

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

CASE NO. 10-0810

Appellants,

v.

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

Appellee.

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

**Court of Appeals
Case No. 08-MA-227**

**REPLY BRIEF OF APPELLANTS
GAYLE SPERRY, KRISTOFER SPERRY, EVELYN SPERRY, and
MYRDDIN WINE COMPANY, LLC**

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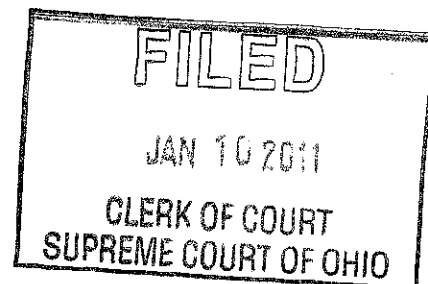


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I. STATEMENT OF FACTS

Throughout its Brief, Appellee mischaracterizes the stipulated facts. For example, they argue that Appellants' primary activity consists of retail sales and other "commercial activities," and portray Appellants' viticulture activity as "one grapevine and one grape." See Appellee Brief, p. 7 ("It is clear that Appellants' commercial activities are not secondary to the production of their single grape vine and single grape."). Appellees even go so far as to misrepresent the stipulated facts by claiming "Appellee therefore argues that Appellants' use of the property, for the retail sale of wine, grapes and other non-agricultural products, *ninety five percent (95%) of which are produced off-site* does not meet the definition of agriculture in R.C. 519.01." See, Appellee Brief, p. 9. (emphasis added)

The Court should not be misguided by Appellee's mischaracterization of the stipulated facts. Those facts make it very clear that *100 percent of the wine sold on the property is produced on the property* and five percent of the grapes used in that production are grown on the property. See Stipulation of Facts, Document 14, at Paragraphs 14 to 18.¹ Therefore, it is

¹ The referenced paragraphs of the parties' Stipulations of Fact read as follows:

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*. (emphasis added)

uncontested that Appellants are engaged in “viticulture” on the subject property as that term is used in R.C. §519.21. See Court of Appeals Opinion, p. 5 (“viticulture is the cultivation or culture of grapes especially for winemaking”) and Dissent, p. 1 (“Appellants’ cultivation of 20 grapevines on the property clearly constitutes viticulture.”).

Another factual error that does not involve a stipulated fact but is, nevertheless, incorrect is Appellants’ statement in their Opening Brief that the size of the property located at 3020 Scenic Drive is two acres. See Appellants’ Opening Brief, p. 2. Although the size of the lot is not included in the parties’ stipulation of facts, the Mahoning County Auditor shows the property located at 3020 Scenic Drive to be a waterfront property of approximately 3/4 acre. The error arose from a misunderstanding of counsel and was not intended to mislead the Court. However, even at 3/4 acre, the land is far more than a “postage stamp” property, as Appellee claims. See Appellee Brief, p. 9.

ARGUMENT

II. FOR PURPOSES OF STATUTORY CONSTRUCTION, THE “SUBJECT MATTER” OF R.C. §519.01 AND R.C. §519.21 ARE NOT THE SAME

Appellee’s argument is grounded upon the false premise that an activity must be “agriculture” within the meaning of R.C. §519.01 before it qualifies for a zoning exemption under R.C. §519.21. This same error is reflected in the Court of Appeals’ assumption that R.C. §519.01 and R.C. §519.21 deal with the same “subject matter.” That Opinion begins by reciting this Court’s requirement that statutes dealing with a single subject matter are to be read *in pari materia* unless a contrary intent is clearly manifest. In the Court’s words:

The Ohio Supreme Court has consistently held that “[s]tatutes pertaining to the same subject matter are construed in *pari materia*.” ... 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.’ ” ... 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.

See, Opinion, p. 4 (citations omitted)

However, the Court of Appeals’ assumption that R.C. §519.01 and R.C. §519.21 deal with the same “subject matter” is incorrect. The subject matter of R.C. §519.01 is the general definition of agriculture while the subject matter of R.C. §519.21 is exemption from zoning. This error is manifest in the statement that follows the above quoted language. The Majority Opinion goes on to say,

Reading RC. 519.01 together with RC. 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 RC. 519.01 and includes viticulture."

See, Opinion, p. 5.

A careful reading of R.C. §519.21(A) shows that it does not prohibit zoning of “agriculture,” it prohibits zoning of “agricultural uses,” for which it provides a slightly different definition from that found in R.C. 519.01. Specifically, the definition of “agriculture” in R.C. §519.01 informs, but does not limit, the scope of “agricultural uses” exempt from zoning under R.C. §519.21.

Set forth below is the full text of each statute to include the headings for each statute. The Court will see that the heading of R.C. §519.01 is “Definition” and the subject matter is a general definition of “agriculture.” The heading of R.C. §519.21, on the other hand, is “Prohibition of agricultural uses limited” and the subject matter of the statute is not a definition of agriculture, but a definition of “agricultural uses” exempt from zoning. The statutes read as follows;

519.01 Definition

As used in section 519.02 to 519.25 of the Revised Code, “agriculture” includes farming; ranching; aquaculture; apiculture; horticulture; **viticulture**; animal husbandry, including, but not limited to, the care and raising of livestock, equine, and fur-bearing animals; poultry husbandry and the production of poultry and

poultry products; dairy production; the production of field crops, tobacco, fruits, vegetables, nursery stock, ornamental shrubs, ornamental trees, flowers, sod, or mushrooms; timber; pasturage; any combination of the foregoing; the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production.

519.21 Prohibition of agricultural uses limited

(A) Except as otherwise provided in division (B) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture, and no zoning certificate shall be required for any such building or structure.

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

- (1) Agriculture on lots of one acre or less;
- (2) Buildings or structures incident to the use of land for agricultural purposes on lots greater than one acre but not greater than five acres by: set back building lines; height; and size;
- (3) Dairying and animal and poultry husbandry on lots greater than one acre but not greater than five acres when at least thirty-five per cent of the lots in the subdivision are developed with at least one building, structure, or improvement that is subject to real property taxation or that is subject to the tax on manufactured and mobile homes under section 4503.06 of the Revised Code. After thirty-five per cent of the lots are so developed, dairying and animal and poultry husbandry shall be considered nonconforming use of land and buildings or structures pursuant to section 519.19 of the Revised Code.

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

(C) Such sections confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit in a district zoned for agricultural, industrial, residential, or commercial uses, the use of any land for a *farm market where fifty per cent or more of the gross income received from the market is derived from produce raised on farms owned or operated by the*

market operator in a normal crop year. However, a board of township trustees, as provided in section 519.02 of the Revised Code, may regulate such factors pertaining to farm markets as size of the structure, size of parking areas that may be required, set back building lines, and egress or ingress, where such regulation is necessary to protect the public health and safety.

As the above-quoted language of R.C. §519.21 indicates, exempt uses include the normal activities related to “agriculture.” For this reason, the definition of agriculture provided in R.C. §519.01 is relevant to interpreting the scope of an “agricultural use” exemption under R.C. §519.21. However, the definition of agriculture contained in R.C. §519.01 in no way limits the agricultural use exemptions established in R.C. §519.21. For example, R.C. §519.21(C) provides an express exemption for farm markets even though the operation of a farm market is not included in the definition of “agriculture” set out in R.C. §519.01. Put another way, the operation of a farm market is exempt from zoning as an “agricultural use” even though it is not “agriculture” within the meaning of R.C. §519.01. Even if the operation of a farm market were viewed as “marketing” under R.C. §519.01, the farm market exemption in R.C. §519.21(C) expressly modifies the “secondary to” requirement of R.C. §519.01 by granting exemption from zoning when gross income from the sale of commercial products (e.g. non-produce) is *equal to* (e.g. 50 percent), and not “secondary to,” the agricultural use defined in the statute as the sale of “produce raised on farms owned operated by the market operator in a normal crop year.”

The special exemption allowed for viticulture is no different from the farm market exemption. Both exemptions deviate from the definition of agriculture contained in R.C. §519.01 and, more importantly, state the express will of the legislature to encourage these industries by relieving them of burdensome zoning restrictions. The exemptions related to viticulture and farm markets are clear, unambiguous and carefully target specific industries for exemption from

zoning in the context of a statute specifically addressing zoning exemptions. It would be difficult to draft a statute that more clearly stated the legislative intent.

Because the subject matter of R.C. §519.01 and §519.21 are not the same, Appellee's assumption that the two statutes must be read *in pari materia* is error. This error led the Court of Appeals to conclude that the "secondary to" language of R.C. §519.01 imposed a requirement under R.C. §519.21(A) that viticulture be the primary activity on land subject to zoning. See Opinion, p. 7 ("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."). While the primary activity test may apply in deciding whether an activity is "agriculture" within the meaning of R.C. §519.01, it is irrelevant to a determination of whether an activity is exempt from zoning under R.C. §519.21. As Judge DeGenaro states in the Dissenting Opinion, "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)." See Opinion, Dissent, p. 1.

Once it is recognized that an activity can be exempt from zoning under the "agricultural use" exemption of R.C. §519.21 without being "agriculture" within the meaning of R.C. §519.01, many of Appellee's arguments become meaningless. For example, most of Appellee's Brief is devoted to their argument that the "secondary to" language of R.C. §519.01 must be satisfied before the "agricultural use" exemptions of §519.21 apply. See, e.g. Appellee Opening Brief, pp. 6-8. If that logic is followed, then Appellee would not only nullify the viticulture exemption of R.C. §519.21(A), but also the farm market exemption of §519.21(C), which allows an exemption for non-agricultural activities that are "equal to" the sale of produce. That is not what the legislature intended as that intent is expressed in the plain language of R.C. §519.21.

III. APPELLEE DOES NOT CHALLENGE THE APPLICABLE RULES OF STATUTORY CONSTRUCTION PRESENTED IN APPELLANTS' OPENING BRIEF OR IN THE DISSENTING OPINION OF JUDGE DEGENARO.

As the Opening Briefs make clear, the outcome of this appeal turns entirely on the rules of statutory construction. One such rule is the "subject matter" test discussed in the previous section. However, if the Court rejects the above argument and finds that the provisions of R.C. §519.01 and R.C. §519.21 do, in fact, deal with the same "subject matter," then the Court must either read the statutes *in pari materia*, or find a "clearly manifest" intent to exempt property from zoning if "any part" of the land is used for viticulture, as did the dissent.

In deciding whether to follow the Court of Appeals' Majority or the Court of Appeals' Dissent, Appellants would point out that the rules of statutory construction clearly favor the dissent. Moreover, the rules of statutory construction set out in Appellants' Opening Brief are uncontested by Appellee.

IV. APPELLEE'S ARGUMENT VIOLATES THE APPLICABLE RULES OF STATUTORY CONSTRUCTION

Appellees' Brief begins by quoting the issues presented to the Trial Court. Those issues were:

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?; and
2. Is the Myrddin Winery exempt from zoning regulations by Milton Township pursuant to section 519.21(A) of the Ohio Revised Code?

See, Appellee's Brief, p. 3, citing Record, Document 14 (Stipulations of Fact).

While the above statement of issues comes from the parties' Stipulation of Fact, it is misleading on the question of law to be resolved in this appeal. For example, the first issue asks "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?" As the Court can see from the above quotations of the

two statutes, R.C. §519.01 does not define an “agricultural use,” it defines “agriculture.” The only statute that purports to define an “agricultural use” is R.C. §519.21. Accordingly, the true question of law to be resolved is “Are the winery activities conducted on the property an *Agricultural Use* of the property *as defined in Section 519.21* of the Ohio Revised Code?” That is the proposition of law presented² and that is the only question the Court needs to resolve. In resolving that question of law, the Court will apply time honored rules of statutory construction.

It goes without saying that a broad construction of the zoning power and a narrow construction of exemptions from the zoning power favors the township (Appellee). That is the approach urged by Appellee. On the other hand, a narrow construction of the zoning power and a broad construction of exemptions from the zoning power favors the landowner (Appellants). That is the approach urged by Appellants. The only real question to be resolved in this appeal, therefore, is what the applicable rules of statutory construction require.

In the foregoing section, Appellants pointed out that R.C. §§519.01 and 519.21 do not deal with the same subject matter and, thus, the rule of statutory construction requiring the statutes to be read *in pari materia* does not apply. In the Dissenting Opinion, Judge DeGenaro takes a slightly different approach by accepting the premise that the statutes deal with the same subject matter, but then applying the rule of statutory construction that says “a specific statutory provision prevails over a conflicting general provision.” See Opinion, Dissent, p.2. Either approach leads to the conclusion that the plain language of R.C. §519.21(A) exempts Appellants’ winemaking operation from zoning because they are engaged in viticulture on the subject property. Applying the rule of construction urged by Judge DeGenaro, the Court’s attention is

² See, Appellants’ Proposition of Law No. 1: “Pursuant to the provisions of R.C. §519.21(A), land that is otherwise subject to zoning by a township pursuant to Chapter 519 of the Ohio Revised Code is exempt from such zoning if “any part” of the land is used for viticulture. A property owner engages in “viticulture” within the meaning of R.C. §519.21(A) if the owner grows one or more grapevines for the purpose of making wine.” Appellant’s Opening Brief, p. 4.

directed to a case it decided only a few weeks ago. In *State v. Cook* (2010), 2010 WL 5392811, the Court was faced with two statutes in apparent conflict and said:

‘First, all statutes which relate to the same general subject matter must be read *in pari materia*. And, in reading such statutes *in pari materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes. The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections. All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously. This court in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict.’ ” *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, quoting *Johnson's Mkts., Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 35, 567 N.E.2d 1018. {¶ 46} Applying these principles, we hold that R.C. 2901.13(B)(1) and (F) do not irreconcilably conflict and that *each applies to a particular situation independent of the other*.

The Court’s finding that statutes dealing with the same subject matter can, nevertheless, apply to a “particular situation independent of the other” is equally applicable to the case at bar. In the instant case, the provisions of R.C. §519.21 address zoning exemptions in the context of “agricultural uses.” While an agricultural use under §519.21 may generally relate to the definition of agriculture in §519.01, it addresses a “particular situation” (e.g. zoning exemptions) that is independent of the general definition of agriculture found in R.C. §519.01.

Other rules of statutory construction only add legitimacy to the reasoning of the dissent. For example, dissenting Judge DeGenaro points out that “legislative intent is paramount” and “it is a cardinal rule of statutory construction that a court must first examine the language of the statute” in its search for legislative intent. See Dissent, p. 2. See also, *State v. Cook* (2010), 2010 WL 5392811 (Headnote 3 - In construing a statute, the Supreme Court’s paramount concern is the legislative intent; Headnote 4 - In determining legislative intent, the Supreme Court first reviews the applicable statutory language and the purpose to be accomplished; Headnote 5 - Courts are required to apply the plain language of a statute when it is clear and unambiguous.)

Other rules of statutory construction directly related to zoning are set out in Appellants' Opening Brief. Those rules will not be restated here but they can be summarized in one sentence: *Ohio property law requires that the zoning power be narrowly construed and exemptions from zoning be broadly construed.* See Opening Brief, p. 6 *et seq.* If that rule is applied to the case at bar, only one decision makes sense and that is the decision urged by Appellants.

V. THERE IS NOTHING ABSURD ABOUT A STATUTE THAT FAVORS ONE INDUSTRY OVER ANOTHER

Finally, Appellants would like to respond to the repeated argument that granting an exemption from zoning on the facts of this case is "absurd." See Appellee Brief, p. 6. Appellee's view of absurdity is grounded upon its misleading argument that we are talking about "a single grape vine and grape." *Id.*, p. 7. In truth, we are talking about 20 grapevines that represent 5 percent of Appellants wine production. See Stipulation of fact, Document 14, Paragraph 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."). If the 5 percent scale is kept the same, but the land area expanded to, say, 1,000 acres, would Appellee still view it as absurd? In that case, you would have 50 acres planted in grapes and 950 acres devoted to processing. That scale fairly represents a reality recognized in the Dissent:

Further, I find persuasive their [Appellants] 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.

A situation the township views as absurd makes perfect sense to a businessman. Every business starts small and, much like a grapevine, is most vulnerable in its infancy. An unexpected frost is fatal to young plants while mature plants will usually survive. Similarly,

burdensome zoning will kill a young business while a more mature business may simply move its operation elsewhere. This concept is well understood by the legislature and the Ohio Revised Code is replete with examples of legislative protection of Ohio businesses, particularly in emerging markets like winemaking. A perfect example of a zoning restriction unrelated to winemaking is the farm market exemption found in R.C. §519.21(C). The vast majority of farm markets are small, family owned businesses that are often targeted by townships. Chapter 519 of the Ohio Revised Code also prohibits zoning of certain business completely unrelated to agriculture. See e.g. R.C. §519.20 (outdoor advertising); R.C. §519.211 (public utilities, railroads, liquor sales, oil and gas production, telecommunication towers); R.C. §519.212 (manufactured homes); and R.C. §519.213 (small wind farms).

The point to be made is that the legislature could have exempted the wine industry from all zoning but chose not to do so. Townships were granted limited authority to regulate land used for winemaking but only if the land to be regulated is not also used for viticulture. If “any part” of the land subject to zoning is used for viticulture, the township has “no power” to zone. That is the plain language of R.C. §519.21(A) and that is the decision respectfully requested by Appellants.

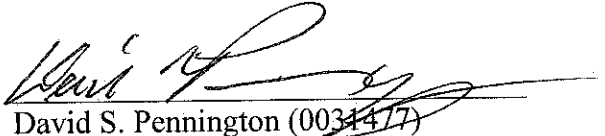
VI. CONCLUSION

Upon the foregoing points and authorities, Appellants respectfully request that the Court reverse the decision of the Court of Appeals for the Seventh District and approve Appellants’ proposed proposition of law, to wit:

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.

Respectfully submitted,

WRIGHT LAW CO. LPA



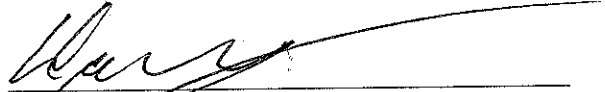
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CERTIFICATE OF SERVICE

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

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