



Board of Zoning Appeals
Council Chambers
October 24, 2022 – 6:00 p.m.
233 South Main Street, Monroe, Ohio

Call to Order

Roll Call

Approval of the Minutes – September 26, 2022

Old Business

New Business

Public Hearing

Case No. 2022-7 Consideration of an appeal to Code section 1446.13 from applicant StachlerHarmon Attorneys at Law on behalf of Benedict Enterprises, Inc., for property located north of Lakeview Drive and east of Garver Road.

Administrative Reports

Adjournment



**Board of Zoning Appeals Minutes
September 26, 2022- 6:00pm
233 South Main Street, Monroe Ohio**

Call to Order

Mr. Adam called the meeting to order at 6:00 p.m.

Roll Call

Members present: Lorenzo Adam, Casey Walters, Joshua Mason and Mike Morris

Staff members present: Tom Smith, Director of Development; Kameryn Jones, Assistant Development Director; Jameson Cole, Planner and Michelle Layman, Planning and Zoning Specialist.

Mr. Adam stated the purpose of the meeting was to reconsider the September 12, 2022, motion for Case No. 2022-6 Consideration of a variance regarding the land transfer between 219 Lynette Court and 225 Lynette Court.

Mr. Adam moved to reconsider the September 12, 2022, motion for Case No. 2022-6 Consideration of a variance regarding the land transfer between 219 Lynette Court and 225 Lynette Court; seconded by Mr. Mason.

Mr. Morris moved to approve Case No. 2022-6 Consideration of a variance regarding the land transfer between 219 Lynette Court and 225 Lynette Court; seconded by Mr. Mason

Roll call vote; 4 ayes, motion carried

Approval of Minutes

Mr. Morris questioned why the minutes read as if there were four members at the last meeting when there were only three. Planning and Zoning Specialist explained that the meeting tonight will take the place of the end of the meeting on September 12, 2022. Mr. Mason moved to approve the September 12, 2022, minutes; seconded by Mr. Morris.

Voice vote: motion carried

Adjournment

Mr. Adam moved to adjourn the meeting; seconded by Mr. Mason. Voice vote. Motion carried.



The Board of Zoning Appeals meeting adjourned at 6:05 p.m.

Respectfully submitted,

Michelle Layman
Planning and Zoning Specialist



CITY OF MONROE
Inter-Office Correspondence

TO: Members of the Monroe Board of Zoning Appeals
FROM: **Tom Smith**
Development Director

DATE: **October 24, 2022**

RE: Information Packet for **October 24, 2022**, Board of Zoning Appeals Meeting at **6:00 p.m.**

I. **BZA-2022-7— Consideration of an appeal to Code section 1446.13 from applicant StachlerHarmon Attorneys at Law on behalf of Benedict Enterprises, Inc., for property located north of Lakeview Drive and east of Garver Road.**

A. Background:

- On May 1, 2018, the City was informed by the Warren County Engineer’s Office that a culvert had been constructed on property identified by the Warren County Auditor as parcel #1106100310, owned by Benedict Enterprises Inc. (BEI).
- This piece of property is located in the floodplain and is overlaid in blue shading in the image below (see figure 1).
- Additionally, it was discovered that fill was placed in the floodplain area of Shaker Creek without a permit. Neither BEI nor the contractor has obtained a floodplain development permit to construct and install the culvert or deposit fill in the special hazard area of Shaker Creek.

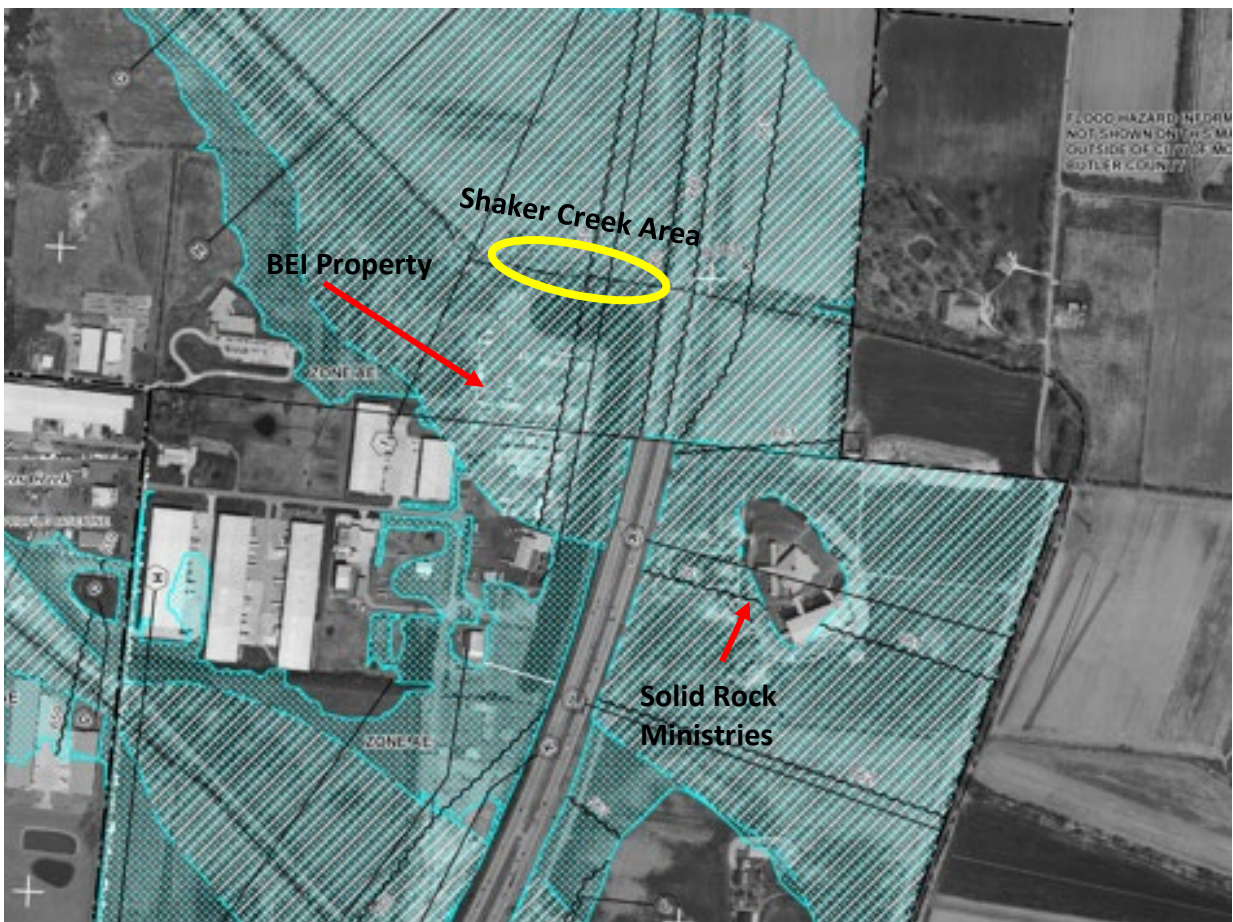


Figure 1: Floodplain Map

- On May 25, 2018, a *notice of violation* was sent to BEI instructing them to remove the culvert due to flooding issues caused for upstream properties. On February 7, 2019, the City sent BEI another letter ordering them to remove the culvert. On February 14, 2019, the City’s Floodplain Administrator, sent another letter to BEI informing them that they were in violation of Section 1446.13 of the City of Monroe Code of Ordinances and that failure to comply will result in a fourth-degree misdemeanor.
- Following the February 14th letter, BEI attempted to work with the City to allow the culvert to remain. After a study and analysis of the pipes used for the culvert, another letter was

sent on December 12, 2019, ordering BEI to remove the culvert. On January 7, 2020, the culvert was removed.

- It was also learned that an earthen berm is located on the property. The earthen berm was never authorized as a FEMA approved structure in the floodway, has never been approved of by the City, and cuts off a significant amount of acreage serviced as floodplain storage along the banks of Shaker Creek.
- Moreover, a substantial amount of rock fill has been deposited into and upon the banks of Shaker Creek without a floodplain permit for the fill. BEI maintains that the earthen berm is part of a levee system that was installed several decades ago.
- As a point of reference only, BEI claims that a 1965 aerial map portrays the earthen berm suggesting that it was installed pre 1965 well in advance of the BEI purchase date of the property in 1991.
- On November 23, 2020, the matter came before the Warren County Court of Common Pleas for a bench trial on behalf of Solid Rock Ministries (Solid Rock) petitioning a Writ of Mandamus (a judicial order from a court to the City obligating the City to enforce its municipal code) against the City of Monroe.

- On February 24, 2021, the Warren County Court of Common Pleas issued the City a Writ of Mandamus. The Mandamus Action included three orders:
 1. Order Prosecution against BEI for culvert construction.
 2. Order Removal of the Fill in Shaker Creek and Above the Banks of Shaker Creek.
 3. Order the Earthen Berm to be Modified

- In response to Order #1, the City notified BEI and ordered a correction of the violation that a culvert was constructed without a permit. Ultimately, the violation was corrected resulting in no further need of prosecution.

- Regarding Order #2, Solid Rock argues that fill was placed in the floodplain area of Shaker Creek without a permit. However, the City maintains that there is no evidence to support who/what/where/when the fill came from and that because the origin of the fill's placement cannot be determined, no violation can take place. In addition, the City has been informed that the fill in question has been removed. Notwithstanding, the court is ordering the City to issue a notice of violation to BEI requiring that it correct the violation to be in compliance with City ordinance(s).

- Concerning Order #3, the court determined that an unauthorized berm exists in the floodway causing flooding for certain properties and that the use of the earthen berm is an unauthorized use in accordance with code section 1446.29(a)(3), specifically the following clause:

Use, arrangement, or construction contrary to that authorized shall be deemed a violation of this chapter and punishable in accordance with division (c) below of this section.

- The order by the court also states: "whether or not the BEI constructed the berm is of little consequence because the use of the berm is an unauthorized use." For that reason, under the courts Order #3, the City was ordered to issue a notice of violation to BEI requiring that the earthen berm be modified to be in conformity with City ordinance(s).

- The City, in compliance to and in fulfillment of, the Writ of Mandamus Orders #2 and #3, on June 27, 2022, issued a violation notice [Exhibit B] to BEI for Floodway Encroachment: Shaker Creek Earthen Berm and Other Fill Areas for failure to obtain a floodplain development permit prior to construction pursuant to code section 1446.13: Floodplain development permits; application; inspections; revocation.

B. Appeal Purpose:

- Per 1203.11 of the Monroe Planning and Zoning Code, appeals are initiated by the person aggrieved or affected by any order, decision, determination, or interpretation made by the authority having jurisdiction who is charged with the administration or enforcement of the code.

C. Appeal Request:

- On July 28, 2022, the City received an Application for Appeal [Exhibit A] to code section 1446.29 on the basis of:
 1. clarifying what needs to be done with the earthen berm;
 2. that the berm existed long before any standards for what can or cannot be placed along the banks used for storm water runoff; and
 3. that any modifications to the earthen berm would result in the property being unserviceable as a consequence to a significant rain event such as the one-hundred-year storm/flood.

D. Relevant Code Sections:

Section 1446.13: Floodplain development permits; application; inspection; revocation

It shall be unlawful for any person to begin construction or other development activity including but not limited to filling; grading; construction; alteration, remodeling, or expanding any structure; or alteration of any watercourse wholly within, partially within or in contact with any identified special flood hazard area, as established in [section 1446.06](#), until a floodplain development permit is obtained from the floodplain administrator. Such floodplain development permit shall show that the proposed development activity is in conformity with the provisions of this chapter. No such permit shall be issued by the floodplain administrator until the requirements of this chapter have been met.

Section 1446.29: Enforcement, violations and penalties

(a) Compliance required.

- (1) No structure or land shall hereafter be located, erected, constructed, reconstructed, repaired, extended, converted, enlarged or altered without full compliance with the terms of this chapter and all other applicable regulations which apply to uses within the jurisdiction of this chapter, unless specifically exempted from filing for a development permit as stated in [section 1446.14](#).*
- (2) Failure to obtain a floodplain development permit shall be a violation of this chapter and shall be punishable in accordance with division (c) below of this section.*
- (3) Floodplain development permits issued on the basis of plans and applications approved by the floodplain administrator authorize only the use, and arrangement, set forth in such approved plans and applications or amendments thereto. Use, arrangement, or construction*

contrary to that authorized shall be deemed a violation of this chapter and punishable in accordance with division (c) below of this section.

- (b) *Notice of violation. Whenever the floodplain administrator determines that there has been a violation of any provision of this chapter, he or she shall give notice of such violation to the person responsible therefore and order compliance with this chapter as hereinafter provided. Such notice and order shall:*
- (1) *Be put in writing on an appropriate form;*
 - (2) *Include a list of violations, referring to the section or sections of this chapter that have been violated, and order remedial action, which, if taken, will effect compliance with the provisions of this chapter;*
 - (3) *Specify a reasonable time for performance;*
 - (4) *Advise the owner, operator, or occupant of the right to appeal;*
 - (5) *Be served on the owner, occupant, or agent in person. However, this notice and order shall be deemed to be properly served upon the owner, occupant, or agent if a copy thereof is sent by registered or certified mail to the person's last known mailing address, residence, or place of business, and/or a copy is posted in a conspicuous place in or on the dwelling affected.*
- (c) *Violations and penalties. Violation of the provisions of this chapter or failure to comply with any of its requirements shall be deemed to be a strict liability offense, and shall constitute a fourth degree misdemeanor. Any person who violates this chapter or fails to comply with any of its requirements shall upon conviction thereof be fined or imprisoned as provided by the laws of the City of Monroe. Each day such violation continues shall be considered a separate offense. Nothing herein contained shall prevent the City of Monroe from taking such other lawful action as is necessary to prevent or remedy any violation. The City of Monroe shall prosecute any violation of this chapter in accordance with the penalties stated herein.*

E. Review Criteria:

- **Chapter 1202.05: Board of Zoning Appeals:**
 - (C) *POWERS AND DUTIES*
 - (2) *Hear and decide on any questions related to interpretation of the code text or the zoning map and zoning district boundaries.*
 - (5) *Hear, review and make decisions on appeals where it is alleged by the appellant that there is error in any order, requirement, decision, grant, or refusal made by the Code Enforcement Officer or other development applications where it is the established role of the BZA to hear such appeals.*
- **Chapter 1203.11: Appeals:**
 - (D) *A decision or determination shall not be reversed or modified unless there is competent, material, and substantial evidence in the record that the decision or determination fails to comply with either the procedural or substantive requirements of this code.*
- **Chapter 1446.28: Appeals and Variances:**
 - (B) *Power and duties*
 - (1) *The appeals board shall hear and decide appeals where it is alleged there is an error in any order, requirement, decision or determination made by the floodplain administrator in the administration or enforcement of this chapter.*

F. Department Comments:

City Administration concludes that:

1. Order #1 has been remedied;
2. the citation issued, pursuant to Order #2, cannot be substantiated, and therefore is at an impasse; and
3. the conditions surrounding Order #3 seem to have existed well in advance of any formal storm water regulations established by the City and before the existence of FEMA.

G. Public Comments:

None received as of October 18th, 2022.

H. Recommendation:

Motion to approve the applicant's request for appeal to code sections 1446.13 and 1446.29 confirming that the City's floodplain standards and codes have been satisfied on the premise that:

1. Order #1 has been remedied;
2. the citation issued by the City to BEI, pursuant to Order #2, cannot be substantiated, and therefore is at an impasse; and
3. the conditions surrounding Order #3, the earthen berm/levee and its unauthorized use seem to have existed well in advance of any formal storm water regulations established by the City and before the existence of FEMA, and are therefore exempt.



Appeals Form

Monroe Development Department
233 South Main Street, Monroe, Ohio 45050
Phone: 513-539-7374
www.monroehio.org

For Staff Use Only

Submittal Date: 7-27-22

Date Application Determined Complete:

Date of BZA Review:

Fee Paid: \$100

Staff Initials: AB

Application/Case Number: 20220507

Appeals Information

1. An appeal shall stay all proceedings by the city in furthering the decision being appeals, except in cases where a stay would cause imminent peril to life or property.
2. The appeals procedure and review criteria are established in Section 1203.11 of the Monroe Planning and Zoning Code.
3. The application fee for an appeal is \$100, due at the time the application is submitted.

Basic Project and Site Information

Project Address: Garver Road, Monroe, Ohio 45050

County: Butler Warren Total Lot Area: 73.9222 acres

County Tax Parcel ID: 0701300014

Existing Zoning District: City of Monroe

Decision-making board or staff member responsible for the action being appealed:

William Brock, P.E., City Manager

Date of decision that is being appealed: June 27, 2022

Applicant Information

Applicant Name: Benedict Enterprises, Inc.

Contact Person: John H. Stachler

Contact Address: 7810 McEwen Road, Suite B, Dayton, Ohio 45459

Contact Phone Number: 937-461-5901

Contact Fax Number: 937-461-5981

Contact E-Mail: john@stachlerharmon.com

Project Address or Tax Parcel ID: 0701300014

Additional Project Information

1) Explain, in detail, the nature of your request for an appeal and what you feel is the justification for such appeal.

Please see the attached letter and corresponding exhibits.

Certification and Signature

Applicant Signature - I certify that, to the best of my knowledge, the information contained in this form and within any attachments is correct and truthful.

Print Name: John H. Stachler

Signature:



Date: July 27, 2022

Submittal Requirement Checklist

Number of Copies <>

General Information

<input checked="" type="checkbox"/>	Appeal Application Form
<input checked="" type="checkbox"/>	Application fee
<input checked="" type="checkbox"/>	Any additional information determined to be necessary by the Development Department.
<input type="checkbox"/>	OPTIONAL - The applicant may submit any additional information that they feel supports their reasoning for an appeal to the BZA in advance of the hearing.

EXHIBIT A



STACHLERHARMON

ATTORNEYS AT LAW

July 26, 2022

City of Monroe
Board of Zoning Appeals
233 South Main Street
Monroe, OH 45050

**Re: Notice of Appeal of Violation Notice issued to Benedict Enterprises, Inc.
Floodway Encroachment – Shaker Creek Earthen Berm and Other Fill Areas**

Dear Board,

Please be advised that our office has the pleasure of representing Benedict Enterprises, Inc. (Benedict).

The purpose of this letter is to appeal the violation notice issued to Benedict by the City of Monroe dated June 27, 2022, ordering Benedict to comply with the Decision Granting a Writ of Mandamus (Decision) filed February 24, 2021 and Final Judgment Entry filed March 12, 2021, by Judge Timothy N. Tepe of the Warren County Court of Common Pleas (Court), a copy of which is attached.

The reasons for this appeal are simple and straightforward. The Court ordered two separate and distinct actions on the part of City of Monroe, both of which Orders were set forth in the City's notice.

The first Order set forth in the Decision and included by reference in the City's notice of violation was that Benedict correct the fill by removing the rip rap (rocks installed to prevent soil erosion) on the banks of Shaker Creek. As the rip rap was removed on February 3, 2021, prior to the Court issuing its Decision, it is Benedict's position that the rip rap issue is moot.

The second Order set forth in the Decision and included by reference in the City's notice of violation relates to modification of the earthen berm on the north bank of Shaker Creek. Simply put, the Decision is unclear as to what needs to be done with the earthen berm.

The bank structure referred to in the Decision as an "earthen berm" is actually a levee system that was installed several decades ago, and possibly as far back as 100 years ago (depicted on an aerial map dated 1965), many years prior to the 1991 sale of the property to Benedict by the City of Monroe, which previously owned the property where the berm/levee in question is located.

EXHIBIT A

The Monroe City Manager, William Brock, P.E., can testify that not only did the berm/levee exist on the property at the time Benedict purchased this parcel from the City, but that it was definitely in existence prior to the creation of FEMA. In other words, this earthen berm/levee existed long before there were even any standards on what can or cannot be placed along the banks.

It is also interesting to note that this earthen berm/levee runs east across I-75 then north on Union Road. It is clear that any modifications to the earthen berm/levee along Benedict's parcel would render the property useless in the event Shaker Creek floods due to a significant rain event. Evidence supporting Benedict's position will be presented at the hearing.

For the forgoing reasons Benedict submits this appeal and respectfully requests a hearing.

Respectfully Submitted,

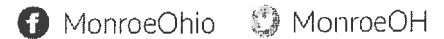
STACHLERHARMON

A handwritten signature in black ink, appearing to read "John H. Stachler", with a stylized flourish at the end.

John H. Stachler

JHS:dm
Enclosure

EXHIBIT A



June 27, 2022

Benedict Enterprises, Inc.
Corporate Office
750 Lakeview Drive
Monroe, OH 45050

RE: Floodway Encroachment – Shaker Creek Earthen Berm and Other Fill Areas

To Whom It May Concern:

As stated in Chapter 1446, Section 13, of the City of Monroe Codified Ordinance, a Floodplain Development Permit shall be obtained prior to any construction or other development activity including, but not limited to, filling, grading, construction, alteration, remodeling, or expanding any structure, or alteration of any watercourse wholly within, partially within or in contact with any identified special flood hazard area. As the property owner, you are currently in violation of this Section of the Code.

You are hereby notified that you have thirty (30) days of receipt of this letter to correct the fill and the earthen berm to comply with the City of Monroe Ordinances, consistent with the decision of the Warren County Common Pleas Court, date February 24, 2021 and Final Judgement Entry, filed March 12, 2021, copies of which are enclosed.. Failure to comply with this order shall be deemed a strict liability offense, and shall constitute a fourth degree misdemeanor. In order to be in compliance, a proper application must be filed containing all elements stated within Chapter 1446 Section 13 (a).

As outlined in Chapter 1446 Section 28 you may appeal this decision thru the City of Monroe Board of Zoning Appeals.

If you have any questions or concerns please feel free to contact me via phone at (513) 539-7374 or email at brockb@monroeohio.org.

Respectfully,

William Brock, P.E.
City Manager
City of Monroe

EXHIBIT A

Filed in Warren County on 03/12/2021 11:56:52 AM

FAO 3/12/21 cp

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

TO THE CLERK
SERVE NOTICE OF JUDGMENT
PURSUANT TO CIVIL RULE 58(B)

Disposition Code: OT

STATE OF OHIO ex. rel. Solid
Rock Ministries International, et. al., :

CASE NO. 19-CV-92927

Realtor, :

JUDGE TIMOTHY N. TEPE
Magistrate Sarah M. Foster

v. :

CITY OF MONROE, :

FINAL JUDGMENT ENTRY
GRANTING WRIT OF MANDAMUS
AND TERMINATION ENTRY

Respondent. :

On February 24, 2021, this Court issued a Decision Granting a Writ of Mandamus. First, this shall constitute a Final Judgment Entry Granting the Writ of Mandamus against the City of Monroe. Second, this Final Judgment Entry orders the Sheriff of Warren County, Ohio, to serve a certified copy of this Writ of Mandamus in accordance with § 2731.08 of the Ohio Revised Code by personal service upon the City of Monroe. Third, this Final Judgment Entry shall assess costs against the City of Monroe in accordance with §2731.11 of the Ohio Revised Code. Fourth, this Judgment Entry shall constitute a Final Appealable Order of this Court for which any appeal shall be calculated from this date of filing this Final Judgement Entry. Fifth, with this Final Judgment Entry, this case is terminated on the Docket of the Common Pleas Court of Warren County, Ohio.

First, it is an **ORDER** of this Court granting a Writ of Mandamus against the City of Monroe, Ohio, as follows:

EXHIBIT A

1. The City of Monroe is **ORDERED** to issue a Notice of Violation to Benedict Enterprises, Inc. requiring it to correct the fill to comply with the City of Monroe Ordinances, consistent with this Court's Decision dated February 24, 2021.
2. The City of Monroe is **ORDERED** to issue a Notice of Violation to Benedict Enterprises, Inc. requiring it to correct the earthen berm to comply with the City of Monroe Ordinances, consistent with this Court's Decision dated February 24, 2021.

Second, it is an **ORDER** of this Court that the Sheriff of Warren County, Ohio, shall personally serve the City of Monroe at 233 South Main Street Monroe, Ohio 45050, Attention City Manager, with a certified copy of this Court's Decision Granting Writ of Mandamus and a certified copy of this Final Judgment Entry. The Sheriff shall make a return to the Clerk of Court evidencing personal service upon the City of Monroe in accordance with § 2731.08 of the Ohio Revised Code.

Third, in accordance with § 2731.11 of the Ohio Revised Code all costs shall be assessed against the City on Monroe for all costs of this action. In addition to the costs described in the docket of the clerk of court, additional costs shall also be assessed against the City of Monroe for the subpoena fee for the appearance of Jordan Parker (\$25.00), Charles Petty (\$15.00), William Brock (\$15.00); for a total of \$55.00 additional costs.

Fourth, this Final Judgment Entry shall constitute a Final Appealable Order and there is no just reason for delay.

Fifth, the case is terminated on the docket of the Common Pleas Court of Warren County, Ohio.

IT IS SO ORDERED.



JUDGE TIMOTHY N. TEPE
Warren County Common Pleas Court

EXHIBIT A

Filed in Warren County on 02/24/2021 11:07:20 AM

**IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION**

STATE OF OHIO ex. rel. Solid Rock Ministries International, et.al.,	:	CASE NO. 19-CV-92927
Relator,	:	JUDGE TIMOTHY N. TEPE Magistrate Sarah M. Foster
	:	
v.	:	<u>DECISION GRANTING WRIT OF MANDAMUS</u>
CITY OF MONROE,	:	
	:	
Respondent.	:	

This matter came before the Court on November 23, 2020 for a bench trial on the petition for mandamus brought by relator State of Ohio ex. rel. Solid Rock Ministries (individually, “Solid Rock”) against respondent City of Monroe (“the City”).

Upon the information presented at trial, as well as the post-trial briefs submitted by both parties, the Court finds that Solid Rock has established by a preponderance of the evidence that they are entitled to a writ of mandamus for part of the relief they request – specifically, the Court will order the City to enforce its ordinances to (1) require Benedict Enterprises, Inc. (“BEI”) to remove the fill from within and above the banks of Shaker Creek and (2) to modify the earthen berm in order to reconnect the FEMA-designated floodway.

However, as further explained below, the Court will not order the City to retroactively commence prosecution against BEI and Majors Enterprises, Inc. for the unauthorized construction of a culvert on BEI’s property, as this culvert has been removed and BEI and Majors are now in compliance with the ordinances.

Findings of Fact

At the trial in this matter, the Court heard expert testimony from Matthew Gramza, who is a professional engineer who has devoted his practice to floodplain management, erosion, and sediment control; William Brock, who is the floodplain administrator, city manager, and city engineer for the City; Darrell Smith, the church administrator for Solid Rock; Charles Petty, who

EXHIBIT A

works for the Warren County Engineer's Office; Lawrence Bishop, the Pastor of Solid Rock Church and owner of the property at issue, and Jordan Parker, the City of Monroe Engineering Technician.

Based on the cumulative testimony and the exhibits submitted, the Court finds that the following facts have been established. Solid Rock is located adjacent to property owned by BEI. Both properties are located in a special flood hazard area and are required to comply with the City of Monroe Code of Ordinances in order to make any modifications that may impact water flow in those areas.

On May 1, 2018, the City learned from Warren County Engineer's Office that a culvert had been constructed on BEI's property. Neither BEI nor Majors (which constructed the culvert) had obtained a floodplain development permit to construct the culvert. On May 25, 2018, Mr. Parker, Monroe's engineering technician, sent BEI a letter informing them that they had to remove the culvert immediately because it was causing flooding issues for upstream properties, including Solid Rock's property. On February 7, 2019, Mr. Parker sent BEI another letter ordering them to remove the culvert. On February 14, 2019, Mr. Brock, the City's floodplain administrator and city manager, sent BEI a letter informing them that they were in violation of the City of Monroe Ordinance 1446.13. The letter provided, in pertinent part:

As the property owner, you are currently in violation of this Section of the Code. You are hereby notified that you have fifteen (15) days to remove the culvert structure that was constructed within the special flood hazard area. Failure to comply with this order shall be deemed a strict liability offense, and shall constitute a fourth degree misdemeanor.

Following this letter, BEI attempted to work with the City to allow the culvert to remain, but ultimately, after a study and analysis of the pipes used for the culvert, on December 12, 2019, Mr. Brock sent BEI another letter ordering that the culvert be removed. By January 7, 2020, the culvert had been removed.

Additionally, the testimony and exhibits establish that an earthen berm is located on BEI's property. This earthen berm was never authorized as a FEMA-approved structure in the floodway, has never been approved by the City, and it cuts off a significant amount of acreage from serving as floodplain storage.

EXHIBIT A

Finally, the testimony and exhibits establish that a substantial amount of rock fill has been intentionally deposited into and upon the banks of Shaker Creek on BEI's property, without a floodplain development permit for such fill.

Conclusions of Law*1) Writ of Mandamus*

To be entitled to a writ of mandamus, the relator must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Zander v. Judge of Summit Cty. Common Pleas Court*, 2019-Ohio-1704, ¶ 4, 156 Ohio St. 3d 466, 467, 129 N.E.3d 401, 403. Moreover, mandamus will not issue to compel an act that has already been performed. *State ex rel. Madsen v. Jones*, 2005-Ohio-4381, ¶ 11, 106 Ohio St. 3d 178, 179, 833 N.E.2d 291, 292.

2) Monroe Code of Ordinances Chapter 1446 – Flood Damage Reduction

The Monroe Code of Ordinances, chapter 1446 (“Flood Damage Reduction”) applies to all areas of special flood hazard within the jurisdiction of the City of Monroe, including the land at issue in this case. Section 1446.13 provides that the following is prohibited without first obtaining a flood development permit:

It shall be unlawful for any person to begin construction or other development activity including but not limited to filling; grading; construction; alteration, remodeling, or expanding any structure; or alteration of any watercourse wholly within, partially within or in contact with any identified special flood hazard area, as established in section 1446.06, until a floodplain development permit is obtained from the floodplain administrator. Such floodplain development permit shall show that the proposed development activity is in conformity with the provisions of this chapter. No such permit shall be issued by the floodplain administrator until the requirements of this chapter have been met.

Section 1446.12 establishes the duties and responsibilities of the City's floodplain administrator:

The duties and responsibilities of the floodplain administrator shall include but are not limited to:

- (1) Evaluate applications for permits to develop in special flood hazard areas.

EXHIBIT A

- (2) Interpret floodplain boundaries and provide flood hazard and flood protection elevation information.
- (3) Issue permits to develop in special flood hazard areas when the provisions of this chapter have been met, or refuse to issue the same in the event of noncompliance.
- (4) Inspect buildings and lands to determine whether any violations of this chapter have been committed.
- (5) Make and permanently keep all records for public inspection necessary for the administration of this chapter including flood insurance rate maps, letters of map amendment and revision, records of issuance and denial of permits to develop in special flood hazard areas, determinations of whether development is in or out of special flood hazard areas for the purpose of issuing floodplain development permits, elevation certificates, variances, and records of enforcement actions taken for violations of this chapter.
- (6) Enforce the provisions of this chapter.
- (7) Provide information, testimony, or other evidence as needed during variance hearings.
- (8) Coordinate map maintenance activities and FEMA follow-up.
- (9) Conduct substantial damage determinations to determine whether existing structures, damaged from any source and in special flood hazard areas identified by FEMA, must meet the development standards of this chapter.

Section 1446.29 (“Enforcement; violations and penalties”) delineates the procedures the floodplain administrator must follow to enforce the requirements of chapter 1446. It provides:

- (a) *Compliance required.*
 - (1) No structure or land shall hereafter be located, erected, constructed, reconstructed, repaired, extended, converted, enlarged or altered without full compliance with the terms of this chapter and all other applicable regulations which apply to uses within the jurisdiction of this chapter, unless specifically exempted from filing for a development permit as stated in section 1446.14.
 - (2) Failure to obtain a floodplain development permit shall be a violation of this chapter and shall be punishable in accordance with division (c) below of this section.

EXHIBIT A

- (3) Floodplain development permits issued on the basis of plans and applications approved by the floodplain administrator authorize only the use, and arrangement, set forth in such approved plans and applications or amendments thereto. Use, arrangement, or construction contrary to that authorized shall be deemed a violation of this chapter and punishable in accordance with division (c) below of this section.

- (b) *Notice of violation.* Whenever the floodplain administrator determines that there has been a violation of any provision of this chapter, he or she shall give notice of such violation to the person responsible therefore and order compliance with this chapter as hereinafter provided. Such notice and order shall:
 - (1) Be put in writing on an appropriate form;
 - (2) Include a list of violations, referring to the section or sections of this chapter that have been violated, and order remedial action, which, if taken, will effect compliance with the provisions of this chapter;
 - (3) Specify a reasonable time for performance;
 - (4) Advise the owner, operator, or occupant of the right to appeal;
 - (5) Be served on the owner, occupant, or agent in person. However, this notice and order shall be deemed to be properly served upon the owner, occupant, or agent if a copy thereof is sent by registered or certified mail to the person's last known mailing address, residence, or place of business, and/or a copy is posted in a conspicuous place in or on the dwelling affected.

- (c) *Violations and penalties.* Violation of the provisions of this chapter or failure to comply with any of its requirements shall be deemed to be a strict liability offense, and shall constitute a fourth degree misdemeanor. Any person who violates this chapter or fails to comply with any of its requirements shall upon conviction thereof be fined or imprisoned as provided by the laws of the City of Monroe. Each day such violation continues shall be considered a separate offense. Nothing herein contained shall prevent the City of Monroe from taking such other lawful action as is necessary to prevent or remedy any violation. The City of Monroe shall prosecute any violation of this chapter in accordance with the penalties stated herein.

3) *Mandamus Relief Requested*

1. *Order Prosecution against BEI and Majors for the Culvert Construction*

First, Solid Rock seeks a writ of mandamus from the Court compelling the City to commence prosecution under section 1446.29(c) against BEI and Majors. Solid Rock contends

EXHIBIT A

that BEI and Majors violated sections 1446.13 and 1446.29 by constructing a culvert in a special flood hazard area without applying for a floodplain development permit and that the City ordinances require that they be prosecuted for the violation. Further, Solid Rock argues BEI and Majors committed continuing violations each day that they failed to remove the culvert after they were ordered to do so; specifically, for six hundred twenty-three (623) days from May 25, 2018 (when they were ordered to remove) and approximately January 7, 2020 (the date it was removed).

In response, the City states that Mr. Brock, the floodplain administrator, correctly followed the procedures laid out in the ordinance by determining a violation had occurred, notifying BEI and ordering correction of the violation, and ultimately, ensuring the violation was corrected. As a result, the City argues prosecution is not warranted because BEI is now in compliance with the ordinances.

Indeed, the testimony at trial established that BEI and Majors constructed an unapproved culvert without a floodplain development permit. Therefore, the floodplain administrator, Mr. Brock, issued a notice of violation in compliance with 1446.29(b) to BEI. This notice contained the required language and ordered remedial action to be taken. This remedial action was taken, although the floodplain administrator appeared to allow BEI an inordinately long time to remove the culvert without any repercussions. Notwithstanding, the issue then becomes whether the City should be compelled under the ordinances to initiate prosecution for the time between the notice of violation and the removal of the culvert.

The plain language of 1446.29(c) is not a model of clarity, but appears to provide the City with discretion over when to initiate prosecution: “Violation of the provisions of this chapter *or* failure to comply with any of its requirements shall be deemed to be a strict liability offense, and shall constitute a fourth degree misdemeanor” (emphasis added). The City argues that this language allows it to give violators an opportunity to comply with the statute. Indeed, the language of subsection (b) right above it confirms this interpretation – it lays out the notice that shall be given and what can be done to bring a property into compliance. In this instance, BEI and Majors corrected the violation and so whether they should be prosecuted becomes moot. Since the Court is required to construe the ordinances in favor of the governmental entity, it would not be appropriate to order the City to commence prosecution now that the violation has been corrected.

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2. *Order Removal of the Fill in Shaker Creek and Above the Banks of Shaker Creek*

Next, Solid Rock seeks a writ of mandamus to compel BEI to remove the rock fill that is currently located in the floodway, floodplain, and special hazard area of Shaker Creek, as Solid Rock contends that it was placed there without a permit. In response, the City argues that there was no testimony about who/what/where/when this fill came from. Also, the City argues that, in his discretion, Mr. Brock did not find that a violation occurred.

Section 1446.11 defines “fill” as “a deposit of earth material placed by artificial means.” At trial, the evidence demonstrated that fill in the form of large rocks has been placed along Shaker Creek and no permit had ever been issued approving this fill. According to the City, the floodplain administrator determined that this is not a violation of the ordinances.

However, the ordinances plainly state that “it shall be unlawful for any person to begin construction or other development activity including but not limited to **filling**[...]until a floodplain development permit is obtained from the floodplain administrator.” As unauthorized fill remains in and on the banks of Shaker Creek, it is an abuse of the floodplain administrator’s discretion to unilaterally determine that no violation has occurred. Therefore, the City is ordered to issue a notice of violation to BEI requiring that it correct the violation to comply with the ordinances.

3. *Order the Earthen Berm to be Modified*

Finally, Solid Rock has established that an earthen berm exists on BEI’s property. This berm is 3100 feet long, 40 feet wide, has an average height of 7.5 feet and maximum height of 8.5 feet. The testimony at trial established that this berm cuts off 80% of the floodway and 56 acres of floodway storage. This berm causes Shaker Creek to back up and flood upstream properties, including Solid Rock. Solid Rock argues that the berm violates Chapter 1446 as no permits for the berm exist and the berm does not appear on either FEMA or Army Corp of Engineers’ maps. The City asserts that there was no testimony and there is no evidence regarding when or how the earthen berm was built or who put it in place. As a result, the City argues that there was never any need for a development permit since they don’t have knowledge of its being built.

EXHIBIT A

However, the Court finds that the City's argument is not in keeping with the spirit of Chapter 1446 as a whole. The fact remains that the unauthorized berm exists in the floodway and it is causing flooding for certain properties. Moreover, 1446.29(a)(3) provides, in pertinent part, "Use, arrangement, or construction contrary to that authorized shall be deemed a violation of this chapter and punishable in accordance with division (c) below of this section."

The plain language of the ordinance states that "use" contrary to what is authorized is also a violation. Whether or not BEI constructed the berm is of little consequence because the use of the berm on its property is an unauthorized use. For this reason, the City is ordered to issue a notice of violation to BEI requiring that the berm be modified to be in compliance with the ordinances.

Conclusion

Based on the foregoing, Solid Rock has established by clear and convincing evidence that it is entitled to the following mandamus relief:

- 1) The City is ordered to issue a notice of violation to BEI requiring that it correct the fill violation to comply with the city ordinances;
- 2) The City is ordered to issue a notice of violation to BEI requiring that the earthen berm be modified to be in compliance with the ordinances.

Counsel for Solid Rock shall submit a proposed final judgment entry granting the writ of mandamus within fourteen (14) days to the Court for signature.

IT IS SO ORDERED.



JUDGE TIMOTHY N. TEPE
Warren County Common Pleas Court

c: All parties of record

EXHIBIT B



June 27, 2022

Benedict Enterprises, Inc.
Corporate Office
750 Lakeview Drive
Monroe, OH 45050

RE: Floodway Encroachment – Shaker Creek Earthen Berm and Other Fill Areas

To Whom It May Concern:

As stated in Chapter 1446, Section 13, of the City of Monroe Codified Ordinance, a Floodplain Development Permit shall be obtained prior to any construction or other development activity including, but not limited to, filling, grading, construction, alteration, remodeling, or expanding any structure, or alteration of any watercourse wholly within, partially within or in contact with any identified special flood hazard area. As the property owner, you are currently in violation of this Section of the Code.

You are hereby notified that you have thirty (30) days of receipt of this letter to correct the fill and the earthen berm to comply with the City of Monroe Ordinances, consistent with the decision of the Warren County Common Pleas Court, date February 24, 2021 and Final Judgement Entry, filed March 12, 2021, copies of which are enclosed.. Failure to comply with this order shall be deemed a strict liability offense, and shall constitute a fourth degree misdemeanor. In order to be in compliance, a proper application must be filed containing all elements stated within Chapter 1446 Section 13 (a).

As outlined in Chapter 1446 Section 28 you may appeal this decision thru the City of Monroe Board of Zoning Appeals.

If you have any questions or concerns please feel free to contact me via phone at (513) 539-7374 or email at brockb@monroeohio.org.

Respectfully,

1. The City of Monroe is **ORDERED** to issue a Notice of Violation to Benedict Enterprises, Inc. requiring it to correct the fill to comply with the City of Monroe Ordinances, consistent with this Court's Decision dated February 24, 2021.
2. The City of Monroe is **ORDERED** to issue a Notice of Violation to Benedict Enterprises, Inc. requiring it to correct the earthen berm to comply with the City of Monroe Ordinances, consistent with this Court's Decision dated February 24, 2021.

Second, it is an **ORDER** of this Court that the Sheriff of Warren County, Ohio, shall personally serve the City of Monroe at 233 South Main Street Monroe, Ohio 45050, Attention City Manager, with a certified copy of this Court's Decision Granting Writ of Mandamus and a certified copy of this Final Judgment Entry. The Sheriff shall make a return to the Clerk of Court evidencing personal service upon the City of Monroe in accordance with § 2731.08 of the Ohio Revised Code.

Third, in accordance with § 2731.11 of the Ohio Revised Code all costs shall be assessed against the City on Monroe for all costs of this action. In addition to the costs described in the docket of the clerk of court, additional costs shall also be assessed against the City of Monroe for the subpoena fee for the appearance of Jordan Parker (\$25.00), Charles Petty (\$15.00), William Brock (\$15.00); for a total of \$55.00 additional costs.

Fourth, this Final Judgment Entry shall constitute a Final Appealable Order and there is no just reason for delay.

Fifth, the case is terminated on the docket of the Common Pleas Court of Warren County, Ohio.

IT IS SO ORDERED.



JUDGE TIMOTHY N. TEPE
Warren County Common Pleas Court

This is a corrected notice originally run on *OCTOBER 1ST, 2022* for the Board of Zoning Appeals October 24th, 2022 hearing

LEGAL NOTICE

Notice is hereby given of a public hearing before the Monroe Board of Zoning Appeals on Monday, October 24, 2022, at 6:00 PM in the City Council Chambers, 233 South Main Street, Monroe, Ohio. The Board of Zoning Appeals will consider an appeal from John H. Stachler of StachlerHarmon Attorneys at Law (7810 McEwen Road, Suite B, Dayton, Ohio 45459), on behalf of property owner Benedict Enterprises, Inc., to code section 1446.13: Floodplain development permits; application; inspections; revocation of the Code of Ordinances for Parcel 0701300014 situated north of Lakeview Drive and east of Garver Road.

The public may appear at the public hearing, be heard, and submit evidence and written comments with respect to the application. Monroe will provide assistance to persons with disabilities, needing interpreters, other auxiliary aids, and services in order to participate in this meeting. Any request for such assistance must be made no later than 72 hours in advance of the meeting by contacting the Development Department at 513-539-7374.

All documentation regarding the application can be viewed at the City of Monroe Development Department located at 233 S. Main Street, Monroe, Ohio 45050. Written comments can also be presented prior to the public hearing at the address listed above. Development Department staff is also available to answer any questions related to the application and can be reached at 513-539-7374.



The Board of Zoning Appeals meeting adjourned at 6:05 p.m.

Respectfully submitted,

Michelle Layman
Planning and Zoning Specialist