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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA
7 MODESTO DIVISION
8

9 In re) Case No. 09-93249-E-11
10 MICHAEL KENNETH NEMEE and)
MICHELLE SEOBHAN McKEE NEMEE,)
11)
Debtor(s).)
12 _____)
13 MICHAEL KENNETH NEMEE and) Adv. Pro. No. 09-9088
MICHELLE SEOBHAN McKEE NEMEE,) Docket Control No. MDG-3
14)
Plaintiff(s),)
15 v.)
16 COUNTY OF CALAVERAS,)
17 Defendant(s).)
18 _____)

19 This memorandum decision is not approved for publication and may
20 not be cited except when relevant under the doctrine of law of
the case or the rules of claim preclusion or issue preclusion.

21 MEMORANDUM OPINION AND DECISION
22 Motion for New Trial or in the Alternative a New Judgment

23 Michael and Michelle, the Plaintiff-Debtors in this Adversary
24 Proceeding, have filed a Motion for New Trial or in the Alternative
25 a New Judgment¹. They seek this remedy with respect to a judgment
26 of this court entered on December 16, 2011, which determined that
27 _____

28 ¹ In this Decision, the court references the Motion as a "Motion
for New Trial or Amended Judgment," which is consistent with the
Federal Rules of Civil Procedure.

1 the commercial golf course constructed on real property owned by
2 the Plaintiff-Debtors was not permitted under the applicable Zoning
3 Ordinances for Calaveras County, California.² The judgment also
4 enjoins the Plaintiff-Debtors from allowing the operation of the
5 commercial golf course on and after January 27, 2012. The court's
6 Memorandum Opinion and Decision on which the judgment is based was
7 issued on November 21, 2011.

8 This adversary proceeding was originally scheduled for a two-
9 day court trial. That trial extended into three full days,
10 notwithstanding the court and parties having utilized the direct
11 testimony statement procedure as provided under Local Bankruptcy
12 Rule 9017-1. This procedure, which requires that a party prepare,
13 file with the court, and exchange with the other parties written
14 declarations for the direct testimony of that party's non-hostile
15 witnesses, greatly streamlines the trial process.

16 The trial extended into three days in large part because of
17 the trial strategy adopted by both parties of allowing argument to
18 be presented to the court as part of the direct questioning
19 process. This effectively allowed each party to repeatedly make
20 its arguments to the court during the trial.

21 Following the trial, the court first issued the written ruling
22 in the form of the Memorandum Opinion and on November 21, 2011.
23 Because the judgment included an injunction requiring the
24 Plaintiff-Debtors to cease the operation of the commercial golf
25 course, the court did not immediately issue the judgment.
26 Cognizant of the foreshortened appeal period from judgments issued

27
28 ² Unless otherwise stated, references to "Zoning Ordinances" or
"Ordinances" are to the ordinances enacted by Calaveras County,
California.

1 by the bankruptcy court (14 days), the court delayed issuing the
2 judgment until December 15, 2011. This afforded the Plaintiff-
3 Debtors an opportunity to construct well-crafted post-trial motions
4 and requests for stay pending appeal as they deemed appropriate.
5 Further, the court delayed the effective date of the injunction
6 requiring the Plaintiff-Debtors to cease the operation of the
7 commercial golf course until January 27, 2012. At a status
8 conferences in the bankruptcy case and another adversary proceeding
9 involving one of the litigation counsel for the Plaintiff-Debtors,
10 the court assured counsel that seeking a stay pending appeal from
11 the appellate court would not offend this judge when counsel stated
12 that common courtesy was to first request the stay from the trial
13 court.

14 The present Motion for New Trial and a related Motion for Stay
15 Pending Appeal were filed with this court on December 22, 2011, 12
16 days after the entry of the judgment and 37 days after the court
17 issued the Memorandum Opinion and Decision. Though filed, the
18 Motion for New Trial and Motion for Stay Pending Appeal were not
19 set for hearing as required by Local Bankruptcy Rule 9014-1(b)(1)
20 by the Plaintiff-Debtors. The Plaintiff-Debtors also failed to
21 designate a docket control number which is used on all pleadings
22 relating to the motion and used by the court to organize the
23 pleadings. *Id.*, at 9014-1(c). After the Clerk of the Court
24 notified counsel for the Plaintiff-Debtors of the failure to set
25 the matter for hearing, the Plaintiff-Debtors set hearings on the
26 Motion for New Trial and Motion for Stay Pending Appeal to be heard
27 on February 22, 2012. Dckt. 193 and 194.

28 In connection with the Motion for Stay Pending Appeal the

1 court *sua sponte* rescheduled the hearing for January 25, 2012, to
2 allow for that matter to be heard and ruled on before the
3 injunction went into effect. Dckt. 203. This was done to avoid
4 the court's ability to consider and address any error which would
5 justify a stay pending appeal being rendered moot by having a
6 hearing on such motion a month after the injunction went into
7 effect and the commercial golf course operation ceased. The court
8 also ordered counsel for the Plaintiff-Debtors to use specific
9 docket control numbers for both motions. The Plaintiff-Debtors
10 subsequently requested, and the court granted, the acceleration of
11 the hearing date on the Motion for New Trial so it would be
12 conducted at the same time as the Motion for Stay Pending Appeal.

13 **LEGAL BASIS FOR A NEW TRIAL OR AMENDED JUDGMENT**

14 In bankruptcy cases and adversary proceedings Federal Rule
15 Bankruptcy Procedure 9023 makes applicable the procedure for
16 seeking a new trial or altering or amending a judgment pursuant to
17 Federal Rule of Civil Procedure 59. A motion for new trial or to
18 amend the judgment must be filed within fourteen days after the
19 entry of the judgment. In this Adversary Proceeding, the Motion
20 for New Trial or New Judgement was filed on December 28, 2011,
21 twelve days after the entry of the judgment.

22 Though a motion for new trial is addressed to the broad
23 discretion of the court, such a motion should be based on a
24 manifest mistake of fact or error of law, with the court finding
25 substantial reasons before setting aside the judgment.³ A motion
26 for new trial should not be granted merely because the losing party
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28 ³ 12 MOORE'S FEDERAL PRACTICE THIRD EDITION § 59.13[3][a], Ball v.
Interoceanica Corporation, 71 F.3d 73, 76 (2nd Cir. 1995).

1 can probably present a better case on another trial.⁴ In trials
2 conducted before the court, there are three grounds for granting a
3 new trial: (1) manifest error of law, (2) manifest error of fact,
4 and (3) newly discovered evidence.⁵

5 In considering a motion to alter or amend the judgment, review
6 under Fed. R. Civ. P. 59(e) considers the same factors as a motion
7 for new trial, whether there was: (1) manifest error of fact, (2)
8 manifest error of law, or (3) newly discovered evidence.⁶

9 **GROUND S ALLEGED IN MOTION**

10 The court has been presented with one pleading titled "Notice
11 of Motion, Motion, Declaration and Points and Authorities in
12 Support of New Trial or Alternatively, a New Judgment." Dckt. 193.
13 This pleading is not a notice of motion, motion, or declaration,
14 but is a points and authorities. Local Bankruptcy Rule 9014-1 and
15 the Revised Guidelines for Preparation of Documents, ¶ (3)(a),
16 require that the notice of motion, motion, points and authorities,
17 declarations, and exhibits be filed as separate pleadings. Working
18 in a near-paperless environment, counsel preparing and filing with
19 the court an omnibus electronic document comprised of the motion,
20 points and authorities, declarations, and exhibits results in the
21 court receiving an unworkable electronic document. Federal Rule of
22 Civil Procedure 7(b) and Federal Bankruptcy Rule of Procedure 7007
23 require that a motion state with particularity the grounds for
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25 ⁴ *Id.*

26 ⁵ *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978). See
27 *Molski v. M.J. Cable, Inc.*, 481 F.3d 724 (9th Cir. 2007) FN.4.

28 ⁶ *Hale v. United States Trustee (In re Basham)*, 208 B.R. 926,
934 (9th Cir. BAP 1997), *affrm.* *Hale v. United States Trustee (In re*
Bryne), 152 F.3d 924 (9th Cir. 1998)

1 seeking the order. Attempting to bury the grounds in a points and
2 authorities filled with citations, quotations, legal arguments, and
3 factual arguments not only makes review of the motion more
4 difficult for the court, but it also can be misused as a strategy
5 to confuse and bewilder the opponent as to what grounds the moving
6 party is really asserting.⁷ The court waives, due to the exigency
7 of the circumstances, the failure to comply with the Federal and
8 Local Rules to consider the merits of the Motion.

9 The Motion seeks a new trial or an amended judgment based on
10 an asserted error of law.

11 1. The Agritourism portion of the original Zoning Ordinances
12 which was a permissive ordinance.

13 a. While the original zoning ordinances may have
14 stated it was permissive (17.02.010(A)), the
15 Agritourism and amendments to the agriculture
16 zoning portions of the ordinances are not merely
17 permissive.

18 2. Contrary to the court's opinion, the opinion of an
19 administrator for the County is of little or no weight to interpret
20 these Ordinances.

21 3. As court admits, a golf course on the olive orchard fits
22 the definition of Agritourism.

23 4. A plain reading of the definition should be sufficient.

24 a. The methodology utilized by the court is flawed

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26 ⁷ As this court has stated in other proceedings, it is not the
27 job of the court to canvas the various pleadings filed by the movant,
28 mine the declarations and exhibits, delve into any other pleadings on
the docket, and then divine what grounds the movant intended to be the
basis for the motion, articulate those grounds, present those grounds
to the opposing party, and then rule on the grounds which the court
presumed that the movant intended to assert.

1 because it is premised on the ordinances being
2 permissive.

3 b. The court failed to address that the statutes were
4 enacted at different times is fatal.

5 5. The Decision fails to address the reason for the
6 ordinance.

7 a. To help the farms during the severe economic
8 downturn (testimony of Jerry Howard).

9 b. Not even lip service was provided by the court to
10 this purpose.

11 6. Ten minutes for oral argument after three days of trial
12 was insufficient for the Plaintiff-Debtors to communicate their
13 contentions to the court.

14 a. Significance of the fact that the permissive zoning
15 part was adopted 20 years prior to the Agritourism
16 amendment is probably the most significant point
17 missed.

18 The Plaintiff-Debtors assert the following legal arguments in
19 support of their contention that the error exists to warrant the
20 court either granting a new trial or amending the judgment.

21 1. That portion of the Zoning Ordinance dealing with
22 agriculture, and in particular Agritourism is not a permissive
23 statute.

24 2. That a specific provision of law takes preference over a
25 conflicting general provision of law.

26 3. A more recent enactment creates a presumption that the
27 legislature intended a change when it enacted the new law.

1 4. The Agritourism Ordinance is not a permitted use
2 ordinance, but is one in which "any and all activities are
3 permitted unless expressly prohibited or do not fit the definitions
4 contained within the ordinance."

5 5. Court referencing multimillion dollar golf courses when
6 that reference is not included in the ordinance shows a bias
7 against "multimillion dollar golf courses, but not against
8 multimillion dollar amphitheaters with rock concerts."⁸

9 6. What does a rock concern have to do with agriculture?

10 **PROPER STATUTORY CONSTRUCTION OF THE**
11 **COUNTY ZONING ORDINANCES**

12 One of the errors of law alleged is that the court has
13 incorrectly construed the Zoning Ordinances for property zoned
14 agriculture to control over the asserted more specific provision
15 (Ordinance 17.06.0151, which defines the term "Agritourism")
16 asserted to be the operative provision to determine the use of
17 property for Agritourism. California Code of Civil Procedure
18 § 1859 provides,

19 § 1859. The intention of the Legislature or parties

20 In the construction of a statute the intention of the
21 Legislature, and in the construction of the instrument
22 the intention of the parties, is to be pursued, if
23 possible; and when a general and [a] particular provision
24 are inconsistent, the latter is paramount to the former.
25 So a particular intent will control a general one that is
26 inconsistent with it.

27 This section cited by the Plaintiff-Debtors does not merely state
28 that any statute or term making a specific reference to a matter

26 ⁸ At oral argument, the Plaintiff-Debtors clarified that they
27 were not alleging that the court was biased (determining matters other
28 than on the facts before it and on the law), but that the court did
not find Plaintiff-Debtors' witness credible. Therefore, the court
did not agree with the Plaintiff-Debtors' conclusion as to the law and
facts.

1 controls over any other provision, but that when a general and a
2 specific provision are inconsistent, then the specific provision
3 will control over the general provision to the extent of such
4 inconsistencies. In their Motion and supporting argument, the
5 Plaintiff-Debtors do not state how the Zoning Ordinance defining
6 Agritourism is inconsistent with the provisions stating that one of
7 the enumerated permitted uses of property zoned Agriculture is
8 Agritourism. Rather, it is argued that since Agritourism is being
9 interpreted by the court in a manner which does not allow the
10 Plaintiff-Debtors to construct and operate (through their limited
11 liability company) a golf course, then the Plaintiff-Debtors'
12 determination of what constitutes Agritourism should control and
13 trump the balance of the Zoning Ordinances.

14 The analysis provided by the Plaintiff-Debtors attempts to
15 take a fragment from the rules of statutory construction and make
16 it the sole method of determining the statute.⁹ As discussed, the
17 court starts with giving the words of the statute their "plain,
18 common sense meaning."¹⁰ When the language of the statute is not
19 ambiguous, the plain meaning controls and the court does not resort
20 to extrinsic sources and other rules. When the statute cannot be
21 determined by the plain reading of the words, the courts often rely
22 on the canons of statutory construction. In this process, the
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25 ⁹ This appears to be continuing a practice or strategy utilized
26 by the Plaintiff-Debtors as found by the court in its ruling stated in
27 the Memorandum Opinion and Decision. The Plaintiff-Debtors would take
28 a portion of what they were told by one county representative and then
restate that fragment of what was said, out of context, as the
position of the County in a misleading way.

¹⁰ *Kavanaugh v. West Sonoma Cnty. Union High Sch. Dist.*, 29 Cal.
4th 911, 919 (2003).

1 statute should be interpreted and harmonized with reference to the
2 whole system of the laws of which is a part.¹¹

3 If it is not clear from the face of the statute, the court
4 then proceeds through a series of steps to determine the proper
5 meaning of the statute. Before trumping one part of a statute with
6 another as the Plaintiff-Debtors do, the court first attempts to
7 harmonize the provisions, giving force and effect to each. "In
8 construing statutes, it is the duty of the Court to reconcile, if
9 practicable, apparently conflicting provisions, so as to carry into
10 effect the intention of the Legislature as it appears from the
11 whole Act and from contemporaneous legislation."¹² This basic
12 principle of harmonizing statutes has been established in both
13 California and federal law for a long time and is not subject to
14 any serious dispute. "It is a rule of universal application in
15 construing a statute, that some effect shall be given, if
16 practicable, to every part of it, and that apparent inconsistencies
17 shall be reconciled, if it can be done without torturing the
18 language."¹³

19 This fundamental rule applies whether determining portions of
20 an individual statute, as statute as part of a specific statutory
21 scheme, or two separate and distinct statutes. "[E]very statute is
22 to be construed with reference to all other statutes of similar
23 subject so that each part of the law as a whole may be harmonized
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27 ¹¹ *Id.*

28 ¹² *Pond v. Maddox*, 38 Cal. 572, 574 (1869).

¹³ *People v. Southwell*, 46 Cal. 141, 148 (1873).

1 and given effect.”¹⁴ The various statutes blend into each other and
2 are regarding as constituting but a single set of statutes. Thus,
3 the statutes are not to be treated as antagonistic laws, but parts
4 of one system with effect given to each section.¹⁵

5 **PLAIN MEANING OF WORDS IN DETERMINING THE ORDINANCE**

6 The Plaintiff-Debtors argue that the plain meaning of the
7 Agritourism Ordinances is that their commercial golf course is
8 legal on property zoned for General Agriculture and Agriculture
9 Preserve. Their analysis begins with the Plaintiff-Debtors arguing
10 that a plain meaning of Zoning Ordinance 17.060.0151 allows
11 defining Agritourism as “an enterprise located on a working farm,
12 ranch, or other agricultural operation . . . for the enjoyment and
13 education of visitors, guests, or clients, that generates income
14 for the owner/operator.” Therefore, Plaintiff-Debtors conclude,
15 this definition includes a golf course built on an olive farm.
16 Plaintiff-Debtors then turn to the second sentence of the
17 definition stating that Agritourism “refers to an act of visiting
18 a working farm/ranch or to any agricultural/horticultural operation
19 for the purpose of enjoyment or education or active involvement of
20 the farm/ranch or agricultural operation that also adds to the
21 economic viability of the agricultural operation.”

22 For the Plaintiff-Debtors, a golf course operated on an olive
23 farm which markets olive oil to golfers is clearly within this
24 definition. It is contended that because the definition of
25 Agritourism includes a non-exclusive list of examples of

27 ¹⁴ *People v. Frawley*, 82 Cal. App. 4th 784, 789 (2000),
28 citing *Franchise Tax Board v. Superior Court*, 63 Cal. App. 4th 794,
799 (1998).

¹⁵ *Id.*, 790.

1 Agritourism enterprises, and because the Ordinance defining
2 Agritourism states that it is a non-exclusive list, then the Zoning
3 Ordinances which define Agritourism also provide the authorization
4 to use property zoned Agriculture, thereby making it something
5 other than a permissive use statute.

6 Ordinance 17.06.0151 is a definitional provision, not a
7 portion of the Ordinances providing for how property may be used in
8 the County. This definition is determined and applied in the
9 context of the entire body of Ordinances, as are the Ordinances
10 which specify the uses for property zoned to Agriculture. The
11 Plaintiff-Debtors are incorrect in asserting that the definition of
12 Agritourism is the beginning and end of the inquiry of how property
13 zoned Agriculture may legally be used in Calaveras County.

14 The court clearly understood Plaintiff-Debtors' argument that
15 the plain meaning of the words in Ordinance 17.06.0151 defining
16 Agritourism meant that the Plaintiff-Debtors could construct and
17 let their limited liability company operate a commercial golf
18 course on the Property. When issuing the Memorandum Opinion and
19 Decision in this Adversary Proceeding, the court did not agree with
20 that contention. The court does not agree with that contention in
21 this Motion for New Trial or Amended Judgment.

22 The definition begins with "an enterprise located on a working
23 farm, ranch or other agricultural operation or agricultural
24 plant/facility . . . " First, there must be a working agricultural
25 operation, which in this case is asserted to be the olive orchard.
26 Second, the enterprise must be conducted for the enjoyment and
27 education of visitors, guests or clients. In this Adversary
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1 Proceeding, the golf course operation is asserted to be conducted
2 for the enjoyment and education of visitors, guests, or clients.¹⁶

3 The Plaintiff-Debtors' contention that a golf course complies
4 with the plain meaning of the words of this Ordinance breaks down
5 with the second sentence of Ordinance 17.06.0151 - Agritourism is
6 the act of visiting a working farm /ranch or any agricultural,
7 horticultural or agricultural operation for the purpose of
8 enjoyment, education or active involvement "in the activities of
9 the farm/ranch or agricultural operation that adds to the economic
10 viability of the agricultural operation." Taken on its face, the
11 plain language of this Ordinance requires that the enterprise have
12 the visitor, guest, or client engage in "the activities of the
13 farm/ranch or agricultural operation."

14 The day of the trial the Plaintiff-Debtors asserted a new
15 argument that the golf course itself was an "agricultural
16 operation" which was permitted on the property, without regard to
17 whether it was Agritourism. That contention was rejected on its
18 merits by the court and is not asserted in connection with this
19 Motion. Rather, the substance of the argument presented is that
20 the Plaintiff-Debtors can engage in any other non-agricultural
21 enterprise as Agritourism on the property, so long as there is some
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23 ¹⁶ On its face, this definition requires that the enterprise be
24 for both the "enjoyment **and** education" of the visitors, guests, or
25 clients. [Emphasis added.] Use of the word "and" is in the
26 conjunctive and requires that the enterprise for both enjoyment and
27 education. *In re C.H.*, 53 Cal. 4th 94, 101-102 (2011). No argument is
28 made in the present Motion, and no evidence was presented at trial,
how the commercial golf course was educational for the visitors,
guests, or clients. If the court were to conclude the analysis at
merely the limited "plain language" as directed by the Plaintiff-
Debtors, they have not provided evidence that the commercial golf
court is both for the enjoyment and education of the guests, visitors,
or clients.

1 agricultural operation (the olive trees). If the court's analysis
2 stopped at this point, the Ordinance would only allow such
3 enterprises by which the visitor, guest, or client engaged in the
4 ongoing farm/ranch or agricultural operation. Examples which come
5 to mind are having students participate in the milking operation at
6 a dairy or sowing seeds for the planting of a crop. However, the
7 Ordinance does not stop with just the general definition, but the
8 Board of Supervisors provides a set of non-exclusive examples for
9 defining Agritourism.

10 As addressed in the Memorandum Opinion and Decision, two
11 canons of statutory construction apply to this situation. The
12 first is *noscitur a sociis* ("it is known from its associates").¹⁷
13 This canon provides that the meaning of words which are placed
14 together in a statute should be determined in light of the words
15 with which they are associated. *Id.* This is closely related to
16 *Ejusdem Generis* ("of the same kind"), a canon which directs that
17 where general words follow specific words, or specific words follow
18 general words in a statutory enumeration, the general words are
19 construed to embrace only things similar in nature to those
20 enumerated by the specific words. *Id.* at p. 181 (looking to
21 examples enumerated in the statute to understand the scope of the
22 ambiguous portion of the statute and narrowing that scope according
23 to the examples provided). The court utilized these examples in
24 determining whether the commercial golf course is Agritourism.

25 Rather than considering these specific examples in determining
26 the scope of Agritourism, the Plaintiff-Debtors ignore them and
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28 ¹⁷ *Cal. Farm Bureau Fed. v. Cal. Wildlife Conservation Bd.*,
143 Cal. App. 4th 173 (2006).

1 rush to find that the general language of the definition overrides
2 the actual Zoning Ordinances which provide for the uses of
3 property. The Plaintiff-Debtors ignore the language of the
4 Ordinances and the canons of statutory construction, jumping to the
5 conclusion that the definition of Agritourism is in conflict with
6 the balance of the Zoning Ordinances and controls.

7
8 **CONSIDERATION OF THE SUBSEQUENT ENACTMENT
OF AGRITOURISM ORDINANCES**

9 The Plaintiff-Debtors assert that an error of law occurred
10 because the court failed to take into account that the Agritourism
11 Ordinances were enacted by the Board of Supervisors in 2005, 20
12 years after the balance of the current ordinances were put into
13 place. The tenor of the contention is that the court should treat
14 the Agritourism Ordinances as free-standing provisions which are
15 not construed in connection with the balance of the Zoning
16 Ordinances. This is incorrect, as even subsequent enactments are
17 interpreted as part of the statutes as a whole.

18 When enacted in 2005, the definition of Agritourism was added
19 to the existing definitions set forth in Chapter 17.06, which
20 includes a total of 211 definitions to be used with respect to the
21 Zoning Ordinances. Ordinance 17.06.0010. The use of property
22 zoned Agriculture was added to Ordinances 17.16.020 (titled
23 "Permitted uses" for General Agriculture zoned property) and
24 17.18.020 (titled "Permitted uses" for Agriculture Preserve zoned
25 property).

26 The addition for Agritourism use to Ordinance 17.16.020 is
27 placed as subparagraph "a" to paragraph 21 (Recreation and
28 education) of 24 paragraphs specifying permitted uses, each with

multiple subparagraphs (which total 57 specified permitted uses) for property zoned General Agriculture. Within paragraph 21 for Recreation and education, there are ten subparagraphs of permitted uses, including Agritourism.

For property zoned Agriculture Preserve, the addition for Agritourism use is stated in Ordinance 17.18.015 (titled "Permitted uses") and placed as subparagraph "a" to paragraph 21 (titled Recreation and education). Within paragraph 21 there are nine Recreation and education uses listed, including Agritourism. Ordinance 17.18.020 specifies a total of 57 permitted uses on property zoned for Agriculture Preserve.

These permitted uses do not include the additional 45 conditional uses on General Agriculture property and 41 conditional uses on Agriculture Preserve property. In all, the Zoning Ordinances specify 200 permitted and conditional uses (four of which are Agritourism).

When subsequently enacted, the Board of Supervisors embedded the Agritourism uses within the existing statutory scheme, making them four of many permitted and conditional uses. While enacted subsequently, the Board has made the permitted Agritourism use part of the comprehensive statutory scheme for property zoned agriculture. In enacting the Agritourism uses, the Board of Supervisors did not enact provisions which conflicted with the existing Ordinances, but added another use. The subsequent enactment of the subparagraphs providing for Agritourism as one of many potential permitted and conditional uses of property zoned to Agriculture does not result in this additional provision a zoning

ordinance being a provision separate and apart from the comprehensive zoning scheme.

Permitted Uses

While admitting that the Zoning Ordinances were enacted as part of a permitted use and conditional use statutory scheme, the Plaintiff-Debtors contend that the Agritourism Ordinances can be interpreted in a vacuum outside of this permitted use and conditional use scheme. Such a contention ignores the plain language of Ordinances 17.16.010 *et seq.* (property zoned General Agriculture) and 17.18.010 *et seq.* (property zoned Agriculture Preserve). For property zoned General Agriculture, Ordinance 17.16.020 is titled "Permitted Uses," and enumerates the permitted uses of such property. The first listed permitted use is Agricultural Operations and under the 21st permitted use, Recreation and education, is listed "Agritourism activities not otherwise specified (less than 75 persons on-site at one time). For property zoned Agriculture Preserve the same permitted use structure exists. Ordinance 17.18.020 is titled "Permitted uses," with the first permitted use being Agricultural Operations and under the 21st permitted use, Recreation and education, the permitted used of "Agritourism activities not otherwise specified (less than seventy-five persons on-site at one time)."¹⁸

Contrary to Plaintiff-Debtors' contention that Agritourism is a free-standing right to use property, and not a permitted use to be determined under the General Agriculture and Agriculture

¹⁸ Conditional uses for both General Agriculture and Agriculture Preserve include "Agritourism activities not otherwise specified (more than seventy-five persons on-site at one time)." Ordinances 17.16.030 A. 1, 11. a., and Ordinance 17.18.030 a.1., 11.a.

1 Preserve Ordinances, the Ordinances expressly state that
2 "Agritourism activities **not otherwise specified**" are permitted
3 uses. [Emphasis added.] Only by considering the other uses as
4 permitted under the Ordinances can one determine the scope of
5 permitted Agritourism. The Agritourism Ordinances are part of the
6 comprehensive Zoning Ordinance scheme enacted by the Calaveras
7 County Board of Supervisors.

8 **Consideration of Purpose of Agritourism**
9 **and Drafting of the Agritourism Ordinances**

10 The Plaintiff-Debtors contend that part of the court's error
11 was not to consider the purpose of the Agritourism Ordinance –
12 generating additional revenue to assist agricultural operations in
13 tough economic times. The court did not ignore this purpose, but
14 did not agree with the Plaintiff-Debtors' interpretation that a
15 permitted use for Agritourism allowed the property owner to
16 construct and operate whatever business enterprise on the property
17 so long as it generated revenue.

18 The Plaintiff-Debtors repeat their contention made at trial
19 that by enacting the Agritourism provisions the Board of
20 Supervisors intended to allow owners of property zoned agriculture
21 to engage in other enterprises which will generate income. Based
22 on the evidence presented, this is partially correct. It was
23 undisputed that the provisions for Agritourism were added to the
24 existing Zoning Ordinances to encourage and authorize the owners of
25 property zoned to agriculture to have a broader range of money-
26 generating activities to help support their farming operations.
27 There was dispute as to the Plaintiffs' contention that the
28 Agritourism provisions allowed the landowner to engage in whatever
enterprise he or she wanted on the property, so long as there was

1 some farming or ranching activity and the additional enterprise
2 generated money.

3 The Plaintiffs-Debtors' arguments at trial and repeated in
4 this Motion seek to have the Agritourism provisions operate in
5 isolation from the Zoning Ordinances, in which the Agritourism
6 provisions are embedded as a subpart of a paragraph within a
7 section.¹⁹ In its ruling after trial, the court considered the
8 Agritourism provisions as written and as part of the Zoning
9 Ordinances. The court considered that these provisions were added
10 and provide for a broader use of the property than originally
11 permitted under the Zoning Ordinances. The court concluded that
12 the commercial golf course was not Agritourism as defined under the
13 Zoning Ordinances. The arguments represented in this Motion for
14 New Trial are no more persuasive than they were when presented at
15 trial. Providing a new use to generate revenue on property zoned
16 for Agriculture does not mean that the owner can engage in whatever
17 uses they want, in disregard of the language in the Ordinance and
18 the comprehensive statutory scheme.²⁰

19
20 ¹⁹ As discussed in this Decision, Agritourism is one of a number
21 of permitted activities, allowed as permitted recreation and education
on property zoned General Agriculture or Agriculture Preserve.

22 ²⁰ In closing argument at trial counsel for the County made the
23 colorful illustration that accepting Plaintiff-Debtors' argument on
24 this point would mean that a landowner could elect to construct and
25 operate a house of ill-repute as Agritourism so long as it generated
26 revenue for the owner. While the court did not interpret this
27 colorful argument to be that activities otherwise illegal under state
28 law would be made legal by Plaintiff-Debtors' interpretation of this
Zoning Ordinance, such interpretation would allow an owner to do
anything else on the property, even activities which required
conditional use permits or were not permitted as part of the
comprehensive Zoning Ordinances. Under the Plaintiff-Debtors'
scenario, the owner of property zoned General Agriculture or
Agriculture Preserve could construct a car race track, demolition
derby course, 20 story destination resort and spa, avenue of
nightclubs, adult entertainment theaters, and bars, regional power

1 **Consideration of the Use of**
2 **Agriculture Property by Ironstone Vineyards**

3 The Plaintiff-Debtors contend that part of the court's error
4 was in not considering that Ironstone Vineyards had built an
5 amphitheater and held revenue generating "rock concerts" on
6 property zoned agriculture in Calaveras County. This contention of
7 error includes an assertion that the court's ruling manifests a
8 "bias against multi-million dollar golf courses" and a "bias in
9 favor of multi-million dollar amphitheater and concerts." As
10 stated in the Motion, evidence was presented that some of the
11 County representatives thought that such use was illegal, but no
12 action was taken by the County against Ironstone Vineyards.

13 The court did consider the use of property by Ironstone
14 Vineyards and the evidence of such use which was actually provided
15 to the court. With respect to the use, several witnesses testified
16 that some concerts were held and an amphitheater had been
17 constructed. The court did not have evidence by which it could
18 determine the nature, scope and significance of the construction or
19 concerts. While in the Motion reference is made to there being
20 "thousands of people and cars coming to concerts," the Plaintiff-
21 Debtors did not present the court with sufficient evidence of the
22 scope of that operation for any such finding.

23 The Plaintiff-Debtors contend that the County has not enforced
24 the Ordinances to prevent Ironstone Vineyards from constructing the
25 amphitheater and conducting the concerts, and such shows that such
26 activities are permitted as Agritourism, and therefore the

27 _____
28 plant, dam and reservoir, junk yard, or contaminated waste storage
facility, all based on that use generating revenue to supplement
whatever farming operation exists.

1 commercial golf course is permitted as Agritourism. The court
2 considered this one use by one owner of one other property zoned
3 agriculture, but did not find it determinative as does the
4 Plaintiff-Debtors. Out of the entire County, the Plaintiff-Debtors
5 directed the court to this one property for a use which is
6 contended to show that the Plaintiff-Debtors' commercial golf
7 course is a permitted use as Agritourism. Having given it due
8 consideration, it did not alter the court's final determination as
9 to whether the commercial golf course was a permitted use as
10 Agritourism.²¹

11 In addition to the quality and scope of evidence provided
12 concerning the use of property by Ironstone Vineyards, the court
13 was not presented with any basis for determining that the
14 construction and use of the property were permitted Agritourism
15 uses. The Zoning Ordinances provide a detailed list of permitted
16 and conditional uses for property in the County. Agritourism is a
17 subcategory of the Recreational and educational permitted and
18 conditional uses. The court does not know which, if any, of such
19 other permitted uses may have been considered (if any) by Ironstone
20 Vineyard and the County.

21 Woven in the Plaintiffs-Debtors' arguments is the contention
22 that since the County has let Ironstone Vineyards operate its
23 concerts, and even if they violated the law, the Plaintiff-Debtors
24 should be able to construct and have their limited liability
25 company operate a commercial golf course because Ironstone

27 ²¹ In considering the evidence presented, the court considered
28 the cumulative effect of the contentions raised by the Plaintiff-
Debtors, not merely considering each in isolation. The court
addresses each in this ruling separately for clarity of discussion.

1 Vineyards has been allowed to violate the law. While not accepting
2 the "if he can break the law, then we can break the law" version of
3 this argument, the court did consider whether this one use cited by
4 the Plaintiff-Debtors on one other property weighed in favor of the
5 Plaintiff-Debtors' interpretation of the Ordinance. In the end it
6 did not.

7 It is well established that merely failing to enforce an
8 ordinance against one person does not invalidate the ordinance. As
9 discussed in *Wade v. San Francisco*, 82 Cal. App. 2d 337, 339
10 (1947), merely lax enforcement of a law or ordinance does not cause
11 the enforcement of the statute to violate a constitutional right.²²

12 As stated in the Memorandum Opinion and Decision, the court
13 has not been presented with the task of determining whether
14 Ironstone Vineyard's use of its property is in violation of the
15 County Zoning Ordinances. To the extent that County
16 representatives have either been confused or in disagreement as to
17 the scope of Agritourism, this ruling provides some guidance. No
18 prior judicial decisions concerning these Zoning Ordinances were
19 presented to the court. Having prevailed and obtaining this
20 ruling, the County has established how it interprets and applies
21 the Zoning Ordinances relating to Agritourism. If it fails to
22 properly, fairly, and equally apply these ordinances to the
23 property owners in the County, there are political consequences and
24 legal actions which may be taken by other government officials,
25 grand jury, and the public.

26
27
28 ²² See *Town of Atherton v. Templeton*, 198 Cal. App. 2d
146,154 (1961).

1 The court did not find, and does not find, the use of property
2 by one other landowner, Ironstone Vineyards, to determine either
3 (1) what constitutes Agritourism or (2) a voiding of the Zoning
4 Ordinances.

5 **Opinions as to Construction of the Statute**

6 The Plaintiff-Debtors assert that the court's error includes
7 not adopting the interpretation of Agritourism as proffered by
8 Kenneth Churches. As stated in the Motion and the Memorandum
9 Opinion and Decision, Mr. Churches is the former UC Davis
10 Cooperative Extension Branch in Agriculture Farm Advisor for
11 Calaveras County. He worked with the agricultural landowners in
12 drafting proposed amendments to provide for Agritourism. This
13 group of landowners submitted the proposal to the County, which was
14 processed through the Planning Department and amendments providing
15 for a permitted Agritourism use was adopted by the Board of
16 Supervisors. Neither Mr. Churches nor the group of landowners who
17 proposed the Agritourism provisions are the governmental officers
18 who enacted those provisions.

19 As a first point, just as the court has rejected the Board of
20 Supervisors' after-the-fact during litigation determination that
21 the commercial golf course was not Agritourism, neither is Mr.
22 Churches' opinion as to what he and the landowners subjectively
23 intended by their proposal to the County determinative. Mr.
24 Churches was not and is not a supervisor and does not speak for the
25 County in what it intended in adding the Agritourism provisions to
26 the Zoning Ordinances. His testimony could well be phrased as
27 being that the landowners hoped to get enacted an Ordinance
28 allowing Agritourism with a definition so general and broad that

1 they could do whatever they wanted with their property free of any
2 land use restrictions. Such may well be the dream of many
3 landowners. The court was not presented with sufficient evidence
4 that such was intended by the Board of Supervisors or that the
5 language of the Ordinance renders such a result.

6 The court addressed this intentional, general language which
7 insured that questions as the one now before the court would arise.
8 The court considered Mr. Churches' opinion and testimony as to how
9 the language was drafted, presented to the Board of Supervisors,
10 and ultimately adopted. The court did not find that testimony
11 persuasive so as to conclude the Plaintiff-Debtors' interpretation
12 of the Ordinance was correct.

13 **SUFFICIENCY OF ORAL ARGUMENT**

14 The Plaintiff-Debtors contend that error exists because the
15 court allowed the parties ten minutes of oral argument after the
16 trial. The trial in this Adversary Proceeding was scheduled for
17 two days and could have been concluded in two days. The Bankruptcy
18 Court utilizes the Alternative Direct Testimony procedure by which
19 each party prepares Direct Testimony Statements (declarations) for
20 the non-hostile witnesses for their respective cases in chief.
21 Local Bankr. R. 9017-1. This allows each attorney to carefully and
22 clearly lay out the witness' testimony, including the foundation
23 for exhibits presented at trial. Evidentiary objections are
24 presented prior to trial, the court reviews the Direct Testimony
25 Statements and Exhibits prior to the trial, oral argument is
26 presented for any evidentiary objections, and those matters are
27 promptly resolved. The witnesses take the stand ready to adopt
28 their respective Direct Testimony Statements and begin their direct

1 testimony, without having to repeat the basic information relating
2 to their background, experience, and establishing a foundation for
3 their testimony and exhibits.

4 No request for additional time for further argument was made
5 by the Plaintiff-Debtors until weeks after the trial and the court
6 had announced that it reached a decision in this Adversary
7 Proceeding at a status conference in the Chapter 11 case. At the
8 request of Plaintiff-Debtors' counsel, the court advised the
9 parties of the ruling, which was being issued in writing. Only
10 after learning that they had not prevailed did the Plaintiff-
11 Debtors advise the court that they wanted to make further argument.

12 The court's opinion as to the sufficiency of time for oral
13 argument has not changed from its ruling on the belated request
14 from Plaintiff-Debtors after learning that they had lost at trial.
15 Dckt. 167. The court incorporates the ruling on that motion as
16 part of this decision, without restating it in its entirety herein.

17 The trial extended to three days in large part due to counsel
18 for the respective parties engaging in extensive argument during
19 direct and cross-examination of witnesses. Given the issues before
20 the court in this Adversary Proceeding, the court permitted counsel
21 to allow each other such leeway. By the close of the case on the
22 third day, the court clearly understood the arguments of each side,
23 including the arguments now restated in the Motion for New Trial.
24 In addition to the arguments presented during and at the end of the
25 trial, the parties filed trial briefs prior to trial. Further,
26 this Adversary Proceeding has been hotly contested by the parties.
27 By the time of trial, many of the arguments had been presented to
28 the court in connection with a motion to dismiss.

1 The time allowed for oral argument was correct and not in
2 error. The arguments were clearly presented to the court prior
3 to, during, and after the trial. The court considered the
4 arguments and contentions by each party in reaching the final
5 decision in this Adversary Proceeding. As with all trials, at the
6 end of the day someone wins and someone loses, with no amount of
7 repetitive argument changing the decision of the trial court.

8 **COMMENTS OF NON-PARTIES TO THE ADVERSARY PROCEEDING**

9 David and Hedy Hirsch and Roger and Kathy Gunderson, creditors
10 holding general unsecured claims in the Plaintiff-Debtors'
11 bankruptcy case, filed their statements as "parties in interest" in
12 this Adversary Proceeding. They are not parties to this Adversary
13 Proceeding and are not parties in interest to participate in this
14 Adversary Proceeding. They did not intervene or otherwise obtain
15 permission from the court to insert themselves in this lawsuit.
16 Merely because they are creditors of the Plaintiff-Debtors does not
17 given them standing to appear in this Adversary Proceeding.

18 Hirsch and Gunderson direct the court to 11 U.S.C. § 1109(b)
19 as the authority for them to appear in this Adversary Proceeding.
20 The express language of this Code section states that a party in
21 interest may "raise and may be heard on any issue in a case under
22 this chapter [11]." A case under Chapter 11 is commenced by the
23 filing of a bankruptcy petition. 11 U.S.C. § 301 and 302. An
24 adversary proceeding is not a "case under Chapter 11," but a
25 separate law suit to which only the parties in that action have
26 standing. Fed. R. Bankr. P. 7001, 28 U.S.C. § 157(a) (federal
27 court jurisdiction for any and all cases under Title 11 and all
28 proceedings arising under Title 11, or arising in or related to a

1 case under Title 11). In 28 U.S.C. § 157(a) Congress has clearly
2 distinguished between a "case" arising under Title 11 and some
3 other proceeding arising in or related to the "case" under
4 Title 11. Federal Rule of Civil Procedure 24 and Federal Rule of
5 Bankruptcy Procedure 7024 provide that intervention is the method
6 by which someone inserts themselves into an adversary proceeding.

7 Because of the significance of this decision to the bankruptcy
8 case, for which Hirsch and Gunderson are parties in interest, the
9 court has reviewed the pleading. The position taken by these four
10 creditors suffers from the same substantive defects as the
11 Plaintiff-Debtors. They argue that the court has ignored that
12 portion of the definition of Agritourism stating that the examples
13 are a non-exclusive list. The court did not interpret or apply the
14 list of examples as an exclusive list and limit the definition of
15 Agritourism to only those items. Instead, the court applied the
16 established canons of construction to consider the correct
17 interpretation of this statute. The Plaintiff-Debtors and these
18 creditors ignore the canons of statutory construction and given no
19 consideration to the specific examples placed in the Ordinance
20 defining Agritourism.

21 **CONCLUSION**

22 The court having considered the Motion for New Trial or for an
23 amended judgment, all of the arguments, and the record in this
24 case, the Motion is denied.

25 This Memorandum Opinion and Decision constitutes the court's
26 findings of fact and conclusions of law pursuant to Fed. R. Civ. 52
27 and Fed. R. Bank. P. 7052.

1 The court shall issue a separate order consistent with this
2 ruling.

3 Dated: January 27, 2012

4
5 /s/ Ronald H. Sargis
6 RONALD H. SARGIS, Judge
7 United States Bankruptcy Court
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