legal existence of the corporation begins upon the filing of the articles or on a later date specified in the articles that is not more than ninety days after filing, and, unless the articles otherwise provide, its period of existence shall be perpetual."

the attestation that he or she has “read the statements made (in the application) and certify they are true.”

{¶60} Although the Concord Township Zoning Inspector approved the permit on June 21, 2000, the court finds that the permit is a nullity, a sham, and is invalid, because the application was made by a non-existent person, was not “signed” so as to make the applicant identifiable and accountable for its contents, and contained several material errors, misstatements or misrepresentations of fact, including that North Shore Kennels, Inc. was the land owner or occupant, and had any interest in the real property, and that it was a corporation or some other legal person or entity that existed.

The Real Property

{¶61} The court visited the real property and inspected it with the parties. The parties stipulated that the property at this time is in a condition substantially identical to its condition when this court first ordered any and all construction stopped on April 23, 1996.

{¶62} The court finds the structure is a partially completed, brick-sided, two-story, contemporary upper middle class, single-family residence, with four-car attached garage. The exterior of the structure is substantially completed, and the interior is substantially framed. The house proper has an estimated floor space of 6,000 to 7,000 square feet, excluding the garage, porches, and basement. Including the garage, porches, and basement, the structure has about 12,000 feet of floor space. The house will have a large gourmet kitchen.

{¶63} The areas of the structure which violate the side yard clearance requirements are primarily a porch on the north side at the west end, and a family-type room with a fireplace on the west side. The court finds that the cost of the removal of the portions of the structure that are in violation of the side yard clearance requirements and reconstruction of those portions is approximately \$30,000 to \$60,000. The court further finds that the value of the property in its “as is” condition is approximately \$150,000 to \$250,000, and that the property, if the construction is completed to the same quality as it has been started, would have a fair market value of approximately \$400,000 to \$500,000.

{¶64} The residence is situated on about one-half acre of land, the parcel being about 100 feet wide. The residence occupies about one-half of the area of the parcel, and is set back from the highway as far as possible.

{¶65} The court found no facilities in the residence or on the land specifically designed or adapted for the purpose of kenneling or breeding and raising dogs. No plans, designs, or drawings were entered into evidence pertaining to the use of the structure as a kennel, or for the breeding and raising of dogs. Although Mr. Gibbs testified that they could breed the dogs in the basement or garage and show them on the first floor front room of the residence, the court finds that that use or purpose is subordinate and secondary to the use of the structure as a residence.

{¶66} The defendants placed a small placard in the front window of the structure with the words, “North Shore Kennels” on it. Of course, the structure is not nearly completed or ready for occupancy.

{¶67} Pursuant to Evidence Rule 201, the court takes judicial notice of the records of the Lake County Auditor and Lake County Geographic Information System (GIS) Board. Internet research of the public records kept in the usual course of business by these two public offices reveals base data, sketches, residential data, maps, and aerial photographs of the real property in issue. The public records show that the structure is a two-story brick contemporary residence built in 1993 and consists of 6,356 square feet of floor space. The value of the property when last appraised was \$27,650 for the 0.57 acres (24,829 square feet) of land, and \$172,950 for the structure, for a total market value of \$200,600. The real property located at 10447 Johnnycake Ridge Road, Concord Township, Lake County, Ohio, is permanent parcel number 08A032D000170, and is titled to Hazelwood Builders, Inc. The court’s inspection and finding of the real property comports with the public records obtained by the court. The court has identified five pages of the public records it obtained as the court’s exhibits in this case, numbered Court’s Exhibits 3, 4, 5, 6, and 7 and has provided copies of these exhibits to counsel for the parties.

{¶68} Although exact dollar values (set forth in paragraphs {63} and {67}) are not necessary to this court’s decision in this case, the court finds that the cost of remediation is significantly less than the value of the structure in its present condition. The court finds that remediation of the structure to bring it into compliance with the zoning resolution is more efficient, less deleterious to the defendants, and preferable to ordering the structure razed or having the defendants transfer title to the plaintiffs or incarcerating Defendant Robert E. Gibbs until compliance is effected.

Raising and Breeding of Dogs

{¶69} North Shore Kennels, Inc. was incorporated on May 13, 2002, as a for profit corporation.

{¶70} The court finds that on March 3, 2003, defendants filed their notice of substantial compliance with the order, in essence alleging that upon the application by North Shore Kennels, Inc. for an agricultural use permit for the premises, which was granted by Concord Township on June 21, 2000, Concord Township no longer had any power to prohibit Defendants Hazelwood Builders, Inc. and Robert E. Gibbs from continuing the construction or use of the structure or to enforce the side yard clearance resolution.

{¶71} The defendants, Hazelwood Builders, Inc. and Robert E. Gibbs, have never used the land or structure at 10477 Johnnycake Ridge Road, Concord Township, Ohio for agricultural purposes, including animal husbandry, or as a dog kennel, or for the breeding, raising, boarding, or care of dogs.

{¶72} The defendants did not construct or use the structure located on the real property incident to any agricultural use of the land.

{¶73} The defendants introduced no evidence of: (1) entering into any contracts for breeding and raising of dogs with North Shore Kennels, Inc., (2) constructing any portion of the structure, or providing any plan, design, or drawing to adapt the structure for use for breeding and raising dogs, or (3) that the plans for the structure changed from the time the structure was built (in 1993) to accommodate the kenneling, or breeding and raising of dogs.

"Incident To"

{¶74} The dominant purpose of the land and structure on the real property in issue is its use as a single family residence, rather than for any agricultural purpose.

{¶75} Any reasonable kenneling or breeding and raising of dogs that could be accomplished on the real property in issue would be incident and subordinate to the use of the structure as a single family residence.

{¶76} The residential structure on the real property is not and will not be incident to, or closely or inseparably related to, or dependent upon, or naturally appearing with, an agricultural use, such as breeding and raising dogs, that is more dominant or worthy, taking into consideration the totality of the circumstances.

{¶77} Any claimed future breeding and raising of dogs may be incident to the use of the structure as a residence, but certainly the use of the structure is not and cannot be incident to the use of the land for breeding and raising of dogs.

{¶78} The defendants, Hazelwood Builders, Inc. and Robert E. Gibbs, admitted that they did not intend to use the land and the structure located on the land for agricultural purposes before June 21, 2000, and based upon the evidence, the court finds that the defendants did not intend to use the land and the structure located on the land for agricultural purposes after June 21, 2000.

{¶79} The defendants presented no evidence that there are or ever were dogs present on the real property, or owned by the defendants, or North Shore Kennels, Inc., and kept elsewhere.

{¶80} The court has reviewed the court file and the transcripts of proceedings and has found no evidence of any intention to use or any actual use of the property for agricultural purposes, and the court specifically finds that the belated assertion of the property's use for agricultural purposes (the breeding and raising of dogs) is an effort to subvert and circumvent this court's order of April 23, 1996.

{¶81} The court finds that the application by North Shore Kennels, Inc. for an agricultural permit was made more than four years after the court entered its order enjoining the construction and compelling the removal of the portions of the structure that violated the zoning resolution, and is an attempt to subvert and circumvent the law and this court, and to provide yet another avenue to delay by multiple appeals. The application by North Shore Kennels, Inc. for an agricultural permit was made more than seven years after construction on the structure began.

{¶82} The court finds that the defendants caused a non-existent entity to apply for a zoning permit (four years after they were ordered to remove the offending portions of the house) and made a sign and placed it in a window of the unfinished, presently unoccupiable house, and have requested that this court deem that an "agricultural use."

{¶83} The application for zoning permit filed by North Shore Kennels, Inc. on the real property in question does not operate to prohibit Concord Township from requiring a zoning certificate or from enforcing its side yard clearance requirements against the defendants.

{¶84} If this court were to grant the defendants an exemption from the zoning ordinance based upon the arguments of the defendants' counsel, the paucity of evidence the defendants offered in this

case, and the frivolous conduct of the defendants, Concord Township would have no zoning power – every home garden and every instance of whelping of cats and dogs would exempt the property owner from all zoning regulation.

{¶85} The court finds that the real property in issue is a \$450,000 residence, where the homeowners may acquire a female dog in the indefinite future, rather than a \$450,000 kennel, where humans happen to reside.

Ability to Pay a Fine

{¶86} Defendant Robert E. Gibbs testified that Hazelwood Builders, Inc. does not have any funds to finish the construction of the structure; nor does it have funds to remove the offending portions of the structure to bring it into compliance. Mr. Gibbs testified that he is retired, receives only Social Security benefits as income, and performs maintenance services for his wife’s interests without compensation, and that he does not have funds to finish the construction of the structure or bring it into compliance. Mr. Gibbs testified that his wife’s company, 270 Main Street, Inc., has a first mortgage on the real property in issue. Mr. Gibbs testified that he could not do anything with the real property in issue because of the pending litigation. The court finds that the defendants have sufficient resources to fund this litigation.

{¶87} The court finds that the litigation which has paralyzed the completion of the improvement of the real property in issue is solely because of the conduct and fault of the defendants. The defendants have appealed every ruling by this court, even some that were not final orders, failed to prevail in every one of them, and have unnecessarily prolonged the litigation and increased the expenditure of resources, including taxpayer funds.

{¶88} The court finds that the defendants have an interest in the real property in question, which is a valuable asset, and that any taxes or obligations existing on the tax list and duplicate will have priority over any obligations secured by a mortgage on the property. There should be sufficient equity in the real property to meet the cost of its remediation, if the property is foreclosed upon, with some funds remaining to pay a portion of a fine.

Attorney fees

{¶89} The court finds that the defendants’ conduct in this case may be either frivolous or vexatious, as defined in R.C. §§2323.51 and 2323.52, because the defendants have asserted defenses that

obviously serve merely to harass or maliciously injure the plaintiffs in this civil action (including the eight appeals), or is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or is imposed solely for delay. The defendants and their counsel knew that North Shore Kennels, Inc. was a non-entity when the application for zoning permit was filed on June 21, 2000. The defendants obviously believed that the corporate existence of North Shore Kennels, Inc. was critical to the assertion of their defense, or else they would not have testified about its existence and submitted Exhibit D. The defendants did not incorporate North Shore Kennels, Inc. until more than two years after the zoning permit application was made. The court finds that the defendants (and their attorney) knew the corporation did not exist when the application was made, and that the application was fictitious.

{¶90} At the hearing held on November 24, 2003, the plaintiffs offered to forego any of the fine if the defendants would agree to correct the violation and comply with this court's order forthwith. The defendants refused. The plaintiffs have requested that the court award them attorney's fees expended in this matter. The court has not awarded the plaintiffs any attorney's fees in this order – even though the attorney's fees may be substantial – because the court has determined that the fine levied in this order is substantial, necessary, and a sufficient remedy for the plaintiffs, in combination with the removal of the portions of the structure which are in violation of this court's order. However, since the court does not know the extent of the taxpayer funds used for attorney's fees, if the plaintiffs still desire to pursue their request for attorney's fees, they should notify the court within seven days of their receipt of this order, and the court will schedule a hearing for the presentation of evidence and taking argument on the issue of the amount of attorney's fees.

CONCLUSION

{¶91} The court finds by clear and convincing evidence and declares that Defendants Hazelwood Builders, Inc. and Robert E. Gibbs remain in contempt of this court's order of April 23, 1996, and that, having afforded defendants seven and a half years, and six appeals to the court of appeals, and two attempts at discretionary appeals to the Supreme Court of Ohio, to purge themselves of the contempt and to comply with the law and this court's orders, the defendants need be afforded no further time to purge themselves of the contempt or to delay compliance, or to engage in further frivolous or vexatious conduct in connection with this litigation.

{¶92} The court further finds that defendants have not complied with the orders of this court, by North Shore Kennels, Inc.'s securing a zoning permit for agricultural purposes on June 21, 2000, and the defendants are not entitled to the protections under R.C. §519.21(A).

{¶93} The court finds that plaintiffs are entitled to appropriate relief, and this court has the inherent authority to fashion any appropriate relief to enforce compliance with this court's orders. The remedy that the court sets forth in this order is necessary and appropriate.

ORDER

{¶94} The court orders that the plaintiffs are entitled to appropriate relief, which includes an order that the portions of the structure that are in violation of the zoning ordinance shall be removed; that the cost thereof be paid initially by plaintiffs and placed on the tax list and duplicate on the subject real property, and be subject to collection by foreclosure as a tax lien on the real property; and that the fine previously ordered shall be imposed.

{¶95} The parties may submit to the court an architectural or engineering plan, design, or drawing by a reputable, licensed, and bonded architect or engineer, on or before the sixtieth day after entry of this order, detailing the planned removal and reconstruction of the portions of the west and north sides of the residence at 10447 Johnnycake Ridge Road, Concord Township, Lake County, Ohio that violate the fifteen-foot side yard clearance required by Concord Township zoning resolution section 15.06(A).

{¶96} The cost of providing any plan, design, or drawing submitted by the plaintiffs shall be paid by the plaintiffs and the cost thereof shall be certified by the court to the county auditor, who shall place that amount on the general tax list and duplicate on the real property, and be subject to collection by foreclosure as a tax lien on the real property, and for which amount judgment will be rendered in favor of plaintiffs and against defendants, jointly and severally, and upon which execution may issue.

{¶97} The cost of providing any plan, design, or drawing submitted by the defendants shall be borne by the defendants.

{¶98} The court will then select an architectural or engineering plan, design, or drawing for the remediation from those submitted by the parties, and will notify the parties of the selection.

{¶99} Within 30 days of the selection by the court of a plan, design, or drawing for the remediation, the parties may submit firm bids by reputable, licensed, and bonded construction contractors for performance of the removal and construction work detailed in the plan, design, or drawing selected by the court.

{¶100} The court will then select a construction contractor from those submitted by the parties, and order the work to be commenced and completed within a reasonable time and that plaintiffs pay the cost thereof, which amount will be certified by the court to the county auditor, who shall place that amount on the general tax list and duplicate on the real property, and be subject to collection by foreclosure as a tax lien on the real property, and for which amount judgment will be rendered in favor of plaintiffs and against defendants, jointly and severally, and upon which execution may issue.

{¶101} The court further imposes the fine of \$5,000.00, plus \$100.00 for each of the 1,668 days from May 28, 1999 to December 22, 2003, in the amount of \$166,800.00, in favor of plaintiffs and against defendant, jointly and severally, upon which execution may issue.

{¶102} Any funds actually collected by plaintiffs from the placement of the cost of the remediation work (including the plan, design, or drawing submitted by the plaintiffs to the court) on the general tax list and duplicate on the real property shall not be recovered a second time from the fine set forth above, so that plaintiffs shall be entitled only to the difference between the amounts actually obtained from being placed on the general tax list and duplicate and any uncollected amount of the \$166,800.00 fine.

{¶103} Defendants, jointly and severally, shall pay the costs of this action, for which execution may issue.

{¶104} If the plaintiffs still desire to pursue their request for attorney's fees, they should notify the court within seven days of their receipt of this order, and the court will schedule a hearing for the presentation of evidence and taking argument on the issue of the amount of attorney's fees.

{¶105} **IT IS SO ORDERED.**

EUGENE A. LUCCI, JUDGE

c: Geoffrey W. Weaver, Esq., Attorney for plaintiffs
Donald A. Richer, Esq., Attorney for defendants