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WHERE A DISTRICT IS ZONED EXCLUSIVELY FOR AGRICULTURE, SALES OF AGRICULTURAL PRODUCTS MAY BE MADE IN THE DISTRICT IF SOLD ON THE PREMISES WHERE PRODUCED—§§519.01, R.C. 519.02, R.C.

SYLLABUS:

Where a district is zoned exclusively for agriculture under Sections 519.01 and 519.02, Revised Code, sales of agricultural products may be made in the district provided such products are produced by the seller on the premises from which they are sold.

Columbus, Ohio, June 22, 1961

Hon. Thomas A. Beil, Prosecuting Attorney
Mahoning County, Youngstown, Ohio

Dear Sir:

Your request for my opinion reads:

“This office has been asked for an opinion as to whether nurseries, garden stores and allied commercial enterprises selling garden and lawn tools, commercial fertilizer, seeds and bulbs, etc. in connection with a nursery operation would conform to a zoning ordinance classifying the land used as an agricultural district. Because this question appears, not only in a specific instance with one township, but because there are many such enterprises being questioned throughout our County, I would appreciate your opinion on such matter.”

Section 519.01, Revised Code, reads:

“As used in sections 519.02 to 519.25, inclusive, of the Revised Code, ‘agriculture’ includes agriculture, farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture, and animal and poultry husbandry.”

Some of the terms used in Section 519.01, *supra*, probably should be defined, for the purpose of clarity. These are the respective definitions found in Webster’s New International Dictionary, of four such terms: “Apiculture” is defined as “beekeeping, especially as an industry”; “horticulture,” as “the cultivation of a garden or orchard”; “floriculture,” as

“the cultivation of ornamental flowering plants”; and “viticulture,” as “the cultivation of vine; grape growing.”

Section 519.02, Revised Code, provides :

“For the purpose of promoting the public health, safety, and morals, the board of township trustees may in accordance with a comprehensive plan regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures including tents, cabins, and trailer coaches, *and the uses of land for trade, industry, residence, recreation, or other purposes* in the unincorporated territory of such township, and for such purposes may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.” (Emphasis added)

The procedure for the adoption of a zoning regulation by resolution is set forth in Sections 519.03 to 519.10, inclusive, Revised Code. Of interest with respect to the present question is Section 519.21, Revised Code, which reads in part :

“Sections 519.02 to 519.25, inclusive, of the Revised Code confer no power on any 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.”

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(Emphasis added)

It follows that the use of *any* land in the unincorporated territory of a township for agricultural purposes, cannot be regulated away by a zoning resolution. On the other hand, if and when a comprehensive plan for dividing the territory of a township into various use areas is adopted, such regulation may set up specific areas for the exclusive use of land therein for agricultural purposes.

In Opinion No. 363, Opinions of the Attorney General for 1959, page 209, in which another aspect of township zoning was discussed and ruled upon, I stated in the second paragraph of the syllabus:

“Within the limitations of Section 519.02, Revised Code, township trustees and a township zoning commission *may by resolution lawfully divide the township into a residential area, an agricultural area, and an area for retail business*, and thereby exclude industrial and manufacturing plants from the township, provided such division of the township is substantially related to the health, safety and morals of the inhabitants of the township, and provided pre-existing rights are recognized and protected.” (Emphasis added)

The nurseries, stores and allied enterprises mentioned in your letter, sell garden and lawn tools, commercial fertilizer, seeds and bulbs, and articles and products of similar kind. It is to be noted in this connection that under Section 519.21, *supra*, no zoning certificate is required for the construction or use of buildings or structures “incident” to the use for agricultural purposes of land on which such buildings or structures are located. The word “incident”, used as an adjective, is defined in Black’s Law Dictionary as:”

“anything which is usually connected with another, or connected for some purposes, though not inseparably.”

A nursery, in the horticultural sense, is defined in Webster’s International Dictionary as:

“a place where trees, shrubs, vines, etc., are propagated for transplanting or for use as stocks for grafting.”

Under the facts given in the instant case all of the sales are made in connection with a nursery operation. Undoubtedly, the nursery operation would come within the term “agriculture.” But the *selling* of tools, commercial fertilizer, seeds and bulbs, etc., could be a different question.

It has been held that the words “agricultural use” allow the selling of farm products produced and sold on the property of the seller. *Moulton v. Building Inspector*, 312 Mass., 195, 43 N.E. (2d) 662, (1942). But the selling of agricultural products “grown on the premises,” allowed under a zoning ordinance, *does not include fruits brought in for sale*. *D’Acchioli v. Zoning Board*, 74 Rhode Island, 327; 60 A. (2d) 707, (1948).

In view of the above, therefore, I am of the opinion that a person in the agricultural district may sell agricultural products if the products have been produced by the seller on the land from which they are sold. Clearly, when items are sold which have not been produced on the land from which they are sold, the seller is not engaged in one of the cultures specified in Section 519.01, *supra*, but in dealing in a commercial enterprise; for it cannot be said that the use of a building in an agricultural area for the carrying on of such a business is incident to the use for agricultural purposes of the land on which the building is located.

While garden and lawn tools may be used in agriculture, I am doubtful whether they could be called agricultural products. In any event, however, it would not appear that the tools in the instant case are being manufactured by the seller on the land from which they are sold; and, thus, the sale of the same would not be allowed within the purview of the *Moulton* and *D'Acchioli* cases, *supra*.

It is probable that some commercial fertilizers could be termed an agricultural product, but the facts supplied do not state whether the fertilizer in the instant case is being produced on the land from which it is sold. If the seller is, in fact, producing this fertilizer on the premises, and it is an agricultural product, he would in my opinion be authorized to sell such product from the land on which it is produced.

Seeds and bulbs are without a doubt within the meaning of agriculture, but again, the seeds and bulbs being sold must be produced on the premises.

In *Metzenbaum, Law of Zoning*, Volume 3, page 1811, it is stated:

“Under an ‘inclusive’ ordinance, only those uses which are specifically named, are permitted and the burden is on the property owner to show that the use he proposes, is one that is included or permitted.”

I might add that a township could, by amending the existing zoning regulation, *expressly* allow retail sales of goods and articles mentioned in your letter in the agricultural district; such re-zoning, provided it did not materially affect the comprehensiveness of existing zoning regulations, would not, I believe, constitute a nuisance *per se*. See *The Salvation Army v. Frankenstein*, 22 Ohio App. 159, 4 Ohio Law Abstract, 594. But, this is not the question here, and, therefore, I will refrain from discussing it further.

Answering your specific question, it is my opinion and you are advised that where a district is zoned exclusively for agriculture under Sections 519.01 and 519.02, Revised Code, sales of agricultural products may be made in the district provided such products are produced by the seller on the premises from which they are sold.

Respectfully,

MARK McELROY

Attorney General