

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0810

GAYLE K. SPERRY, KRISTOFER
SPERRY, EVELYN SPERRY, and
MYRDDIN WINE COMPANY,

CASE NO. _____

Appellants,

v.

JENNIFER TERRY, ZONING INSPECTOR,
MILTON TOWNSHIP,

Appellee.

On Appeal from Mahoning
County Court of Appeals,
Seventh Appellate District

Court of Appeals
Case No. 08-MA-227

APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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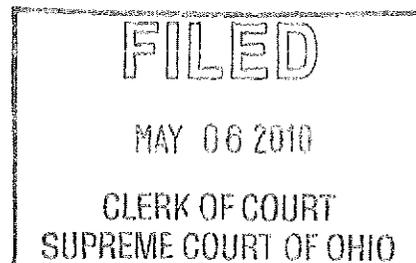


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I. PROPOSITION OF LAW NO. 1

Pursuant to the provisions of R.C. §519.21(A), land that is otherwise subject to zoning by a township pursuant to Chapter 519 of the Ohio Revised Code is exempt from such zoning if “any part” of the land is used for viticulture. A property owner engages in “viticulture” within the meaning of R.C. §519.21(A) if the owner grows one or more grapevines for the purpose of making wine.

II. EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED AND WHY THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

A. Exercise Of The Zoning Power In Excess Of Statutory Authority Is A Regulatory Taking Of Private Property In Violation Of Article I, Section 19 Of The Ohio Constitution

This case is about a township’s power to restrict the use of property used for viticulture (e.g., growing of grapes for winemaking) in the face of a specific statutory exemption for that activity. The exemption is contained in the statute generally referred to as the “agricultural exemption” statute, Ohio Revised Code (R.C.) §519.21(A). Most notably, the statute makes special provision for viticulture which the dissenting opinion in the Court of Appeals acknowledged, but which the majority refused to recognize. The statute under review reads, in relevant part¹, as follows:

¹ The full text of R.C. §519.21 reads as follows:

(A) Except as otherwise provided in division (B) of this section, sections 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, including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture, and no zoning certificate shall be required for any such building or structure.

(B) A township zoning resolution, or an amendment to such resolution, may in any platted subdivision approved under section 711.05, 711.09, or 711.10 of the Revised Code, or in any area consisting of fifteen or more lots approved under section 711.131 of the Revised Code that are contiguous to one another, or some of which are contiguous to one another and adjacent to one side of a dedicated public road, and the balance of which are contiguous to one another and adjacent to the opposite side of the same dedicated public road regulate:

(1) Agriculture on lots of one acre or less;

(A) ... sections 519.02 to 519.25 of the Revised Code confer ***no power*** on any township ... to prohibit the ... use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, ***including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture ...***

It is well settled law in Ohio that the exercise of the zoning power in excess of statutory authority is a “taking” of private property in violation of Article I, Section 19 of the Ohio Constitution. That rule of law was established by this Court over 90 years ago. In *State ex rel. Moore Oil Co. v. Dauben* (1919), 99 Ohio St. 406, 124 N.E. 232, the Court established the following rule of construction when dealing with zoning statutes. The Court said:

Statutes or ordinances of a penal nature, or which restrain the exercise of any trade or occupation, or the conduct of any lawful business, or which impose restrictions upon the use, management, control, or alienation of private property, will be strictly construed, and their scope cannot be extended to include limitations not therein clearly prescribed; ***exemptions from such restrictive***

(2) Buildings or structures incident to the use of land for agricultural purposes on lots greater than one acre but not greater than five acres by: set back building lines; height; and size;

(3) Dairying and animal and poultry husbandry on lots greater than one acre but not greater than five acres when at least thirty-five per cent of the lots in the subdivision are developed with at least one building, structure, or improvement that is subject to real property taxation or that is subject to the tax on manufactured and mobile homes under section 4503.06 of the Revised Code. After thirty-five per cent of the lots are so developed, dairying and animal and poultry husbandry shall be considered nonconforming use of land and buildings or structures pursuant to section 519.19 of the Revised Code.

Division (B) of this section confers no power on any township zoning commission, board of township trustees, or board of zoning appeals to regulate agriculture, buildings or structures, and dairying and animal and poultry husbandry on lots greater than five acres.

(C) Such sections confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit in a district zoned for agricultural, industrial, residential, or commercial uses, the use of any land for a farm market where fifty per cent or more of the gross income received from the market is derived from produce raised on farms owned or operated by the market operator in a normal crop year. However, a board of township trustees, as provided in section 519.02 of the Revised Code, may regulate such factors pertaining to farm markets as size of the structure, size of parking areas that may be required, set back building lines, and egress or ingress, where such regulation is necessary to protect the public health and safety.

provisions are for like reasons liberally construed. (citations omitted) (emphasis added)

See, *State ex rel. Moore Oil Co. v. Dauben* (1919), 99 Ohio St. 406, 411, 124 N.E. 232, 233 – 234.

The rule of construction quoted above was affirmed by this Court as recently as 1981, where the Court stated:

All zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. (citations omitted) Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed. (citations omitted)

See, *Saunders v. Clark County Zoning Dept.* (1981), 66 Ohio St.2d 259, 261, 421 N.E.2d 152, 154.

For reasons explained in Section IV, *infra*, the majority opinion of the Court of Appeals violated the above-quoted rules of statutory construction by narrowly construing the agricultural exemption, particularly as it applies to the express exemption for activities related to viticulture.

B. Determining The Scope Of The “Viticulture” Exemption Established In R.C. §519.21(A) Is Crucial To The Winemaking Industry In Ohio

This case is of public or great general interest because wine making is a large industry in Ohio that benefits the entire State. If the majority decision of the Court of Appeals is allowed to stand, it will allow local zoning officials to put small wineries out of business. This will not only have adverse economic consequences for winemakers throughout the State, it will severely undermine the legislative intent behind R.C. §519.21(A), which is to promote wine making in Ohio.

Winemaking provides a large job market in Ohio² and it is still growing. The National Association of American Wineries recognizes Ohio as the ninth (9th) largest wine producer in the United States, with 126 wineries producing in excess of 1.1 million gallons of wine per year.³ The economic importance of this industry to Ohio was expressly recognized by the legislature in the plain language of R.C. §519.21(A). Not content to lump vinting and viticulture with the general provisions related to “agricultural,” the legislature made specific provision for viticulture in the agricultural exemption statute. In unambiguous language, the legislature declared that townships have “no power” to regulate the vinting and selling of wine if those activities occur on land “any part of which” is used for viticulture. As in *Moore*, the language of the exemption could not be more clear, yet the exemption was denied by the lower courts.

The dissenting opinion in the Court of Appeals decision got it right, and the Court is urged to carefully review dissenting Judge DeGenaro’s opinion. Her reasoning is sound—and it is right. For this reason, the Court is urged to accept this case for review and reverse the majority opinion for reasons stated in the dissent. The alternative is to allow the majority decision to stand, in which case the winemaking industry in Ohio would be severely, and adversely, affected.

² As the Ohio Winemakers Association states: “The turning point for the Ohio Wine industry came in the early 1960's with the planting of French-American varieties in southern Ohio, encouraged largely by The Ohio State University's Ohio Agricultural Research and Development Center in Wooster. The hardy, disease-resistant grapes produced wines similar to the older European vinifera varieties. Their success in the south encouraged plantings in the Lake Erie Grape Belt. Since 1965, more than 40 new wineries have been established across the state ...”.Source: http://www.ohiowines.org/info_pack.shtml, May 5, 2010.

³ Source: “General Information about the U.S. Wine Industry” Published by the National Association of American Winemakers, located at <http://www.wineamerica.org/newsroom/docs/Wine%20Industry%20Fact%20Sheet%2009.pdf>

III. STATEMENT OF THE CASE AND FACTS

This honorable Court has never addressed the scope of the zoning exemption established for the winemaking industry by the Ohio legislature's passage of R.C. §519.21(A). This case concerns the meaning of the phrase "any part of which is used for viticulture" in that statute.

Appellant Gayle Sperry owns property located in Milton Township. The property was a vacant lot prior to her purchase in 1995. Since the date of her purchase, Appellant Gayle Sperry built her residence there along with a freestanding addition. Appellant Kristofer Sperry and his wife, Appellant Evelyn Sperry, are the son and daughter-in-law of Appellant Gayle Sperry. Appellants Gayle, Kristofer, and Evelyn Sperry collectively operate a winery known as Myrddin Wine Company, LLC dba Myrddin Winery (the "Winery") on the property at 3020 Scenic Avenue ("Winery Property") located within the political subdivision of Milton Township.

Before beginning their winemaking operation, however, Appellants sought and obtained the necessary state and federal permits, including a permit from the Tobacco Trade Bureau (formerly part of the Bureau of Alcohol, Tobacco and Firearms), an A-2 permit issued by the Ohio Division of Liquor Control specifically for wineries, and a vendor permit from Mahoning County. Before Appellants began actual operation of the Winery, Appellant Kristofer Sperry made a phone call to the then Milton Township Zoning Inspector, Betsy Opre ("Zoning Inspector Opre"), and inquired whether a permit from the Township was needed and, if so, the type of permit required. Zoning Inspector Opre informed Appellant Kristofer Sperry that his proposed used was permissible. Appellant Kristofer Sperry was further told that he did not need to come to the office and pick up a certificate allowing him to start the Winery operations. He was told that

he could just start. It was stipulated at trial that zoning certificates in Milton Township are only issued orally by the zoning inspector and not in writing.⁴

Relying on the representations of Zoning Inspector Opre, Appellants began their winemaking operation. The activities conducted in the operation of the Winery are like any other winery. Grapes and other fruits are grown and harvested for wine. Grapes are de-stemmed and crushed, then moved into the fermentation process. The wine is aged then bottled, labeled, and readied for sale. The wine is made and stored at the property that is the subject of this appeal, to wit: The Winery Property located at 3020 Scenic Avenue, within the political subdivision of Milton Township.

The Winery Property is approximately two acres in size and, while approximately five percent of the grapes used in production are grown on the Winery Property, the majority of grapes are grown on other properties and brought to the Winery Property for processing and sale.⁵

On January 23, 2008, Milton Township filed a complaint in the Court of Common Pleas of Mahoning County pursuant to R.C. §519.24 that alleged Appellants' Winery was in violation of Milton Township Zoning Resolution Section 5, B. "R-1" *Residential District* and Section 4,

⁴ See, Trial Record, Jennifer Terry Tr. pp.17, 18 and Stipulation of Facts at Paragraph 20.

⁵ It was noted at trial that Appellants, like most wineries, grow most of their grapes on other properties. At the time of summary judgment Appellants actually had control of approximately 800 grape vines on a plot in excess of 90 acres, on the opposite side of the road from the Winery's property, through a sharecropping agreement with the owner of the plot. The Winery Property in question is approximately two acres and had approximately 20 grape vines planted at time of trial. There are presently around 50 grape vines on the Winery Property. See, Defendant's Supplemental Brief in Opposition to Plaintiff's Motion for Order of the Court Granting Relief as Prayed for In Plaintiff's Complaint, at p. 3.

*Definitions.*⁶ After cross motions for summary judgments were filed, the Mahoning County Court of Common Pleas issued its Judgment Entry, which granted the Township's Motion. Appellants appealed the Trial Court decision to the Court of Appeals for the Seventh Circuit.

In a 2-1 decision, the Court of Appeals affirmed the Trial Court's grant of summary judgment in favor of the Township. By this appeal, Appellants ask the Ohio Supreme Court to reverse the majority opinion in the Court of Appeals and adopt the reasoning of Judge DeGenaro's dissenting opinion, which was to apply the language of R.C. §519.21(A) as it is written.

IV. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

A. The Decision Below

As noted, township zoning is governed by Chapter 519 of the Ohio Revised Code. The definition of "agriculture" for purposes of Chapter 519 is set out in R.C. §519.01 and reads as follows:

As used in section 519.02 to 519.25 of the Revised Code, "*agriculture*" includes farming; ranching; aquaculture; apiculture; horticulture; *viticulture*; animal husbandry, including, but not limited to, the care and raising of livestock, equine, and fur-bearing animals; poultry husbandry and the production of poultry and poultry products; dairy production; the production of field crops, tobacco, fruits, vegetables, nursery stock, ornamental shrubs, ornamental trees, flowers, sod, or mushrooms; timber; pasturage; any combination of the foregoing; the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production.

See, R.C. § 519.01

Applying the above-quoted language, the Court of Appeals first noted that the proper definition of "viticulture" is "the cultivation or culture of grapes especially for winemaking."⁷

⁶ Under R.C. §519.24, Appellants were not required to be served with a notice of zoning violation from which the Complaint arose and therefore Appellants did not have the opportunity to appeal to the Board of Zoning Appeals pursuant to R.C. §519.14.

The Court of Appeals then reasoned that because Appellants' grape growing activities were not the *primary* use of the land, such use failed to qualify as an "agricultural" use within the meaning of R.C. §519.01. In the Court's words: "The agricultural purpose [viticulture] must be the primary use of the property". See Opinion, p. 8.

The dissenting opinion of Judge DeGenaro rejected the majority's reasoning. Applying the time honored rule of statutory construction that "a specific statutory provision prevails over a conflicting general provision,"⁸ Judge DeGenaro first noted that it was undisputed at trial that Appellants used part of the land for viticulture⁹ and that the main building on the property "is primarily used for vinting and selling wine."¹⁰ On such facts, Judge DeGenaro correctly reasoned that the express exemption established for viticulture in R.C. §519.21(A) applied. Under that statute, the Township had "no power" to impose zoning restrictions on the property.

Although the Trial Court's decision turned on legislative intent, the opinion is devoid of any discussion or analysis of the true legislative intent behind R.C. §519.01 and R.C. §519.21. Similarly, the majority opinion of the Court of Appeals fails to consider the legislative intent behind an express, and very specific, exemption for the wine making industry. Before addressing that issue, however, it is useful to examine the legislature's general approach to the agricultural exemption from zoning.

B. The Ohio Legislature Intended That R.C. §519.01 Be Broadly Construed

Although R.C. §519.01 is the definitional section of Chapter 519 of the Ohio Revised Code, it defines only one term - "agriculture." The statute was first enacted in 1953. The 1953 version of this statute read as follows:

⁷ See Court of Appeals Opinion, p. 5.

⁸ See Court of Appeals Opinion, Dissent, p.2.

⁹ See, *Id.*,

¹⁰ See, *Id.*, p. 3

As used in sections 519.02 to 519.25, inclusive, of the Revised Code, 'agriculture' includes agriculture, farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture, and animal and poultry husbandry. (emphasis added)

See, 1994 Ohio Laws File 91 (S.B. 134).

In 1994, the Ohio legislature amended R.C. §519.01 to greatly expand the definition of agriculture. The statute now reads as follows:

As used in section 519.02 to 519.25 of the Revised Code, "agriculture" includes farming; ranching; aquaculture; apiculture; horticulture; viticulture; animal husbandry, including, but not limited to, the care and raising of livestock, equine, and fur-bearing animals; poultry husbandry and the production of poultry and poultry products; dairy production; the production of field crops, tobacco, fruits, vegetables, nursery stock, ornamental shrubs, ornamental trees, flowers, sod, or mushrooms; timber; pasturage; any combination of the foregoing; the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production. (emphasis added)

See, R.C. §519.01.

Courts in many other jurisdictions have been called upon to interpret the term "agriculture" in the context of a zoning case and they invariably interpret the term expansively.¹¹

¹¹ In *Hagenburger v Los Angeles* (1942), 51 Cal App 2d 161, 124 P2d 345, the Court, referring to an oft-cited definition in Webster's Dictionary, stated that the term "agriculture" is defined "as the art or science of cultivating the ground; the art or science of the production of plants and animals useful to man or beast; it includes gardening or horticulture, fruit growing, and storage and marketing."; In *County of Grundy v Soil Enrichment Materials Corp.* (1973), 9 Ill App 3d 746, 292 N.E.2d 755, the Court stated that the words "agricultural purpose" have been generally interpreted to carry a comprehensive meaning involving the art or science of cultivating the ground; Referring to Webster's Dictionary, the Court in *County of Lake v Cushman* (1976), 40 Ill App 3d 1045, 353 N.E.2d 399, stated that "agriculture" is defined as the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock; tillage; husbandry; farming; and in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of those products for man's use. The definition, the court said, includes farming, horticulture, and forestry together with such subjects as butter and cheese making, sugar making, and the like, noting that unless restricted by context, the words "agricultural purposes" have generally been given this comprehensive meaning by the courts. See, 38 A.L.R.5th 357, "Construction And Application Of The Terms "Agricultural," "Farm," "Farming," Or The Like, In Zoning Regulations." The Ohio Supreme Court relied upon Webster's definition of "agriculture" to interpret R.C. §519.01 in

C. The Size Of An Operation Is Irrelevant To A Determination Of Whether An Activity Is “Agriculture” Within The Meaning Of R.C. §519.01.

The decisions below turn entirely upon the erroneous view that the legislature intended courts to consider the relative size of an operation when determining whether an activity is “agriculture” within the meaning of R.C. §519.01. The Trial Court offered no authority for this view and the Court of Appeals decision relies upon a case easily distinguished on its facts.¹² As noted in the dissent, the cited case of *Concord Twp. Trustees v. Hazelwood Builders Inc.* (2005), 11th Dist. No. 2004-L-012, 2005-Ohio did not involve a viticulture operation that falls squarely within the scope of the statutory example. See Opinion, Dissent, p. 3.

Township Trustees desiring to prohibit the agricultural use of land in derogation of R.C. §§519.01 and 519.21 invariably argue that the activity they wish to regulate is a non-agricultural business use outside the scope of R.C. §519.01. Depending on the facts, Trustees will argue that an operation is too large to be agriculture or, as in this case, too small be agricultural. A recent appellate case that addresses this issue and provides an excellent analysis of a township’s limited power to regulate agriculture is *Meerland Dairy L.L.C. v. Ross Twp.* (Ohio App. 2 Dist.,2008). In that case, the Second District Court of Appeals stated:

The trustees sought to avoid the prohibitions in R.C. 519.21(C) by declaring that farming operations which their zoning regulation classifies as an “agribusiness” are not “agriculture.” *The definition of agriculture in R.C. 519.01 includes “farming” and “dairy production,” and makes no distinction with respect to size. Obviously the statutory provision prevails. [citation omitted] The trustees argue that plaintiffs offered no evidence showing that their operation satisfies the relevant definition of agriculture in R.C. 519.01. The fact that it involves keeping 2,100 dairy cows on approximately 100 acres of unincorporated land for purposes of milk production, a fact not in dispute, is sufficient.*

Mentor Lagoons, Inc. v. Zoning Bd. of Appeals of Mentor Tp. (1958), 168 Ohio St. 113, 119-120, 151 N.E.2d 533, 538 (“In Webster's New International Dictionary (2 Ed.) ‘animal husbandry’ is defined as ...”)

¹² The majority relies upon the case of *Concord Twp. Trustees v. Hazelwood Builders Inc.*, 11th Dist. No. 2004-L-012, 2005-Ohio

See, *Id.*, 2008 WL 1991886, at 3 (emphasis applied).

The above-quoted paragraph applies almost verbatim to the instant case. In this case, the fact that Appellant's use involves viticulture "is sufficient" to bring the activity within the scope of R.C. §519.01.

D. The Search For Legislaive Intent Is Improper Where The Meaning Of A Statute Is Clear And Unambiguous

The Ohio Supreme Court has repeatedly cautioned Ohio's Judiciary to avoid the temptation to rewrite statutes.

The first rule of statutory construction is that a statute which is clear is to be applied, not construed. "There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for." *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, 29 O.O. 4, 56 N.E.2d 265, paragraph eight of the syllabus. *Our obligation is to apply the statute as written. R.W. Sidley, Inc. v. Limbach* (1993), 66 Ohio St.3d 256, 257, 611 N.E.2d 815, 817.

See, *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265-266, 648 N.E.2d 1364, 1367 (emphasis added)

In the instant case, the Court of Appeals acknowledges that viticulture is "agriculture" within the meaning of R.C. §519.01. See, Opinion, p.5. With that conclusion, the court had a duty to apply the provisions of R.C. §519.21(A) as written. The Court failed in that duty.

E. The Plain Language Of R.C. §519.21(A) Prohibits Township Zoning Of Land Where "Any Part" Of The Land Is "Used For Viticulture."

The Ohio legislature's intent is clearly and unambiguously stated in the text of R.C. §519.21(A), which reads as follows:

(A) Except as otherwise provided in division (B) of this section, sections 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, *including buildings or structures that are used primarily for vinting and selling wine and that are located on land*

any part of which is used for viticulture, and no zoning certificate shall be required for any such building or structure.

See, R.C. §519.21(A)

It is ironic that a decision grounded upon legislative intent should be so contrary to the plain intent of the statute. The above-quoted language is not ambiguous and reveals a clear choice on the part of the legislators to prohibit township zoning of the viticulture industry except in very limited circumstances. If “any part” of a lot subject to zoning is used for viticulture, the township has “no power” to prohibit the use of “buildings or structures that are used primarily for vinting and selling wine.”

The language of R.C. §519.21(A) is no accident. The statute recognizes the reality that grapes used in vinting operations are rarely produced at the same location where the processing and winemaking occurs. Nevertheless, the legislature granted townships the power to regulate a “pure” vinting operation, e.g. one in which no grapes are grown at the location where vinting occurs. However, the legislature made it quite clear that if “any part” of the land is devoted to grape production, the townships have “no power” to regulate the use of buildings or structures devoted to the vinting process. Those are precisely the facts presented in this case. See Opinion, p. 1 (“The property contains 20 grape vines, of which ... 12 are harvested.”).

Under the plain language of R.C. §519.21(A) a single grape vine would be sufficient to prohibit township zoning of the entire vinting operation and, contrary to the Trial Court’s view, that is precisely what the legislature intended. Any other outcome would rewrite the statute, and that, a Court may not do. See, *Vought Industries, Inc. v. Tracy, supra*.

V. CONCLUSION

Upon the foregoing points and authorities, Appellants respectfully request that the Court accept this case for review and reverse the decision of Seventh District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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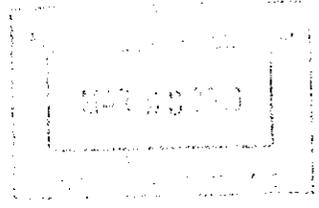
Mail this 6th day of May, 2010, upon the following:

Mark Finamore
258 Seneca Avenue, N.E.
Warren, Ohio 44482



David S. Pennington (0031477)

APPENDIX



STATE OF OHIO)

IN THE COURT OF APPEALS OF OHIO

MAHONING COUNTY)

) SS:

SEVENTH DISTRICT

JENIFER TERRY, ZONING INSP.)
MILTON TOWNSHIP,)

PLAINTIFF-APPELLEE,)

CASE NO. 08-MA-227

VS.)

JUDGMENT ENTRY

GAYLE K. SPERRY, et al.,)

DEFENDANTS-APPELLANTS.)

For the reasons stated in the opinion rendered herein, appellants' three assignments of error are without merit and are overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio, is affirmed. DeGenaro, J. dissents. See dissenting opinion attached.

Costs taxed against appellants.

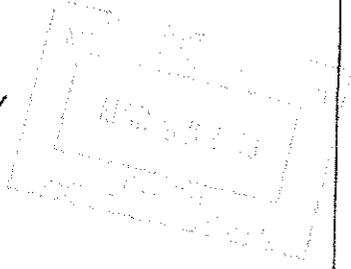
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JUDGES.

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STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT



JENIFER TERRY, ZONING INSP.)
MILTON TOWNSHIP,)
)
PLAINTIFF-APPELLEE,)
)
VS.)
)
GAYLE K. SPERRY, et al.)
)
DEFENDANTS-APPELLANTS.)

CASE NO. 08-MA-227

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 08CV348

JUDGMENT:

Affirmed

APPEARANCES:

For Plaintiff-Appellee

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Kristofer Sperry
Evelyn Sperry
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 23, 2010

DONOFRIO, J.

{¶1} Defendants-appellants, Gayle Sperry, Kristopher Sperry, and Evelyn Sperry, appeal from a Mahoning County Common Pleas Court entry of summary judgment in favor of plaintiff-appellee, Jenifer Terry, the Milton Township Zoning Inspector, finding that their winery is not exempt from Milton Township zoning regulations.

{¶2} Appellant Gayle Sperry owns and resides on property in Milton Township. On this property, she built her home and a freestanding addition. Appellants Kristopher and Evelyn Sperry are Gayle's son and daughter-in-law. Together the three appellants operate Myrddin Winery (the winery) on Gayle's residentially-zoned property, which they opened in May 2005.

{¶3} Prior to commencing operations, appellants contacted the Milton Township Zoning Inspector at the time, Betsy Opre, to inform her of their planned home business and to inquire if there were any local requirements for beginning such an operation. (Kristopher Sperry Dep. 9-10). She informed them that there were no local permits necessary to start such a business and that they could begin their operations immediately. (Kristopher Sperry Dep. 10). Appellants had already obtained the county, state, and federal permits and licenses required for operating the business. (Kristopher Sperry Dep. 12-13). Appellants began operation of the winery based on the oral representation of Opre that they were permitted to do so. (Kristopher Sperry Dep. 10). Zoning certificates in Milton Township are only issued orally by the zoning inspector and not in writing. (Terry Dep. 17).

{¶4} As stated by the trial court, appellants' winery business is as follows:

{¶5} "Defendants make and bottle wine on the premises and sell the wine and other shelf stable foods to customers who enter the premises for that purpose. The property contains 20 grape vines, of which only 12 are harvested. Defendants purchase other grapes and grape juices not grown on the property for use in the production of wine on the premises. The parties stipulate that ninety-five percent (95%) of the sales of bottled wine sold on the premises are from grapes and/or grape juices not planted, cultivated or harvested on the property."

{¶6} To advertise its business, the winery has a three-by-nine inch "rack card" with the winery's name and address on it that is displayed at the winery and some other local wineries. (Evelyn Sperry Dep. 9-10). It has a website listed through the Ohio Department of Agriculture's website and in other publications. (Gayle Sperry Dep. 15). It also had a sign the size of a political yard sign, an arrow on the winery's mailbox, and a sign located across the street from the winery, all informing visitors of the business's location. (Kristopher Sperry Dep. 20-21). The winery also provides off-street parking to its patrons. (Kristopher Sperry Dep. 20).

{¶7} Appellee filed a complaint pursuant to R.C. 519.24 on January 23, 2008, alleging that the winery was in violation of Milton Township Zoning Resolution, Section 5, B, "R-1" Residential District, and Section 4, Definitions¹, and that appellants continued to operate the winery despite notice of their violation of the zoning resolution. Appellee asked that the court permanently enjoin appellants from using their property in violation of the Milton Township Zoning Resolution.

¹ {¶a} These sections provide:

{¶b} "Uses permitted. The following uses are permitted. A zoning certificate may be required as provided for in Section 10 of this Ordinance.

{¶c} "a. Agriculture

{¶d} "b. One family dwellings * * *.

{¶e} "c. Churches and other places of worship.

{¶f} "d. * * * schools * * *.

{¶g} "e. Home Occupations as defined in Section 4.

{¶h} "f. Automobile parking spaces shall be provided as required in Section 6.

{¶i} "g. Accessory buildings.

{¶j} "Home occupations are defined as an occupation conducted in a dwelling unit or small garage provided that:

{¶k} "a. No person other than members of the family residing on the premises shall be engaged in such occupation conducted entirely in the dwelling unit, or garages containing 600 square feet or less.

{¶l} "b. The use of the dwelling unit of the home occupation shall be clearly incidental and subordinate to its use for residential purposes by its occupants, and not more than 25% of the total floor area of the dwelling unit shall be used in the conduct of the home occupation;

{¶m} "c. There shall be no change in the outside appearance of the building or premises or other visible evidence of conduct of such home occupation other than one sign as permitted in Section 8C of this Ordinance;

{¶n} "d. Sufficient offstreet parking shall be provided based on the type of home occupation and such occupation shall not create traffic, parking, sewerage, or water use in excess of what is normal in a residential neighborhood.

{¶o} "e. No equipment or process shall be used in such occupation which creates noise, vibration, glare, fumes, odors, or electrical interference detectable to the normal senses off the lot, if the occupation is conducted in a single family residence, or outside the dwelling unit if conducted in other than a single family residence." (Stipulations of Fact, Number 9).

{¶18} The parties filed cross-motions for summary judgment. They also stipulated to numerous facts and agreed that there were two issues for the trial court to determine: (1) Are the winery activities an agricultural use of the property as defined by R.C. 519.01; and (2) Is the winery exempt from zoning regulation by Milton Township pursuant to R.C. 519.21(A)?

{¶19} The trial court answered both questions in the negative. The court found that the winery's activities of making wine and marketing wine and shelf stable foods on the property were the primary uses and that agriculture was secondary. Therefore, the court found that the production of wine on the property was not agriculture within the meaning of R.C. 519.01. The court went on to reason that because the activities conducted on the property were not an agricultural use of the property, R.C. 519.21(B) does not apply. Therefore, it found that the winery was not exempt from the local zoning regulations. Consequently, the court granted appellee's motion for summary judgment and denied appellants' motion.

{¶10} Appellants filed a timely notice of appeal. On appellants' motion, this court issued a stay of the trial court's judgment pending this appeal.

{¶11} Appellants raise three assignments of error. All of appellants' assignments of error allege that summary judgment in favor of appellee was incorrect. Thus, we will review appellants' assignments of error under the summary judgment standard of review.

{¶12} In reviewing an award of summary judgment, appellate courts must apply a de novo standard of review. *Cole v. American Industries & Resources Corp.* (1988), 128 Ohio App.3d 546, 552. Thus, an appellate court applies the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming* (1994), 68 Ohio St.3d 509, 511.

{¶13} Appellants' first and third assignments of error raise a similar issue. Therefore, we will address them together. They state:

{¶14} "THE TRIAL COURT ERRED WHEN IT INCORRECTLY INTERPRETTED R.C. §519.01."

{¶15} "THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER APPELLANTS' ACTIVITIES IN THE OPERATION OF THE WINERY WERE EXEMPT FROM THE MILTON TOWNSHIP ZONING REGULATION PURSUANT TO R.C. §519.21."

{¶16} R.C. 519.01 provides:

{¶17} "As used in section 519.02 to 519.25 of the Revised Code, 'agriculture' includes farming; ranching; aquaculture; apiculture; horticulture; *viticulture*; animal husbandry, * * *; poultry husbandry * * *; dairy production; the production of field crops, tobacco, fruits, vegetables, nursery stock, ornamental shrubs, ornamental trees, flowers, sod, or mushrooms; timber; pasturage; any combination of the foregoing; *the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production.*" (Emphasis added.)

{¶18} The Ohio Supreme Court has consistently held that "[s]tatutes pertaining to the same subject matter are construed in *pari materia*." *Bartchy v. State Bd. Of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, at ¶16; *State ex rel. Citizens for Open, Responsive & Accountable Government v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, at ¶28. Moreover, "[a] code of statutes relating to one subject is presumed to be governed by one spirit and policy, and intended to be consistent and harmonious; and all of the several sections are to be considered, in order to arrive at the meaning of any part, unless a contrary intent is clearly manifest." *State ex rel Cromwell v. Myers* (1947), 80 Ohio App. 357, 364, quoting *City of Cincinnati v. Guckenberger* (1899), 60 Ohio St. 353.

{¶19} Thus, a reading of R.C. 519.01 must also include consideration of R.C. 519.21, which is also at issue in this case. R.C. 519.21(A) provides:

{¶20} "Except as otherwise provided in division (B) of this section, sections 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, including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture, and no zoning certificate shall be required for any such building or structure."

{¶21} Reading R.C. 519.01 together with R.C. 519.21(A) reveals that a township zoning commission may not prohibit the use of any land for "agriculture." As stated above, agriculture is defined in R.C. 519.01 and includes viticulture.

{¶22} Appellants argue here that the winery's activities qualify as "agriculture" as defined by R.C. 519.01 and, therefore the zoning inspector has no power to limit the use of the land for purposes related to operating the winery.

{¶23} Appellants contend that the trial court's definition of "viticulture" is incorrect. They assert that "viticulture" includes the growing of grapes for making wine.

{¶24} The trial court defined "viticulture" as "the production of wine." However, the application of this definition does not consider the growing of grapes in any way. Appellants were producing wine (fermenting, bottling, and labeling it) from the grapes and juice obtained off-site in addition to growing a small amount of grapes on site. (Kristopher Sperry Dep. 18).

{¶25} However, as appellants assert, the trial court's definition of "viticulture" is incorrect. Merriam-Webster's online dictionary defines "viticulture" as "the cultivation or culture of grapes especially for winemaking." <http://www.merriam-webster.com/dictionary/viticulture>.

{¶26} Given this definition of viticulture, we must go on to determine whether the "but are secondary to, such husbandry or production" clause applies to viticulture.

{¶27} Appellants argue that the word "production" should only be applied to the words in the statute with which it is specifically used. They contend that because "production" is not used to describe "viticulture," the phrase "but are secondary to, such husbandry or production" does not apply to viticulture.

{¶28} The word "production" appears in the phrases, "the production of poultry;" "dairy production;" "the production of field crops, tobacco, fruits, vegetables, nursery stock, ornamental shrubs, flowers, sod, or mushrooms;" and finally "but secondary to, such husbandry or production." The word production does not appear along with the words "farming; ranching; aquaculture; apiculture; horticulture; [or] viticulture." However, to dissect this statute in the way appellants suggest would mean that different activities that constitute agriculture are to be treated differently under the statute even though they are all part of the same definition. Such a result would be illogical.

{¶29} A simpler analysis of the statute yields the same result. The statute contains a list of items that constitute "agriculture." One of the items on the list is "viticulture," which we have already stated is the cultivation of grapes especially for wine making. Another item on the list is "the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production." Thus, this item of "processing, drying, storing, and marketing" is just another type of agriculture. And this type of agriculture requires that the "processing, drying, storing, and marketing" is secondary to the production of the agricultural products.

{¶30} Appellants also contend that the use of semi-colons in R.C. 519.01 should be construed to separate the clause "but are secondary to, such husbandry or production" from the list of activities that appear at the beginning of the section, which includes "viticulture."

{¶31} This argument is not persuasive. In looking at the entire statute, the intent of the legislature is clear: to define the activities that constitute "agriculture." Appellants' acts of cultivating grapes for winemaking are clearly included as viticulture, and thus, agriculture. However, it is the remainder of appellants' activities

(making wine from outside grapes and juices, advertising their products, selling shelf stable foods, etc.) that do not fit into any of the categories listed in R.C. 519.01. These activities are not encompassed in "viticulture." Thus, the only possible category that they could fit into is "the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production."

{¶32} But there is no evidence in the record to suggest that viticulture is the primary activity at the winery and that the remaining activities are secondary. Instead, just the opposite is true. The property contains 20 grape vines, of which only 12 are harvested. (Stipulation 14). Appellants purchase grapes and grape juices from vendors who ship the grapes and juices to appellants for processing, bottling, and selling. (Stipulation 15). Wine and shelf stable foods are sold on the premises. (Stipulation 16). Ninety-five percent of the sales of bottled wine sold on the premises are from grapes/grape juices not planted, cultivated, and harvested on the property. (Stipulation 17). Only five percent of the sales of bottled wine sold on the premises are from grapes planted, cultivated, and harvested on the property. (Stipulation 18).

{¶33} These facts demonstrate that the primary activity on the property in question is not "viticulture." Instead, the primary activities are the processing, bottling, and selling of wine. Thus, these activities are not "secondary to" the production of the agricultural products, i.e. the grapes cultivated for wine making. Therefore, appellants' activities do not fit into the item of "agriculture" listed in R.C. 519.01.

{¶34} Appellants contend that "secondary" has an alternate meaning. They assert that "secondary" can be defined as "not first in order of occurrence or development," and that this meaning is appropriate to apply to the statute. Citing, <http://www.merriam-webster.com/dictionary/secondary>. But if the term "secondary" is interpreted to mean "not first in order of occurrence or development," it would be stripped of its meaning because of the nature of the temporal relationship that it describes. Appellants acknowledge as much in their brief when they state, "To market wine, one first has to have grapes grown for wine and then the wine itself,

without which marketing would be a foolhardy endeavor." (Appellants' Brief p. 16). Therefore, this argument is meritless.

{¶35} Finally, appellants assert reading R.C. 519.01 and R.C. 519.21(A) in pari materia manifests the legislature's intent to protect wine making operations from zoning restrictions. They allege that by reading the statutes together, it becomes clear that "agriculture" includes viticulture *and* selling wine.

{¶36} Appellants' argument here relies on R.C. 519.21(A)'s language that allows for buildings used for vinting and selling wine that are located on land "any part of which is used for viticulture." But a close reading of the statute reveals that while the buildings and structures used for vinting are permitted without prohibition from zoning ordinances, these buildings must be *incident to* the agricultural purpose. The statute explicitly states that a zoning commission may not prohibit the use of land for two purposes (1) agricultural purposes or (2) the construction of buildings or structures *incident to* the use for agricultural purposes of the land on which the buildings are located. Included in the second purpose are buildings or structures used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture. The statute goes on to state that no zoning certificate is required for any such building.

{¶37} In examining the zoning exception set out in R.C. 519.21, the Third District found, "structure-use must be 'directly and immediately' related to agricultural use." *State v. Huffman* (1969), 20 Ohio App.2d 263, 269. Furthermore, "the plain language of the statute [R.C. 519.21(A)] requires the building or structure to be incident to the agricultural purpose. In other words, *the agricultural purpose must be the primary use of the property.*" (Emphasis added.) *Concord Twp. Trustees v. Hazelwood Builders Inc.*, 11th Dist. No. 2004-L-012, 2005-Ohio-1791, at ¶41.

{¶38} In this case, as discussed above, the agricultural purpose here was *not* the primary use of the property. Any building or structure used for vinting and selling wine here was not "incident to" the primary purpose of agriculture. Instead, the vinting and selling was the primary purpose. Consequently, appellants do not fall under the zoning exception set out in R.C. 519.21(A).

{¶39} Based on the foregoing analysis, appellants' first and third assignments of error are without merit.

{¶40} Appellants' second assignment of error states:

{¶41} "THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT THAT DEFENDANT-APPELLANTS' ACTIVITIES OPERATING A WINERY WERE NOT 'AGRICULTURE' AND THAT PLAINTIFF APPELLEE WAS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW."

{¶42} Appellants first argue that the record demonstrates that there are material facts that, when applying the trial court's definition of viticulture, precluded the court from granting appellee's motion for summary judgment.

{¶43} Appellants' argument here must fail based on our earlier conclusion that the trial court's definition of "viticulture" was erroneous.

{¶44} Appellants next argue that there is no evidence in the record to support the trial court's finding that the marketing or selling of wine is of greater value or importance than the cost incurred for the cultivation of grapes and fruit for the production of wine. They argue that there are no facts in the record demonstrating the respective values of the grapes and plants planted on the property, the value of grapes and juice obtained off-site, or the value of the winery's marketing and selling efforts.

{¶45} Appellants are correct that there are no values in the record for the grapes and plants grown on the property, for the grapes and juice obtained from other sources, or for the winery's marketing and selling efforts. However, the actual values of the grapes and plants grown on the property and the other items are not material facts in this case. The fact remains that no matter what the value of the grapes, juices, marketing, etc., ninety-five percent of the sales of wine are from grapes and juices not grown or harvested on the property. Consequently, the lack of exact values for the items appellants take issue with does not affect the court's summary judgment ruling.

{¶46} Appellants also make several other arguments concerning Milton Township's Zoning Resolution. First, they argue that their activities in operation of the winery comply with the "agriculture" use in Section 5(B)(1)(a). Second, they argue that Milton Township did not follow its own Zoning Resolution and that they relied on the representations made by Milton Township's Zoning Inspector that they were permitted to open the winery. Finally, they argue that there is no evidence that their activities were in violation of the "Home Occupation" restrictions in the Zoning Resolution.

{¶47} The arguments appellants now raise were not before the trial court to decide and, therefore, we will not address them here. As noted previously, the parties entered into numerous stipulations in this case. In addition to stipulations of fact, the parties stipulated as to the issues for review. The stipulated issues were: (1) whether the winery's activities are an agricultural use of the property as defined by R.C. 519.01; and (2) whether the winery is exempt from zoning regulation pursuant to R.C. 519.21(A). The arguments that appellants now raise do not fall under either of these limited stipulated issues for review. The trial court decided both of the issues before it. We too have reviewed both stipulated issues.

{¶48} Accordingly, appellants' second assignment of error is without merit.

{¶49} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., dissents. See dissenting opinion.

APPROVED:


Gene Donofrio, Judge

DeGenaro, J., dissenting.

I respectfully dissent from the majority's decision, and would reverse the trial court's decision and grant summary judgment in favor of Appellants. Appellants' use of their property as a winery falls under the zoning exception set forth in R.C. 519.21(A), and thus not subject to regulation by Appellee.

As an initial matter, I agree with the majority's conclusion that agriculture includes viticulture, the proper definition of which is "the cultivation or culture of grapes especially for winemaking." Majority at ¶25, quoting Merriam-Webster's online dictionary, <http://www.merriam-webster.com/dictionary/viticulture>. Appellants' cultivation of 20 grapevines on the property clearly constitutes viticulture.

I also agree that Appellants' additional activities, to wit, making wine from outside grapes and juices, advertising their products, and selling shelf-stable foods, do not constitute "agriculture." As defined by R.C. 519.01, "agriculture includes * * * the processing drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production." Here, the record reveals Appellants' wine-making activities are presently not secondary to their viticultural activities.

However, I disagree with the majority's conclusion that Appellants' winery does not fall under the zoning exception set forth in R.C. 519.21(A).

R.C. 519.21(A) provides:

"Except as otherwise provided in division (B) of this section, sections 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, *including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture*, and no zoning certificate shall be required for any such building or structure." (Emphasis added.)

When engaging in statutory interpretation, legislative intent is paramount. *Bailey v. Republic Engineered Steels, Inc.* (2001), 91 Ohio St.3d 38, 39, 741 N.E.2d

121. In order to determine legislative intent, it is a cardinal rule of statutory construction that a court must first examine the language of the statute. *State v. Jordan* (2000), 89 Ohio St.3d 488, 492, 733 N.E.2d 601. Further, it is well established that a specific statutory provision prevails over a conflicting general provision. *Springdale v. CSX Ry. Corp.* (1994), 68 Ohio St.3d 371, 376, 627 N.E.2d 534, citing *State v. Volpe* (1988), 38 Ohio St.3d 191, 193, 527 N.E.2d 818; see, also, R.C. 1.51. Here, R.C. 519.21(A) provides a specific zoning exception with regard to buildings and structures used for vinting operations.

R.C. 519.21(A) precludes township zoning authorities from prohibiting the use of buildings or structures incident to the agricultural use of the land. R.C. 519.21(A) then provides a specific example of buildings or structures that are "incident" to agricultural use, namely, "buildings or structures that are used primarily for vinting and selling wine and are located on land any part of which is used for viticulture." In other words, buildings or structures which are used primarily for vinting and selling wine and are located on land any part of which is used for viticulture are incident to the agricultural use of the land. A township has no power to regulate such buildings or structures pursuant to R.C. 519.21(A).

I agree with the position of amici curiae, Ohio Farm Bureau Federation and Mahoning County Farm Bureau, that the language of R.C. 519.21(A) unambiguously reveals a choice by the legislature to prohibit township zoning of the viticulture industry except in limited circumstances. Further, I find persuasive their argument that the legislature's use of vinting operations as a specific statutory example shows its recognition of the reality that all grapes used in vinting operations are rarely produced at the same location where the processing and winemaking occurs. Indeed, there was testimony by Appellant Gayle Sperry that cultivation of a single grapevine can take several years. (Gayle Dep. 19.) This reality necessitates the use of outside grapes to allow a viticulture and vinting operation to sustain itself in its infancy.

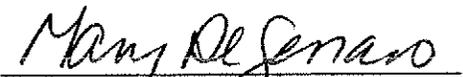
Based on the plain language of the statute, the R.C. 519.21(A) exception applies to Appellants' winery. It is undisputed that Appellants use part of the land for viticulture. The property contains 20 grape vines, 12 of which are harvested. (Stipulation 14.) The remaining eight are still growing. (Gayle Dep. 19; Kristopher

Dep. 17.) In addition, the main building on the property is primarily used for vinting and selling wine. In her deposition, Gayle Sperry testified that the wine-making process, including, the crushing, destemming, fermenting, aging, bottling and labeling of the wine takes place inside the main building. (Gayle Dep. 14.) Further, all equipment used in this process is stored in the building. (Gayle Dep. 16.) Potential buyers are entertained, enjoyed wine and shelf-stable foods, and purchase wine in the building as well. (Gayle Dep. 13, 17.) And zoning inspector Jenifer Terry concluded that the primary use for the building is vinting as she testified in her deposition that Appellants' operation had "gone way above and beyond a home occupation." (Terry Dep. 11.) Therefore, based on my reading of R.C. 519.21(A), Appellants' winery falls squarely into the zoning exception. The winery is incident to the agricultural use of the land.

The majority cites *Concord Twp. Trustees v. Hazelwood Builders, Inc.*, 11th Dist. No. 2004-L-012, 2005-Ohio-1791, in support of the proposition that in order for a structure to be "incident to" agricultural use, "the agricultural purpose must be the primary use of the property." *Id.* at ¶41. However, *Hazelwood Builders* is factually distinguishable in that it did not involve the specific example provided by the statute, i.e., a structure or building primarily used for vinting and selling wine. Rather, *Hazelwood Builders* concerned animal husbandry, more specifically, the proposed use of a residence for dog breeding.

In sum, because Appellants' winery was incident to the agricultural use, as specified in R.C. 519.21(A), I would hold that Appellee had no power to regulate it. Accordingly, I would hold that Appellants' third assignment of error is meritorious and reverse the judgment of the trial court on that basis.

APPROVED:


JUDGE MARY DEGENARO