

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CIVIL DIVISION

MIAMI TOWNSHIP	*	CASE NO. 2019 CV 05444
BOARD OF TRUSTEES,	*	
	*	JUDGE SKELTON
Plaintiff,	*	
	*	
-vs-	*	DEFENDANTS' MEMORANDUM IN
	*	OPPOSITION TO PLAINTIFF'S MOTION
DARREN POWLETTE, et al.,	*	FOR SUMARY JUDGMENT
	*	
Defendants.	*	

Now come Defendants, by and through Counsel, and pursuant to Ohio Civil Rule 56 hereby oppose Plaintiff's Motion for Summary Judgment. Defendants incorporate herein all of the facts, law and argument set forth in Defendants' Motion for Summary Judgment previously filed in this matter. Additional reasons why summary judgment in favor of the Plaintiff is not proper are set forth in the Memorandum below.

Respectfully Submitted,

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MEMORANDUM

Plaintiff's Motion for Summary Judgment should be overruled and Defendants' Motion for Summary Judgment should be granted. Plaintiff's only claim against the Defendants in the First Amended Complaint is that the Defendant's "continue to operate illegal wedding/special events venue from the Property in violation of the Zoning resolution." Plaintiff seeks a permanent injunction which would require this Court to determine that under no conceivable circumstance could the property and the barn be used for agritourism purposes.¹

The undisputed facts reveal that the Defendants are not violating any legitimate zoning regulation. They are using the Property as an agritourism facility, which is a permitted use under the zoning resolution, as a matter of law.

I. STATEMENT OF FACTS

Defendants incorporate herein the State of Facts set forth in their Motion for Summary Judgment. In addition, other salient facts follow.

Between May 8, 2018 and the filing of the lawsuit herein, Miami Township had never set foot on Powlette's property to determine what types of activities were occurring on the property.

Driving Go-Karts before, during, and after a celebratory event, which seems to be a theme in Plaintiff's Motion, is not an agriculturally related educational, entertainment, historical, cultural or recreational activity. However, interacting with farm animals, enjoying hayrides,

¹ Defendants have never claimed that they are using the property or the barn primarily for the vinting of wine. Defendants do grow grape vines on the property, which constitutes viticulture. But, Defendants are not, and are not claiming to be, primarily using the barn for the vinting of wine...yet. As such, there can be no permanent injunction of an activity that is not being engaged in.

learning about the history of farming activity and construction, taking tours of the farm before during and after the celebratory events are agriculturally related activities, which all constitute agritourism.

The guests of the property make the decision to use the property because it has alpacas, farm animals and other agriculturally related activities to engage in in conjunction with the celebratory event. *See previously filed Affidavits.* Without these agricultural activities, there would be no celebratory event. The township seeks to divide and then conquer these activities; but, they are co-dependent, one does not exist without the other.

The barn is always used for agricultural purposes on a daily basis. Everyday it has an agricultural purpose and use. It could be storing hay. It could be storing equipment used in hay production, animal husbandry, or poultry husbandry. It could be housing alpacas. It could be rearing chickens. It could be vinting wine. In short, each and every day, the barn is used for an agricultural purpose.

II. **LAW AND ARGUMENT**

A. **SUMMARY JUDGMENT STANDARD**

For summary judgment to be appropriate, it must appear that: (1) there is no genuine issue as to any material fact to be litigated; (2) the moving party is entitled to judgment as a matter of law; (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing, Inc.*, (1978), 54 Ohio St. 2d 64, 66. The burden of showing that there is no

genuine issue as to any material fact is on the moving party. *Harless*, at 66. In considering a motion for summary judgment, the court views the evidence in a light most favorable to the non-moving party. *Id.*

Where the non-moving party bears the burden of production at trial, such party must produce evidence as to each issue to which the burden applies. *Wing v. Anchor Media, Ltd.*, (1991), 59 Ohio St. 3d 108. To withstand a motion for summary judgment, the non-moving party cannot merely rest on the allegations of the pleadings. Rather, the non-moving party must affirmatively set forth the material facts which preclude summary judgment. *Celotex Corp. v. Catrett*, (1986), 477 U.S. 317. Where the non-movant fails to meet this obligation, the moving party is entitled to summary judgment. *Johnson v. Great American Moving Co.*, (1988), 44 Ohio App. 3d 71. In showing that there is a genuine issue for trial, only disputes over facts that might affect the outcome of the suit (*i.e.*, ‘material’ facts) may preclude summary judgment. *Anderson v. Liberty Lobby* (1986), 477 U.S. 242, 248.

Statutory interpretation presents a question of law. *Scasny v. Village of Mayfield*, 2016-Ohio-5517, 69 N.E.3d 1219, (App. 8 Dist. 2016), citing *Riedel v. Consol. Rail Corp.*, 125 Ohio St.3d 358, 2010-Ohio-1926, 928 N.E.2d 448, ¶ 6. The necessity of considering the facts or the evidence to determine whether a legislative act applies to a particular case does not turn the issue of statutory interpretation into a question of fact. *Id.*

In this case, not only is Miami Township not entitled to summary judgment, Powlette is entitled to summary judgment in his favor.

B. TOWNSHIP ZONING AUTHORITY

Ohio townships have no inherent or constitutionally granted police or zoning power. *Yorkavitz v. Bd. of Columbiana Twp. Trustees* (1957), 166 Ohio St. 349, 351, 2 O.O.2d 255, 142 N.E.2d 655. "Accordingly, the zoning authority possessed by townships in the state of Ohio is limited to that which is specifically conferred by the General Assembly." *Bd. of Bainbridge Twp. Trustees v. Funtime, Inc.* (1990), 55 Ohio St. 3d 106, 108, 563 N.E.2d 717.

In addition, "[a]ll zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. Restrictions on the use of real property by ordinance, resolution or statute must be **strictly construed**, and the scope of the restrictions **cannot be extended** to include limitations not clearly prescribed." (Citations omitted.) *Saunders v. Clark Cty. Zoning Dept.* (1981), 66 Ohio St.2d 259, 261, 20 O.O.3d 244, 421 N.E.2d 152. Furthermore, exemptions from restrictive zoning provisions are to be **liberally construed**. *State ex rel. Moore Oil Co. v. Dauben* (1919), 99 Ohio St. 406, 124 N.E. 232, at syllabus paragraph 1 (Emphasis added).

In this case, Miami Township, at an administrative level, has narrowly construed Ohio's agritourism statute in contravention of clearly established precedent. Miami Township must construe its zoning regulation liberally as it is a derogation of common law and deprives its citizens of the right to use their land. Under *Saunders* and *Dauben*, the zoning regulation at issue should be construed in favor of the property owner and any attempted restriction by Miami Township must be strictly construed.

Herein, it is apparent that a liberal construction of the agritourism statute reveals that the Defendants' use of the property is proper.

C. PERMANENT INJUNCTION STANDARD

It is well settled that *R.C. 519.24*, "creates a cause of action against a landowner who uses his land in violation of any of the provisions [of] R.C. Chapter 519 or any township resolution." *Ghindia v. Buckeye Land Dev., LLC*, 11th Dist. No. 2006-T-0084, 2007 Ohio 779. However, Miami Township has the burden of proving, by clear and convincing evidence, that the property is being used in violation of the zoning ordinance." *Ghindia*, 2007 Ohio 779, at ¶19.

In this case, Miami Township cannot establish by clear and convincing evidence that the property is being used in violation of a zoning ordinance. Moreover, since the use of the property can change over time as it relates to agritourism and agritourism activity, it is clear a permanent injunction would never be proper unless this Court determines that Powlette's use of the property could never be deemed agritourism.

D. ARGUMENT

It does not appear that Miami Township disputes that fact that the property is being used for agricultural purposes. Nonetheless, a review of the agricultural use of the land is important.

Powlette acquired the property in May of 2016. Since at least 2003, the 26-acre property has been used to grow and bale hay. Prior to Powlette owning the Property, the farm supplied between 800 -900 bales of hay each year. Since Powlette has owned the Property, the hay production has increased dramatically. To be sure, in 2017 the hay production increased to 2000 bales of hay per year. In 2020, hay production exceeded 3,000 bales of hay. *Powlette Deposition*

at pg. 11. The hay is grown and harvested at least three times during the year. *Id. at 40.* Powlette regularly stores the hay he retains in the loft of the Barn and uses the hay to feed his alpacas and provide base layers for his chicken coops. *Id. at 71.* In addition, Powlette stores the equipment he uses to transport the hay and feed his alpacas in the barn. *Id. at 76.* Moreover, in the hot summer months, the alpacas use the unfinished portion of the barn to help them stay cool and out of the sun. *Id.*

In addition to the hay production (which involves the use of the Barn in essence 365 days a year), Powlette also raises a herd of alpacas on the Property. *Id. at 11.* The alpacas regularly use the Barn during the hot summer months in order to stay cool and out of the sun. *Id. at 76.*

Powlette also has egg producing chickens on the Property. He raises and feeds the chickens and then collects and sells the eggs that are produced.

In addition to the poultry husbandry and poultry production, Powlette also raises free range turkeys on the Property. Each year he brings in a number of turkeys. He feeds them, raises them, and then shortly before Thanksgiving he has them harvested in Amish country and sells them. *Id. at 61-62.*

In addition, in the summer of 2018, Powlette planted a vineyard on the property. *Id. at 11.* He started with 40 grapevines. *Id. at 12.* In 2021, he significantly increased the size of the vineyard by adding an additional 50 grapevines. *Id.* He has grown and continues to grow Marquis grapes on the Property. *Id. at 13.*

It is beyond dispute that the property is used for agricultural purposes.

Powlette also uses the property for celebratory events such as weddings and wedding receptions. *Id. at 18*. In that capacity, he is an agritourism provider, who owns, operates, provides and/or sponsors an agritourism activity.

Miami Township Zoning Resolution Section 307 provides:

SECTION 307 | AGRICULTURAL EXEMPTION TO A ZONING CERTIFICATE

A. In claiming an agricultural exemption, the following definitions as used in sections 519.02 to 519.25 of the Ohio Revised Code shall apply:

1. "agriculture" includes farming; ranching; aquaculture; algaculture meaning the farming of algae; apiculture and related apicultural activities, production of honey, beeswax, honeycomb, and other related products; horticulture; viticulture, winemaking, and related activities; 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.

2. "agritourism" means an 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.

B. An applicant may submit a Declaration of Intent – Agricultural Exemption form in lieu of obtaining a zoning certificate for structures that will be used exclusively for agricultural or agritourism purposes. *The structure being exempted will not be required to have a permit on file and no fee will be required.*

C. In association with the exemption form, an applicant will be required to provide a property site plan that clearly shows the location and size of the exempted structure for Township records.

In this case, Powlette has twice submitted a Declaration of Intent-Agricultural Exemption form that was compliant with the ordinance. In 2017, Powlette identified his use of the property to include hay storage. In fact, when he submitted the Declaration, Miami Township stamped the required property site plan as “Zoning Approved” on October 5, 2017. Since receiving that agricultural exemption, Powlette has continuously used the Property for hay storage and other agricultural purposes. When Powlette expanded the use of his property and the barn, he filed a second Declaration of Exemption, which included, *inter alia*, agritourism. He submitted the required site plan with this Declaration as well. Miami Township accepted the Declaration and the structure identified was as a result, exempt from Township zoning.

Significantly, since this Declaration was filed, Miami Township has NEVER revoked the exemption. As such, the barn is exempt from Township Zoning.

Powlette has complied with Miami Township’s Zoning Ordinance. However, it is important to also note that *R.C. 519.21* also provides a significant restriction on township authority with regard to property used in agriculture.

R.C. § 519.21 provides, in pertinent part:

“Powers not conferred on township zoning commission by chapter:

(A) Except as otherwise provided in divisions (B) and (D) 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... and no zoning certificate shall be required for any such building or structure. . . .

(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: . . .

4. Agritourism. However, a board of township trustees, as provided in section 519.02 of the Revised Code, may regulate such factors pertaining to agritourism, except farm markets as described in division (C)(1) of this section, as size of a structure used primarily for agritourism, size of parking areas that may be required, setback building lines for structures used primarily for agritourism. and egress or ingress where such regulation is necessary to protect public health and safety. Nothing in division (C)(4) of this section confers power on a township zoning commission, board of township trustees, or board of zoning appeals to require any parking area to be improved in any manner, including requirements governing drainage, parking area base, parking area paving, or any other improvement. Nothing in division (C)(4) of this section confers power on a township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land or the construction or use of buildings or structures that are used primarily for vinting and selling wine that are located on land any part of which is used for viticulture as provided in division (A) of this section.

In this case, Miami Township lacks the authority to regulate Powlette's agricultural use of the barn or his use of the barn for agritourism activities, or his use of the building incident to either of these agricultural uses as a matter of property.

Ohio townships have no inherent or constitutionally granted police or zoning power. *Yorkavitz v. Bd. of Columbiana Twp. Trustees*, 166 Ohio St. 349, 351, 142 N.E.2d 655 (1957). Accordingly, the zoning authority possessed by townships in the state of Ohio is limited to that which is specifically conferred by the General Assembly." *Bd. of Bainbridge Twp. Trustees v. Funtime, Inc.*, 55 Ohio St.3d 106, 108, 563 N.E.2d 717 (1990).

Moreover, any "[a]mbiguity [in a zoning regulation] must be construed against the zoning resolution because it is a police power exercise that constricts property rights." *Id.*, citing, *Freedom Twp. Bd. of Zoning App. v. Bd. of Mental Retardation* (1984), 16 Ohio App.3d 387, 390.

In this case, rather, than liberally construing the relevant statutes in favor of the property owner, Miami Township seeks to expand any limitations set forth in *RC 519.21*. This is simply not an power granted to the Township. To be sure, the limitations the Township places on Powlette's use of the property are **"not clearly prescribed"** in the statute. The Township expands its power and abuses its rightful authority by expanding these limitations. This is a clear abuse of township authority.

There can be no doubt that the Property is a farm engaged in "agriculture." The Property produces hay, is engaged in animal husbandry, is engaged in poultry husbandry and the production of poultry products. These facts are not in dispute. Additionally, Powlette is also engaged in viticulture. If all of the agricultural activities Powlette is engaged in on the Property constitute agritourism, he is zoning compliant.

Agritourism is an "agriculturally related educational, entertainment, historical, cultural, or recreational activity...conducted on a farm that allows or invites members of the general public to observe, participate in, or enjoy." To be engaged in "agritourism," Powlette only has to satisfy **one** of these criteria. Of course, the activities do not need to be exclusively agricultural (as the township's argument would require). Rather, the agritourism activity must be related to, or in other words, connected to, associated with, linked to, or allied with, agriculture, which is this case, is beyond doubt.

Powlette must only be engaged in ONE of these agriculturally related activities.

“Educational” means “intended or serving to educate or enlighten.”² In conjunction with the celebratory events he hosts, Powlette regularly educates his guests, both young and old, about the animals on his farm, the products the farm produces, as well as the history of farm structures and construction techniques used in the building of those structures. This evidence is undisputed. As such, Powlette and his guests are plainly engaged in agriculturally related education activities on his farm during and in conjunction with these celebratory events.

“Entertainment” has been defined as “[T]he action of providing or being provided with amusement or enjoyment.”³ Clearly, a farm-based wedding is, among other things, the gathering of guests in an agricultural setting. The guests regularly interact with the alpacas and other farm animals on the property. They feed the animals. They take pictures with the animals and the children get to run around and play in the fields. The guests are provided hayrides and other agriculturally related activities during these events. The guests are without question “being provided with amusement and enjoyment” related to an agricultural activity. This is also undisputed.

“Historical” means “of or concerning history; concerning past events, belonging to the past, not the present.”⁴ Ohio history is replete with in its history references to farm weddings and weddings held at the home of a bride or groom. Historically, weddings did not even take place in a church. It was not until the mid-1800s that churches became the primary venue for weddings. Prior to that time, for rural residents in particular, the wedding would take place on the family farm or at the family residence. Within this historical context, having a wedding on a farm is, in

² Oxford Dictionary

³ Oxford Dictionary

⁴ Oxford Dictionary

and of itself, consistent with Ohio's rural, agrarian history. And is an agriculturally related historical activity.

“Cultural” means “relating to the ideas, customs, and social behavior of a society.”⁵ Not unlike the historical context of a farm wedding, the current social behavior and custom of our society begs for weddings to be held in rustic, rural settings. To be sure, in 2017, fifteen percent (15%) of all weddings in the United States took place on a farm. Statistics show that less than thirty percent (30%) of weddings in the United States were held in a religious institution. For better or worse, there has been a significant cultural shift in Ohio and across our country with regard to how weddings are celebrated. Accordingly, our culture, particularly in this region, is shifting towards holding weddings in rustic, scenic settings rather than at religious institutions. Thus, the simple action of hosting a wedding in a barn, in a rural, rustic setting, is now a culturally related agricultural activity, thus, it is in and of itself agritourism.

“Recreation” means, “[A]ctivity done for enjoyment when one is not working.”⁶ Certainly, “recreation” includes weddings, reunions, and other celebratory events. Having the opportunity to gather with friends and family in a rural setting, to interact with and feed farm animals, and to enjoy simply being on a farm is in and of itself “recreation.” Doing all of these activities on a 26-acre farm, amongst rolling hayfields and an array of livestock is obviously an agriculturally related activity.

⁵ Oxford Dictionary

⁶ Oxford Dictionary

Powlette is engaged in agritourism. Most certainly when construing the agritourism statute in a manner that favors the property owner, which this Court must, it is simply beyond doubt that agritourism activities are being conducted on the farm as a matter of law.

Certainly, Miami Township has not proved by clear and convincing evidence that all of these activities being conducted on the farm are not agritourism.

Miami Township's zoning regulation must be strictly construed as a restriction on private property rights. Moreover, Miami Township cannot expand the scope of any restrictions prescribed by the statute. Nonetheless, in this case, Miami Township seeks to narrowly construe the definition of agritourism rather than construe it in a manner in favor of the property owner.

When considering the wide range of agriculturally related activities the guests of the Property engage in; and, combining that with the Court's obligation to construe ambiguities in the statute in favor of the landowner; it is beyond dispute that Powlette is engaged in lawfully permitted agritourism on the Property.

Plaintiff filed the lawsuit herein based upon its misplaced reliance on Judge O'Connell's decision in *Case No. 2018 CV 04129*. In that case, Judge O'Connell determined that as of May 8, 2018, Darren Powlette was not engaged in agritourism activities on the farm and therefore his use of the property was not agritourism AT THAT TIME. Of course, at that time, Powlette did not yet have his chickens, turkeys, alpacas, hayrides, tours, history and educational programs, or other activities he is now conducting in conjunction with the celebratory events. In his decision, Judge O'Connell was very clear, "The ruling by this Court is regarding the BZA's decision as to the use of Powlette's barn as of May 8, 2018."

Further Judge O’Connell noted, “ The BZA also argues that Powlette did not receive an exemption to use the barn as a wedding or event venue. **The Court does not find this argument well-taken.**” Finally, Judge O’Connell further noted, “The Court is unwilling to find at this time that using the barn as a wedding or event venue would never fit within the definition of agritourism...”

In that case, Judge O’Connell based his decision on how the property was being used as of May 8, 2018. Of course, since the decision was published, Miami Township has never even set foot on Powlette’s property to determine what activities were being conducted after May 8, 2018. Rather, Miami Township blindly filed suit without any understanding of what activities were being conducted. Miami Township did not care. The Township never even tried to reach out to Mr. Powlette to inquire as to what activities were being conducted. Rather, despite the clear language of the Court’s decision, the Township assumed Powlette use was not permitted.

Of course, the Ohio Department of Commerce considers Powlette’s use of the barn to host weddings and other celebratory events to be agritourism. This Court should as well.⁷

For the foregoing reasons, Defendants respectfully request that this Court OVERRULE Plaintiff’s Motion for Summary Judgment and GRANT the Defendants’ Motion for Summary Judgment.

⁷ Of note, Miami Township has not consulted with the State of Ohio, the Department of Commerce or any other outside agency or source to inquire whether its interpretation of the agritourism statute is appropriate.

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Certificate of Service

I hereby certify that the foregoing was served upon all Counsel of Record via the Montgomery County Clerk of Courts E-Filing system on this 28th day of October 2021.

/s/ Gregory S. Page

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