LAND USE AND RESOURCE LAW UPDATE

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I. Right to Farm

***Coffie v. Florida Crystals Corporation*, 2020 WL 2739724 (U.S. Dist. Ct., S.D. Fla. 2020).**

Defendants farm sugarcane on approximately 400,000 acres in the areas south and southeast of Lake Okeechobee (the "Affected Area"). Defendants use a method for harvesting sugarcane that burns off the outer leaves of the sugarcane prior to harvesting. The preharvest burns generally occur during the six-month period from October through March. The burns are done on 40 to 80 acre tracts of land at a time and are regulated by the Florida Forest Service.

This preharvest burning causes smoke, particulate matter ("PM"), dioxins, polycyclic aromatic hydrocarbons ("PAHs"), volatile organic compounds ("VOCs"), carbon monoxide, sulfur oxides, nitrogen oxides, ammonia, elemental carbon and organic carbon to migrate onto, to be deposited upon, and to contaminate Plaintiffs' and the proposed class members' land and to expose Plaintiffs and the proposed class members to these pollutants. The burning produces many hazardous compounds, including benzo[*a*]pyrene (classified by the International Agency for Research on Cancer ("IARC") as a confirmed human carcinogen), naphthalene (classified by IARC as a possible human carcinogen), acenaphthylene, acenaphthene, flourene, phenanthrene, anthracene, flouranthene, pyrene, benzo[*a*]anthracene (classified by IARC as a possible human carcinogen), benzo[*k*]flouranthene (classified by IARC as a possible human carcinogen), indenol[1,2,3-*cd*]pyrene (classified by IARC as a possible human carcinogen), benzol[*g,h,i*]perylene, formaldehyde, acetaldehyde, propionaldehyde, benzene, toluene, ethylbenzene, styrene, and *o,m,p*-xylene. The smoke and ash (referred to as "black snow") from the preharvest burning travels through and gets deposited onto properties in the Affected Area, causing property damage, such as discoloration of buildings and cars, and causes medical conditions, such as respiratory problems, within the affected communities. The burning also results in Plaintiffs being exposed to the pesticides used by Defendants. Plaintiffs allege that there are green alternatives to preharvest burning that Defendants refuse to adopt.

Plaintiffs either reside in and own property near the sugarcane fields, or allege to have been exposed to pollutants from the sugarcane operation. Plaintiffs allege that the burning has led to a diminution of their property values and that they have suffered and continue to suffer damage to their property, unnecessary and substantial nuisance, and long-term health effects. Plaintiffs also allege that as a result of Defendants' burning activity the Affected Area has been prevented from growing economically and has been denied equal chance of benefitting from overall economic growth and from stimulus programs. Plaintiffs allege that residents of the Affected Area are at a higher risk than the rest of the population for developing various

diseases, including respiratory conditions, because of the increase in particulate matter as well as other compounds.

The Amended Complaint alleges seven counts against all Defendants: (1) negligence on behalf of the Property Owner Class; (2) strict liability for ultrahazardous activity on behalf of the Property Owner Class; (3) strict liability pursuant to Florida Statute, on behalf of the Property Owner Class; (4) trespass on behalf of the Property Owner Class; (5) nuisance on behalf of the Property Owner Class; (6) medical monitoring on behalf of the Medical Monitoring Class; and (7) injunctive relief on behalf of both classes.

U.S. Sugar files a Motion to Dismiss with three main arguments: (1) Plaintiffs lack Article III standing; (2) Plaintiffs' claims are barred by Florida's Right to Farm Act (RTFA); and, 93) Plaintiffs' claim for injunctive relief is barred by the primary jurisdiction doctrine. Florida Crystals joins in the standing and RTFA arguments and adds five of their own.

With respect to the RTFA, Defendants argue that Plaintiffs have repackaged all but one claim as something other than nuisance to avoid application of the Act. Plaintiffs counter that the allegations fall within exceptions to the RTFA. Plaintiffs argue that their claims fall under the exception for "dangerous waste materials, or gases which are harmful to human or animal life"; that sugarcane burning is not an acceptable agricultural practice; and even if the Act applied, it would only bar Counts IV(trespass) and V (nuisance). The court found that the burning is an acceptable agricultural practice and that the exceptions apply to sanitary conditions and are not applicable in this case.

Defendants argue that the RTFA applies to all counts since all claims are essentially nuisance claims, citing cases from Texas, Indiana and California. The court noted that all of these cases involved trespass claims, unlike the case at bar. The negligence claim includes allegations of negligence, the statutory claim is a strict liability claim based on an ultrahazardous activity, and the medical monitoring claim and claim for injunctive relief are not based on nuisance activities.

With respect to the RTFA defense, Counts II (strict liability for ultrahazardous activity), Court 4 (trespass), and Count V (nuisance) were dismissed with prejudice. With respect to the other arguments, the Amended Complaint was dismissed for lack of standing, and the Plaintiffs were granted leave to amend to replead the standing allegations. Count VII (injunctive relief) was dismissed without prejudice to permit Plaintiffs to pursue administrative remedies. Florida Crystals' Motion to Dismiss was denied as to Count III (strict liability pursuant to statute).

***Merrill v. Valley View Swine, LLC*, 941 N.W.2d 10 (Iowa 2020).**

A group of property owners filed a petition alleging that certain confined animal feeding operations (CAFOs) operated and supported by the defendants constituted a nuisance. Because the plaintiffs had failed to exhaust farm mediation, they had to dismiss their initial lawsuit. The plaintiffs refiled. Later, two of the plaintiffs voluntarily dismissed their claims a second time, resulting in an adjudication against them on the merits.

The defendants sued by these two plaintiffs moved for costs and expenses pursuant to Iowa Code section 657.11(5), and the district court granted their motions. Iowa Code section 657.11(5), a litigation-cost-shifting provision relating to animal feeding operations, provides:

> If a court determines that a claim is frivolous, a person who brings the claim as part of a losing cause of action against a person who may raise a defense under this section shall be liable to the person against whom the action was brought for all costs and expenses incurred in the defense of the action.

The two plaintiffs appealed. They argued: (1) two voluntary dismissals do not mean they had "a losing cause of action," (2) their claims were not frivolous, and (3) the district court improperly assessed certain costs and expenses. The Supreme Court of Iowa held that these plaintiffs had a losing cause of action, that the district court did not abuse its discretion in finding their claims frivolous, and that the district court's apportionment of costs and expenses was appropriate. The judgment of the district court was affirmed.

One plaintiff owned property 2.36 miles and 3.69 miles from the CAFOs at issue. That plaintiff had very little evidence of odor issues and could not even identify the source of the odors. The other plaintiff presented evidence of events that could be found to be a significant hardship. However, that plaintiff had no ownership interest in, nor did she reside at, the property in question.

***Lima Township v. Bateson,* 2019 WL 6977830 (Ct. App. Mich. 2019).**

This case involves costs and attorney fees incurred by the Township while prosecuting this action against the Batesons. Bateson owned property zoned AG-1 (agricultural) under the Lima Township Zoning Ordinance. The Township thereafter initiated this action in the trial court alleging that the Batesons were operating a commercial contractor's business or storage yard on the property, uses not permitted in an agricultural zone. The Batesons raised the Right to Farm Act as a defense, arguing that they operated a tree farm on the property.

After the litigation ended, with the Township prevailing, the Township filed a motion for costs and attorneys' fees, alleging that the Right to Farm defense was frivolous. The trial court granted costs and attorneys' fees against the Batesons, but not against their attorney. The Court of Appeals of Michigan, finding "scant evidence" of a tree farm, affirmed the ruling that the defense was frivolous.

Because the trial court in this case did not consider the reasonableness of the Township's attorney fees incurred before entry of the judgment, as well as attorney fess after the judgment, the court remanded the

case to the trial court for determination of reasonable costs and attorney fees incurred before judgment, and for imposition of that amount, together with the amount already determined by the trial court to be reasonable post-judgment costs and attorney fees, against the Batesons and their attorney.

II. Urban Chickens

City of Columbiana v. Simpson, 2019 WL 4897158, 2019 Ohio 4086. __ N.E.3d __ (2019).

The Simpsons live on Main Street in Columbiana, and have kept 8 hens, a chicken coop, and an enclosure on their property for approximately seven years. The Simpsons consider the hens to be pets, just their cats (although it was not clear whether the cats and the hens were kept together in the enclosure). The Simpsons raise hens to eat their eggs and to butcher the (pets just like cats) hens when they become to old to lay eggs. Mr. Simpson was former Mayor, city council member and planning commission member for the City.

The City began receiving complaints about the chickens, raising concerns about the smell, noise, dirt, running at large and health hazards. After the Simpsons refused to remove the chickens, the City filed an action for declaratory judgment and injunctive relief, alleging that the chickens were not allowed under the zoning ordinance. The Simpsons' 50-page motion to dismiss that included affidavits from neighbors that were not bothered by the chickens and copies of sections of a legal treatise discussing urban chickens. The motion argued that since there was no evidence that the chickens were a nuisance, the ordinaces were arbitrarily and capriciously applied. The Simpsons also argued that raising the chickens was not "agriculture", which requires a commercial element.

The Court of Appeals of Ohio found that the keeping of chickens constituted "agriculture" under the ordinance and the ordinance implicitly banned agricultural uses in residential districts.

Atwell v. City of Indianapolis, 135 N.E.3d 157 (Ind. 2019).

Beginning in 2013, Atwell kept as many as 55 poultry, consisting of chickens (including roosters) and turkey, on a 1/3 acre lot zoned "Dwelling District Five". As of 2013, keeping of poultry was not allowed in that zoning district and was not listed as an accessory use. In 2016, the City revised the ordinance to allow up to 12 chickens (including one rooster), quail, pigeons, and ducks. Turkeys were never allowed in the zoning district. The City filed suit to enforce a notice of violation. Atwell countered that the keeping of the poultry was a nonconforming use. The trial court found, and the Court of Appeals affirmed, that since the use was not lawful at the time it commenced, no nonconforming use existed and the turkeys must go, along with all but 12 chickens (including up to one rooster). Note that the language of the opinion makes it appear that the court believed that roosters are not chickens.

III. Solar

***Board of County Commissioners of Washington County v. Perennial Solar*, 464 Md. 610, 212 A.3d 868 (2019).**

The Court of Appeals of Maryland started the opinion with a quote from "Here Comes the Sun" by the Beatles: "Here comes the sun, and I say, It's all right." Perennial Solar, LLC ("Perennial") applied to the Washington County Board of Zoning Appeals ("Board") for a special exception and variance to construct a Solar Energy Generating System ("SEGS"). After the Board granted the variance and special exception, a group of aggrieved landowners sought judicial review of the Board's decision in the Circuit. The Board of County Commissioners of Washington County, Maryland ("Washington County" or "the County") intervened in the case.

While the petition for judicial review was pending, Perennial filed a motion for pre-appeal determination challenging the subject matter jurisdiction of the Circuit Court for Washington County on the ground of state law preemption by implication. Prior to considering the merits of the Board's decision, a hearing was held on Perennial's motion. The circuit court granted the motion and determined that Maryland Code, preempts the Washington County Zoning Ordinance and that the Public Service Commission ("PSC") has exclusive jurisdiction to approve the type of SEGS proposed by Perennial. Washington County appealed the case to the Court of Special Appeals. The intermediate appellate court affirmed the judgment of the circuit court.

The Court of Appeals affirmed, holding that the state statute granting the Public Service Commission general regulatory powers over generating stations, including solar energy generating systems, impliedly preempted local zoning authority with respect to the location and construction of the systems.

***PLH LLC v. Town of Ware,* 2019 WL 7201712 (Mass. Land Ct.).**

The penultimate paragraph of Mass. G. L. c. 40A, § 3 states: "No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare." The question presented in this case is whether the Town of Ware's requirement that of a special use permit for a ground-mounted solar energy project violates this provision. The plaintiff initially alleged that the requirement of a special use permit also violates the public trust doctrine, but this issue was not addressed by the court.

The court noted that other legislation relating to unreasonable regulation by zoning specifically calls out special use permits, but not this statute. Case law precedent indicates that the board may not apply the special use permit requirement in a way that is "tantamount to an arbitrary denial or an unwillingness to allow the protected use". Special permits are not per se invalid in these situations. Therefore, the plaintiff's motion for summary judgment is denied and summary judgment is granted in favor of the town.

***One Energy Development, LLC v. Kittitas County*, 9 Wash.App.2d 1057 (2019).**

Under Kittitas County's zoning code, a solar farm project can be developed in certain agricultural areas if approved through a conditional use permit (CUP). The code lists several criteria for CUP approval, including, as relevant here, a condition that a project preserve "rural character" as that term is defined in the Growth Management Act (GMA), chapter 36.70A RCW. In the GMA, rural character refers to areas where open space, the natural landscape, and vegetation predominate over the built environment.

One Energy Development, LLC applied to Kittitas County for a CUP in hopes of constructing a large solar farm. A hearing officer initially recommended approval, but the Kittitas County Board of Commissioners (Commissioners) disagreed and voted against the CUP by a tally of 2-1. In making this decision, the Commissioners specified that the solar project was inconsistent with the GMA's definition of rural character because, on the parcels of land at issue in the CUP application, open space, the natural landscape, and vegetation would not predominate over the built environment.

The Commissioners' CUP analysis took too narrow a view of what it means for open space to predominate over the built environment. The GMA's rural character definition refers to patterns of development within the rural element of a county's comprehensive land use plan. It is not limited to a particular parcel or project site. Because the Commissioners' CUP denial was predicated on an erroneous legal determination, this matter was remanded for further proceedings.

IV. Wind

***Northern Monticello Alliance LLC v. San Juan County*, 2020 WL 2563480, 2020 UT App. 79 (Ct. App. Utah 2020).**

In 2012, the San Juan County Planning and Zoning Commission (the Planning Commission) issued a conditional use permit (CUP) to Wasatch Wind Intermountain, LLC (Wasatch Wind) allowing for the construction of a wind farm in San Juan County. Owners of undeveloped land near the wind farm, who formed NMA, were not at the hearing when the Planning Commission granted the CUP. At a later hearing to consider amending the CUP, NMA opposed the CUP but withdrew its opposition after entering into a land purchase option agreement with Wasatch Wind. The Planning Commission issued an amended CUP to Wasatch Wind, after which Sustainable Power Group, LLC (sPower) acquired the wind farm.

After receiving complaints that sPower was not complying with the amended CUP, the Planning Commission held a hearing, following which it decided against revoking the amended CUP. At this hearing, the Planning Commission did not allow NMA to submit evidence or participate in any meaningful way. Owners of undeveloped land near wind farm sought review of decision of county commission which upheld planning and zoning commission's decision not to revoke conditional use permit (CUP) for the wind farm. NMA appealed and the district court remanded, with instructions to allow NMA due process.

On remand, the County Commission allowed NMA to brief the issues and to participate in oral argument, but contrary to the district court's specific reference to the "opportunity ... to present its own evidence," NMA was again forbidden from presenting "any additional evidence not already in the record" because the County Commission claimed that "the purpose of [the] rehearing was solely to consider sPower's request for reconsideration." The County Commission again upheld the Planning Commission's decision not to revoke the amended CUP.

NMA appealed again. The district court granted summary judgment for the county commission and owners of the windfarm. The Court of Appeals of Utah first noted that the Legislature has instructed that "any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may ... appeal that decision," and the "appeal authority shall respect the due process rights of each of the participants".

The court found that NMA has shown that its members are adversely affected or aggrieved because (1) the wind farm was built next to their properties, significantly affecting their use and enjoyment thereof; (2) the wind farm adversely affects their properties' value; and (3) this injury could be remedied by their requested relief, i.e., revocation of the amended CUP. The court further held that NMA was entitled to due process through the proceedings and were denied due process. Reversed and remanded.

***Ternes v. Board of County Commissioners of Sumner County,* 464 P.3d 395 (Ct. App. Kansas 2020).**

This appeal and cross-appeal arise from Invenergy, LLC's (Invenergy) applications for a zoning change and conditional use permit to allow the construction and operation of the Argyle Creek Wind Project in Sumner County. After the planning commission recommended denying Invenergy's applications, the Sumner County Board of County Commissioners (Board) voted to approve both applications. Plaintiffs, who include several Sumner County landowners, challenged the Board's decisions in district court. The district court struck the zoning change and conditional use permit, finding the zoning change was unreasonable and the Board lacked jurisdiction to approve the conditional use permit.

On appeal, the Board first contends the district court erred by striking the conditional use permit because the Board could approve the permit against the planning commission's recommendation. The Board next argues the zoning change was reasonable even though the evidence presented at the hearings supported only a wind energy project and no other permitted use in an Agricultural Commercial District. Plaintiffs cross-appeal arguing that imperfect notice on the applications rendered the Board's zoning decisions invalid.

Upon review, the Court of Appeals held that the district court erred by striking the zoning change and conditional use permit. Contrary to the district court's findings, the Board could approve the conditional use permit despite the planning commission's recommendation to deny the permit, and the zoning change was reasonable. The court also found the district court did not err by ruling that imperfect notice by Sumner County did not render the zoning decisions invalid. Accordingly, the court affirmed in part, reversed in part, and remanded with directions to uphold the resolutions approving the zoning change and Invenergy's conditional use permit.

***Ansell v. Delta County Planning Commission*, 2020 WL 3005856, __ N.W.2d __ (Ct. App. Mich. 2020).**

This case arises from the Delta County Planning Commission's decision to grant conditional use permits to appellees Heritage Sustainable Energy and Heritage Garden Wind Farm (Heritage) for the construction of 36 wind turbines on the Garden Peninsula in Delta County. Heritage submitted applications to the appellee planning commission in October 2017. The planning commission held public hearings on the applications on December 4 and 12, 2017, January 15 and 23, 2018, and February 5, 2018. The planning commission announced its decisions in favor of Heritage on January 23 and February 5, 2018, and the conditional use permits followed.

Appellants appealed the planning commission's grant of the permit applications to the Delta County circuit court, filing notices of appeal on February 26, 2018. On September 17, 2018, an appeal hearing was held in the circuit court. Appellants argued the planning commission granted the applications in error where the applications failed to comply with multiple provisions of Delta County's Zoning Ordinance No. 76-2. Appellants further argued how specific violations related to noise, vibrations, light pollution, property values, aesthetics, and environmental concerns affected residents living in the county. Heritage argued that appellants lacked standing to challenge the planning commission's decision and therefore, could not invoke the circuit court's appellate jurisdiction, because appellants were not "aggrieved parties" under the Michigan Constitution and court rules. Appellants responded that they were not required to prove they were aggrieved parties where their appeal was from a decision of the planning commission and not the Zoning Board of Appeals. They argued that even if the standing requirement had applied, they had an interest in the litigation and would suffer an adverse impact from the planning commission's decision.

The circuit court agreed with Heritage that it lacked jurisdiction to hear the appeal because appellants lacked standing. It found that case law concerning an appeal from a township board where no appeal to the zoning

board of appeals existed, and the appellate court rules, both explicitly limited the exercise of appellate jurisdiction to aggrieved parties. The court determined that appellants had not established that they were aggrieved parties because they had not shown special damages or a unique harm uncommon to all other property owners. The circuit court dismissed the appeal in its entirety without reaching the merits of appellants' claims regarding the planning commission's grant of Heritage's permit applications. The Court of Appeals affirmed.

V. Zoning

***Town of Delaware v. Leifer*, 34 N.Y.3d 234, 139 N.E.3d 1210 (Ct. App. NY 2019).**

Leifer owns a 68-acre parcel zoned Rural. He planned a 3 day event called "The Camping Trip". The event would include musical performances by 15 different acts, food trucks providing meals, off-site parking, rental of shuttle buses to transport attendees, 16 portable toilets, a 30-cubic-yard dumpster, and EMT and security on-site. The Town moved to enjoin the event since musical performances are not allowed in the rural zoning district, which is reserved for mainly agricultural purposes. Leifer argued that "theaters" are allowed in other zoning districts, but not in the rural district, alleging that the omission violates the First Amendment.

The court found that the provisions are time, place and manner regulations that are content neutral. Therefore, intermediate scrutiny applies. The zoning ordinance was sufficiently narrowly tailored and ample opportunity for expression in other zoning districts in the town. Event permanently enjoined. However, the court was careful to state that uses consistent with the single family dwelling on the premises were permitted.

***Heisler's Egg Farm, Inc. v. Walker Township Zoning Hearing Board*, 2020 WL 2754884, ___ A.3d ___ (Commonwealth Ct. Pa. 2020).**

Heisler's seeks to expand its operations. Specifically, it proposes to: (1) remove its existing egg-packing building and replace it with a larger egg-processing building; (2) add two additional chicken laying barns to accommodate an increase in the number of chickens from the current 140,000 layers to a maximum of 468,000 layers;[3] (3) transfer manure from the two additional layer barns to a new manure storage building; and (4) treat egg wash water with a 26,853-gallon wash water treatment facility in accordance with its Nutrient Management Plan (NMP) prepared pursuant to the Pennsylvania Nutrient Management Act (NMA).

The Zoning Ordinance provides that for lands exceeding 40 acres, any Intensive Agriculture use in excess of 6.0 animal equivalent units (AEUs) per acre requires a special exception. Heisler's applied for a special exception. Although the Board concluded that services and utilities are available to adequately service the proposed use, the special exception was denied for a number of reason. Inter alia, the Board found that egg wash water produces foul odors and attracts flies and rodents.

On appeal, Heisler's makes three arguments. First, it argues that the trial court erred in determining that Applicant was not entitled to a deemed approval of its application for a special exception. Second, Applicant argues the trial court erred in holding that the subject of flies, odors, and egg wash were relevant because those issues are governed solely by the NMA. Third, Applicant argues that it satisfied all the objective requirements for a special exception set forth in Section 1615 of the Zoning Ordinance.

The court found, first, that Heisler's was not entitled to deemed approval. Heisler argued that a particular meeting failed to qualify as a "hearing", meaning that statutory hearing requirements were violated,

mandating that the application be deemed approved. A vigorous dissent agreed with Heisler's on this issue.

With respect to preemption, the court noted a provision in the NMA that allowed local governments to regulate matters covered by the NMA, so long as local regulation was not more stringent than the NMA. Finding that the regulation was not more stringent than the state standard, the court affirmed the trial court finding.

Finally, the court found that although Heisler's had met the requirements that the Board had found the application deficient on, that the Board's conclusion that services and utilities were available to adequate service the use was erroneous. Heisler's expert testified that water would be provided via three groundwater wells on the property. The expert testimony and the documentation entered at the hearings failed to determine the proposed water consumption and/or water use rates. The burden of proof is on the applicant in this case, therefor Heisler's failed to show that all requirements for the permit were met. The trial court decision was affirmed on other grounds.

VI. Conservation Easements

***In the Matter of Michael Picozzi SADC*, 2020 WL 2179004 (Super. Ct. N.J. 2020).**

In 2005, appellant purchased approximately sixteen acres of property in Harding Township. Prior to appellant's purchase, Harding Township obtained the development rights to a ten-acre portion of the property from the previous owners permanently preserving and encumbering that portion of the property with a farmland preservation easement. The terms of the Easement generally restricts non-agricultural development in order to maintain and enhance the agricultural industry in the State. The Morris County Agriculture Development Board (MCADB) is the holder of the Easement with the State Agriculture Development Committee (SADC) and Morris County jointly retaining the right to enforce its provisions.

On October 14, 2015, appellant submitted a zoning application to Harding Township for the "construction of a barn for agricultural purposes." Harding Township approved appellant's application and allowed construction of an "agricultural building" based on appellant's representation that "the steel building [he was] proposing to build will be used only for agricultural purposes." When the MCADB asked appellant for additional information regarding use of the barn, he explained that "the proposed use [of the barn] is for hay farming" and further elaborated that "whether it is hay farming (as currently done) or dairy farming or pig farming, which [he was] also considering" the purpose of the barn was to "support that agricultural production." Appellant began construction in the spring of 2016 and completed construction sometime in the fall.

On October 27, 2016, a Harding Township zoning officer inspected appellant's newly constructed barn and determined that "the use of the structure [was] not strictly agricultural." The zoning official's photographs taken during the inspection showed "hockey rink boards with plexi[ ]glass, [a] batting cage, hockey goal, hockey sticks and pucks, as well as an artificial skating surface." The MCADB also learned of the alleged hockey rink inside the barn soon thereafter.

The MCADB issued a December 14, 2016 notice of violation to appellant specifying that the hockey rink constituted a non-agricultural use on the property and violated the Easement. According to photographs in the record, appellant subsequently removed all hockey-related items from the barn including the hockey boards, goal, sticks, pucks, and the skating surface prior to MCADB conducting a January 25, 2017 follow-up inspection. MCADB accordingly issued a notice of compliance to appellant on March 1, 2017.

MCADB re-inspected the property on December 21, 2017 and observed that appellant reinstalled the

hockey rink and equipment, including the plexiglass-topped hockey boards bolted to the concrete floor and an ice surface, that were the subject of the original notice of violation. In response, the MCADB issued another notice of violation providing him thirty days "to remove the hockey rink, ice surface[,] and hockey-related items from the barn." On a January 26, 2018 follow-up inspection, however, the MCADB noted that appellant's barn still contained the hockey rink which was now covered by astro-turf, the chillers used to cool the temperature of the floor for ice, and the hockey equipment.

The SADC explained that paragraph one of the Easement provided that "[a]ny development of the [p]remises for non[-]agricultural purposes is expressly prohibited," and appellant's "[d]evelopment of the farm for purposes of ice skating and/or athletic facility purposes ... is ... prohibited." Further, paragraph two stated that the encumbered property was limited to "agricultural use and production…" and "[t]he conversion of preserved land to a structure which does not service an agricultural use renders the land no longer available for agricultural use or production [and] is therefore prohibited."

The SADC also relied on paragraph three of the Easement and noted that the original grantor of the Easement certified that "at the time of [its] execution[,] ... the non[-]agricultural uses indicated on attached Schedule (B) existed ... [and] [a]ll other non[-]agricultural uses are prohibited ...." The SADC concluded that "[n]o non[ ]agricultural uses existed at the time of preservation [,] ... none are listed in Schedule (B)," and appellant's "[u]se of the farm for the construction of an ice skating rink/athletic facility constitutes a non[-]agricultural use ... which was not in existence at the time of the conveyance of the easement, and is therefore prohibited."

Additionally, the SADC noted that paragraph nine of the Easement permitted appellant to "use the [property] to derive income from certain recreational activities ... only if such activities do not interfere with the actual use of the land for agricultural production and that the activities only utilize the [property] in its existing condition." It further provided that "[o]ther recreational activities from which income is derived and which alter the [property], such as golf courses and athletic fields, are prohibited." The SADC found that appellant's "ice skating rink/athletic facility complete with optional ice or artificial turf floor, hockey boards[,] and training infrastructure does not utilize the [property] in its existing condition, does interfere with use of the area for agricultural production, does alter the land to create an athletic field and is therefore prohibited." Paragraph fourteen of the Easement provided that appellant "may construct any new buildings for agricultural purposes[,]"

The court affirmed the SADC's decision determining that appellant violated paragraphs one, two, three and fourteen of the development easement. We reverse the SADC's determination that appellant violated paragraph nine of the development easement.

VII. Water

***Modesto Irrigation District v. Tanaka,* 48 Cal.App.5th 898, 262 Cal.Rptr.3d 408 (2020).**

Irrigation district brought action seeking declaratory and injunctive relief to enjoin landowner from diverting water from river for subdivided parcel of farmland that her great-grandfather had acquired via 130-year-old deed and that had been part of a larger riparian tract but was no longer contiguous to water. After bench trial, the Superior Court, Sacramento County, entered judgment in favor of irrigation district. Landowner appealed.

The grant in question provided: "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof." The court stated that they "must determine what this language would have meant to our 19th century friends". We turn to the cases interpreting the language at the time it was used.

After an extensive review of riparian rights in California, the context of the grant and the circumstances of the times in which the grant occurred, the Court of Appeal, held that deed conveyed riparian rights to great-grandfather of Tanaka. Reversed.

VIII. Pipelines

***Lorenzen v. West Cornwall Township Zoning Hearing Board*, 222 A.3d 893 (Commonwealth Ct. Pa. 2019).**

In 2012, Sunoco Pipeline, LP (Sunoco) announced its intent to develop the Mariner East Project (ME Project). The ME Project is "an integrated pipeline system for transporting petroleum products and natural gas liquids (NGLs) such as propane, ethane, and butane from the Marcellus and Utica Shales in Pennsylvania, West Virginia, and Ohio to the Marcus Hook Industrial Complex (MHIC) and points in between." [citations omitted]. On March 21, 2014, Sunoco filed 31 petitions with the Pennsylvania Public Utility Commission (PUC), naming 31 municipalities, including the Township. Through the petitions Sunoco sought an exemption from local zoning requirements for various buildings that Sunoco had constructed or sought to construct in connection with its repurposing of ME1 to carry NGLs.

In the petitions, Sunoco represented that its ME1 would offer interstate service. During the course of proceedings, the PUC indicated that there was a presumption that Sunoco was a public utility based on prior filings. The PUC directed the Office of Administrative Law Judges to hold hearings as required by Section 619 of the MPC, so that the PUC could make a determination as to whether Sunoco was exempt from local zoning requirements with regard to ME1. On March 5, 2015, Sunoco withdrew all 31 petitions, stating that it no longer needed PUC exemption from zoning requirements because it either had obtained local zoning approval through the municipalities or would obtain such approval, thus rendering the petitions moot. As a result of Sunoco's withdrawal of the petitions, the PUC never issued a final decision on whether Sunoco is a public utility corporation with regard to ME1 and whether the repurposing of ME1 for transporting NGLs constituted a public utility service.

On May 7, 2015, subsequent to Sunoco's withdrawal of the permits before the PUC, the Lebanon County Planning Department (Planning Department), as the zoning officer of the Township, issued Sunoco a zoning permit (Permit) for "accessory support and maintenance structures" (Structures) for a pump station (Pump Station) and power distribution center (Power Distribution Center). The Site is located in the Township's M-Manufacturing District ("M District"), which permits manufacturing and processing only by approval

for conditional use. The Permit allows the Structures to be erected on the Site, described in the Permit as "unmanned accessory support and maintenance structures, under Section 27-1722" of the Township's zoning ordinance (Zoning Ordinance), which the Permit refers to as a "Public Utilities Exemption.".

Basically, Sunoco built the Structures around the already-existing Pump Station and Power Distribution Center to protect its equipment and decrease noise. The Planning Department purportedly issued the Permit pursuant to Section 27-1722 of the Zoning Ordinance. The Planning Department did so without requiring Sunoco to submit an application for conditional use approval and without a hearing or any other municipal review. Although the Permit sought to "erect" the Structures, Sunoco had actually constructed the Structures eight months prior to the issuance of the Permit.

Appellants appealed the Permit on June 5, 2015, to the Board, disputing that Sunoco had established that it was a public utility entitled to an exemption and challenging the issuance of the Permit without a review of the environmental, health, and safety impacts of the Permit as allegedly required by Section 27-1503 of the Zoning Ordinance and Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment. The Board conducted a hearing on September 15, 2015, at which Sunoco asserted that Appellants did not have standing. As a result, the Board limited the hearing to the issue of standing. Thereafter, the Board dismissed the appeal, having determined that Sunoco is a public utility for purposes of Section 27-1722 of the Zoning Ordinance, thereby entitling it to an exemption from zoning requirements, and that Appellants lacked standing.

Appellants appealed to common pleas, and Sunoco intervened. Appellants argued that the Board incorrectly based its determination that Sunoco is a public utility entitled to an exemption under Section 27-1722 of the Zoning Ordinance on the PUC's general recognition of Sunoco as a public utility through the PUC's issuance of a certificate of public convenience. Appellants alleged that, as a result of that premature determination, the Board wrongly denied Appellants standing. Appellants contend that, instead, the Board should have permitted them to present evidence that Sunoco was not entitled to the exemption. By order dated November 21, 2016, common pleas reversed the Board's decision and remanded the matter for further proceedings. Common pleas directed the Board to take evidence of and consider the factors necessary to establish whether Sunoco is a public utility entitled to an exemption the Zoning Ordinance.

On remand, the Board conducted hearings and issued a decision, dated August 23, 2017. The Board concluded: (1) for purposes of ME1, Sunoco is a public utility under Section 27-1722 of the Zoning Ordinance, thereby exempting it from Township zoning requirements for accessory support and maintenance structures and buildings not requiring human occupancy; (2) the Planning Department properly issued the Permit; and (3) Appellants lacked standing in the matter. Appellants appealed to common pleas, and common pleas affirmed.

On appeal, the Commonwealth Court held that the citizens' association had standing, while individual plaintiffs lacked standing. The energy company was not exempt from zoning provisions as a public utility. The court found that the language of the zoning ordinance did not create an exemption for public utilities, but attempted to limit the scope of such an exemption granted by other parties. Sunoco never obtained such an exemption. Reversed.