Understanding the Agricultural Exemption from Ohio Zoning Law: Summary of Relevant Court Cases and Attorney General Opinions

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A. Animal Rescue Shelter as an "Agricultural Use" under ORC 519.21

Bd. of Brimfield Twp. Trustees v. Bush, 2007-Ohio-4960 (11th Dist. 2007).
Discretionary appeal not allowed by *Brimfield Twp. Bd. of Trustees v. Bush,* 2008 Ohio 381, 2008 Ohio LEXIS 333 (Ohio, Feb. 6, 2008).

Bush operated an animal rescue shelter on her seven acre property in a district zoned residential in Brimfield Township. The shelter housed 50-80 animals at a time, kept inside and in outdoor cages. Neighbors complained of noise, odors, delivery truck traffic and animals straying from the property. The Board of Trustees filed suit in the Portage County Court of Common Pleas alleging zoning violations and statutory nuisance, and sought a permanent injunction against Bush. The trial court granted the injunction, and Bush appealed.

The appellate court addressed the issue of whether the animal rescue shelter is an "agricultural use." If so, the township could not prohibit the use because of the "agricultural exemption" found in ORC 519.21, which states that townships may not use zoning to prohibit agriculture in unincorporated areas. In determining that the animal rescue operation is an agricultural use, the court relied upon ORC 519.01, which defines agriculture to include "animal husbandry, including, but not limited to, the care and raising of livestock, equine, and fur-bearing animals" and an Ohio Supreme Court decision, *Harris v. Rootstown Twp. Zoning Bd. Appeals* (1975), 44 Ohio St.2d 144, in which the Supreme Court of Ohio held: "The breeding, raising, and care of dogs constitutes animal husbandry, as that term is used in R.C. 519.01. . . and does constitute the use of land for agriculture within the meaning of R.C. 519.21." Although the township argued that boarding of dogs is not the same as "breeding, raising and care of dogs," the court disagreed, stating that there is no distinction between care provided for the dogs, whether for breeding or boarding purposes.

Although not raised on appeal by the township, the court also stated that the agricultural exception in Ohio's nuisance statute, ORC 3767.13(D), protected Bush from the injunction based on nuisance. There was no evidence that the agricultural use was injurious to public health or safety or was not conducted in accordance with generally acceptable agricultural practices, so an injunction could not be granted under ORC 3767. The Court of Appeals reversed the decision granting the injunction made by the Portage County Court of Common Pleas.

B. Defining Agriculture and Farm Market under ORC 519.01 and 519.21

Ohio Attorney General Opinion No. 2002-029 (2002).

The questions presented to the Attorney General concerned the definition of agriculture under ORC 519.01, specifically in reference to special events, marketing of agricultural products and the farm market 50% test. The Attorney General concluded that:

> 1. The holding of a banquet, reception, party at which entertainment is provided, theatrical show, music festival, clambake, pig roast, or other entertainment or special event constitutes the "marketing of agricultural products" for purposes of the definition of "agriculture" in R.C. 519.01 when the event is held to promote or merchandise the sale of grapes or wine and when the event occurs together with, and is of lesser importance or value than, the production of grapes or wine. Whether an event is being held to promote or merchandise the sale of grapes or wine and whether it occurs together with, and is of lesser importance or value than, the production of grapes or wine are questions of fact that must be answered on a case-by-case basis by township zoning officials.
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> 2. Township zoning officials may consider any factors they deem necessary and relevant in order to determine in a reasonable manner whether an activity constitutes the marketing of agricultural products in conjunction with, and secondary to, the production of grapes or wine for purposes of the definition of "agriculture" in R.C. 519.01.
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> 3. The farm market exemption set forth in R.C. 519.21(C) exempts from township zoning regulations the use of land for a farm market that conducts banquets, receptions, parties at which entertainment is provided, theatrical shows, music festivals, clambakes, pig roasts, and other entertainment and special events where fifty percent 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.

C. Farm Market 50% Test under ORC 519.21

Hambrecht v. Whiting, 1983 Ohio App. LEXIS 12471 (11th Dist. 1983).

The Whitings constructed a farm market on a 12.5 acre parcel in Burton Township without obtaining a building permit and began selling produce and other food goods from the market. The Burton Township Zoning Inspector filed an action in the Common Pleas Court of Geauga County seeking to enjoin the use of the structure as a "farm market" and to order its removal. The Zoning Inspector argued that the sale of non-produce goods such as apple butter, apple fritters, pear butter, and goat's milk fudge deprived the structure of its "agricultural" or "farm market" character. The trial court disagreed and refused the request for an injunction, except on the sale of apple fritters. The Zoning Inspector appealed the trial court's decision.

Interpreting ORC 519.21, the appeals court determined that the statute does not place a prohibition on *what* farmers can sell, so long as 50 %or more of the gross income is derived from farm produce. There is no limitation on what could be sold to make up the *other 50 percen*t of gross sales, and the parcel on which the farm market is located need not be the sole source of the produce sold. The appeals court upheld the lower court's refusal to grant an injunction, and also noted that the sale of apple fritters per se would not violate ORC 519.21 unless the 50% rule had not been met.

D. Regulation of Large Animal Feeding Facilities under ORC 519.21

Meerland Dairy v. Ross Township, 2008 Ohio 2243 (2008)

Meerland Dairy purchased property with plans to operate a large dairy farm. Meerland obtained the necessary permits required by the Ohio Livestock Environmental Permitting Program, ORC 903. The Ross Township Board of Trustees amended its zoning resolution to define large and major animal feeding facilities as "agribusiness" that must obtain a conditional use zoning permit. Meerland Dairy refused to seek the conditional use permit and filed suit in the Greene County Court of Common Pleas, claiming that the zoning resolution violated ORC 519. The trial court determined that Meerland Dairy could not bring a legal challenge to the zoning resolution, since it had not actually applied for a zoning permit or been denied a zoning permit. Meerland Dairy appealed the decision.

The Court of Appeals disagreed with the trial court, and held that ORC 519.21(C) prohibited a township from requiring an animal feeding operation to obtain a conditional use permit because the operation meets the definition of "agriculture" pursuant to ORC 519.01. Addressing the township's attempt to revise the state's definition of "agriculture" by declaring large confined animal feeding operations to be "agribusiness" and not "agriculture," the court stated that the size of an operation is not a basis for locally distinguishing confined animal facilities from the definition of agriculture. The court also explained that Meerland Dairy was not required to exhaust its administrative remedy by applying for the conditional use permit before bringing their action, as such would have been unnecessarily onerous. The court also determined that the Ohio Livestock Environmental Permitting Program did not give a local government any authority to regulate animal feeding operations. The Court of Appeals reversed the decision of the trial court, ordering the court to declare the zoning resolution in conflict with Ohio law and to issue an injunction against enforcement of the zoning regulation. Ross Township filed a motion asking the Court of Appeals to reconsider its decision, but the court refused to reconsider, stating that it is quite clear "the General Assembly has denied townships, which are political subdivisions created by the General Assembly, the authority to adopt zoning regulations that limit or restrict agricultural uses."

E. Landscaping as "Agriculture" under ORC 519.01

Gabanic v. Apanius, 1986 Ohio App. LEXIS 7377 (11th Dist. 1986)

Apanius operated Better Lawn and Gardens in a residential zoning district in Chester Township, Geauga County. The business included nursery and landscaping activities. Apanius grew much of the stock used in the landscaping business at the nursery and stored gravel, stone, mulch, and railroad ties on the site for both the landscaping business and the nursery. The Chester Township Zoning Inspector filed a complaint against Apanius seeking to enjoin the operation of his business, alleging that the business activities were not permitted in the residential district. Apanius argued that the Better Lawns and Gardens business was exempt from zoning as an agricultural use pursuant to ORC 519.21. The trial court agreed that the nursery activities qualified as agriculture, but determined that the landscaping activities were not agriculture. However, the court noted that it could not restrain one of the activities without restraining the other because the activities were so intermingled. The same equipment, vehicles and materials were used in both businesses, reasoned the court, and were "inseparably intertwined." Enjoining the landscaping business would prevent the operation of the permissible nursery activities. The trial court thus refused to grant injunctive relief for either the nursery or landscaping activities, and the township appealed.

On appeal, the court questioned the trial court's logic in finding that the landscaping and nursery activities were "inseparably intertwined." Despite the sharing of equipment, vehicles and materials for both the nursery and landscaping activities, the court stated that the two activities could be separated from one another. The court ordered the landscaping business, which did not qualify as agricultural use, in violation of the zoning resolution.

Petitti v. Plain Twp. Bd. of Zoning Appeals, 2003-Ohio-6849 (5th Dist. 2003)

The Plain Township Bd. of Zoning Appeals upheld a notice of zoning violation against Petitti Landscaping, Inc. for operating a non-permitted business in a residential district. Petitti appealed the decision to the Stark County Court of Common Pleas, claiming that the business was an agricultural use exempt from zoning regulations pursuant to ORC 519.21. The court upheld the BZA's decision, based on the BZA's following findings of facts that led it to conclude that the business was a landscaping business rather than an agricultural use: the business was organized for the purpose of landscaping, stock on the property was purchased from nurseries rather than grown on the property, half of the nursery stock was only temporarily maintained on the property prior to being resold, and equipment and materials on the property were of the type used for landscaping. Petitti appealed, but the court of appeals stated that the trial court's decision was based on substantial and reliable evidence and was consistent with other court decisions that determined that a landscaping business is not an agricultural use that is exempt from zoning regulations.