

Ohio Food, Agriculture and Environmental Law Webinar Series

**Regulating Agriculture at the Local Level:
Zoning, Building Code and Other Hot Issues**
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Welcome!
The webinar will begin at 1 pm

Who are you? *Please indicate your profession in the poll box located in the upper right hand corner of your screen.*

 THE OHIO STATE UNIVERSITY
COLLEGE OF FOOD, AGRICULTURAL
AND ENVIRONMENTAL SCIENCES

OSU Agricultural & Resource Law Program
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Three Questions:

1. **When can a county or township use zoning to regulate an agricultural land use?**
2. **When does the Ohio Building Code apply to an agricultural building or structure?**
3. **What is “agriculture” for purposes of CAUV eligibility determinations by counties?**

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1. When can a county or township use zoning to regulate an agricultural land use?

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**Ohio Revised Code:
Zoning Authority and Agriculture**

- **ORC 303.02 and 519.02:**
 - General grant of county (303) and township (519) zoning authority.
- **ORC 303.21/519.21 “Agricultural Exemption”**
 - (A)—General limitation of zoning authority
 - (B)—Exceptions to the general limitation
 - (C)(1)—Farm markets exemption
 - (2)—Bio/energy production exemption
 - (3)—Biologically derived methane gas production
- **ORC 303.01/519.01**
 - Definition of agriculture.

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ORC 519.21(A)—General Limitation on Zoning Authority over Agriculture

Ohio county/township zoning law confers **no power** to:

- Prohibit the use of **any land** for agricultural purposes.
- Or prohibit the **construction or use of buildings or structures** that are **incident to agricultural use** of the land on which they 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 ("the winery exemption").
- And **no zoning certificate** shall be required for any such building or structure.

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ORC 519.21(B) – Exceptions to the General Limitation

- A county/ township **may** regulate some agricultural activities in these limited situations:
 - In a **platted subdivision** approved under section 711.05, 711.09 or 711.10 of the Revised Code
 - Or in any area consisting of **15 or more lots approved under ORC 711.131** [process for approval without a plat] that are **contiguous** to one another, on one or both sides of a road.

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ORC 519.21(B)— Exceptions to the General Limitation

In those situations, a township **may** regulate:

- Agriculture on lots of **1 acre or less**.
- Set back building lines, height, and size of **buildings or structures incident to** the agricultural use of land.
- **Dairying and animal and poultry husbandry**
 - On lots between 1 and 5 acres
 - When at least 35% of the lots are developed
 - And after 35% of the lots are developed, dairying and animal/poultry husbandry shall be considered a nonconforming use of land pursuant to ORC 519.19.

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ORC 519.21(B) Exceptions to General Limitation

- But note this language at the end of 519.21:
 - Division (B) 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 5 acres**.
 - "The 5 acre exemption"

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ORC 519.21(C)(1)— The Farm Market Exemption

(C) Such sections confer **no power** on any township to prohibit in a district zoned for **agricultural, industrial, residential, or commercial uses**, the use of any land for:

- (1) A farm market **where 50% 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.
 - “The 50% test”

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ORC 519.21(C)(1)— Farm Market Exemption (*continued*)

However, a board of township trustees **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**.

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ORC 519.21(C)(2) Bio/energy Exemption

(C) Such sections confer **no power** on any township to prohibit in a district zoned for **agricultural, industrial, residential, or commercial uses**, the use of any land for:

- (2) Biodiesel production, biomass energy production, or electric or heat energy production **if the land on which the production facility is located qualifies as land devoted exclusively to agricultural use under sections 5713.30 to 5713.37 of the Revised Code (CAUV program)**.

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ORC 519.21(C)(3) Methane Exemption

(3) Biologically derived methane gas production

- **if** the land on which the production facility is located qualifies as land devoted exclusively to agricultural use under sections 5713.30 to
- **and if** the facility that produces the biologically derived methane gas does not produce more than 17,060,710 BTU, five megawatts, or both.

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What is “Agriculture”?

➔ Refer to ORC
519.01 definition

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ORC 519.01—Definition of Agriculture

As used in 303/519 of the ORC, 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;

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ORC 519.01 – Definition (*continued*)

- 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.

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Applying the Agricultural Exemption: Common Issues

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Can township prohibit an agricultural land use in a district zoned “residential”?

Example:

- Landowner has 7 acre parcel in a residential district and wants to build a barn and raise sheep.

Answer: No.

- The zoning district designation is not a basis for prohibiting agriculture, because the general limitation on township zoning authority applies **in any zoning district**.

Ohio Supreme Court in *Mentor Lagoons, Inc. v. Zoning Bd. of Appeals of Mentor Township*.

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Does it matter whether the agricultural use is not a “commercial” activity?

• *Examples:*

- Landowner wants to build barn to store farm equipment used on the farm.
- Landowner wants to build barn to house horses for landowner’s recreational use.

• *Answer:*

- The definition of “agriculture” does not use the word “commercial.”
- Unlike CAUV property tax assessment, which requires that land be devoted to “commercial” agricultural use. ORC 5713.30.

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“Commercial” agriculture? (*continued*)

But note one exception that requires “commercial” activity:

- The bio/energy/methane exemptions in 519.21(C) only apply on land that qualifies under the CAUV program (is devoted to commercial agricultural production).

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“But they aren’t selling the animals”

- “Animal husbandry” per the definition of agriculture includes the keeping of animals and need not include the selling and breeding of animals.
 - Ohio Supreme Court in *Mentor Lagoons*; see also Ohio Court of Appeals in *Lexington Township v. O’Brien*.

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What if the owner sells goods other than produce in a farm market?

- *Example:*
 - Landowner sells apples and sweet corn raised on the farm and also wants to sell mulch and pumpkins purchased off the farm.
- *Answer:*
 - The 50% test only requires that 50% or more of the gross income is derived from farm produce.
 - The parcel on which the farm market is located need not be the sole source of the produce.
 - There is no zoning authority over **what else** a farmer can sell for the other 50% of gross sales.
- Ohio Court of Appeals in *Hambrecht v. Whiting*

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Selling goods other than produce

The “other 50%” can include banquets, receptions, parties at which entertainment is provided, theatrical shows, music festivals, clambakes, pig roasts, and other entertainment and special events.

- *Ohio Attorney General Opinion No. 2002-029.*

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When is a barn really a barn?

- *Example:*
 - A proposed “barn” to be used for agriculture will also store a boat and RV.
- *Answer:*
 - The barn or structure must be “incident to” and agricultural use of the land.
 - The statute is silent about **how much** of the barn must be incident to an agricultural use of the land.

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Barns and Structures

What does “incident to an agricultural use of land” mean?

- The structure use must be **directly and immediately related** to an agricultural use. *State v. Huffman*, 20 Ohio App. 2d 263 (1969)
- The structure must be **usually or naturally and inseparably dependent** upon an agricultural use on the land. *Hill v Tate Twp.*, 1996 Ohio App. LEXIS 3961
- Structure must be on the **same land** on which the agricultural use is taking place. *Keynes Bros. v. Pickaway Twp.*, 1988 Ohio App. LEXIS 1028.

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What if the landowners are making wine from purchased grape concentrate?

Example:

- Landowners are growing some grapes and also using imported concentrate to make their wine.

Answer:

- A county or township can't prohibit the winery use or require a building permit as long as buildings are used **primarily** for vinting and selling wine and any amount of grapes are growing on the property.
- The winery exemption applies, not the "marketing and processing secondary to production" language in the definition of agriculture.
- *Terry v. Sperry*, 130 Ohio St.3d 125 (2011).

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Agritourism Legislation in Ohio

- Currently proposed H.B. 80 and S.B. 75:

- Would add "agritourism" to the agricultural exemption from zoning.
- Defines "agritourism" as agriculturally related educational, entertainment, historical, cultural, or recreational activity, including you-pick operations or farm markets, conducted on a farm that allows or invites members of the general public to observe, participate in or enjoy that activity.
- But does allow limited regulatory authority over size of building, parking areas, setbacks and ingress and egress where necessary to protect public health and safety (echoes farm market language).

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2. When does the Ohio Building Code apply to an agricultural building or structure?

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Ohio Building Code

- Ohio Revised Code 3781.06(A)(1):

- (1) Any building that may be used as a place of resort, assembly, education, entertainment, lodging, dwelling, trade, manufacture, repair, storage, traffic, or occupancy by the public, any residential building, and all other buildings or parts and appurtenances of those buildings erected within this state, **shall be so constructed, erected, equipped, and maintained that they shall be safe and sanitary** for their intended use and occupancy.

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Ohio Building Code Agricultural Exemptions

- ORC 3781.06(B)—Ohio building code provisions **do not apply** to:
 - (1) Buildings or structures that are incident to the use for agricultural purposes of the land on which the buildings or structures are located, **provided** those buildings or structures are **not used in the business of retail trade**.

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Ohio Building Code Agricultural Exemptions

- ORC 3781.06(B)(1)—A building or structure is not considered “used in the business of retail trade” **if**:
 - **50% or more** of the gross income received from **sales of products in the building** or structure by the owner or operator is from **sales of products produced or raised** in a normal crop year on farms owned or operated by the seller.

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Ohio Building Code Agricultural Exemptions

- ORC 3781.061— Agricultural Zoning Certificates
 - Whenever a county zoning inspector or a township zoning inspector issues a **zoning certificate** that declares a specific building or structure is to be used in agriculture, such building is not subject to the Ohio building code.

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Applying the Ohio Building Code Agricultural Exemption

- Smith Farm wants to build a new barn on the farm for selling its produce: must it be built according to Ohio Building Code standards?
 - Answer: No, not if more than 50% of the gross income from the building will result from the sales of products produced or raised by Smith Farm.

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3. What is “agriculture” for purposes of CAUV eligibility determinations by counties?

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Current Agricultural Use Valuation Program

- ORC 5713.30-5713.99—Allows for differential property tax assessment for qualifying agricultural properties, as determined by county auditor.
 - Land must be “devoted exclusively to agricultural use” according to ORC 5713.30.

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“Devoted Exclusively to Agricultural Use”

- Parcels at least **ten acres** in size that were:
 - (a) devoted exclusively to **commercial** animal or poultry husbandry, aquaculture, algaculture, apiculture, the production for a **commercial** purpose of timber, field crops, tobacco, fruits, vegetables, nursery stock, ornamental trees, sod, or flowers, or the growth of timber for a **noncommercial** purpose, if the land on which the timber is grown is contiguous to or part of a parcel of land under common ownership that is otherwise devoted exclusively to agricultural use.

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“Devoted Exclusively to Agricultural Use”

- Parcels at least **ten acres** in size that were:
 - (b) devoted exclusively to biodiesel production, biomass energy production, electric or heat energy production, or biologically derived methane gas production if the land on which the facility is located is contiguous to or part of a parcel of land under common ownership that is otherwise devoted exclusively to agricultural use, provided that at least fifty per cent of the feedstock used in the production was derived from parcels of land under common ownership or leasehold.
 - (c) devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government

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“Devoted Exclusively to Agricultural Use”

- Parcels **less than ten acres** in size that were:
 - In the prior three years devoted exclusively to **commercial** animal or poultry husbandry, aquaculture, algaculture, apiculture, the production for a **commercial** purpose of field crops, tobacco, fruits, vegetables, timber, nursery stock, ornamental trees, sod, or flowers **where such activities produced an average yearly gross income of at least twenty-five hundred dollars** during such three-year period or where there is evidence of an **anticipated** gross income of such amount from such activities during the tax year in which application is made,
 - or were devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government;

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“Devoted Exclusively to Agricultural Use”

- Parcels **less than ten acres** in size that:
 - During the previous three consecutive calendar years have been designated as land devoted exclusively to agricultural use, but such land has been **lying idle or fallow for up to one year** and **no action has occurred to such land that is either inconsistent with the return of it to agricultural production or converts** the land devoted exclusively to agricultural use as defined in this section. Such land shall remain designated as land devoted exclusively to agricultural use provided that beyond one year, but less than three years, the landowner proves good cause as determined by the board of revision.

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“Devoted Exclusively to Agricultural Use”

- "Land devoted exclusively to agricultural use" includes tracts, lots, or parcels of land or portions thereof that are used for **conservation practices**, **provided that** the tracts, lots, or parcels of land or portions thereof comprise **twenty-five per cent or less** of the total of the tracts, lots, or parcels of land that satisfy the criteria established in division (A)(1), (2), or (4) of this section together with the tracts, lots, or parcels of land or portions thereof that are used for conservation practices.

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