

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Appellants,

vs.

**JENNIFER TERRY, ZONING INSPECTOR,
MILTON TOWNSHIP, OHIO**

Appellee

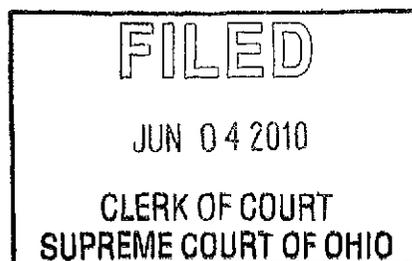
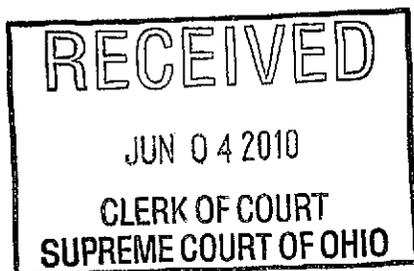
CASE NO. 2010-0810

**ON APPEAL FROM
THE SEVENTH DISTRICT
COURT OF APPEALS,
MAHONING COUNTY**

**MEMORANDUM IN OPPOSITION TO APPELLANT'S MEMORANDUM IN
SUPPORT OF JURISDICTION**

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STATEMENT OF APPELLEE'S POSITION AS TO WHETHER A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED OR WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

It is the position of the Appellee, Jennifer Terry, Zoning Inspector, Milton Township, Ohio, that the present case does not involve a substantial constitutional question. It does not involve a takings issue, as the Appellants are alleging. The property, zoned Residential, was purchased as a vacant lot and then improved with the construction of a home on the property, in compliance with zoning. As such, the property is suited for the permitted use of the residential district in which the property is located. Further, such zoning use classification of the property does not deprive the Appellant owners of the reasonable use of the property, and therefore cannot constitute a taking. Nor is this a case of public or great general interest, as will be demonstrated in the Argument below. Instead, the Appellants are attempting to use this Court as an additional court of review.

ARGUMENT IN SUPPORT OF THE APPELLEE'S POSITION THAT THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION NOR A MATTER OF PUBLIC OR GREAT GENERAL INTEREST

Article IV, Section 2 of the Ohio Constitution states:

- (B)(2) The Supreme Court shall have appellate jurisdiction as follows:...
- (a) In appeals from the court of appeals as a matter of right in...
 - (iii) Cases involving questions arising under the constitution of the United States or of this state...
 - (e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals...

Ohio Const., Art. IV, §2.

An appeal that claims a substantial constitutional question...may invoke the appellate jurisdiction of the Supreme Court and shall be designated a claimed appeal of right. S. Ct. Prac. R. 2.1(A)(2). The Supreme Court will determine whether to accept the appeal. *Id.* An appeal that involves a question of public or great general interest invokes the discretionary jurisdiction of the Supreme Court and shall be designated a discretionary appeal. S. Ct. Prac. R. 2.1(A)(3). Again, the Supreme Court will determine whether to accept the appeal. *Id.*

The sole issue for determination by the Supreme Court at this juncture is whether it has either appellate jurisdiction or discretionary jurisdiction. *See: Williamson v. Rubich*, 171 Ohio St. 253 (1960). For a matter to be of public or great general interest, it must be distinguished from questions that are of interest primarily to the parties involved. *Id.* The issue must have statewide concern. *See: West Unity ex rel. Beltz v. Merillat*, 2004-Ohio-2682 (2004, 6th Dist. Court of Appeals). The issue must not be a controversy that is purely local in its nature, with no important principle of state-wide application. *State v. Noctor*, 106 Ohio St. 516 (1922) Further, this honorable Court is not to serve as an additional court of appeal on review. *State v. Bartrum*, 2009-Ohio-355 (2009).

All zoning ordinances are presumed to be constitutional. State ex rel. Republic Serv. Of Ohio II, LLC v. Pike Twp. Bd. Of Zoning Appeals, 2005-Ohio-7119 (2005); citing, Century Motors Corp. v. Pepper Pike, 73 Ohio St.3d 581 (1995). However, as zoning ordinances are in derogation of the common law and tend to deprive land owners of some use of their land, they must be strictly construed and their scope not extended to include limitations not clearly prescribed. Saunders v. Clark Cty. Zoning Dept., 66 Ohio St.2d 259 (1981). Further, if the ordinance language is unambiguous, the court must apply the plain and ordinary meaning of the words. Roxane Laboratories, Inc. v. Tracy, 75 Ohio St.3d 125 (1996).

The Appellants, in their Memorandum in Support of Jurisdiction, state their proposition of law as:

“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.”

In its Argument in Support of its Proposition, the Appellants have five (5) statements of support. First, they note the decision on the case at bar in the Court of Appeals, relying upon the dissent. In that dissent, Judge DeGenaro would have applied the “time honored rule of statutory construction that ‘a specific statutory provision prevails over a conflicting general provision’ and held that the Appellants’ use of the property would be exempt pursuant to R.C. 519.21(A)”. However, the majority correctly determined that R.C. 519.01 and 519.21(A) must be read together in order to determine if the use is agricultural and whether it is exempt from zoning. Further, the

majority also noted that the specific statutory provision which Judge DeGenaro referred to, R.C. 519.21(A), specifically states that buildings and structures exempted from zoning regulations must be incidental to the agricultural purpose.

The facts, not in dispute here, state that the property was vacant, prior to the property owner, Ms. Gayle Sperry, purchasing the property and building a home on it. At the time that this matter came before the trial court, only twenty (20) grapevines were growing on the property, of which only twelve (12) were capable of production and harvesting. Ninety-five (95) percent of the sales of wine were from grapes not planted, cultivated or harvested on the property. Only five (5) percent of the wine sold on the property was produced by the property. When sales were combined of both wine and shelf stable products, over ninety-five (95) percent of the sales of the Myrrdin Winery consisted of items **not** produced on the land. Therefore, as both lower courts determined, the agricultural use of the land was not its primary purpose; commercial sales were. Therefore, the exemption of R.C. 519.21(A) does not apply.

As second support of its proposition of law, the Appellants state that the Ohio Legislature intended that R.C. 519.01 be broadly construed. On this point, it appears all parties are finally in agreement. It must be noted that in their brief to the Court of Appeals, the Appellants were asking the Court for an almost nonsensical result, by asking for a disjointed interpretation of R.C. 519.01, that involved examining the placement of colons and semi-colons, and the location of the words "husbandry" and "production." The Appellee has always argued for a broader interpretation of both R.C. 519.01 and 519.21(A) and has noted courts in agreement with this view. *See: Springfield Twp. Bd. Of Trustees v. Anderson*, 2007-Ohio-1530 (6th Dist. 2007) and *Moreland v. Salyer*, 2005-Ohio-1756 (5th Dist. 2005).

R.C. 519.01 and R.C. 519.21, as originally enacted in 1947, by House Bill 22, and codified as GC 3180-45, noted that agriculture “shall be defined as including agrivulture, farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture and animal and poultry husbandry.” 1947 HB 22 3180-45 (97th General Assembly). Currently, R.C. 519.01 provides a more expansive definition of agriculture, but specially states that it does include “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.” Ohio Rev. Code Ann. Sec. 519.01 (West 2009).

When viewed in the most positive and favorable light, the Appellants’ use of the property, again as properly noted by the lower courts, is not agriculture as defined in R.C. 519.01. From their twenty (20) vines, the Appellants are attempting to piggy back onto this statute and be allowed permission to operate a commercial business in a residential district, deriving over ninety-five (95) percent of their sales on products not raised on the property. This is clearly not the “marketing of agricultural products when those activities are conducted in conjunction with, **but secondary to**” agriculture. (Emphasis added.)

As their third point, the Appellants argue that the size of an operation is irrelevant to a determination of whether an activity is “agriculture’ within the meaning of R.C. 519.01. Again, the Appellees would agree with this statement. Determinative is what is occurring on the property and whether it meets the definition of agriculture as provided in R.C. 519.01. The statute specifically states that viticulture is agriculture, as well the “*processing, drying, storage and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to*” such agriculture. This is where the Appellants lose their argument.

Their twenty vines are agriculture. (The Appellees note for the record that at the time this

matter came before the trial court, this was the total of vines under Appellants' control and/or possession. Appellants' reference to a sharecropping agreement for [property located across the street, being a separate parcel, was never mentioned in the parties' stipulation of facts, depositions, documentary evidence or trial brief, and therefore is not part of the record.) The marketing activities are not secondary to this agriculture; they are primary. Quite simply, the Appellants are using the property to operate a business, selling wines and shelf products that are not produced on the property, which account for over ninety-five (95) percent of their sales. This is not agriculture pursuant to R.C. 519.01.

The Appellants reference the Meerland Dairy LLC case as support for their third point. As the Appellee previously noted in her Brief to the Court of Appeals, the facts of Meerland are factually distinguishable from the matter at hand, as that case involved a large dairy operation on over one-hundred (100) acres, accommodating two thousand one hundred (2,100) cows. *See: Meerland Dairy LLC v. Ross Twp*, 2008-Ohio-2243 (2nd Dist. May 9, 2008). While agreeing with the statement made by the Meerland court that the definition of R.C. 519.01 makes no distinction with respect to the size of a farming operation in order to determine if it is agriculture, the Appellants cannot seriously contend that their twenty (20) vines on a 200 ft. x 202.37 ft. lot provide sufficient support to argue that all of their activities are exempt from zoning.

As its Fourth argument, the Appellants state that the search for legislative intent is improper where the meaning of a statute is clear and unambiguous. First, the Appellee points out the contradiction this poses within Appellants' brief, wherein their second argument states that legislative intent is important. (The Ohio Legislature intended that R.C. 519.01 be broadly construed.) Legislative intent either is important or it is not, but Appellant cannot have it both ways.

Further, as with Appellants' third point, the Appellee agrees that legislative intent is improper where the meaning is clear and unambiguous. The twenty grape vines are agriculture, pursuant to R.C. 519.01. The marketing and commercial activities that are not secondary to the agricultural use are not agriculture and therefore are not permitted, per the clear and unambiguous wording of R.C. 519.01.

As its fifth and final point, the Appellants argue that the plain language of R.C. 519.21(A) prohibits township zoning of land where "any part" of the land is "used for viticulture." Here is where the Appellants are reverting back to arguments made in their Court of Appeals brief and arguing for a disjointed reading of the statute. If the Appellants are truly arguing for a broad and comprehensive reading of the statutes, R.C. 519.21(A) states that the township may not prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to those purposes, including buildings or structures that are used primarily for vinting and selling wine and that are located on land used for viticulture. Again, the buildings and structures on the property in question are not incidental to the agriculture. The buildings and structures on the property are primary to the marketing and selling of products that are not produced on the property. These buildings and structures are **not** secondary to any agricultural use of the property.

While acknowledging the importance of agriculture, including viticulture, for the state of Ohio, the Appellants cannot seriously contend that one producing grapevine is enough to remove their property from zoning oversight. Again, Appellants contradict themselves by noting their belief that legislative intent (although previously stating it was improper where the meaning of a statute is obvious) allows such a result. The Appellee again states that the statute is clear and unambiguous and the uses are not secondary to any agricultural use of the property.

For the above stated reasons, the Appellee argues that this case does not involve a substantial constitutional question and is not of great public or general interest. Instead this appeal is an attempt by what Appellee assumes is disappointed property owners, who chose to continue and expand a business that is wholly commercial in nature while they were embroiled in a controversy with zoning officials, in arrogant defiance of the Milton Township Zoning Resolution and community comprehensive plan for land use in the township, to have this Honorable Court act as an additional court of review.

CONCLUSION:

As there is no Constitutional issue nor an issue of public or great general interest, the Appellee respectfully requests this Court deny the Appellants' Appeal as it has no jurisdiction.

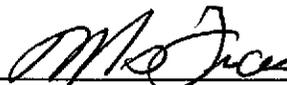
Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular mail this 3 day of June, 2010, to David S. Pennington, Attorney for Appellants, 4266 Tuller Road, Dublin, Ohio 43017



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