

Columbus, Ohio
November 28, 1962

OPINION NO. 3440

SYLLASUS:

1. A structure used only as a dwelling house for a person engaged in agriculture is not a structure incident to an agricultural use of land so as to be exempt by the terms of Section 519.21, Revised Code, from the provisions of a zoning regulation enacted pursuant to Chapter 519., Revised Code.

2. A determination of whether land is used for an agricultural purpose so as to be exempt from township zoning pursuant to Section 519.21, Revised Code, must be made upon a consideration of the facts relating to the use of the land, and not the occupation of the owner thereof.

Hon. Paul R. Young
Prosecuting Attorney
Montgomery County
Court House Annex
Dayton, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

"We are submitting the following questions for clarification regarding Section 519.21 of the Ohio Revised Code. This Section states that:

"Sections 519.02 to 519.25 inclusive of the Ohio Revised Code confer no powers on the board of township trustees or board of zoning appeals to prohibit the use of any land for the construction or use of buildings or structure 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 buildings or structures."

"Our problem consists of a part-time farmer who is building an addition onto his home. The township has written for our opinion as to the necessity of a Zoning Certificate. In order to answer their question we are requesting your opinion to two of our own.

"1) Is the Owner's resident 'incident to the use of agricultural purposes'?"

"2) If residences are included, what guides are available to determine whether the land is being used for 'agricultural purposes'. That is, must a livelihood be earned from the land or will raising sod grass constitute an agricultural purpose."

Section 519.01, Revised Code, states:

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

A board of township trustees is granted the power to establish zoning regulations pursuant to Section 519.02, Revised Code, which reads as follows:

"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."

Section 519.21, Revised Code, quoted in your request, is a limitation upon the power granted to the board of township trustees and such limitation has been held not to render Chapter 519., Revised Code, unconstitutional. East Fairfield Coal Co. Miller, 71 Ohio Law Abs., 490.

As to your first question, attention is directed to the following language of Hurd, J. in stating the court's opinion in Mienz v. Village of Mayfield Heights, et al., 92 Ohio App., 471, at page 478:

"* * * If the legislation bears a real and substantial relation to the public health, morals, safety or general welfare, it will not be nullified by the judicial process. Whether the power exists to limit or regulate a particular use is to be determined, not by abstract considerations, but by considering it in connection with the facts and circumstances of each particular case."

I have been unable to find any citation of authority which deals directly with the question of whether a residence is incidental to an agricultural use. The word "incident" is defined in Black's Law Dictionary as:

"Used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. Watts v. Copeland, 170 S.C. 449, 170 S.E. 780, 783. Used as a noun, it denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the 'principal.'

In this sense, a court-baron is incident to a manor. Also, less strictly, it denotes anything which is usually connected with another, or connected for some purposes, though not inseparably. Thus, the right of alienation is incident to an estate in fee-simple, though separable in equity. *Cromwell v. Phipps*, Sur., 1 N.Y.S. 278; *Mount Carmel Fruit Co. v. Webster*, 140 Cal. 183, 73 P.826."

It is, of course, elementary that the effect of a zoning resolution is determined by the use made of the land or building in question. A residence, generally speaking, is a building used as a dwelling regardless of the occupation or occupations of its inhabitants. It can be argued that land cannot be used for agriculture purposes unless the person who is working the land has a place of abode at or near the "farm," and that his residence is therefore incident to the agricultural use. It will be seen that following such argument to its natural conclusion, such worker's residence would be considered incident to an agricultural use regardless of whether it was on the same parcel of land used for agriculture or was located some distance away.

The General Assembly, in enacting Chapter 519., Revised Code, granted the power to establish township zoning for the purpose of promoting public health, safety, and morals and in so doing to regulate the size and height of buildings and the size of yards and density of population. Section 519.02, Revised Code. Certainly, the first area where such regulations fulfill the public purpose for which they are designed is that dealing with residential zoning. Considering this fact in light of the language used by the legislature in Section 519.21, *supra*, I am of the opinion that, under normal conditions, a farm residence is not incident to an agricultural use of land so as to be exempt from a zoning resolution adopted pursuant to Chapter 519., Revised Code. Heed the statements of Judge Hurd in the *Miesz* case, *supra*, I must add that the application of any zoning ordinance, including the exemption therefrom, must be determined based upon the facts and circumstances of each case. While I am unable to conceive of an agricultural use of land which would establish sufficient facts and circumstances to cause a residence erected or to be erected to be incident to such use, I do not in this opinion rule out such possibility. (This opinion deals, however, with a structure used only as a dwelling house).

As to your second question, "agriculture" is defined by Section 519.01, *supra*. Such definition, as can readily be seen, does not close the door to any shadow of doubt as to the meaning of such word. Definitions of the word "agriculture" in its legal sense can be found at 58 American Jurisprudence, 989, Zoning, Section 76; 114 A.L.R. 1201; *Law of Zoning* by James Metzenbaum, 2d ed., Vol. 2, Chapter x-p, page 1709 et seq., and elsewhere. (I am able to find no case dealing with whether "sod grass" grow is an agriculture use, however, the maintenance of a tree nursery has been held to be such a use. *Hozenlsurger v. City of Los Angeles*, 124 Pac. 2d, 345) Whether land and buildings are used for or are incidental to an agriculture use depends upon the fact surrounding the use of the land and buildings, and not those use to determine the livelihood of the owner thereof. Zoning regulates the use of land and buildings; it does not regulate people except as is necessary to cause compliance with the land and building regulations. Any determination as to the category of use in which any land or building must fall should be made based upon the use which is made or intended to be made thereof.

In accordance with the foregoing, I am of the opinion and you are advised:

1. A structure used only as a dwelling house for a person engaged in agriculture is not a structure incident to an agricultural use of land so as to be exempt by the terms of Sec.

2. A determination of whether land is used for an agricultural purpose so as to be exempt from township zoning pursuant to Section 519.21, Revised Code, must be made upon a consideration of the facts relating to the use of the land, and the occupation of the owner thereof.

Respectfully,

MARK McELROY
Attorney General