[Cite as *Siebenthaler Co. v. Beavercreek Twp. Bd. of Zoning Appeals*, 2009-Ohio-6595.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

THE SIEBENTHALER COMPANY	:	
	:	Appellate Case No. 09-CA-36
Plaintiff-Appellee	:	
	:	Trial Court Case No. 06-CV-0911
v.	:	
	:	
BEAVERCREEK TOWNSHIP, OHIO BOARD OF ZONING APPEALS	:	(Civil Appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 11th day of December, 2009.

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FAIN, J.

{¶ 1} Appellant Beavercreek Township, Ohio, Board of Zoning Appeals (the Board) appeals from a judgment rendered against it in the Greene County Court of Common Pleas. The Board contends that the trial court erred in reversing and

vacating its decision to uphold a Cease, Desist and Removal order issued by the Beavercreek Township Zoning Officer against appellee The Siebenthaler Company (Siebenthaler).

{¶ 2} The trial court held that Siebenthaler's "Garden Center" and signage are incident to an agricultural use, and that the Board's decision is arbitrary, and unsupported by a preponderance of probative evidence. The Board contends that the trial court's findings are not supported by reliable, probative, and substantial evidence.

{¶ 3} We conclude that the trial court did not abuse its discretion, because there is nothing in the record to establish that the court acted unreasonably, arbitrarily, or unconscionably. Whether, in a particular case, the use of a structure is "incident" to agricultural use is essentially a question of fact for the trier of facts. The trial court did not act arbitrarily, irrationally, or unreasonably in concluding that Siebenthaler's Garden Center and signage are incident to the primary, agricultural use of the land. Siebenthaler's president testified to this effect, and the trial court credited his testimony. The trial court also rejected the testimony of the Beavercreek Township Zoning Inspector, who had not been inside the premises, and was not, therefore, in a position to know what activities were being conducted inside.

{¶ 4} In addition, no evidence was offered to show that Siebenthaler's marketing activities are more important than their production of agricultural products. In the absence of evidence to that effect, we cannot conclude, as a matter of law, that the trial court's decision is not supported by a preponderance of reliable, probative and substantial evidence. Accordingly, the judgment of the trial court is

Affirmed.

I

{¶ 5} Siebenthaler has been in business in the Dayton area since 1870, and currently engages in the growth of plant material, landscaping services, and a retail garden-store business. Siebenthaler's primary production facility for the growth of its agricultural stock is located on about 435 acres in Beavercreek Township, Ohio. This facility has been operated since the mid-1950's. About 80% of the property is under intense cultivation, ranging from large caliber shade trees, eight to ten inches in diameter, to vetting plants and flowers. The stock is growing in the field, in greenhouses, and in containers. Everything Siebenthaler grows is produced for end users, either home or commercial property needing trees, shrubs, and flowers. Siebenthaler also provides landscape services as one way of marketing its products.

{¶ 6} Some time before October 2005, Siebenthaler decided that it needed a facility on the Beavercreek Township property, in order to market and sell its agricultural products. At the time, Siebenthaler had no focal point on the Beavercreek property. People came out, wandered around, talked to workers, and were shuttled off to one end of the greenhouses to conduct transactions. People were also driving through the fields. Siebenthaler wanted a central point as a funnel for the sale and display of nursery stock, in order to deliver growing products to end users. Siebenthaler also intended to sell other products, like fertilizer, some hand tools, hoses, pots, and a small amount of furniture, like patio benches, or stepping

stones, so that people could be successful in their gardening endeavors.

{¶ 7} Before beginning construction, Siebenthaler's president, Jeffrey Siebenthaler, consulted with attorney Michael McNamee. In late October 2005, McNamee sent a letter to Karol Hendley, the Zoning Inspector for Beavercreek Township. McNamee attached a concept site/floor plan for the proposed Garden Center, and indicated that most of the inventory sold from the location would be generated through agricultural use. Citing R.C. 519.21, McNamee stated his belief that Siebenthaler was not required to seek a zoning certificate from the Township. McNamee also said that Siebenthaler was amenable to considering any suggestions Hendley had about the project.

{¶ 8} Hendley did not respond in writing, but subsequently spoke orally with McNamee. Hendley indicated that the Township could: (1) restrict the size of the building to less than 1,000 square feet; (2) prohibit Siebenthaler from selling anything other than farm products from the garden center; and (3) require a zoning certificate as a means of imposing the regulation. Hendley further said that she could not permit the proposed building as an agricultural exemption, because its size exceeded 1,000 square-feet.

{¶ 9} McNamee responded with a five-page letter in late November 2005, in which he summarized Hendley's position, set out pertinent case law, and indicated disagreement with Hendley's position. McNamee stated that no zoning certificate was required, because the Township had no ability under R.C. 519.21(A) to regulate buildings used pursuant to agricultural use of the property. McNamee also noted that the Township could not regulate inventory available for sale at a farm market,

apart from compliance with the income criteria set out in R.C. 519.21(C), and could not restrict the size of buildings used as farm markets absent legitimate health or safety concerns. McNamee then went on to write:

{¶ 10} "All of this being said, I would like to provide you with a brief disclosure of my client's plan to move forward. Because I am convinced that my position is firmly grounded in well-settled Ohio law, my client will be moving forward with the construction and operation of the garden center. He will fully expect this course to be continued free from intrusion by Beavercreek Township. Nevertheless, I understand that the township has concerns regarding several issues such as parking and setbacks. In the spirit of mutuality, I would be happy to schedule a meeting to discuss those concerns in an attempt to alleviate them. If you would prefer to engage in such a meeting, please do not hesitate to contact me directly." November 23, 2005 letter from Michael McNamee to Karol Hendley, p. 5.

{¶ 11} Hendley received the letter from McNamee, and understood that Siebenthaler would not be applying for a zoning permit. Hendley did not respond to McNamee's letter. In December 2005, Siebenthaler began construction on the facility, which would include, upon completion, a retail center, a break room for employees who work in the retail center on the property, an office where landscape designs could be presented to clients, and an office where the store manager could count money. The construction was visible from the road, and was evident early in the process of construction.

{¶ 12} In late January 2006, Hendley heard a discussion about earth being moved at the Siebenthaler site. Hendley happened to drive by the site in early

February 2006, and noticed that walls were up on the building. During Hendley's testimony before the Board, the following exchange occurred:

{¶ 13} "Q. So then, it's a fair statement to say that as of late January or early February, you had knowledge that a structure or a building was being erected on the site in question?

{¶ 14} "A. That there was some construction beginning, yes.

{¶ 15} "Q. And you also had knowledge at that time that a zoning certificate for that building or structure had not been secured from ---

{¶ 16} "A. That's correct.

{¶ 17} "Q. --- that office? * * * Had not been secured from your office. Is that correct?

{¶ 18} "A. Yes.

{¶ 19} "Q. And in late January or early February, you did not issue a notice of zoning code violation, did you?

{¶ 20} "A. No."

{¶ 21} July 19, 2006 Transcript of Beavercreek Township Zoning Appeals Hearing, p.78.

{¶ 22} The Garden Center was constructed a cost of about $500,000, and was open for operation in March 2006. About two weeks after the Garden Center opened, Siebenthaler received a "Cease, Desist and Removal Order" from Hendley. Hendley stated in the letter that Siebenthaler had submitted an incomplete application for zoning review in November 2005, and that Siebenthaler had erected a

garden center and permanent signs without zoning certificates or determinations.[1] Hendley cited Siebenthaler for the following violations: "Article 19.02 - Zoning permit required prior to structure erection; Article 19.09 - Violation, nuisance per se: Abatement; Article 19.10 - Fees for zoning permits required; and Article 20.12 - Permit required prior to erection of a sign." Cease, Desist and Removal Order, dated March 31, 2006. In the Order, Hendley directed Siebenthaler to cease and desist its illegal operation of the Garden Center and to remove the completed portion of the structure. The citation said nothing about farm markets, but was concerned solely with Siebenthaler's failure to obtain a zoning permit, and the erection of an alleged improper sign on the premises.[2]

{¶ 23} Siebenthaler appealed to the Board, and a hearing was held in July 2006, at which only Jeffrey Siebenthaler and Hendley testified. Jeffrey Siebenthaler testified as outlined above regarding the construction of the Garden Center and its proposed use. He further testified that the Garden Center signs had been in existence since around 1994, prior to the adoption of the Beavercreek Township Zoning Code.

{¶ 24} Hendley also testified as outlined above. She additionally stated that she did not know when the sign on the property was constructed. Hendley said that she had an idea from McNamee's letter of the intended use of the Garden Center, but had never gone through the center, not even by the time of the Board hearing.

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[1]This was incorrect. Siebenthaler never submitted an application for zoning review.

[2]The parties agreed at the Board hearing that operation of a farm market was not at issue. The only issues were the lack of a zoning permit and the alleged improper signage.

{¶ 25} The Board continued the matter to review and consider the materials that had been submitted. Subsequently, in October 2006, the Board heard testimony from Siebenthaler's contractor, who discussed matters relative to the process of construction of the center, but nothing relevant to the agricultural use of the land or structure. After the hearing, the Board voted to uphold Hendley's order. In written findings of fact, the Board stated, among other things, that:

{¶ 26} "The building constructed on the property without a zoning permit is not being used solely for a bonafide agricultural purpose. The building is being used as a retail sales location for nursery stock grown on the Property as well as for the retail sale of nursery products which are not grown on the property. It is also being used as a site for the retail sale of other items such as fertilizer, mulch, hand tools, furniture, hoses, pots, fountains, artificial greenery, and stepping stones, none of which are produced on the Property. The building is also being used for the wholesale sale of products grown both on and off the Property. It is also being used as an office where design services are being offered to clients and for accounting purposes associated with the retail and wholesale operations conducted on the premises." December 20, 2006 Board Findings of Fact No. (e), p. 2.

{¶ 27} The Board further found that the property signs "were erected in the '90" [sic] without obtaining a permit from Beavercreek Township. Id. at (f), p. 3. The Board concluded that Article 20.11 allows only one ground sign for each developed parcel and regulates the size of any sign permitted in an agricultural district. In addition, the Board concluded that Article 20.12 requires a zoning permit to be obtained for erection of any sign unless exempted by Article 20 of the

Beavercreek Township Zoning Resolution, and that the signs on the property are not exempted from the resolution. Id. at (g), (h),and (i), p. 3.

{¶ 28} Following the Board's decision, Siebenthaler appealed to the Greene County Common Pleas Court. The matter was referred to a magistrate, who concluded, after reviewing the record, that the Board's decision is arbitrary and is unsupported by a preponderance of the probative evidence. The magistrate found from Jeffrey Siebenthaler's testimony, which the magistrate credited, that Siebenthaler is engaged in the production of agricultural products, and that the Garden Center and signage are incident to the primary use of the property for agriculture. The magistrate assigned little or no value to Hendley's testimony in determining whether the Garden Center and signage are incident to the production of agricultural products, because Hendley issued the cease and desist order without having inspected the Garden Center. The magistrate was also troubled by the fact that the structure had been erected with the knowledge of the Zoning Inspector, and no affirmative acts were taken to stop construction until after the building was open for business. However, the magistrate did not make a finding of estoppel against the Board.

{¶ 29} The Board filed objections to the magistrate's decision. The trial court overruled the objections, and adopted the magistrate's decision as the judgment of the court. The Board now appeals from that judgment, which reversed and vacated the Board's decision.

II

{¶ 30} The Board's First Assignment of Error is as follows:

{¶ 31} "THE GREENE COUNTY COURT OF COMMON PLEAS' DECISION THAT APPELLEE-SIEBENTHALER'S GARDEN CENTER AND SIGNAGE WERE INCIDENT TO AN AGRICULTURAL USE IS NOT SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE; THEREFORE, THE COURT ERRED IN REVERSING AND VACATING THE BEAVERCREEK BOARD OF ZONING APPEALS' DECISION TO UPHOLD THE CEASE, DESIST AND REMOVAL ORDER ISSUED BY THE ZONING INSPECTOR."

{¶ 32} Under this assignment of error, the Board contends that the trial court's decision is not supported by a preponderance of reliable, probative, and substantial evidence, because the Garden Center is not directly and immediately related to an agricultural use.

{¶ 33} R.C. 2506.01(A) allows aggrieved parties to appeal administrative decisions of political subdivisions. The scope of review of administrative orders is provided for in R.C. 2506.04, as follows:

{¶ 34} "The court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided by the Rules of Appellate Procedure and, to

the extent not in conflict with those rules, Chapter 2505. of the Revised Code."

{¶ 35} In appeals brought under R.C. Chapter 2506, the common pleas court "must weigh the evidence in the record and may consider new or additional evidence." *Smith v. Granville Twp. Board of Trustees,* 81 Ohio St.3d 608, 612,1998-Ohio-340. However, review of the trial court's decision by a court of appeals is " 'more limited in scope.' " *Henley v. Youngstown Bd. of Zoning Appeals,* 90 Ohio St.3d 142, 147, 2000-Ohio-493 (citation omitted). Common pleas court judgments may be reviewed " 'only on "questions of law," which does not include the same extensive power to weigh "the preponderance of substantial, reliable and probative evidence," as is granted to the common pleas court.' * * * 'Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.' " Id. (citations omitted). "Within the ambit of 'questions of law' for appellate court review would be abuse of discretion by the common pleas court." *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34, n. 4. Accord, *Henley,* 90 Ohio St.3d 142, 147. An abuse of discretion occurs when the trial court acts unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citation omitted).

{¶ 36} From our review of the record, we conclude that the trial court did not abuse its discretion, because there is no evidence that the court acted unreasonably, arbitrarily, or unconscionably.

{¶ 37} Under R.C. 519.02, township trustees have the power to regulate building and land usage within unincorporated territory. However, R.C. 519.21(A) restricts this ability with regard to agricultural use, by providing that:

{¶ 38} "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."

{¶ 39} R.C. 519.01 defines "agriculture" to include: "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."

{¶ 40} The production of nursery stock, ornamental shrubs, flowers, and trees on the 435 acres owned by Siebenthaler fall within the statutory definition of agriculture. The issue is whether the use of Siebenthaler's Garden Center is "incident" to the agricultural production.

{¶ 41} Parenthetically, we note that although the statutory limitation of the zoning power in cases involving the use of buildings or structures is, itself, restricted to those buildings or structures "incident to the use for agricultural purposes of the

land on which such buildings or structures are located," Beavercreek Township's exercise of that power appears to be subject to a broader restriction. Section 19.02 of the Beavercreek Township Zoning Resolution provides that: "No permit is required for any building or structure to be used for bonafide agricultural * * * purposes." While the agricultural purpose of the building or structure must be bonafide in order to trigger this restriction, it does not appear that the agricultural purpose must predominate, as required to trigger the restriction mandated by R.C. 519.21(A). The parties have not argued this point, either here or in the trial court, and the trial court did not consider this point in its decision. Therefore, we will assume, for purposes of this appeal, that Beavercreek Township's exercise of its power to regulate the use of buildings or structures with an agricultural purpose is coextensive with the extent of that power permitted by statute.

{¶ 42} In *State v. Huffman* (1969), 20 Ohio App.2d 263, the Third District Court of Appeals held that whether "structure use" is "incident to 'agricultural use' is essentially a question of fact for the trier of facts." Id. at 269. After considering various definitions of "incident," the Third District held in *Huffman* that "structure-use must be 'directly and immediately' related to agricultural use. It must be either 'usually or naturally and inseparably' dependent upon agricultural use." Id.

{¶ 43} The trial court in the case before us did not act arbitrarily, irrationally, or unreasonably in concluding that Siebenthaler's Garden Center and signage are incident to the primary use of the land for agriculture. Siebenthaler's president testified to this effect, and the court credited his testimony. The trial court also discounted the testimony of the Zoning Inspector, who had not been inside the

Garden Center, and was not, therefore, in a position to know what activities were being conducted therein, other than what she was told in the letter she received from McNamee. The letter reflects that agricultural use is the primary intended function of the Garden Center.

{¶ 44} The Board argues that the Garden Center is not primarily concerned with selling agricultural products grown on the land, "as evidenced by the myriad of retail and commercial activities and services provided at the Garden Center." But the Board failed to present evidence of this fact, other than eliciting testimony from Siebenthaler's president that some other landscape-related products were being sold at the Garden Center. Mr. Siebenthaler's testimony indicates, however, that the primary function of the Garden Center is to serve as an outlet for the agricultural products grown on the property.

{¶ 45} The Board also relies on *State ex rel. Fox v. Orwig* (Sept. 15, 1995), Trumbull App. No. 94-T-5100, 1995 WL 787459, for the proposition that the agricultural use exception does not apply to landscaping activities. In making this statement, the court in *Orwig* relied on its prior decision in *Gabanic v. Apanius* (June 27, 1986), No. 1259, 1986 WL 7281. The facts in that case indicated that during a typical eight-hour day, about three to four hours were devoted to nursery activities on the premises, and another four to five hours were expended on landscaping activities elsewhere. The trial court held that the nursery activity was an agricultural use under R.C. 519.21. The court refused, however, to enjoin the landscaping activities, because it concluded that the nursery and landscaping activities were " 'inseparably intertwined' and that he could not restrain one without restraining the other." Id. at *

1. The Eleventh District Court of Appeals disagreed, stating that:

{¶ 46} "The basis of the court's finding that the landscaping activities and the nursery activities conducted by Apanius are 'inseparably intertwined' appears to be the fact that he used the 'same equipment, vehicles and materials' for both types of activities. While it may be true Apanius uses the 'same equipment, vehicles and materials' in his landscaping business as he does in his nursery business, said fact does not lead to the conclusion that the 'equipment, vehicles and materials' used in the nursery business cannot be kept separate from the 'equipment, vehicles and materials' used in the landscaping business." Id. at * 2.

{¶ 47} Subsequently, in *Orwig*, the Eleventh District considered a situation in which a landscaping business did not grow any products on site, but only temporarily stored products there for a few months until they could be used in landscaping. The court noted that under *Gabanic*, landscaping activities are not an "agricultural" use. This is a correct statement, as landscaping is not among the items listed as "agriculture" in R.C. 519.01, unless landscaping activities could be classified as the "marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production." R.C. 519.01.

{¶ 48} The court in *Orwig* went on to note that any agricultural activities were "incidental" to the landscaping business, because they were simply an accommodation to the landscaping business. 1995 WL 787459, *4. Again, this is a correct statement, based on the facts of the case. Likewise, in *Gabanic*, the landscaping activities could not be said to be secondary to the production activities, since the greater amount of time each day was spent on landscaping, rather than

production.

{¶ 49} The situation in the case before us is distinguishable. Based on the *only evidence provided*, landscaping design and services are offered for purposes of marketing the products grown on Siebenthaler's property, and are directly related to the primary use of the land for production of nursery stock. Accordingly, the trial court did not abuse its discretion in concluding that the Garden Center is incident to the agricultural use of the property under R.C. 519.21(A). We also note that discussion of landscape design and services occupied a minimal part of the proceedings below. No evidence was elicited to indicate that landscaping is the primary activity of Siebenthaler, or even that it is an activity that occupies a greater amount of time than agricultural production. In fact, the only evidence elicited regarding landscaping is that a room is provided in the Garden Center to allow designs to be presented to a client. Jeffrey Siebenthaler also testified that landscape services are one way of marketing the company's agricultural products. Again, this testimony was unrebutted.

{¶ 50} With respect to the signage on the property, the Board contends that it cannot be said to be incident to the agricultural use, because the Garden Center itself is not related to an agricultural use. Since we have rejected the Board's position about the lack of relationship between the Garden Center and the agricultural use of the property, the Board's argument about signage must be rejected as well.

{¶ 51} We also note that the Board refers in its brief to the wrong signage. The Board challenges signage reading "Siebenthaler's Beaver Valley Garden

Center." But according to Hendley's testimony before the Board, the signage that is the subject of the citation reads "Welcome Store Open Heleborous Pansies Daffodils Phlox Tulips." See July 19, 2006 Transcript of Beavercreek Township Zoning Appeals Hearing, p. 81 (identifying the sign in the lower right-hand corner of Ex. A as the sign for which the violation was issued). This sign clearly refers to agricultural products. This is consistent with case law that the Board relied on during oral argument. See 2009 Ohio Atty. Gen.Ops. No. 2009-041 (indicating that use of free-standing outdoor signs are directly and immediately related to the use for agricultural purposes of a lot when they advertise the sale of agricultural products derived from the lot on which the sign is located). No evidence was presented in the case before us to indicate that the above products are not being produced on the premises.

{¶ 52} The Board's First Assignment of Error is overruled.

III

{¶ 53} The Board's Second Assignment of Error is as follows:

{¶ 54} "THE GREENE COUNTY COURT OF COMMON PLEAS' DECISION THAT APPELLEE-SIEBENTHALER'S GARDEN CENTER AND SIGNAGE WERE USED TO MARKET THE AGRICULTURAL PRODUCTS GROWN ON THE PROPERTY IS NOT SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE; THEREFORE, THE COURT ERRED IN REVERSING AND VACATING THE BEAVERCREEK BOARD OF ZONING APPEALS' DECISION TO UPHOLD THE CEASE, DESIST AND REMOVAL ORDER

ISSUED BY THE ZONING INSPECTOR."

{¶ 55} After reviewing the record, the magistrate concluded that the Garden Center and signage are incident to Siebenthaler's agricultural use of its property. The Board objected to the magistrate's decision, arguing, among other things, that Siebenthaler is not using the Garden Center to market its agricultural products. After reviewing the record and objections, the trial court rejected the Board's objections. The court did not address individual objections, but concluded that the magistrate had properly determined the issues and had correctly applied the law. The trial court further concluded that the Garden Center and signage are exempt from Beavercreek Township zoning regulations, and that the decision of the Board is "arbitrary and unsupported by a preponderance of probative evidence." April 15, 2009 Amended Judgment Entry Adopting Magistrate's Decision, p. 1.

{¶ 56} In addition to including ornamental trees and so forth within the definition of agriculture, R.C. 519.01 also includes "marketing of agricultural products" "when those activities are conducted in conjunction with, but are secondary to, such husbandry or production." The Board contends under this assignment of error that the trial court's decision is not supported by a preponderance of reliable, probative and substantial evidence, because the primary purpose of the Garden Center is to sell a variety of retail items unrelated to agricultural production.

{¶ 57} We have already concluded that the trial court did not act unreasonably, arbitrarily, or unconscionably in finding that the Garden Center is directly related to, and dependent upon, the agricultural use of the property. The testimony indicated that the primary use of Siebenthaler's land is the production of

nursery stock, trees, and flowers, and that the sale of these items in the Garden Center is directly and naturally related to their production. The Board contends, however, that Siebenthaler's retail activities, including the sale of items that are not produced on the property, are not secondary to production, and cannot qualify as "marketing of agricultural products" under R.C. 519.01 and R.C. 519.21(A).

{¶ 58} Marketing is generally "synonymous with selling." *Kiehl v. Univ. Hosps. Health Sys.-Heather Hill, Inc*., Cuyahoga App. No. 92547, 2009-Ohio-5379, at ¶ 22, citing *Firsdon v. Mid-American Natl. Bank* (Dec.13, 1996), Wood App. No. WD-96-009. In 2002 Ohio Atty. Gen.Ops. No. 2002-029, the Ohio Attorney General considered whether the holding of activities like banquets, theatrical shows, and music festivals constitutes "the use of land for the marketing of agricultural products in conjunction with, and secondary to, the production of grapes or wine for purposes of the definition of 'agriculture' set forth in R.C. 519.01." Id. at p. 1. These festivals and receptions are similar to the sale of landscape-related items, in that they do not actually constitute the product grown on the property, but are used to complement and assist in the sale of the product.

{¶ 59} The Attorney General concluded that " 'marketing' commonly denotes the act of holding forth property for sale and the aggregate of activities involved with such act." Id. at 5. The Attorney General stressed, however, that "such marketing is not 'agriculture,' as defined in R.C. 519.01, unless the marketing is conducted in 'conjunction' with, and 'secondary' to, the production" of the agricultural product in question. Id. at 6. These terms were interpreted, for purposes of the particular case, to mean that "any event that is being held to promote or merchandise the sale

of grapes or wine must occur together with, and be of lesser importance or value than, the production of grapes or wine in order to constitute 'agriculture,' as defined by R.C. 519.01." Id. at 7. In this regard, the Attorney General further noted that:

{¶ 60} "Because the General Assembly has not set forth any factors for making this determination, 'this determination will of necessity require an exercise of judgment in each particular instance.' * * * As such, township zoning officials when making this determination may consider any factors they deem necessary and relevant in order to exercise their judgment in a reasonable manner. * * * Such factors may include, but are not limited to, the amount of money derived from, and time and resources devoted to, an activity and the overall production of agricultural products from the land, the primary purpose for holding an activity, and the principal use of the land and buildings on which the activity is conducted.

{¶ 61} "In addition, township zoning officials may consider the nature and character of all the other activities conducted on the land and the type and extent of any activities that are not conducted on the land to prepare the agricultural products for sale. These officials also may consider whether the activity is traditionally associated with the selling or production of agricultural products and whether the activity is a typical method by which to promote or merchandise the sale of goods." Id. at 8 (citations omitted).

{¶ 62} In the case before us, Siebenthaler's president testified that the primary purpose of its acreage is for use as a production facility, and that the Garden Center serves a secondary purpose of marketing the resulting products to the public. Siebenthaler also described the other items sold and the landscape design services

as incidental, and used in conjunction with the agricultural products that are grown on the land. There was no evidence presented to rebut this testimony. Accordingly, the trial court did not err, as a matter of law, in concluding that the Board's decision is unsupported by a preponderance of probative evidence. *Smith*, 81 Ohio St.3d 608, 613, 1998-Ohio-340.

{¶ 63} We also note that the Board applied an incorrect standard in its findings, by stressing that "The building constructed on the property without a zoning permit is not being used solely for a bonafide agricultural purpose." December 20, 2006 Board Findings of Fact, No. (e), p.2. As is evident from 2002 Atty. Gen.Ops. No. 2002-029, the law does not require that a building or the marketing activities conducted within be used "solely" for a bonafide agricultural purpose. The structure must be " 'directly and immediately' related" to agricultural use, and " 'usually or naturally and inseparably' dependent upon agricultural use." *Huffman*, 20 Ohio App.2d 263, 269, interpreting R.C. 519.21(A). Furthermore, marketing activities must only occur in conjunction with, and be of lesser importance than, the agricultural production. R.C. 519.01 (defining "agriculture"). Jeffrey Siebenthaler testified that the Garden Center would not exist, but for the purpose of being an outlet for the products grown on the property. Furthermore, no evidence was offered to show that Siebenthaler's marketing activities are more important than the production of agricultural products. In the absence of any evidence to that effect, we cannot conclude, as a matter of law, that the trial court's decision is "not supported by a preponderance of reliable, probative and substantial evidence." 81 Ohio St.3d at 613.

{¶ 64} As a final matter, the only evidence offered as to the use of Siebenthaler's signage was that the signs existed in 1994, before Beavercreek Township's zoning code was enacted. R.C. 519.19 provides that:

{¶ 65} "The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with such resolution or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of said land shall be in conformity with sections 519.02 to 519.25, inclusive, of the Revised Code."

{¶ 66} No evidence was offered to indicate that Siebenthaler discontinued the use of its signage at any time after the zoning code was adopted. Accordingly, the signage would be appropriate as a non-conforming use, even if it were not directly related to an agricultural use of the land, or were not being used to market agricultural products. See, *e.g.*, *Jackson Tp. Bd. of Trustees v. Donrey Outdoor Advertising Co.* (Sept. 21, 1999), Franklin App. No. 98AP-1326 (noting that R.C. 519.19 protects non-conforming uses, including signage, that exist when zoning codes are enacted. In addition, property owners are protected constitutionally from being divested of property rights by a township's change of zoning ordinances.)

{¶ 67} We do agree with the Board that Siebenthaler did not raise this issue in the trial court, and the trial court did not appear to base its decision upon the pre-existence of the signage.

{¶ 68} The Board's Second Assignment of Error is overruled.

IV

{¶ 69} All of the Board's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

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