

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

CASE NO. 10-0810

Appellants,

v.

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

JENNIFER TERRY, ZONING INSPECTOR,
MILTON TOWNSHIP,

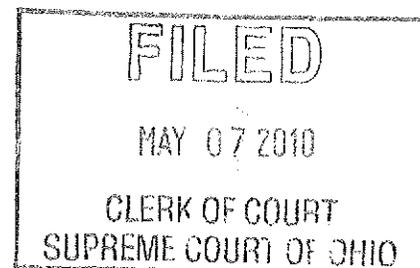
Court of Appeals
Case No. 08-MA-227

Appellee.

APPELLANTS' MOTION FOR STAY OF COURT OF APPEALS JUDGMENT

David S. Pennington (0031477)
Wright Law Co. LPA
4266 Tuller Road
Dublin, Ohio 43017
Ph: 614-791-9112
Fax: 614-791-9116
E-Mail: dpennington@wright-law.net
Attorney for Appellants

Mark Finamore (0012726)
258 Seneca Avenue, N.E.
Warren, Ohio 4481
Ph. 330-394-6148
Fax: 330-373-1029
E-Mail: markfinamore@aol.com
Attorney for Appellee



MEMORANDUM IN SUPPORT OF MOTION FOR STAY

A notice of appeal was filed in this case on March 6, 2010. See Exhibit 1. Appellant hereby moves the Court, pursuant to S. Ct. Prac. R. II 2 (A)(3), to immediately stay execution of the judgment of the Seventh district Court of Appeals.

I. BACKGROUND

Appellants operate a winery called Myrddin Winery at 3020 Sylvadale (also known as 3020 Scenic Drive) in Berlin Center, Ohio. Appellant Kristofer Sperry and his wife, Appellant Evelyn Sperry, are sole members of named Appellant, Myrddin Wine Company LLC dba Myrddin Winery (the "Winery"). Appellant Gayle Sperry is Kristofer's mother and she resides at the property of the Winery. On or about May 20, 2005, Appellants began to cultivate grapes, blueberries, and raspberries on the Winery premises for the production of wines.

Before Appellants began the Winery operation, Appellant Kristofer Sperry made a phone call to the then Milton Township Zoning Inspector, Betsy Opre ("Zoning Inspector Opre"), and inquired if a permit from the township was needed and if so, the type of permit required. See Affidavit of Appellant Kristofer Sperry at ¶7, attached as and herein referred to as Exhibit 2; Deposition of Kristofer Sperry, May 28, 2008, at p. 9, attached as and herein referred to as Exhibit 3; Deposition of Jennifer Terry, May 28, 2008, at p. 17, attached as and herein referred to as Exhibit 4. Zoning Inspector Opre informed Appellant Kristofer Sperry that what he proposed would be a home-based business and that he could do it. See Exhibit 2 at ¶7; Exhibit 3 at p. 10. Zoning Inspector Opre also informed Appellant Kristofer Sperry, in response to his question, that there were not limits as to what the business could be. See Exhibit 2 at ¶7; Exhibit 3 at p. 10. Appellant Kristofer Sperry was told that he did not need to come to the office and get a certificate allowing him to start the Winery operations and that he could just start. See Exhibit 2

at ¶7; Exhibit 3 at p. 10. Based on this reliance, Appellants began their Winery operation. Until appeals are exhausted, Appellants believe they should not be put out of business for relying on the oral representation of Zoning Inspector Opre, since zoning certificates are only issued orally by the zoning inspector and not in writing. See Exhibit 4 at pp. 17 and 18; Stipulation of Facts at ¶20, attached as and herein referred to as Exhibit 5.

II. ARGUMENT

In the absence of a stay, Appellants face closure of their operations and forfeiture of all business income pending appellate review.

The most important reason to grant the requested stay of the Order of Permanent Injunction pending resolution of this appeal is to prevent economic hardship to Appellants. Appellants will suffer severe economic losses if forced to close the Winery operation during pendency of this appeal.¹ The Appellants have expended time and financial resources for input costs in planting and cultivation of the crop of grapes and other fruit for the production of wine. Exhibit 2 at ¶10. If the Appellants are successful in their appeal but a stay of is not granted, the Winery will likely lose a majority if not all of its customers. Exhibit 2 at ¶9. Reopening and restarting operations will be expensive and difficult for the Appellants. Exhibit 2 at ¶9. Further, Appellants' permits will likely be jeopardized if a stay is not granted. Exhibit 2 at ¶9.

Appellants also have entered into a crop-sharing agreement with the owner of a contiguous 100-acre parcel, which will likely be breached if a stay is not granted. Exhibit 2 at ¶11. This agreement gives Appellants control over the manner in which grape vines for approximately 800 grape vines are harvested. Exhibit 2 at ¶8.

¹ Appellants also pay taxes on the sales of the wine, which will end if a stay is not granted. Appellants are contributing to the local and state coffers during difficult economic times in which the local and state budgets are being tightened.

Appellee will not be harmed if the Appellants are granted a stay. Appellee's deposition testimony did not quantify or give a concrete example of the purported complaints she has received about Appellants' Winery. While Appellants understand the complaint was filed pursuant to R.C. §519.24, Appellee has never issued a notice of violation of the township zoning ordinance to the Appellants. Exhibit 4 at pp. 24 and 25. If this Court grants the stay and requires a reasonable supersedeas bond to be filed, Appellants are prepared to submit such a bond.

III. CONCLUSION

WHEREFORE, Appellants respectfully request this Court grant an immediate stay of the Court of Appeals Judgment affirming the Trial Court's Order of Permanent Injunction, pending the resolution of this appeal.

Respectfully submitted,

WRIGHT LAW CO. LPA



David S. Pennington (0031477)
4266 Tuller Road
Dublin, Ohio 43017
Ph: 614-791-9112
Fax: 614-791-9116
E-Mail: dpennington@wright-law.net
Attorney for Appellants

CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing document was served via Ordinary U.S.

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

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



David S. Pennington (0031477)

IN THE SUPREME COURT OF OHIO

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

CASE NO. _____

Appellants,

v.

JENNIFER TERRY, ZONING INSPECTOR,
MILTON TOWNSHIP,

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

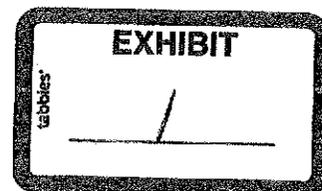
Court of Appeals
Case No. 08-MA-227

Appellee.

NOTICE OF APPEAL OF APPELLANTS
GAYLE K. SPERRY, KRISTOFER SPERRY, EVELYN SPERRY
AND MYRDDIN WINE COMPANY

David S. Pennington (0031477)
WRIGHT LAW CO. LPA
4266 Tuller Road
Dublin, Ohio 43017
Ph: 614-791-9112
Fax: 614-791-9116
E-Mail: dpennington@wright-law.net
Attorney for Appellants

Mark Finamore (0012726)
258 Seneca Avenue, N.E.
Warren, Ohio 44482
Ph: 330-394-6148
Fax: 330-373-1029
E-Mail: markfinamore@aol.com
Attorney for Appellee



NOTICE OF APPEAL OF APPELLANTS
GAYLE K. SPERRY, KRISTOFER SPERRY, EVELYN SPERRY
AND MYRDDIN WINE COMPANY

Appellants Gayle K. Sperry, Kristofer Sperry, Evelyn Sperry and Myrddin Wine Company hereby give notice of their appeal to the Ohio Supreme Court from the Judgment of the Seventh District Court of Appeals, entered in Court of Appeals Case No. 08-MA-227, on March 23, 2010.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

WRIGHT LAW CO. LPA



David S. Pennington (0031477)
4266 Tuller Road
Dublin, Ohio 43017
Ph: 614-791-9112
Fax: 614-791-9116
E-Mail: dpennington@wright-law.net
Attorney for Appellants

CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing document was served via Ordinary U.S.

Mail this 16th day of May, 2010, upon the following:

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



David S. Pennington (0031477)

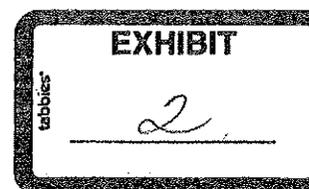
AFFIDAVIT OF KRISTOFER SPERRY

STATE OF OHIO,

COUNTY OF Summit, ss:

Now comes Kristofer Sperry, after being duly cautioned and sworn, and states as follows:

1. My name is Kristofer Sperry and I and my wife, Evelyn Sperry, reside at 129 Corson Avenue Akron, Ohio 44302.
2. I and my wife are the sole members of Myrddin Wine Company LLC dba Myrddin Winery ("Winery"). I am responsible for the operations of the Winery located at 3020 Sylvandale (also known as 3020 Scenic Drive), Berlin Center, Ohio 44401. My mother, Gayle Sperry, currently resides at 3020 Sylvandale (aka 3020 Scenic Drive), Berlin Center, Ohio where the Winery is located.
3. I, my wife, my mother Gayle Sperry, and Myrddin Winery Company LLC dba Myrddin Winery (collectively referred to as "Appellants" or "We") have filed an appeal with this Court appealing the Seventh District Court of Appeals' Judgment dated March 23, 2010.
4. I have personal knowledge of the operations of the Winery, the acreage used for the cultivation of grapes and other fruits for the production of wine, the amount of grape vines, grapes, and other fruit being grown and or available for the production of wine.
5. Grapes and other fruits for the production of wine take time to mature, sometimes up to three years.
6. We have applied for and received the appropriate state and federal permits needed for the operation of the Winery, specifically a permit from the Federal Tobacco Trade Bureau and an A-2 permit from the State of Ohio Division of Liquor Control. We also have a vendor's permit issued by Mahoning County.



7. Before commencing operation of the Winery in 2005, I personally called the then Milton Township Zoning Inspector. Upon information and belief, the then Milton Township Zoning Inspector was Betsy Opre (“Zoning Inspector Opre”). The purpose of my call to Zoning Inspector Opre was to determine if we could start a Winery. I called Zoning Inspector Opre on the belief that she would know if the zoning ordinance would allow me to start the Winery. I described what I wanted to do and Zoning Inspector Opre informed me that I could open a Winery and that it would be a home-based business. I asked Zoning Inspector Opre if there were any limits to what the Winery could be and she replied no. I then asked Zoning Inspector Opre if I needed to come to the office and get a certificate or something else demonstrating that the Winery would be allowed and she told me no, that I could just start. Based on my phone conversation with Zoning Inspector Opre I started the Winery. We have not received any formal notice of violation that is the subject of the complaint from the township or the current Milton Township Zoning Inspector.

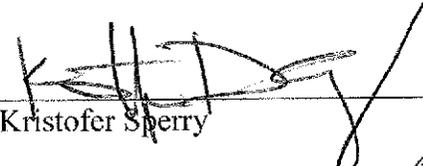
8. Since the commencement of the complaint in the trial court, we have increased the acreage and vines for the growing of grapes for the production of wine. We control the production of approximately 800 grape vines on a 96-acre plot, contiguous with the Winery’s property, through a share cropping agreement with the owner of the 96-acre plot. These 800 vines were planted before the complaint was initiated. We provide the labor used to cultivate and harvest the grapes, have final approval rights over the grapes and are entitled to 75 percent of grapes produced. We have also increased the acreage of the Winery’s property to over two acres with approximately 50 vines and will continue to increase this amount and diversify the crops in the coming seasons. We also plan to plant blueberries, more berries, and pears.

9. If the Appellants are successful in their appeal and are allowed to continue operations but a stay of is not granted, the Winery will likely lose a majority if not all of its customers. Reopening and restarting operations upon a favorable decision by the Court of Appellants' appeal will be difficult and expensive. Further, the permits that we have may be jeopardized if the stay is not granted.

10. Appellants have already paid for the input costs for the grapes and other fruits currently being grown for wine. If Appellants are not granted the stay, we will be forced to attempt to find a buyer for the grapes and other fruit currently in the ground and will only be able to re-coup a fraction of the value of the crop of grapes and other fruit compared to the value the crop would bring as wine. However, is not realistic to find a buyer with what we have planted. The amounts and types of grapes and fruit are desirable only to our winery and were not planted with a sale in mind. If a buyer cannot be found for the crop, the investment in the crop, including the input costs, will most likely be lost.

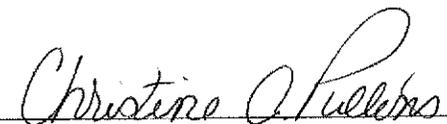
11. Appellants will also likely be forced to breach the share cropping agreement with the owner of the 96-acre contiguous plot if a stay is not granted.

FURTHER AFFIANT SAYETH NAUGHT.



Kristofer Sperry

Sworn to before me and subscribed in presence by Kristofer Sperry this 5th day of
May, 2010.



NOTARY PUBLIC

My commission expires:



CHRISTINE A. PULLINS
Notary Public, State of Ohio
My Commission Expires 11-22-2014

STATE OF OHIO)
) SS: IN THE COURT OF COMMON PLEAS
MAHONING COUNTY)

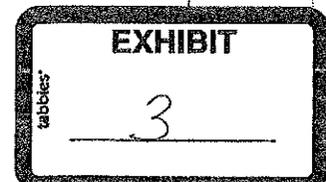
CASE NO. 08 CV 348

JENNIFER TERRY, ET AL)
)
 Plaintiffs) DEPOSITION
)
 VS.) OF
)
 GAYLE K. SPERRY, ET AL) KRISTOFER SPERRY
)
 Defendants)

DEPOSITION taken before me, Debra M. Moore, a Notary Public within and for the State of Ohio, on the 28th Day of May, 2008, pursuant to Notice and at the time and place therein specified, to be used pursuant to the Rules of Civil Procedure or by agreement of counsel in the above cause of action, pending in the Court of Common Pleas, within and for the County of Mahoning, State of Ohio.

COPY

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APPEARANCES

On Behalf of Plaintiffs:

Mark S. Finamore, Attorney at Law
258 Seneca Avenue N.E.
Warren, OH 44481

On Behalf of Defendants:

John C. Oberholtzer, Attorney at Law
Oberholtzer & Filous
39 Public Square, Suite 201
P.O. Box 220
Medina, OH 44258

Also Present:

Ms. Jenifer Terry
Mr. John Boyes



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CROSS EXAMINATION BY MR. FINAMORE - PAGE 5

OBJECTIONS AND MOTIONS: NONE

EXHIBITS INTRODUCED: NONE

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STIPULATIONS

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It is stipulated and agreed by and between counsel for the parties hereto that the deposition may be taken at this time, 2:15 p.m., May 28, 2008, in the offices of Atty. Mark S. Pinamore, 258 Seneca Avenue N.E., Warren, Ohio.

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It is further stipulated and agreed by and between counsel that the deposition may be taken in shorthand by Debra M. Moore, a Notary Public within and for the State of Ohio, and may be by her transcribed with the use of computer-assisted transcription; that the witness's signature to the finished transcript of his\her deposition may be and is hereby waived by agreement of the parties; and that the deposition may be thereupon used on behalf of the parties in the aforesaid cause of action as fully and to the same extent as if written in the presence of the witness and subscribed by the witness in the presence of the Notary Public.

1 WHEREUPON,
2 KRISTOFER SPERRY,
3 of lawful age, being by me first duly
4 sworn to testify the truth, the whole
5 truth, and nothing but the truth, as
6 hereinafter certified, deposes and
7 says as follows:

8 CROSS EXAMINATION:

9 BY MR. FINAMORE

10 Q Kristofer, as you know, my name is Mark
11 Finamore, and I'm the attorney that represents the
12 plaintiff in this case, the Township, which has filed a
13 lawsuit against your mom, yourself, and your wife
14 regarding the property located in Milton Township. You're
15 aware of that?

16 A Yes.

17 Q We're conducting a deposition today, and
18 the purpose of that is to allow me to ask you some
19 questions to do some investigation and obtain facts which
20 will be pertinent to this case so that I can get
21 information to help me prepare my case and also to advise
22 your lawyer of the things that I may think are pertinent
23 to the factual situation.

24 I'm going to ask you a series of questions, and I

1 want you to answer, obviously, honestly to the best of
2 your ability. If I ask you a question, Kristofer, and you
3 don't understand it, please don't hesitate to interrupt
4 me, and I will either explain the question to you or
5 clarify it so that you can answer. If you answer the
6 question, I'll assume that you understood it and you're
7 being responsive to that.

8 A Okay.

9 Q Also, from time to time, if you want,
10 please take whatever time you need to consider your answer
11 before you give it. You don't have to feel that you have
12 to shoot right back with an answer. If, when you're
13 thinking or before you answer, if you hear your attorney
14 note an objection or say he objects, I'd ask you to give
15 the courtesy of letting him -- stop speaking, let him note
16 his objection for the record, and afterwards he would then
17 instruct you to answer the question or respond accordingly
18 to be able to go ahead and do that.

19 The purpose of this isn't to trick you. It's not to
20 show you in a bad light or any of those things. It's
21 simply just to get some basic questions before we go to
22 trial so that nobody is surprised when we go there in
23 terms of what the facts may be or, in this case, if we
24 even do it in writing on the record, we would each have a

1 record to be able to support that; okay?

2 A Okay.

3 Q And the only other thing, I would remind
4 you that all your answers have to be by verbal response,
5 because it is being taken on a stenographic record, and
6 they can't record your nods of the heads and gestures;
7 okay?

8 A Okay.

9 Q Could you just start off and give me
10 your legal name and your current residence address?

11 A Kristofer Sperry, 129 Corson Avenue,
12 Akron, Ohio.

13 Q Okay. And, Kristofer, your mother was
14 in here previously, and she stated she was the owner of
15 the premises located at 3020 -- well, it's Sylvandale,
16 Berlin Center, but it's known as 3020 Scenic Drive; is
17 that correct?

18 A That's correct.

19 Q And you don't claim any interest in the
20 property in terms of being a record holder or a lien
21 holder on that property; is that correct?

22 A I am not on the deed.

23 Q Okay, good. And are you a member or a
24 principal or agent of the Myrddin Wine Company, LLC?

1 A Yes.

2 Q Are you the person that incorporated
3 that?

4 A Yes.

5 Q Okay. And was that formed under the
6 laws of the State of Ohio and registered with the
7 Secretary of State?

8 A Yes.

9 Q Okay. On the articles of that, who are
10 named as the operating members at this time?

11 A Evelyn and myself.

12 Q Okay. Just the two of you make up the
13 entire corporation then?

14 A That's correct.

15 Q And so your mother was correct when she
16 said she's not part of that --

17 A That's correct.

18 Q -- okay, to be able to do that? And
19 could you tell me for what purpose did you form that
20 corporation?

21 A To have a winery.

22 Q Okay. And where do you operate this
23 winery?

24 A At that location.

1 Q In Milton Township?

2 A Yes.

3 Q Okay. Now, your mother indicated that
4 she's not really involved in a lot of the business end of
5 that, so I'm going to ask you more questions on that --

6 A Okay.

7 Q -- to get some information she told me
8 you or Evelyn would be better at to answer that to be able
9 to go ahead and do that. At the time that you were
10 considering doing this, did you make any inquiry of any
11 Township official regarding whether or not you needed any
12 kind of permit or any license to do this from the
13 Township?

14 A Yes, I did.

15 Q And do you recall what inquiry that you
16 made?

17 A I made a phone call, and it was Betsy,
18 but I don't know her last name.

19 Q Do you know what position she held with
20 the Township at that time?

21 A She was the Zoning Inspector.

22 Q Okay. And could you, to the best that
23 you can, relate what your conversation was with her at
24 this time, that time?

1 A I described to her where the property
2 was, and she sounded like she knew what property I was
3 talking about.

4 Q Okay. She was familiar?

5 A And I described that I wanted to do a
6 winery and asked if that was something I could do. And I
7 had not seen the zoning code at all. I just called her.
8 I figured she would know. And she said yes, you can do
9 that. You would be a home-based business. And I said,
10 well, is there any limit to how many people can visit me
11 on a day? I mean, are there any limits to what this
12 business can be? And she said no. I said, do I need to
13 come down and get a certificate or something that says I'm
14 allowed to do this? She said no, just start.

15 Q Okay. And based upon that conversation,
16 then, you concluded that you didn't need any permit from
17 the Township; is that correct?

18 A That's correct.

19 Q Okay. Have you received any other
20 permits or licenses from any other governmental entities
21 with the business to be able to conduct the manufacturing
22 and the harvesting of grapes into wine and sell it?

23 A Yes, we have a federal permit, which
24 comes first.

- 1 Q Who is that from?
- 2 A TTB.
- 3 Q What does that stand for?
- 4 A Tobacco Trade Bureau.
- 5 Q And that's a federal organization?
- 6 A It is. It used to be Firearms, and they
- 7 separated that off.
- 8 Q It used to be part of the ATF?
- 9 A ATF, that's right, and they just renamed
- 10 it.
- 11 Q And what type of permit did you need
- 12 from them to be able to do this?
- 13 A It is -- I'm trying to think of the
- 14 exact terminology. But it's to operate a wine premise.
- 15 Q So it's specifically for the operation
- 16 of how you do wine?
- 17 A Yes.
- 18 Q I assume it's because that would be an
- 19 alcoholic beverage?
- 20 A Yes, and they're mostly concerned with
- 21 the taxes.
- 22 Q To make sure you're paying proper taxes?
- 23 A Yes.
- 24 Q Can't beat the government on that, can

- 1 you, Kristofer?
- 2 A Yeah.
- 3 Q Did you have any other permits, other
4 than the --
- 5 A Yes. So you get a federal permit first,
6 and then, based on having that federal permit is part of
7 also receiving a state permit.
- 8 Q And that would be to do the same thing,
9 for the purpose of selling alcoholic beverages?
- 10 A Yes. And it's specifically -- it is
11 what's called an A-2, which is specifically for wineries.
- 12 Q Okay. And this A-2 permit is the permit
13 that most people would refer to as a liquor license?
- 14 A No.
- 15 Q This is different from a liquor license?
- 16 A Yes.
- 17 Q Okay. Do you also have a liquor
18 license?
- 19 A No.
- 20 Q Okay. Your mother indicated that you
21 had a liquor license on the premises.
- 22 A She's mistaken.
- 23 Q She's mistaken, okay.
- 24 A Yes.

- 1 Q So do you know the actual name of the
2 state organization that issues that permit?
- 3 A Division of Liquor Control.
- 4 Q Okay. All right. That is what they
5 consider -- that would be what we consider the liquor
6 permit then.
- 7 A Okay.
- 8 Q So we're -- yeah, we're not talking
9 about different permits.
- 10 A No, but it doesn't -- I mean, it's
11 specific to the wine that we make.
- 12 Q Right. They have a whole category of
13 D-1, 2, 3, C, and that's what -- I appreciate what you're
14 telling me is your permit is for A-2, which has to do with
15 the manufacture and sale of wine on the premises --
- 16 A That's correct.
- 17 Q -- so the state can make sure they
18 collect their state taxes on that?
- 19 A Yes.
- 20 Q And your mother also indicated that you
21 did acquire a vendor's permit from Mahoning County; is
22 that correct?
- 23 A That is correct, yes.
- 24 Q Okay. And did you know about when you

1 acquired that, what point in time you acquired that?

2 A 2005, late in the year.

3 Q Okay.

4 A Fall.

5 Q And the category of sales on the
6 application was related to the wine sales; is that
7 correct?

8 A Which application? I'm sorry.

9 Q For the sales, the vendor's license?

10 A The vendor's license.

11 Q Yeah, do you recall?

12 A Well, it was a little strange, because
13 they have these categories that they want you to pick.

14 Q Right. That's what I'm asking you.

15 A And there is no category.

16 Q So you checked the other and put --

17 A So when we went in, the woman -- I
18 honestly don't know what she had us check.

19 Q But it would appear on the application
20 and the license that was issued you as a category; right?

21 A I'm not trying to be evasive, but I
22 don't know.

23 Q If you don't know, you don't know.

24 A I don't know what they ended up with.

1 Q But you did get a permit, and you do
2 file returns with the State of Ohio?

3 A That's correct, yes.

4 Q Thank you. Have you ever had any
5 violations of any local, state, or health code on the
6 property that had to be corrected?

7 A Yes. We had our ag inspector come in,
8 and he asked me to replace my light bulbs so that they
9 were plastic coated so that they wouldn't shatter.

10 Q This would be from the Federal
11 Department of Agriculture?

12 A No, it's Ohio Department of Agriculture.

13 Q Do they give you a permit, or they just
14 inspect you?

15 A Well, I don't know whether you would
16 call it a permit or not, because he comes out and he fills
17 out your information at the top. He does his form. He
18 hands it to you. And he checked the box replace the light
19 bulbs, and I've only ever talked to him on the phone after
20 that.

21 Q It's like an inspection form?

22 A Yeah.

23 Q It gives you a punch list, you do it,
24 and he comes out and verifies it and signs off?

1 A Yeah.

2 Q And that's through the State Department
3 of Agriculture?

4 A That's correct.

5 Q Did you have any other violations?

6 A Not that I can think of.

7 Q Okay. Your mother indicated that there
8 was one from the zoning one that went to a criminal court,
9 but that was dismissed against you; right?

10 A Yes, that is correct.

11 Q Okay. Could you please, the best you
12 can, describe the activities that you're conducting on the
13 premises with regard to the winery as to how you process a
14 bottle and sell wine?

15 A Okay. I either harvest or get -- buy
16 juice, which gets brought in. The red and the white -- so
17 I make the wine. I don't know if you want details on
18 that, but we make the wine.

19 Q Well, let me ask you this without
20 putting words in your mouth. Your mom explained it where
21 you get grapes either harvested on the property or
22 brought-in juice, you go ahead and you -- I think the word
23 she used is you devine it or something, you have some
24 process to take the stem?

1 A Destem, yeah.

2 Q Okay. The grapes get crushed into
3 juice, the juice gets fermented, it gets aged, it gets
4 bottled, labeled, and sold. Would that be a fair
5 description of the main process that they do?

6 A Yes, yes.

7 Q Now, your mother indicated to us -- when
8 I had asked her this question, I was trying to determine
9 the volume of grapes which are actually cultivated,
10 harvested on the property, and then processed into wine
11 that is sold on the property, as opposed to the juice that
12 is brought off, processed, and then sold. And is this a
13 fair statement, in that I believe what she told me was
14 that she currently believes there's about 20 vines that
15 are being grown on the premises, of which 12 are only
16 being harvested because of that -- where you have to wait?

17 A The time, yeah.

18 Q And you believe that's fairly accurate
19 then?

20 A Uh-huh.

21 Q Now, what your mother couldn't tell me
22 was the volume of grapes that you get from that to process
23 and then how many bottles of wine you can make from that.
24 Are you able to give me an opinion or any information

1 about --

2 A Well, they get pitched in with other
3 grapes, so specifically saying what those are making, I
4 will tell you in general it's a very small percentage.

5 Q Okay. Let me ask you this, then, just
6 to kind of cut to the nuts and bolts. If you're looking
7 at 100 percent of your sales, in your estimation, what
8 percentage of those sales would be generated from grapes
9 brought off the property, as opposed to grapes brought on
10 the property?

11 A I'm going to say five percent on the
12 property.

13 Q And 95 percent off the property?

14 A Yes.

15 Q Do you know, just as an estimate, how
16 many bottles of wine did you sell last year total?

17 A Gosh, I don't do it in bottles, but we
18 can do the calculation.

19 Q Whatever volume.

20 A I think we were right around 500
21 gallons.

22 Q Five hundred gallons, okay.

23 A Which multiply that by five, and that's
24 bottles.

- 1 Q Twenty-five hundred bottles?
- 2 A Yeah.
- 3 Q Did that meet your expectations the
- 4 first year in terms of --
- 5 A No, it was low. It was low.
- 6 Q Okay. And your mother indicated that
- 7 you serve all shelf stable food, so you don't require a
- 8 health permit for that; correct?
- 9 A That's correct, yeah. It's kind of
- 10 crappy cheese.
- 11 Q And, Kristofer, your mom had indicated
- 12 that the only people that are actually employed or
- 13 participate in this processing are just herself, you, and
- 14 your wife Evelyn; is that correct?
- 15 A That is correct.
- 16 Q You don't employ anybody else on the
- 17 premises or even off premises to help you sell or conduct
- 18 those activities?
- 19 A That's correct.
- 20 Q Okay. She didn't know this either. She
- 21 thought Evelyn might, but if you know it, you can tell me.
- 22 In terms of how you do business for income tax reporting
- 23 purposes, do you report these sales on a corporate
- 24 schedule, a Schedule C profit and loss? Do you know how

1 those are reported on your tax returns?

2 A That's Evelyn's, but my understanding is
3 that as an LLC, it comes through on our personal.

4 Q Yeah, it does flow through. But you
5 file it as a corporate LLC with a flow-through to your
6 individual taxes then?

7 A That's my understanding, but she's the
8 one that really --

9 Q Your mother indicated -- I asked her
10 during peak season what would be the average customers
11 that would go through, and she thought about 100 would be
12 probably the max at any given week during the peak season.
13 Would that be a fair estimate?

14 A She would be the one to best know that,
15 and I can't think of any time when that seems like it
16 wouldn't be in line.

17 Q Okay. And she indicated that you
18 provide off-street parking for your customers?

19 A That's true.

20 Q Okay. And I think she indicated that
21 there are basically three signs. You have kind of like a
22 political temporary sign right outside the premises, you
23 have an arrow on the mailbox, and another sign across the
24 street. Is that accurate?

1 A Yes, and only that the political sign
2 I'm not sure.

3 Q I meant by size, she said it's about ten
4 inches by a couple feet, maybe, or something?

5 A Yeah, small, yeah.

6 Q Small sign, okay.

7 MR. FINAMORE: Off the record.

8 (Discussion off the record)

9 MR. FINAMORE: Kristofer, thank you very
10 much. You did very good.

11 THE WITNESS: Thank you.

12 MR. OBERHOLTZER: You can waive your
13 signature.

14 THE WITNESS: I will waive my signature.

15 SIGNATURE WAIVED

16 (The deposition was concluded at 2:30 p.m.)

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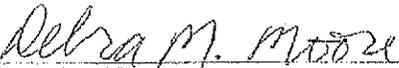
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REPORTER'S CERTIFICATE

I HEREBY CERTIFY that the above and foregoing is a true and correct transcript of all the testimony introduced and proceedings had in the taking of the testimony in the above-entitled matter, as shown by my stenotype notes taken by me at the time said testimony was taken.


Debra M. Moore
Registered Merit Reporter

NAGY-BAKER COURT REPORTING, INC.
(330) 746-7479
(800) 964-3376

1 STATE OF OHIO)
) SS: NOTARY CERTIFICATE
 2 MAHONING COUNTY)
 3

4 I, Debra M. Moore, Notary Public
 5 within the State and County aforesaid, duly commissioned
 6 and qualified, do hereby certify that the within-named
 7 deponent was by me first duly sworn to testify the truth,
 8 the whole truth, and nothing but the truth, and that the
 9 foregoing testimony was written by me in stenotype in the
 10 presence of the witness; that by agreement of counsel,
 11 signature was waived.

12
 13 I do further certify that I am not of
 14 counsel, attorney or relative to either party, or
 15 otherwise interested in the event of this action or
 16 proceeding.

17
 18 IN WITNESS WHEREOF, I have hereunto set
 19 my hand and seal of office at Youngstown, Ohio, this 10th
 20 Day of June, 2008.

21
 22 Debra M. Moore
 23 Debra M. Moore, Notary Public
 24 My Commission Expires 2/1/09

NAGY-BAKER COURT REPORTING, INC.
 (330) 746-7479
 (800) 964-3376

STATE OF OHIO)
) SS: IN THE COURT OF COMMON PLEAS
MAHONING COUNTY)

CASE NO. 08 CV 348

JENNIFER TERRY, ET AL)
)
 Plaintiffs) DEPOSITION
)
 VS.) OF
)
 GAYLE K. SPERRY, ET AL) JENIFER TERRY
)
 Defendants)

DEPOSITION taken before me, Debra M. Moore, a Notary Public within and for the State of Ohio, on the 28th Day of May, 2008, pursuant to Notice and at the time and place therein specified, to be used pursuant to the Rules of Civil Procedure or by agreement of counsel in the above cause of action, pending in the Court of Common Pleas, within and for the County of Mahoning, State of Ohio.

NAGY-BAKER COURT REPORTING, INC.
(330) 746-7479
(800) 964-3376

EXHIBIT

tabbies

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CROSS EXAMINATION BY MR. OBERHOLTZER - PAGE 5

OBJECTIONS AND MOTIONS:
BY MR. FINAMORE: PAGE(S) 27

PLAINTIFF'S EXHIBITS INTRODUCED: NONE

DEFENDANT'S EXHIBITS INTRODUCED:
EXHIBIT A - PAGE 21

1 WHEREUPON,
2 JENIFER TERRY,
3 of lawful age, being by me first duly
4 sworn to testify the truth, the whole
5 truth, and nothing but the truth, as
6 hereinafter certified, deposes and
7 says as follows:

8 CROSS EXAMINATION:

9 BY MR. OBERHOLTZER

10 Q Would you please tell us your name and
11 address for the record?

12 A Sure. Jenifer Terry, 15152 Stoltz Road,
13 S-T-O-L-T-Z, Diamond, Ohio, 44412.

14 Q And you probably should spell your last
15 name, as silly as that sounds.

16 A Well, actually, my first name is all
17 single letters, J-E-N-I-F-E-R. The last name is
18 T-E-R-R-Y.

19 Q You heard your attorney, Mr. Finamore,
20 talk to all the witnesses about how to do a deposition?

21 A Correct.

22 Q You understood those --

23 A I think so.

24 Q -- instructions? I'm not going to

- 1 Q And you're paid?
- 2 A Yes.
- 3 Q Is that per diem, per month, per year,
4 how are you paid?
- 5 A Per hour.
- 6 Q May I ask how much per hour?
- 7 A Ten dollars, I think.
- 8 Q Is there a cap on the amount of time you
9 can spend?
- 10 A Not really, although they like me to
11 keep it around between 15 and 20.
- 12 Q And we're involved here in a lawsuit
13 today that was brought in your name, as the Zoning
14 Inspector; is that correct?
- 15 A Correct.
- 16 Q Tell me how you brought this, or why did
17 you bring it?
- 18 A Major complaints from neighbors.
- 19 Q And did you go to the Zoning Commission,
20 or what did you do? You got some complaints from
21 neighbors?
- 22 A Yes.
- 23 Q And what did you do as a result of those
24 complaints?

1 A Yes.

2 Q Who was the Trustee?

3 A Harold Moore.

4 Q And then did you talk to anybody else
5 after that?

6 A You know, I can't honestly say. I
7 really don't recollect that.

8 Q Not what you said, but at some point did
9 you talk to an attorney?

10 A Well, sure, I talked to Mark.

11 Q And when did you do that?

12 A Somewhere between probably July and
13 August, June and August. I don't --

14 Q This lawsuit was filed in January of
15 2008. Would you have talked to him just before you filed
16 the lawsuit or sometime before you filed the lawsuit?

17 A Sometime before.

18 Q All right. Now, is he the normal
19 Township attorney?

20 A Yes.

21 Q He represents the Township on a variety
22 of other business matters, if you know?

23 A Yes.

24 Q He is what you would call their general

1 about it.

2 Q All right. So the lawsuit that you
3 bring is a violation of the Zoning Resolution?

4 A Yes.

5 Q And that is one of your jobs as a Zoning
6 Inspector, to bring those kinds of lawsuits?

7 A Yes.

8 Q That's a duty you're given by the Ohio
9 Revised Code?

10 A Yes.

11 Q And so you brought a lawsuit that is
12 based on the fact that they are running a home occupation,
13 or what is the trouble?

14 A Well, it's gone way above and beyond a
15 home occupation.

16 Q Okay. So you're saying what, that it is
17 bigger than a home occupation?

18 A Yes.

19 Q Are you saying at one time it was a
20 permissible home occupation?

21 A I believe so.

22 Q So you're saying at one time it was all
23 right to do what they were doing?

24 A From my understanding, yes.

1 Q And the time before that, the permit
2 right before that, what was that issued for?

3 A Well, I mean, I can't honestly say
4 without looking at my records, but I'll say a garage.

5 Q So your Zoning Certificates are issued
6 when somebody is doing a building?

7 A Correct.

8 Q All right. So if somebody comes in and
9 wants to run a home occupation in their house, you don't
10 issue a certificate, do you?

11 A No.

12 Q And if somebody wants to come into your
13 Township and run a business, you don't issue them a
14 certificate?

15 A No.

16 Q So the only time you issue a Zoning
17 Certificate is when somebody is bringing you building
18 plans or wants to do a building?

19 A Correct.

20 Q And are you aware that the Zoning
21 Resolution indicates that a Zoning Certificate that you
22 issue is only good for 18 months?

23 A Actually, let's see, 18 months.

24 Q Pardon?

1 come back and get another permit.

2 Q Do people come back and get a new Zoning
3 Certificate after it expires?

4 A Yes.

5 Q How often do they come back?

6 A I've had it happen once.

7 Q Once?

8 A Uh-huh.

9 Q So most people come in, give you their
10 building plans, you give them a Zoning Certificate, and
11 you never see them again?

12 A That's correct.

13 Q Does that mean that everybody that has
14 gotten a Zoning Certificate and not had it extended is in
15 violation of your Zoning Resolution?

16 A I'm not sure I understand that.

17 Q My question is, I don't understand the
18 purpose of having this certificate expire after either 18
19 months or two-and-a-half years.

20 A Well, I guess -- I don't know. I mean,
21 my only guess -- I could only guess at that.

22 Q Well, and don't guess. I mean, you
23 don't know?

24 A Yeah.

1 Q But you heard all the Sperrys testify
2 that they talked to the Zoning Inspector, and they gave a
3 name of Betsy, but they didn't know her last name. Do you
4 remember the name of -- Betsy's last name?

5 A Opre (phonetic spelling).

6 Q Pardon?

7 A Opre.

8 Q All right. And they said they called
9 her up, and she said it was okay. Does that sound
10 reasonable to you?

11 A My opinion?

12 Q Yes.

13 A I would say that was hearsay.

14 Q I understand that. But as a Zoning
15 Inspector, people call you up and say I want to do this in
16 my house, and you say fine, that's okay?

17 A After I check, yes.

18 Q All right. But you don't issue a
19 certificate?

20 A Correct.

21 Q It's all oral?

22 A Correct.

23 Q You don't give them a writing, a letter,
24 piece of paper, anything?

1 discussed.

2 Q So you're saying that when it started,
3 it was meant to be sort of small?

4 A Yes.

5 Q And it's grown?

6 A Yes.

7 Q And because it's grown, it now has
8 become a problem to the neighbors?

9 A It has become a problem, yes.

10 Q How does one know at what point they've
11 crossed this threshold that in the beginning it's okay,
12 but it's a business, and it gets too big, and now it's not
13 okay? How do you know where you cross that line?

14 A Is it a business?

15 Q Well, let me back up. You are the
16 Zoning Inspector. You said that they were going to have
17 wine tastings?

18 A Uh-huh.

19 Q You weren't there when this happened;
20 right?

21 A Correct.

22 Q But it's based on your understanding,
23 they were going to have wine tastings?

24 A Uh-huh.

1 Q Isn't that kind of subjective on your
2 part?

3 A I don't believe so.

4 (Whereupon Defendant's Exhibit A was marked.)

5 Q I'm going to hand you a document, and it
6 says at the top of it Notice of Zoning Violation. Would
7 you look at that, please?

8 A Okay.

9 Q Do you recognize that document?

10 A I do.

11 Q And do you see a signature at the bottom
12 of it?

13 A I do.

14 Q Whose signature is that?

15 A Julie Meehan.

16 Q And who is she?

17 A She was just prior to myself.

18 Q And she would have been after Betsy?

19 A Yes.

20 Q Okay. Just prior to yourself as what?

21 A Zoning inspector.

22 Q All right. Is the order of procedure
23 here or of personnel Betsy, and then is it Mrs. Meehan?

24 A Uh-huh.

1 A Well, to tell you the truth, I know one
2 person was there for like one week, so I doubt that in
3 that one week he would have evaluated much of anything.

4 Q But if the evaluation of these
5 complaints is subjective on the basis of the Zoning
6 Inspector, you could have had four or five people in that
7 three-year period of time come up with different opinions?

8 A I really -- I suppose you could.
9 Anything's possible.

10 Q Sure. Now, looking at that exhibit,
11 what is that document?

12 A It's a Notice of Zoning Violation.

13 Q All right. And is that a document the
14 Township uses?

15 A Yes.

16 Q And what is the date of that Notice of
17 Zoning Violation?

18 A April 12, 2007.

19 Q All right. May I see it a minute? You
20 were not the Zoning Inspector on April 12, 2007?

21 A No.

22 Q You came along afterwards; is that
23 correct?

24 A That's correct.

1 A You know, that's a year ago, but I don't
2 recollect.

3 Q All right. So if the Sperrys say they
4 never got such a Notice of Zoning Violation, then that's
5 probably correct?

6 A Probably.

7 Q All right.

8 A I send everything Certified Mail, so --

9 Q All right. And you've not produced
10 anything in this case that I've seen?

11 A Okay.

12 Q Is that correct? Correct?

13 A Well, yeah, if you don't have it, it
14 isn't so.

15 Q All right. Now, you are aware that the
16 Sperrys consider this property to be exempt from zoning?

17 A Yes.

18 Q And how are you aware of that?

19 A Well, that's what they said at the
20 hearing in Ashland.

21 Q Okay.

22 A I believe.

23 Q And have you ever discussed that issue
24 with Attorney Finamore or the Zoning Commission?

1 Township cannot regulate a business that is doing
2 viticulture and making wine?

3 A I believe so.

4 Q And does that apply to the Sperrys'
5 situation?

6 A I don't think so.

7 Q Why not?

8 A In my opinion, they're under the amount
9 of -- because they're in a platted subdivision.

10 Q Because they're in a platted
11 subdivision, they can't be a winery?

12 A Correct.

13 Q Has the Township adapted any regulations
14 to regulate agriculture in their Zoning Resolution?

15 A Not to my knowledge.

16 Q So when the statute says that a Township
17 may adopt regulations regulating agriculture, that has not
18 been done, to your knowledge?

19 MR. FINAMORE: At this time I'd just
20 like to note an objection that this calls for legal
21 conclusions. Go ahead and answer.

22 Q If you know.

23 A I don't know, no.

24 MR. OBERHOLTZER: Let me talk to my

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REPORTER'S CERTIFICATE

I HEREBY CERTIFY that the above and foregoing is a true and correct transcript of all the testimony introduced and proceedings had in the taking of the testimony in the above-entitled matter, as shown by my stenotype notes taken by me at the time said testimony was taken.

Debra M. Moore
Debra M. Moore
Registered Merit Reporter



Milton Township Zoning Department

Nickolas D. Bellas, Zoning Inspector
Julie Meehan, Assistant Zoning Inspector

P.O. Box 308
15590 Milton Avenue
Lake Milton, OH 44429

Tel (330) 538-0552
Fax (330) 538-3325

~ NOTICE OF ZONING VIOLATION ~

April 12, 2007

VIA: Certified Mail

Gayle and Chris Sperry (DBA Myrddin Winery)
3020 Scenic Acc. Or 3020 Sylvandale Ave.
Berlin Center, Ohio 44401

RE: Parcel I.D. # 51-062-0-063.00-0

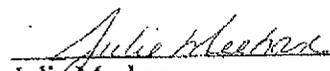
Dear Sir or Madam:

Inspection of your premises at 3020 Scenic Ave. or 3020 Sylvandale Ave, Milton Township, Mahoning County, has disclosed that the use of the premises is in violation of the Milton Township zoning resolution [O.R.C 519.23] as indicated below:

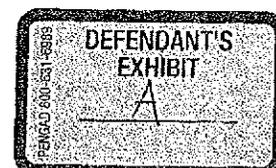
Section 4 Home Occupation Requirements
Section 8 – C Signs

Each day's continuation of this violation may be deemed a separate offense, for which a fine of up to One Hundred dollars [\$100] per day may be assessed, and liens may be placed against said property. If you have any questions or desire further information about this matter, please contact my office at your earliest convenience.

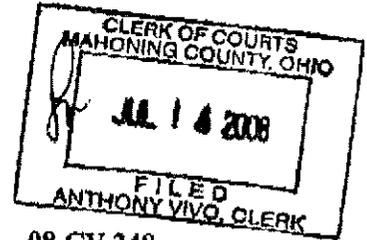
PLEASE GIVE THIS MATTER YOUR URGENT ATTENTION.


Julie Meehan
Zoning Inspector

Certified Mail # 7002 0460 0001 8866 6291



IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

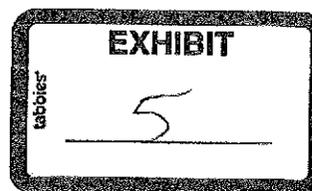


JENIFER TERRY, Zoning Inspector
Milton Township, Mahoning County, Ohio)
)
)
 Plaintiff)
)
 vs.)
)
)
 GAYLE K. SPERRY et al.)
)
)
 Defendants)

CASE NO. 08 CV 348
MAGISTRATE DELAURENTIS
STIPULATIONS OF FACT

1. Plaintiff is the duly appointed Zoning Inspector of Milton Township, Mahoning County, Ohio.
2. This action is brought pursuant to Section 519.24 of the Ohio Revised Code.
3. The Defendant Gayle K. Sperry is the record title holder of real estate located at 3020 Sylvandale, Berlin Center, Milton Township, Mahoning County, Ohio, (also known as 3020 Scenic Drive). The property is located in a platted subdivision.
4. The Property is the primary residence of defendant Gayle K. Sperry.
5. Defendants Kristopher Sperry and Evelyn Sperry do not reside on the property.
6. Defendant Myrddin Wine Company LLC dba Myrddin Winery, registered with the Ohio Secretary of State, is the owner of the winery business located at 3020 Sylvandale aka 3020 Scenic Drive.
7. Defendants Kristofer and Evelyn Sperry are the sole members of Myrddin Wine Company LLC dba Myrdinn Winery and responsible for the operations of the business located at 3020 Sylvandale aka 3020 Scenic Drive.
8. Defendants' property is located within the political subdivision of Milton Township, Mahoning County, Ohio, and therefore subject to the Zoning Resolution of Milton Township, passed in compliance with Sections 519.02 to 519.25 of the Ohio Revised Code.

14



9. Defendant's property is located in an R-1, residentially zoned district.

Milton Township Zoning Resolution, Section 5, B, *R-1 Residential District*, and Section 4, *Definitions*, states:

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

- a. Agriculture
- b. One family dwellings subject to lot and yard space requirements applicable to the district except for publicly owned land fronting on the shoreline of Milton Reservoir as provided in Section 8C.
- c. Churches and other places of worship.
- d. Public schools, elementary and high, and private schools having a curriculum similar to a public school
- e. Home Occupations as defined in Section 4.
- f. Automobile parking spaces shall be provided as required in Section 6.
- g. Accessory buildings.

Home Occupations are defined as an occupation conducted in a dwelling unit or small garage provided that:

- 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.
- 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;

- 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;
- 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.
- 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.

10. Section 519.21(A) of the Ohio Revised Code reads as follows:

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 use of buildings or structures incident to the use for agricultural purposes of the land which such buildings or structures are located, including buildings or structures that are primarily used 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.

11. The Township has not adopted any zoning regulations regulating or prohibiting the agricultural use of property in platted subdivisions as permitted in Section 519.21 (B) ORC.

12. That on or about May 20, 2005, the Defendants commenced operation of a winery business on the premises in question and continue to operate said winery business to date.
13. The defendants have a State of Ohio Liquor License and Vendor's License.
14. The property contains 20 grape vines, of which only 12 are harvested.
15. The Defendants purchase other grapes and grape juices not grown on the property in question, from vendors who ship the grapes and grape juice to the property in question for processing, bottling and sale.
16. The activities conducted on the premises, relevant to this action are as follows:
 - a) Grapes are both harvested on the property and brought in from outside vendors, crushed, de-stemmed, fermented, bottled, aged, labeled and sold on premises.
 - b) The sale of shelf stable foods that do not require a County Health Board Food Service license or permit.
 - c) Customers enter upon the property to purchase bottled wine and shelf stable foods.
17. Ninety-Five percent (95%) of the sales of bottled wine sold on the premises are from grapes and/or grape juice not planted, cultivated and harvested on the property in question.
18. Five percent (5%) of the sales of bottled wine sold on the premises are from grapes and grape juice planted, cultivated, and harvested on the property in question.
19. The defendants advertise the business on an internet website, website links, listing with the Department of Agriculture and signs on the property marking their business location.
20. During the times relevant herein, the zoning inspector(s) did not require an application for approval of home occupations in the township nor did they issue any written approval or permits for the same.

21. Defendants were not issued a zoning violation following the April 12, 2007 summons and notice of violation that was the subject of Misdemeanor Zoning Complaint filed in the Mahoning County Court No., Criminal Case No. 2007 CR B 00423, which was subsequently dismissed without prejudice.

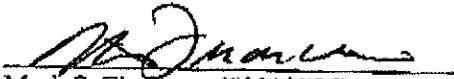
22. The Plaintiff Zoning Inspector elected to file this injunctive remedy in lieu of pursuing an administrative remedy of issuing a zoning violation citation, subject to appeal and review by the Township Board of Zoning Appeals.

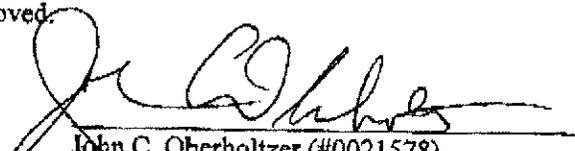
ISSUE PRESENTED FOR REVIEW

1 Are the winery activities conducted on the property an Agricultural Use of the Property as defined in Section 519.01 of the Ohio Revised Code?

2. Is the Myrddin Winery exempt from zoning regulation by Milton Township pursuant to Section 519(A) of the Ohio Revised Code?

The above stipulations are agreed to and approved.


Mark S. Finamore (#0012726)
Attorney for Plaintiff


John C. Oberholtzer (#0021578)
Attorney for Defendants

Date: 7/10/08

Date: 7/8/08

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

Attorney Mark S. Finamore
258 Seneca Ave. NE
Warren, Ohio 44481

For Defendants-Appellants

Gayle Sperry
Kristofer Sperry
Evelyn Sperry
Myrddin Wine Company

Attorney Anthony L. Seegers
4266 Tuller Road
Dublin, Ohio 43017

For Defendants-Appellants
Ohio Farm Bureau Federation, Inc.
Mahoning County Farm Bureau

Attorney David S. Pennington
Ohio Farm Bureau Federation, Inc.
280 N. High St. - 6th Floor
P.O. Box 182383
Columbus, Ohio 43218-2383

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).

{¶8} 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)?

{¶9} 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.

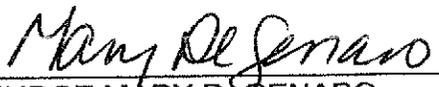
Based on the plain language of the statute, the R.C. 519.21(A) exception applies to Appellants' winery. It is undisputed that Appellants use part of the land for viticulture. The property contains 20 grape vines, 12 of which are harvested. (Stipulation 14.) The remaining eight are still growing. (Gayle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