[Cite as *Schabel v. Troyan*, 2011-Ohio-2452.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

ELIZABETH SCHABEL, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees/ Cross-Appellants,	:	**CASE NOS. 2010-G-2953 and 2010-G-2954**
- vs -	:	
MICHAEL TROYAN, et al.,	:	
Defendants-Appellants/ Cross-Appellees.	:	

Civil Appeals from the Court of Common Pleas, Case No. 09 M 000646.

Judgment: Affirmed in part; reversed in part.

Dale H. Markowitz and *J. Jaredd Flynn*, Thrasher, Dinsmore & Dolan, 100 Seventh Avenue, #150, Chardon, OH 44024-1079 (For Plaintiffs-Appellees/Cross-Appellants).

Abraham Cantor, Johnnycake Commons, 9930 Johnnycake Ridge Road, #4-F, Concord, OH 44060 (For Defendants-Appellants/Cross-Appellees).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Michael Troyan, et al., Auburn Township Trustees ("the township"), appeal the judgment of the Geauga County Court of Common Pleas in favor of appellees, Elizabeth Schabel and Jay Schabel, finding that a pavilion on their property is exempt from township zoning as a structure used for agricultural purposes. For the reasons that follow, we affirm in part and reverse in part.

{¶2} In late 2003, the Schabels purchased a 64-acre parcel of real property located at 9911 Shadow Wood Circle, Auburn Township, Ohio. The parcel is located in a residential zoning district. It is not part of a platted subdivision. The parcel is subject to a conservation easement in favor of a land conservancy, pursuant to which two acres of the parcel are exempt from the easement and another five acres can be used by the Schabels for their agricultural activities.

{¶3} In 2004, the Schabels built a barn on their property in which they resided until 2007, when they built a single-family residence near the barn. Also, in 2007, they built a pavilion near the residence, which they initially used for family gatherings and charitable events.

{¶4} In 2008, the Schabels decided to engage in viticulture, i.e., the production of grapes and manufacture and sale of wine, on their property. In that year they began to convert the barn into a winery for the production of their wine. At around the same time, they built a covered walkway between the barn and the house. They also attached a "crush pad" addition to the rear of the winery, which is used to crush and press grapes.

{¶5} Also, in 2008, the Schabels constructed a covered bridge over a ravine on their property to give them access to the northwest portion of their lot, which is heavily forested.

{¶6} On or about October 16, 2008, the Schabels applied to appellant Frank Kitko, the Auburn Township Zoning Inspector, for a zoning certificate to use the lot as a winery. In support they submitted blueprints for the proposed winery and site plans depicting the aforementioned structures. In response, on October 24, 2008, Mr. Kitko sent an "official notice" to them in which he denied their application, and indicated the

crush pad addition violated the township's setback regulations. He also notified them of their right to appeal these decisions to the township board of zoning appeals ("BZA").

{¶7} On November 4, 2008, the Schabels' counsel, Dale Markowitz, Esq., wrote a letter to Mr. Kitko, advising him that the Schabels were constructing a winery and intended to engage in viticulture. He said this activity fell within the agricultural-use exemption to zoning so that the setback regulations would not apply to them.

{¶8} On January 16, 2009, Mr. Kitko wrote a letter to Mr. Markowitz, conceding that "the production of wine at this location is agriculturally exempt." However, Mr. Kitko stated that, in his opinion, the winery and residence constitute one structure so that, even though the crush pad was an addition to the winery, in his view, it was an addition to the residence. As a result, he said this addition is not exempt and would require an area variance from the rear yard setback requirement. He also said that, because the pavilion had previously been used for charitable events, it was not exempt and required a variance from the regulation prohibiting accessory structures from being in the front yard.

{¶9} On March 5, 2009, the Schabels obtained a permit from the state of Ohio allowing them to manufacture wine and to sell it to retail permit holders and to personal consumers by mail order. Their application to sell wine to consumers on-site was pending at the time of the BZA hearing.

{¶10} On May 1, 2009, the Schabels filed three notices of appeal with the BZA, alleging zoning inspector error and, alternatively, requesting area variances. First, they alleged the zoning inspector erred in deciding that the crush pad was not exempt as an agricultural use. Alternatively, they filed a request for a variance from the rear yard setback for the crush pad.

{¶11} Second, the Schabels alleged the zoning inspector erred in deciding that the pavilion was not agriculturally exempt. Alternatively, they requested a variance from the front yard restriction.

{¶12} Third, the Schabels alleged the zoning inspector erred in deciding their bridge was not agriculturally exempt. Alternatively, they applied for a variance from the requirement that accessory structures not be located in the front yard. They also applied for a five-foot variance from the 15-foot side yard setback for the bridge.

{¶13} The Schabels' appeals and variance requests were consolidated, and the BZA held a hearing on all issues on May 12, 2009.

{¶14} Mr. Schabel testified the winery is used exclusively to make wine. He said they had installed several 250-gallon tanks in the winery, some of which are used to ferment wine, while others are used for wine that has already been fermented.

{¶15} The Schabels now plant grapes on three acres of their property, which are capable of producing 12 tons of grapes or 15,000 bottles of wine each year. They also plan on importing about eight tons of grapes each year for their red wine.

{¶16} Mr. Schabel testified that after the conversion of the winery was completed, they built a three-sided metal "crush pad" addition onto the back of the winery. The sole use of the crush pad is to de-stem, crush, and press the grapes. The product is then placed into bins, and the juice is pumped into the tanks in the winery to be fermented. The crush pad contains a "chiller" that sends cold water to the tanks in the winery to cool the grape juice that is being fermented into wine.

{¶17} Mr. Schabel testified that the pavilion on the property is also used in connection with the family's viticulture activities. It is 1,350 square feet and can accommodate about 40 people. It is used to store grapes to keep their temperature

stable while other grapes are being processed in the crush pad. The pavilion is also used for wine tasting and to sell the wine. The pavilion has tables and benches for customers. The Schabels bring in an entertainer to help in the sale of wine. While in the past the pavilion was used for charitable events and family gatherings, from this point forward, it will be used solely in connection with the winery activities and occasional family gatherings.

{¶18} Also, in 2008, the Schabels constructed a six-foot wide covered bridge to provide a safe crossing over a 25-foot ravine on their property that was created when the old interurban railroad abandoned the area. The ditch is six-foot deep and collects runoff water from both sides, leaving mud and standing water at its base. The Schabels built the bridge to provide access to the northwest portion of their property for forestry management. They use the bridge to remove dead timber from that area. The Schabels' neighbors also use the bridge as part of a walking path.

{¶19} Mr. Schabel testified that when they built the bridge, they were unaware that it would be considered an accessory structure and thus subject to the 15-foot side yard setback. He said that if the variance from the side yard setback was not granted and they were required to move the bridge five feet, they would have to build a new road to allow access to the other side of their property. This would result in the destruction of trees along the side and would disturb the wetland below the bridge. He said the bridge provides access to emergency services on foot or four wheelers. He said that none of the neighbors who can see the bridge object to it.

{¶20} One of their neighbors, Corey Simler, testified that she supports the bridge. She said that children in the area and the neighbors walk the path now that the

bridge has been constructed. She said that the bridge is beautiful and an asset to the community.

{¶21} Mr. Kitko testified with respect to the Schabels' variance requests. He said that, in his opinion, the dwelling is the main structure so that, even though the crush pad is an addition to the winery, it is part of the dwelling. He said that, because the crush pad extends into the rear yard setback, a variance is required. He also objected to the pavilion and the bridge because the zoning regulations prevent any accessory structures from being built in the front yard.

{¶22} Following the hearing, the BZA denied the Schabels' request that the crush pad be exempted from zoning as an agricultural use because, it found, the crush pad is part of the main structure, which is a dwelling. The BZA also denied the request for a variance to the rear yard setback requirement for the crush pad. Next, the BZA denied the request that the pavilion be exempted from zoning as an agricultural use because it had previously been used for a business prior to the proposed winery operation. The BZA also denied the request for variances with respect to the pavilion. Further, the BZA denied the request that the bridge be exempted from zoning. However, while the BZA denied the request for a variance from the side yard setback for the bridge, the BZA granted the request for a variance to allow the bridge to remain in the front yard.

{¶23} The Schabels filed an appeal from the BZA's decision in the trial court pursuant to R.C. Chapter 2506. Upon review of the record, that court reversed the BZA's decision regarding the pavilion. With respect to the pavilion, the trial court found that "[t]he only evidence relating to current use or addressed at the BZA hearing *** was

that Schabels' primary use would be for wine making and selling." As such, the trial court found that the pavilion qualified as an agricultural use.

{¶24} However, the trial court affirmed the BZA's finding that the crush pad was not an agricultural use. In support of this finding, the trial court noted that the residence, winery, and crush pad constitute one structure because the residence is connected to the winery/crush pad by a covered walkway. The trial court therefore found that the structure qualifies as a dwelling and since, in its view, the crush pad is an addition to the dwelling, its primary purpose is residential, not agricultural.

{¶25} Next, the trial court affirmed the BZA's finding that the bridge was not an agricultural use and was not entitled to a side yard variance, although the BZA had granted the Schabels a variance to allow the bridge to remain in the front yard.

{¶26} The township appealed the trial court's decision regarding the pavilion in case No. 2010-G-2953. Thereafter, the Schabels appealed the trial court's decision regarding the crush pad and bridge in case No. 2010-G-2954. Subsequently, this court, sua sponte, ordered that the Schabels' notice of appeal would be treated as a cross-appeal. The trial court stayed the execution of its judgment pending appeal.

{¶27} The township asserts two assignments of error regarding the pavilion. Since they are related, they shall be considered together. They allege:

{¶28} "[1.] The trial court abused its discretion in determining that the pavilion was inseparably dependent upon agricultural use as required by *State v. Huffman*.

{¶29} "[2.] The trial court's refusal to consider all of the evidence presented concerning the history of the use of the pavilion was a proper [sic] application of *Dinardo* when the appellee had the burden of proof."

{¶30} Before addressing the township's arguments, we consider our standard of review. Upon review of an administrative appeal, a court of common pleas considers whether the decision to grant or deny a zoning certificate is supported by "the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. The appellate court's review of the trial court's judgment is more limited in scope than that of the court of common pleas, and the appellate court must affirm the decision of the court of common pleas unless the court of appeals finds, as a matter of law, that the decision of the common pleas court is not supported by a preponderance of reliable, probative, and substantial evidence. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. "While the court of common pleas has the power to weigh the evidence, an appellate court is limited to reviewing the judgment of the common pleas court strictly on questions of law." *Akwen, Ltd. v. Ravenna Zoning Bd. of Appeals*, 11th Dist. No. 2001-P-0029, 2002-Ohio-1475, at ¶17. "Within the ambit of 'questions of law' for appellate court review would be abuse of discretion by the common pleas court." *Kisil*, supra, at fn. 4. This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *In re Edgell*, 11th Dist. No. 2009-L-065, 2010-Ohio-6435, at ¶45.

{¶31} We are mindful that "'[z]oning legislation is an exercise of the police power. *** A township has no inherent zoning power. *** Whatever power a township has to regulate the use of land through zoning regulations is limited to authority expressly delegated and specifically conferred by statute. ***.'" (Internal citations omitted.) *Dinardo v. Chester Township Bd. of Zoning Appeals*, 186 Ohio App.3d 111, 116, 2010-Ohio-40, quoting *Meerland Dairy, LLC v. Ross Twp.*, 2d Dist. No. 07CA0083, 2008-Ohio-2243, at ¶7.

{¶32} In Ohio, the authority of townships to adopt local zoning regulations is derived from R.C. 519.02. However, that authority is limited by R.C. 519.21(A), which exempts property devoted to agricultural uses from zoning regulation. R.C. 519.21(A) provides, in pertinent part:

{¶33} "*** [S]ections 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.)

{¶34} Section 1.05 of the Auburn Township Zoning Resolution essentially tracks R.C. 519.21(A).

{¶35} Further, R.C. 519.01 defines "agriculture" as including viticulture. "Viticulture" has been defined as "1: the cultivation of vines: grape growing 2: a branch of agricultural science concerned with the culture and production of grapes esp. for wine and market[.]" Webster's Third New International Dictionary of the English Language Unabridged (1986) 2559.

{¶36} Thus, pursuant to the foregoing statutes, structures "incident" to agricultural purposes of the land are exempt from zoning. There is also a specific exemption for structures used for viticulture. Such structures are exempt from zoning if they are: (1) primarily used for vinting and selling wine and are (2) located on land any part of which is used for viticulture.

{¶37} The township argues that the trial court abused its discretion in ruling that the pavilion was primarily used for agricultural purposes pursuant to *State v. Huffman* (1969), 20 Ohio App.2d 263 because, it claims, the primary purpose of the pavilion is wine selling, which, it argues, is not an agricultural use. In support, the township cites *Terry v. Sperry*, 186 Ohio App.3d 798, 2010-Ohio-1299. However, its reliance on *Terry* is misplaced. In that case, the Seventh District held the property was not being used for agricultural purposes because the overwhelming majority, i.e., 95 per cent, of the wine sold there was from grapes that were not planted on the property. As a result, the court held: "[a]ny building or structure used for vinting and selling wine here was not 'incident to' the primary purpose of agriculture." Id. at 806. Thus, contrary to the township's argument, the court in *Terry* did not hold that a structure devoted to wine selling could not be agriculturally exempt. Rather, it held that, because the winery operation at issue there was not an agricultural use, a structure used on the property to make and sell wine was not exempt from zoning. Id. at ¶38.

{¶38} In contrast, here, the zoning inspector determined that the winery activities on the Schabels' property were agriculturally exempt. Moreover, it is undisputed that the storage of grapes, wine tasting, and wine sales are virtually the sole current uses of the pavilion. Therefore, the trial court's finding that the Schabels' primary use of the pavilion was "for wine making and selling" and thus exempt from zoning, was supported by the preponderance of reliable, probative, and substantial evidence.

{¶39} We therefore hold that the trial court did not err in reversing the BZA's decision and finding that the pavilion was exempt from the township's zoning regulations.

{¶40} Next, the township argues that the trial court erred in refusing to consider the evidence of the Schabels' past use of the pavilion for charitable and family events in finding that this structure is agriculturally exempt. It argues the trial court should have considered these past uses of the pavilion and denied its exempt status. The township argues the trial court's ruling was based on its allegedly erroneous interpretation of this court's holding in *Dinardo*, supra. In *Dinardo*, this court held that where a property owner applies for a zoning certificate for a use that is permitted under the township zoning resolution, the BZA cannot predicate its denial of the certificate based on the property owner's prior uses of that property. This court stated:

{¶41} "The main problem with the township's approach is the contention that an application for a zoning certificate, completely proper and valid on its face, may be subjectively denied at the discretion of the zoning inspector. While there are occasions that an interpretation of the zoning code is required, it should not be within the discretion of the zoning inspector to decide who he or she thinks is going to comply with the zoning code once a permit is issued, for that is the purpose of the enforcement powers." Id. at 118.

{¶42} Here, the Schabels applied for a zoning certificate for a use that was exempt from zoning. However, R.C. 519.21(A) provides: "[N]o zoning certificate shall be required for any *** building or structure [primarily used for agricultural purposes]."

{¶43} Pursuant to this court's holding in *Dinardo*, supra, because the Schabels presented undisputed evidence that the pavilion would primarily be used for agricultural purposes, its use was exempt from zoning and the BZA could not properly deny its exempt status based on its past uses.

{¶44} We therefore hold that the trial court did not err in finding that the BZA was not entitled to rely on the Schabels' past uses of the pavilion to support its finding that the pavilion is not agriculturally exempt.

{¶45} The township's first and second assignments of error are overruled.

{¶46} For their cross-appeal, the Schabels assert four cross-assignments of error. Because their first and second assigned errors are related, they shall be considered together. They allege:

{¶47} "[1.] The Trial Court erred as a matter of law by affirming the Auburn Township Zoning Inspector and BZA's determination that the Crush Pad on the Schabel Property was not an agricultural use and exempt from Auburn Township's zoning pursuant to Ohio Revised Code Section 519.21.

{¶48} "[2.] The Trial Court's decision was arbitrary, capricious, unreasonable and unsupported by the preponderance of reliable and probative evidence when it affirming [sic] the Auburn Township Zoning Inspector and BZA's determination [sic] that the Crush Pad was not subject to a variance."

{¶49} "'Zoning ordinances are in derogation of the common law. They deprive a property owner of uses of his land to which he would otherwise be entitled and, therefore, when interpretation is necessary, such enactments are normally construed in favor of the property owner.'" *Bd. of Nelson Twp. Trs. v. Soinski*, 11th Dist. No. 2002-P-0130, 2003-Ohio-6418, at ¶24, quoting *Cash v. Brookshire United Methodist Church* (1988), 61 Ohio App.3d 576, 579; *Cicerella, Inc. v. Jerusalem Twp. Bd. of Zoning Appeals* (1978), 59 Ohio App.2d 31, 35 (courts must "liberally construe the terms and language in favor of the *** use"). This court has held that "'[r]estrictions on the use of real property by *** ordinance, resolution or statute must be strictly construed, and *the*

scope of the restrictions cannot be extended to include limitations not clearly prescribed. ***.'" (Internal citations omitted and emphasis added.) *Dinardo*, supra, at 118, quoting *Saunders v. Zoning Dept.* (1981), 66 Ohio St.2d 259, 261.

{¶50} The trial court found that the covered walkway between the winery/crush pad and the residence transformed these separate structures into one structure. The court then found that because a structure can only have one primary use and the structure here includes a residence, the primary use of the crush pad must be residential and it is therefore not agriculturally exempt. We do not agree.

{¶51} First, the trial court's finding that the primary purpose of the winery/crush pad is residential conflicts with the undisputed evidence that the Schabels' production of wine on their property is agriculturally exempt and that the primary use of both of these structures is agricultural. The court's finding is therefore not supported by the evidence.

{¶52} Second, the trial court's finding that the primary purpose of the crush pad is residential conflicts with R.C. 519.21(A). As noted above, this statute prevents a township from prohibiting the use of structures that are "*used primarily for vinting and selling wine* and that are located on land any part of which is used for viticulture." (Emphasis added.)

{¶53} Thus, the agricultural-use exemption is based on the *use* of the structure, not whether the structure is detached or connected with another structure. Pursuant to R.C. 519.21(A), because the primary purpose of the crush pad is agricultural and that structure is located on land any part of which is used for viticulture, the exemption applies to the crush pad. Nothing in R.C. 519.21(A) suggests that the connection of the winery/crush pad to another structure, whose primary use is permitted but not

agricultural, would strip the winery and crush pad of their primary purposes or their exempt status.

{¶54} We note that the trial court did not cite any statute or other authority in support of its ruling that the connecting walkway stripped the winery and crush pad of their primary agricultural uses. Instead, the court merely stated that it was "natural" to so conclude; that it was "not logical to suggest" otherwise; and that it "is assumed that each building has a single main use." However, these findings of the trial court fly in the face of the clear mandate of this court and the Supreme Court of Ohio that "'[r]estrictions on the use of real property by *** ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed.'" *Dinardo*, supra, quoting *Saunders*, supra. Since the General Assembly has not seen fit to restrict the application of the agricultural-use exemption to such activities conducted in detached structures, this court is not willing to so limit its application.

{¶55} Third, the trial court's finding conflicts with the township's definitions of "structure" and "use." Section 2.02 of the zoning resolution defines "structure" as "[a]nything constructed or erected that requires location on the ground or is attached to something having location on the ground." That same section defines "use" as "[a]ny purpose for which a structure or the land is developed or occupied including any activity, business or operation within a structure or on the land."

{¶56} Further, Section 2.01(a), entitled "Rules of Interpretation," provides, at (6), that "[t]he words *** 'structure' and 'use' include 'or part thereof' ***."

{¶57} According to the foregoing definitions, the winery, crush pad, and dwelling were built as separate structures, which are now connected by a covered walkway,

which is yet another structure. The trial court in its judgment suggested that if the winery and crush pad were detached, they would be agriculturally exempt. Thus, according to the trial court, if the walkway was removed, there would be no issue concerning the agricultural nature of the winery and crush pad. However, R.C. 519.21(A) does not draw such a distinction. Since the primary use of the winery and crush pad is agricultural and the terms "structure" and "use" include "or part thereof," if a use is exempt from zoning in a structure, then it is also exempt in *a part of* that structure. Thus, even if the separate structures were now considered to be one structure, the winery and crush pad would still be exempt. It makes no difference whether these structures are detached or "part of" one structure. They are still exempt as structures whose primary use is agricultural.

{¶58} Fourth, common sense, logic, and basic fairness militate against the trial court's finding. No one would reasonably suggest that a farmer who constructs a covered walkway between his farmhouse and his barn—to protect himself and his family from the elements while tending to their animals—could no longer claim his barn was exempt from township zoning. Yet, this is the logical consequence of the trial court's ruling.

{¶59} We therefore hold the trial court erred in finding that the crush pad attached to the Schabels' winery is not exempt from township zoning.

{¶60} The Schabels' first cross-assignment of error is sustained.

{¶61} In light of our holding that the Schabels' crush pad is exempt from township zoning, their second cross-assignment of error is overruled as moot.

{¶62} For their third cross-assignment of error, the Schabels allege:

{¶63} "The Trial Court's decision was arbitrary, capricious, unreasonable and unsupported by the preponderance of reliable and probative evidence when it affirmed the Auburn Township Zoning Inspector and BZA's determination that the Bridge was not subject to a variance."

{¶64} The Schabels constructed a bridge across a ditch on their property to obtain access to the forested northwest portion of their lot. They filed an appeal alleging the zoning inspector erred in determining that the bridge did not qualify as a structure used for an agricultural purpose, i.e., forest management. Alternatively, they requested two area variances for the bridge, one from the prohibition against locating accessory structures in the front yard and another from the 15-foot side yard setback. The Schabels constructed the bridge 10 feet from the property line. They therefore sought a five-foot variance. The BZA denied their appeal, finding the bridge was not agriculturally exempt. As to the variance requests, the BZA granted the Schabels' request for a variance to allow the bridge to be located in the front yard, but denied their request for a variance from the side yard setback. On appeal, the Schabels do not pursue the argument that the bridge is agriculturally exempt. They limit their argument to the trial court's alleged error in affirming the BZA's denial of their request for a variance from the side yard setback.

{¶65} "The standard for granting a variance which relates solely to area requirements should be a lesser standard than that applied to variances which relate to use. An application for an area variance need not establish unnecessary hardship; it is sufficient that the application show practical difficulties." *Kisil*, supra, syllabus.

{¶66} "The factors to be considered and weighed in determining whether a property owner seeking an area variance has encountered practical difficulties in the

use of his property include, but are not limited to: (1) whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance; (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage); (5) whether the property owner purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance." *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, syllabus.

{¶67} In explaining this test, the Supreme Court of Ohio in *Duncan* stated:

{¶68} "*** [A] property owner encounters 'practical difficulties' whenever an area zoning requirement (e.g., frontage, setback, height) unreasonably deprives him of a permitted use of his property. The key to this standard is whether the area zoning requirement, as applied to the property owner in question, is reasonable. The practical difficulties standard differs from the unnecessary hardship standard normally applied in use variance cases, because no single factor controls in a determination of practical difficulties. A property owner is not denied the opportunity to establish practical difficulties, for example, simply because he purchased the property with knowledge of the zoning restrictions. *Kisil*, supra, at 33; cf. *Consolidated Mgmt., Inc. v. Cleveland* (1983), 6 Ohio St.3d 238." *Duncan*, supra, at 86.

{¶69} Nor is there any requirement that the *Duncan* factors be applied mathematically. *Winfield v. Painesville*, 11th Dist. No. 2004-L-053, 2005-Ohio-3778, at ¶28. "Different facts will require that different questions be asked and different factors to be considered, sometimes more, sometimes fewer, but in no two cases must the factors considered necessarily be the same." *Trent v. German Twp. Bd. of Zoning Appeals* (2001), 144 Ohio App.3d 7, 18.

{¶70} The trial court did not make findings of fact under the *Duncan* factors. Instead, it simply noted: "Having to traverse some wet areas and a stream to get to a woods does not equate with entitlement to a variance. *** [T]here is even evidence that there are other ways to access the area. And, the evidence is sparse at best that the bridge passes even a minority of the *Duncan* factors."

{¶71} However, based upon our review of the record and the relevant *Duncan* factors, the Schabels established practical difficulties in support of their request for a variance from the side yard setback. First, there was no evidence that the essential character of the neighborhood would be substantially altered by the variance. Since the BZA granted the variance allowing the bridge to remain in the front yard, allowing it to remain in its present location would not alter the character of the neighborhood. This is especially true because the bridge is surrounded by large trees and largely concealed from the neighbors. The only testimony on this issue indicated that if the variance was *not* granted, the character of the neighborhood would be adversely affected. Mr. Schabel testified that if the variance was denied and they were required to move the bridge five feet, they would be forced to disturb the wetland below the bridge and to remove several trees along the side of the ditch. Second, there was no evidence that adjoining properties would suffer a substantial detriment as a result of the variance. Mr.

Schabel testified that the neighbors who are able to see the bridge have no objection to it. The only neighbor who testified concerning the bridge, Corey Simler, said that the bridge is an asset to the area and that the neighbors support it.

{¶72} Third, there was no evidence that the variance requested would adversely affect the delivery of governmental services. In fact, Mr. Schabel testified that the bridge would provide access to emergency vehicles. Fourth, there was no evidence that the Schabels purchased the property with knowledge of the setback requirement. Mr. Schabel testified that when they built the bridge, he was unaware it would be considered an accessory structure and therefore subject to the side yard setback requirement.

{¶73} We therefore hold that the trial court's decision was not supported by a preponderance of reliable, probative and substantial evidence and that the court erred in not granting the Schabels' variance request for their bridge.

{¶74} The Schabels' third cross-assignment of error is therefore sustained.

{¶75} For their fourth cross-assignment of error, the Schabels allege:

{¶76} "The Trial Court's decision was arbitrary, capricious, unreasonable and unsupported by the preponderance of reliable and probative evidence when it affirmed the Auburn Township Zoning Inspector and BZA's determination that the Pavilion was not subject to a variance."

{¶77} Because we hold, under the township's first assignment of error, that the pavilion is agriculturally-exempt, this cross-assignment of error is overruled as moot.

{¶78} For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed in part and reversed in part.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶79} Current Ohio statutory law necessitates concurrence in the judgment in this case. Under R.C. 519.21(A), a township has no zoning authority to prevent the current vineyard and viticulture activity on Appellees' property. While reluctant to conclude that this situation falls within the purpose behind R.C. 519.21(A), on the facts in the record, this court has no choice but to apply the law, as written.

{¶80} I write separately, however, to note that this case demonstrates the potential tension between residential and some agricultural uses in developing townships. This case is especially unique because the agricultural use came after the residential development. In a similar case, the Ohio Supreme Court offered the following caution: "By concluding that a township zoning ordinance may not prevent the use of land for [agricultural purposes] even in a residential district, we do not mean to suggest that [agricultural purposes] in such a district may not, on the facts of a particular case, be a nuisance and subject to injunction as such. That question is not before us." *Mentor Lagoons, Inc. v. Zoning Bd. of Appeals* (1958), 168 Ohio St. 113, 120.