

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

<b>PERRY TOWNSHIP TRUSTEES, <i>et al.</i></b>	)	<b>CASE NO. 03CV001269</b>
	)	
Plaintiffs	)	<b>JUDGE EUGENE A. LUCCI</b>
	)	
vs.	)	
	)	<b><u>JUDGMENT ENTRY</u></b>
<b>JAMES G. MARINO, <i>et al.</i></b>	)	<b><u>GRANTING PERMANENT</u></b>
	)	<b><u>INJUNCTION AND ORDERING</u></b>
Defendants	)	<b><u>RESTORATION OF PROPERTY</u></b>

**INTRODUCTION**

{¶1} The court held a hearing on the plaintiffs’ request for preliminary and permanent injunction on August 14, 2003 and September 19, 2003, and considered the trial brief of the defendants, filed on October 10, 2003, the post-trial brief of the plaintiffs, filed on October 10, 2003, the rebuttal brief of the defendants, filed on October 14, 2003, and the reply brief of the plaintiffs, filed on October 17, 2003. For the reasons stated in this order, the plaintiffs’ request is granted.

**PROCEDURAL POSTURE**

{¶2} Plaintiff Perry Township Trustees filed its verified complaint, pursuant to R.C. §§519.23 and 519.24, for preliminary and permanent injunction, on June 27, 2003, and filed a motion for temporary restraining order. The plaintiff requested, in essence, that this court restrain and enjoin the defendants, James G. Marino and Karen J. Marino, from continuing the current use of their property located at 5160 River Road, Perry Township, Lake County, Ohio, as a moto-cross or dirt bike track, and that they restore the property to its prior grade and topography as it existed before the construction activities started on the property; the plaintiff also requested an order for its reasonable attorney fees expended in obtaining the requested relief.

{¶3} The case was assigned to Judge Richard L. Collins Jr., who set an oral hearing for July 2, 2003 on the motion for temporary restraining order. The hearing date was reset to July 7, 2003. On July 7, 2003, the plaintiff appeared, along with counsel for the defendants, and the plaintiff orally withdrew its motion for temporary restraining order. The parties agreed to consolidate the preliminary and permanent injunction hearings.

{¶4} Although service was obtained upon the defendants, no answer was filed. On August 4, 2003, the plaintiff filed its motion for default judgment. On August 5, 2003, the defendants filed their motion for leave to file an untimely answer to the complaint, alleging excusable neglect. On August 5, 2003, the court permitted the defendants to file their answer, *instanter*. The court also permitted the plaintiff to amend its complaint to add Walter R. Siegel, the Perry Township Zoning Inspector, as a party plaintiff.

{¶5} On August 8, 2003, this case was reassigned to Judge Eugene A. Lucci. The court allowed the answer that the defendants filed to stand as the answer to the plaintiffs' amended complaint. The court denied the motion for default judgment as moot. The court set the merged preliminary and permanent injunction hearing for August 14, 2003. The parties commenced the hearing on August 14, 2003, and concluded it on September 19, 2003.

#### **ISSUES**

{¶6} The issues presented in this case are: (1) whether the defendants violated the Perry Township Zoning Resolution in constructing a moto-cross or dirt bike track in 2000, and using the track; and (2) whether the plaintiffs are entitled to a permanent injunction, enjoining the defendants from continuing the use of their property as a moto-cross or dirt bike track, and ordering the property to be restored to its pre-construction condition, and any other relief.

#### **LAW**

{¶7} Perry Township has adopted, under the authority of Chapter 519 of the Ohio Revised Code, a comprehensive zoning resolution in which the lands in the unincorporated areas are divided into districts. Ohio Revised Code §519.02 allows township trustees to regulate building and land uses in a township. Ohio Revised Code §519.122 prohibits a challenge to the validity of a zoning resolution or any amendment to the zoning resolution unless the challenge is brought within two years of the adoption of the resolution or the amendment. The current Perry Township Zoning Resolution was adopted on October 4, 1994.

{¶8} From the U.S. Supreme Court’s ruling in *Village of Euclid, Ohio v. Ambler Realty Co.*<sup>1</sup> to the Ohio Supreme Court’s decision in *Goldberg Cos., Inc. v. Richmond Heights City Council*,<sup>2</sup> it has been held that a zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare.<sup>3</sup> The defendants in this case have not raised any constitutional challenge to the Perry Township Zoning Resolution. Therefore, the defendants cannot argue that the resolution does not apply to them or that the resolution is unconstitutional.

{¶9} Ohio Revised Code §519.23 prohibits any person from violating a township zoning resolution or any amendment to the resolution. Revised Code §519.24 authorizes the Perry Township Board of Trustees or the Perry Township Zoning Inspector to institute an action for injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove any unlawful use of the land. The township trustees and the township zoning inspector are both plaintiffs in this case and the action against the defendants was brought pursuant to the authority that is set forth in Revised Code §519.24.

{¶10} The defendants’ land is located in the Perry Township residential zoning district that is designated for zoning purposes as ER-3. Section 300 of the Perry Township Zoning Resolution defines the different zoning districts for Perry Township and provides, in pertinent part: “No building or premises shall be used and no building shall be erected or altered except in conformity with the regulations described herein for the districts in which it is located.”

{¶11} The resolution is worded in the affirmative as to the uses that are permitted in each zoning district. As a consequence, uses not expressly permitted in a zoning district are prohibited.

{¶12} Section 304.01(a) of the Zoning Resolution defines the permitted uses in the ER-3 district and provides:

The following uses and no others shall be deemed Class ER-3 uses:

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<sup>1</sup> 272 U.S. 365, 47 S.Ct. 114, 72 L.Ed. 303, 4 Ohio Law Abs. 816 (1926).

<sup>2</sup> 81 Ohio St.3d 207, 690 N.E.2d 510 (1998).

<sup>3</sup> See also, *State ex rel. Shemo v. Mayfield Heights*, 88 Ohio St.3d 7, 722 N.E.2d 1018, 2000-Ohio-258 (affirmance of an order invalidating a zoning ordinance); 95 Ohio St.3d 59, 765 N.E.2d 345, 2002-Ohio-1627 (granting a writ of mandamus).

- (a) Single family dwellings and buildings accessory thereto;
- (b) Church, school, college, university, public library or public museum; provided, however, any such use shall require a Conditional Zoning Certificate.
- c) Township Cemetery, township owned service buildings, and publicly owned recreation areas.
- d) Any person may maintain an office or carry on a customary home occupation in the dwelling house used by him as his private residence providing such does not involve any extension or modification of said dwelling which will alter its outward appearance as a dwelling and provided it meets the following regulations . . . :
  - i) The use of the dwelling unit for the home occupation shall be clearly incidental and subordinate to its use for residential purposes by its occupants, and not more than twenty-five (25) percent of floor area of the dwelling unit shall be used in the conduct of the home occupation.
  - ii) There shall be no change in the outside appearance of the building or premises, or other visible evidence of the conduct of such home occupation other than one sign, non-illuminated, mounted flat against the wall of the principal building, and meeting all of the requirements set forth in Section 409.09(b).
  - iii) No traffic shall be generated by such home occupation in greater volume than would normally be expected in a residential neighborhood, and any need for parking generated by the conduct of such home occupation shall meet the off-street parking requirements as specified in this resolution and shall not be located in a required front yard.
  - iv) No equipment or process shall be used in such home occupation which creates noise, vibration, glare, fumes, odors, or electrical interference detectable to the normal senses off the lot. In the case of electrical interference, no equipment or process shall be used which creates visual or audible interference in any radio or television receivers off the premises, or causes fluctuations in line voltage off the premises.
- d) (*sic*) Roadside stands consisting of temporary structures used solely for the display and sale of products produced by the occupant provided that adequate facilities are maintained in conjunction herewith so that all customer vehicles are parked at least ten (10) feet from the paved portion of the road.

The above uses shall be permitted only providing such use is not injurious, dangerous, or offensive by reason or (*sic*) odor, dust, smoke, gas, noise, fumes, flame, or vibration.

{¶13} The definition section of the resolution (at page D-1) contains the following provision:

Accessory Building, Structure, or Use – a building, structure, or use which is customarily incidental and subordinate to the main building and/or use located on the same lot.

{¶14} Section 401 of the resolution permits agricultural uses in any zoning district.

{¶15} The defendants are entitled to use their property as a single family residence and/or the other uses that are specifically set forth in Resolution §304.01. The defendants are also entitled to use their property in a manner that is customarily incidental and subordinate to the main building and/or use of the land. The defendants are entitled to use their property for agriculture and to construct and use any buildings and the land incident to the agricultural use.

{¶16} The word “incident,” used adjectively, means “(*in Law*) dependent upon or involved in something else.”<sup>4</sup> “Incident to” means “closely related to; naturally appearing with.”<sup>5</sup> 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.”<sup>6</sup>

{¶17} 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.<sup>7</sup>

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<sup>4</sup> Webster’s New World Dictionary of American English, Third College Edition, 682 (1991).

<sup>5</sup> 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.”

<sup>6</sup> Black’s Law Dictionary, Revised Fourth Edition, 904 (1968).

<sup>7</sup> See, for example, *U.S. v. Mack* (1998), 159 F.3d 208 (6<sup>th</sup> 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

{¶18} 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 moto-cross or dirt bike track if the track is incident to (closely or inseparably related to, dependent upon, and/or naturally appearing with) the (dominant or more worthy purpose of) agricultural use or the dwelling house. This statute confers no power on the township to prohibit structures or use of the land incident to the use for agricultural purposes. The statutory exemption from zoning regulation *will not apply* to the situation where the *agricultural purpose is incident to* the track, 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.

{¶19} Therefore, as applied in this case, the statutory exemption from zoning regulation will not apply to the situation where the dwelling house or agricultural use is incident to (closely or inseparably related to, dependent upon, and/or naturally appearing with) the moto-cross or dirt bike track; but the defendants may be exempt (assuming no other zoning violations) if the track is incident to the dwelling house or agricultural use.

#### **FINDINGS OF FACT**

{¶20} The court heard testimony from the following witnesses: Richard Kotapish, Merrill Bullock, Aven Malec, Walter Siegel, Richard Blasick, James J. Marino (Jr.), Karen Marino, and James G. Marino (Sr.). The court admitted the following exhibits: Plaintiffs’ Exhibits 1, 2, 3, 4, 5, 6, 7, 7A, 8, 9A-9HH, 10, 11, 14, 15, 16, 17 (photo only), 18, and Defendants’ Exhibits A, B, C, D, E, F, G, I, J, K, L, M, AND N.

{¶21} Based upon the testimony and the exhibits, the court makes its findings and conclusions.

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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.”

{¶22} The real property located at 5160 and 5170 River Road, Perry Township, Lake County, Ohio is owned by the defendants, James G. Marino and Karen J. Marino, who purchased it in July 1968.

{¶23} In February 1970, the defendants obtained a zoning permit for the operation of a horse riding academy on their land, including the existing barn, bridal trails, and picnic area, and a permit for a 25 square foot sign.

{¶24} In 2000, the defendants started or permitted construction of a moto-cross or dirt bike track on their property located at 5160 River Road, Perry Township, Lake County, Ohio.

{¶25} The track was constructed to accommodate the riding of motorcycles, dirt bikes, moto-cross bikes, three-wheelers, four-wheelers, and other motorized vehicles over uncertain terrain, involving jumping as high as 40 feet, and high speed riding and maneuvering over unpaved dirt surfaces, and including such hazards as mud, water, and dust.

{¶26} The moto-cross or dirt bike track was completed after Spring 2000 but before Spring 2003.

{¶27} The moto-cross or dirt bike track is larger than the Painesville Speedway, a commercial auto racing track located in Painesville Township, and occupies about five acres.

{¶28} The Marino family rode dirt bikes since the 1970s in the woods adjacent to the newly constructed moto-cross or dirt bike track. Prior to 2000, occasionally, friends of the family would come over and ride their motorized bikes in the woods.

{¶29} The Marinos always permitted non-family members to use the moto-cross or dirt bike track with permission and without charging any fee.

{¶30} Since 2000, the Marinos required any visitor who used their track to sign a liability waiver form, and any rider to wear a helmet.

{¶31} About 20 persons used the track during the last year, ten of which used it regularly. About 50 persons have used the track since it was constructed in 2000.

{¶32} The Marinos never applied for or obtained a permit to construct or use the property as a moto-cross or dirt bike track.

{¶33} The track was constructed by using plowed down trees to form the base of jumps and placing earth on top of the trees, and excavating and moving earth around to create a 3,440 foot long defined track and jumps.

{¶34} Prior to the construction of the track, the area on which the track was constructed was a predominantly flat and level field.

{¶35} The track has been used for moto-cross or dirt bike riding or racing practice, but no competitive races – races in the traditional sense of two or more vehicles starting from the same place and attempting to beat the others to the same finish line – have been held on the property.

{¶36} The construction of the track has caused a change in topography and water flow or drainage, and has created noise and dust when in use. Although there has been no scientific measurement or quantification, the water flow or drainage, noise, and dust have affected persons and properties other than those located at 5160 & 5170 River Road, Perry Township, Ohio.

{¶37} The moto-cross or dirt bike track is not an agricultural use of the land or a use which is incident to an agricultural use of the land.

{¶38} The moto-cross or dirt bike track is not a use which is incident to the main building as a residence; nor is it accessory to the use of the family dwelling.

{¶39} The moto-cross or dirt bike track is not a prior non-conforming use of the land.

#### **DISCUSSION**

{¶40} The defendants use their property as a single family residence and they board horses on the property. The boarding of horses is a permitted use because it falls under the agricultural exemption in the statute and the resolution. Perry Township has sought an injunction in this case because the defendants have constructed a moto-cross or dirt bike track on the property. This track covers almost five acres and is larger than the commercial Painesville Speedway race track.

{¶41} The defendants began construction of the track in the year 2000 and they have used the track since that time. A moto-cross or dirt bike track is not a permitted use in the ER-3 zoning district. A moto-cross or dirt bike track is not an agricultural use of the land. A moto-cross or dirt bike track that is of the size and scope of the track in question is not a use that is customarily incident and subordinate to the main building and/or the use of the land. It certainly is not in this case.

{¶42} In *Samsa v. Heck*,<sup>8</sup> the court considered the limits of accessory uses. While the *Samsa* case involved a private airfield, the principals of law are illustrative. The court noted at the outset that an accessory use:

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<sup>8</sup> 13 Ohio App.2d 94, 98, 234 N.E.2d 312 (1967).

[M]ay be predicated upon a specific provision related to accessory uses found in the ordinance, or may be based upon the concept that whether or not the ordinance provides for accessory uses, the litigated use is the one so customarily incidental to the principal use of the zoning (zoned) lot that it is, as a matter of law, a part of the permitted use.

{¶43} The use of the words “customarily incident” in the resolution considered by the court in the *Samsa* case, is the same language used in the Perry Township Zoning Resolution. The court reasoned, at page 101, as follows:

Directing inquiry as to the meaning of the words customarily incident as they are used in the legislation, we find the word ‘customary’ is defined in Webster’s Third International Dictionary as: ‘agreeing with custom: established by custom: commonly practiced, used or observed: \*\*\*.’ In Webster’s Collegiate Dictionary, fifth edition, the definition is: ‘agreeing with, or established by custom; established by common usage; \*\*\*.’

The word ‘incident,’ when used in connection with the use of property, is generally said to mean anything which is usually connected with the principal use, something which is necessary, appertaining to, or depending upon, the principal use.

The record here clearly precludes this court from finding that the storage of an airplane, and the creation of an airport for flying in and out of the zoned property, constitutes a use of the property customarily incident to a single family residential use, or a use so necessary or commonly to be expected that it cannot be thought that the zoning resolution was intended to prevent it.

{¶44} If the words “five acre moto-cross or dirt bike track with numerous persons practicing their racing on the zoned property” was substituted for “storage of an airplane, and the creation of an airport for flying in and out of the zoned property” in the above quote, the logic would be equally indisputable.

{¶45} Similarly, in *City of Parma Heights v. Jaros*,<sup>9</sup> the court quoted from a Tennessee case in finding that even though an activity is a “hobby” it is not necessarily a permitted use:

A fact pattern essentially identical to the facts of the instant case is found in *Knoxville v. Brown* (1953), 195 Tenn. 501, 260 S.W.2d 264. In discussing the relationship between “hobbies” and “customary use of one-family dwellings,” the *Brown* court stated:

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<sup>9</sup> 69 Ohio App.3d 623, 630, 591 N.E.2d 726 (1990).

\* \* \* We of course can think of all kinds of hobbies, many of which would customarily and ordinarily be considered as a proper use for a one-family dwelling but when a hobby reaches the proportion of the destruction of the neighborhood by the use of assembling and tearing down of numerous automobiles, in this case nine, this goes far beyond any common sense idea of what a One-Family Dwelling might be used for.” *Brown*, supra, 195 Tenn. at 512, 260 S.W.2d at 269.

{¶46} It is clear from all of the testimony in this case that the moto-cross or dirt bike track was not a use that is customarily incident to the use of a single family dwelling.

{¶47} The track that was constructed by the defendants is not allowed in a residential zoning district. If the defendants contend that this track is a use incident to the use of the property as agriculture or as a dwelling, then there is no limit on what is an incidental use. For example, the defendants could then construct an airport or helicopter pad at their property for the use of their friends after they sign a waiver of liability form. The defendants could also enlarge this five acre track to a ten or fifteen acre track and then they could invite more strangers to use their property.

{¶48} If any person wishes to construct a building or change the use of any premises in Perry Township, then the Perry Township Zoning Resolution requires them to apply for and obtain a zoning permit.<sup>10</sup>

{¶49} A garage is an accessory or incidental use of the land. The zoning resolution requires all persons to obtain a zoning permit if he or she wants to construct a garage on his or her property.<sup>11</sup> Even though the resolution allows a garage on the property, one must still obtain a zoning permit before being permitted to construct a new building (main building or accessory building) or when one changes the use of the premises. Therefore, if the defendants wanted to add an accessory use or construct a building, they had to obtain a zoning permit.

{¶50} If the defendants had followed the law and applied for a permit to construct the track, then the zoning inspector would have been required to deny the application because a track is not a permitted use in the ER-3 zoning district. Even if the defendants’ land was vacant and they applied to construct a track on the vacant land, then the zoning inspector would have denied the application because the track is not a permitted use in the ER-3 district.

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<sup>10</sup> See Section 207.01 of the Perry Township Zoning Resolution.

<sup>11</sup> See Section 207.01 of the Perry Township Zoning Resolution.

{¶51} The defendants do not acquire greater rights under the law to keep and use this track because they did not comply with the zoning resolution. The defendants' current use of the property is a violation of the zoning resolution and their failure to obtain a zoning permit when they changed the use of the property is also a violation of the zoning resolution. The plaintiffs are entitled to an injunction against the defendants for their current use of the property and also because they did not obtain a zoning permit prior to changing the use of the property.

{¶52} The defendants claim that Section 410 of the zoning resolution, entitled Sand, Gravel and Earth Removal, does not apply to them. This section states that surface extraction of sand, gravel and other earth materials may be permitted only under a conditional zoning certificate. The defendants did not apply for or obtain such a zoning certificate. The court finds that the defendants extracted earth materials (soil) in order to construct the track, and that the defendants used the extracted soil to build the "jumps" on the newly constructed track.

{¶53} The defendants brought in a back hoe and used it to extract earth materials on the property. They also used a front end loader to extract earth materials on the property. There is nothing in the regulations that requires that the earth material that is excavated must be removed *from and off* the property, or that the extracted material be a mineral or some other object of a mining operation.

{¶54} The specific regulations that were adopted in Section 410 are designed to protect the rights of property owners who abut the area where the earth materials are being excavated. The defendants ignored all of these regulations when they excavated earth materials on this property. As a result, the plaintiffs are entitled to an injunction that prohibits further excavation and also an order that requires the defendants to restore the property to its prior condition.

{¶55} The defendants, in their answer to the complaint, have raised several affirmative defenses. The defendants have claimed that the track is a prior non-conforming use and that the track constitutes an agricultural use of the property. The defendants have the burden of proof on these affirmative defenses and the court finds that there has been no evidence that establishes these affirmative defenses.

{¶56} The track was built in the year 2000, and at that time the zoning ordinance did not permit tracks in the ER-3 district. The defendants did not present any evidence that their property had ever been used specifically as a "track" before 2000. The prior dirt bike riding was done primarily in the

woods adjacent to the newly constructed track.<sup>12</sup> Therefore, there is no prior non-conforming use of this land as a moto-cross or dirt bike track and the defendants have not proved this affirmative defense. Using common sense, even the occasional riding of dirt bikes on the area of the property where the track was eventually established does not establish a “use” of the land for zoning purposes, or a prior use of the land as a moto-cross or dirt bike track of 3,440 feet in length with jumps and hazards.

{¶57} The prior occasional riding of dirt bikes on the property does not establish a prior non-conforming use of the property. The track is not an agricultural use of the land. The track is still a prohibited use and it is not an agricultural use even if the defendants were racing farm tractors around the track.

{¶58} The court further finds that the use of the track is injurious and offensive because of the dust and the noise that is created. Section 304.01 of the zoning resolution prohibits any use of the property if the use of the property is injurious, dangerous, or offensive because of the dust and the noise that is created by the use.<sup>13</sup>

{¶59} The dust still has not settled on this case and the problems will continue unless the court enjoins the defendants’ current use of the property. The only viable remedy in this situation is for the court to issue an injunction that permanently enjoins the defendants from using the track in any manner and also an order that requires the defendants to restore the property to its prior grade and topography before the construction activities started on the property. The only way to remedy this violation is to return the property to the status quo before construction.

{¶60} The zoning resolution permits a person to have accessory uses of their property that are customarily incidental and subordinate to the main use of the property. The primary and dominant

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<sup>12</sup> There was indication in the testimony that there were bridal paths in the woods. The bridal paths may have provided a trail on which to ride dirt bikes, although the court does not recall any specific testimony to that effect.

<sup>13</sup> The track may be dangerous to users, and potentially any nearby spectators, because of the vehicular traffic, speeds, maneuvers, jumps, and the mud, dust, and water hazards – the defendants recognized this and required signed releases from liability. However, the court does not construe the zoning regulation to cover dangerous uses under §304.01 unless the danger is in the form of odor, dust, smoke, gas, noise, fumes, flame, or vibration.

use of the defendants' property is as a single family residence and/or a farm (boarding horses). Prior to the construction of the track, the occasional riding of dirt bikes on the Marino property by family and friends may have been an accessory use of the property because this activity may be customarily incidental and subordinate to the main use of the property. The use of the Marino property prior to 2000 and the occasional riding of dirt bikes on the property during this time is not at issue in this case. The plaintiffs have not sought a court order to stop this activity. An accessory use of the land does not qualify as a prior non-conforming use of the land because it is not the main use of the land.

{¶61} The construction and use of a five acre moto-cross or dirt bike track is not a customarily incidental and subordinate use of the land. The five acre track is not incidental and it is not subordinate to the single family residential or agricultural use of the property. If one would accept the defendants' logic on this issue, then any homeowner could construct a five or ten acre demolition derby track for the purpose of practicing (but not racing) the art of crashing cars together. Based on the defendants' logic, such a homeowner could also argue that their demolition derby track is a non-conforming use because the homeowner has driven his car on the property and once or twice had an accident.

### CONCLUSION

{¶62} The defendants built and used a moto-cross or dirt bike track that covers nearly five acres, starting in the Spring 2000. A moto-cross or dirt bike track or the use of the land for this purpose is not a permitted use in the ER-3 residential zoning district. The defendants violated the zoning resolution when they constructed this track. The use of the track is also a violation of the zoning resolution.

{¶63} The use of the track has caused offensive dust and noise. An authorized or permitted use in the ER-3 zoning district that creates offensive dust and noise is also a violation of the zoning resolution. Therefore, if the track in this case was a permitted use, its use is still a violation of the zoning resolution because of the offensive dust and noise that it creates.

{¶64} The construction of the track has also been a violation of the provision of the zoning resolution prohibiting earth removal without a permit. When the defendants constructed the track, the defendants excavated large amounts of earth. They used this earth to construct the track and used the extracted soil to change the grade of the property where the track and the "jumps" are

located. The excavated earth has created drainage issues on the property of the neighbor that abuts the defendants' property.

{¶65} The defendants violated the Perry Township Zoning Resolution in constructing a moto-cross or dirt bike track in 2000 and in using the track; and the plaintiffs are entitled to a permanent injunction, enjoining the defendants from continuing the construction and use of their property as a moto-cross or dirt bike track, and ordering the property to be restored to its pre-construction condition.

### **ORDER**

{¶66} Plaintiffs' request for preliminary and permanent injunction is granted.

{¶67} Defendants, their officers, successors, agents, assigns, servants, employees, attorneys, and those persons in active concert or participation with them, are restrained and enjoined from constructing or continuing the use of their property located at 5160 & 5170 River Road, Perry Township, Lake County, Ohio, as a moto-cross or dirt bike track. This injunction shall be effective upon the filing of this order.

{¶68} Defendants, their officers, successors, agents, assigns, servants, employees, attorneys, and those persons in active concert or participation with them, are ordered to restore the property located at 5160 River Road, Perry Township, Lake County, Ohio, to the prior condition and topography of the property that existed before they changed the condition and topography of the property in constructing the moto-cross or dirt bike track. The defendants shall comply with this order within 120 days after the filing of this order.

{¶69} The defendants shall pay the costs of this action.

{¶70} If the plaintiffs maintain their request for attorney fees, the plaintiffs shall submit an itemized statement of their attorney fees to the defendants and the court within ten days. A hearing will thereafter be set on the issue of the plaintiffs' request for attorney fees at the earliest convenience of the court.

{¶71} **IT IS SO ORDERED.**

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**JUDGE EUGENE A. LUCCI**

c: James M. Lyons, Esq., Attorney for Plaintiffs  
Neil R. Wilson, Esq., Attorney for Defendants