RESOURCE LAW UPDATE

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I. Right to Farm

***Gilbert v. Synagro Century, LLC*, 131 A.3d 1 (Sup. Ct. Pa. 2015).**

This case examines the question of whether a trial court or a jury should determine the applicability of § 954(a) of the Pennsylvania Right to Farm Act (RTFA), 3 P.S. §§ 951–957, which precludes nuisance actions against farms under certain circumstances, and whether the trial court in the instant case properly concluded the land application of biosolids as fertilizer is a "normal agricultural operation," rendering § 954(a) applicable. The Supreme Court of Pennsylvania held that § 954(a) is a statute of repose; its applicability, as determined by statutory interpretation, is a question of law for courts to decide. Further, the trial court properly held biosolids application falls within the RTFA's definition of "normal agricultural operation," which bars appellees' nuisance claims. Accordingly, the Supreme Court of Pennsylvania reversed the portion of the Superior Court's order that reversed the grant of summary judgment for appellants on the nuisance claims; and affirmed the remainder of the order.

Appellees are 34 individuals who own or reside on properties adjacent to a 220–acre farm in York County, Pennsylvania, owned since 1986 by appellant George Phillips. Phillips operates his own farm, Hilltop Farms, and leases part of the land to appellant Steve Troyer, who raises various crops. Appellants Synagro Central, LLC and Synagro Mid–Atlantic are corporate entities engaged in the business of recycling biosolids[1] for public agencies for land application; they contract with municipalities to recycle

and transport biosolids, which are then used as fertilizer.

In 2005, Synagro obtained a permit from the PaDEP to provide Phillips and Hilltop Farms with biosolids. Over approximately 54 days between March 2006 and April 2009, approximately 11,635 wet tons of biosolids were applied to 14 fields at the farm. The biosolids were spread over the fields' surface and not immediately tilled or plowed into the soil. Appellees contended that as soon as the biosolids were applied, extremely offensive odors emanated; many of the appellees were long-time farm residents and were thus accustomed to the smell of animal manure, and characterized the biosolids' odor as unusually noxious, so bad that they could not leave their homes on many occasions. Appellees described the odor and its impact as: "smells like a dead horse[,]" "the most horrendous smell I ever smelled[,]"; "smelled like dead animals[,]"; "typically smelling like a herd of dead, rotting deer[,]", "I can tell you the difference between manure—this doesn't even go on the same scale as that.... It smelled like death[,]"; "[t]hat smell changed the way we lived[,]" "made your kids stay in ... [m]ade you close your windows when you didn't want to ... [m]ade you tell people not to come visit you, or people that came visit you said they aren't staying[,]"; "like rotting flesh ... [n]auseating, repulsive stench[,]"; "was a lot stronger odor [than animal manure], and it stayed constantly [,]"; and "like a dead, rotting flesh type of situation[,]". During the period the biosolids were applied, appellees described suffering from physical symptoms such as burning eyes, sore throats, coughing, headaches, and nausea.

Appellees complained about the odor to Phillips and Synagro, as well as local officials via petitions, and at a township hearing, all to no avail. The Shrewsbury Township Board of Supervisors complained in writing to the PaDEP and state officials regarding their disappointment that there had been no effective resolution. Although the PaDEP, which with the York County Solid Waste Authority monitored the application of the biosolids, issued notices of violation to Synagro in 2006, 2007, and 2009, none of these involved odors; the violations involved spreading the biosolids beyond designated areas and tilling too soon after application.

In July 2008, appellees filed two similar three-count complaints, which were consolidated; they also filed an amended complaint in 2010. In Count I, appellees alleged appellants' biosolids activities created a private nuisance. Count II alleged negligence by appellants in their duty to properly handle and dispose of the biosolids. Count III alleged appellants' biosolids activities constituted a trespass on appellees' land. Appellees sought injunctive relief, compensatory and punitive damages, and attorney's fees and costs. In October 2009, after receiving the third notice of violation from the PaDEP, Synagro notified the PaDEP it was suspending the use of biosolids at Hilltop Farms, rendering appellees' request for injunctive relief moot. The last application of biosolids at the farm occurred in April 2009.

Appellants moved for summary judgment on the basis that appellees' nuisance claims were barred by the one-year statute of repose in § 954(a) of the RTFA, which provides, in relevant part:
No nuisance action shall be brought against an *agricultural operation* which has *lawfully been in operation for one year or more prior to the date of bringing such action,* where the *conditions or circumstances complained of* as constituting the basis for the nuisance action have *existed substantially unchanged since the established date of operation* and are *normal agricultural operations [.]*

The Court of Common Pleas, York County, entered summary judgment for farmers and contractor. Owners appealed. The Superior Court, reversed. The Supreme Court of Supreme Court held that applicability of statute of repose in RTFA was a question for trial court, not jury, and statute of repose barred nuisance claims. Affirmed in part, reversed in part, and remanded.

Cotton Tree Service, Inc. v. Zoning Bd. of Appeals of Westhampton, 89 Mass.App.Ct. 1136, 56 N.E.3d 434 (2016).

The plaintiffs, Cotton Tree Service, Inc., and Dodge Maple Grove Farm, LLC (collectively "Cotton"), challenge judgments entered in the Superior Court affirming decisions of the defendant Westhampton zoning board of appeals (board). The board upheld orders of a building inspector and zoning officer prohibiting Cotton from conducting commercial wood chipping and storage activities on its property without a special permit except for "noncommercial personal use on a temporary basis."[3] Cotton contends that the orders impermissibly interfere with agricultural activities protected by G.L. c. 40A, § 3 (Mass. Right to Farm Act), and Westhampton's zoning by-laws.

The Massachusetts Appellate Court framed the issue as "whether Cotton's composting activity was protected by considering the composting of mulch to be the primary agricultural activity." The fact Cotton carries on this activity for commercial purposes is irrelevant to the analysis. However, Cotton failed to persuade the court that the board erred in determining that this activity does not qualify as agriculture. While the mulch produced on the property may be a "valuable agriculture product," in that it "can be used as a soil enhancer for growing horticultural products," Cotton's production process is not agriculture. The decision of the Superior Court was affirmed.

***Village of Black Earth v. Black Earth Meat Market*, 879 N.W.2d 809, 2016 WI App 34 (2016).**

A Wisconsin court recently ruled that the state's the right to farm law protects agricultural uses and practices *only* from actions for damages or abatement, and not forfeiture. The defendant is a slaughterhouse and retail meat business in the Village of Black Earth, Wisconsin, regularly receiving delivery of animals from third parties. According to the company, "animals are only present at [the facility] for a short period of time as the slaughterhouse does not have the capacity to house, feed or otherwise take care of live animals for any extended period of time."

Between October 2013 and January 2014, the Village of Black Earth municipality issued BE Meats ten citations for ordinance violations, including harboring noisy animals and fowl, street obstruction and pollution. BE Meats appealed the citations alleging that Wisconsin's right to farm law precludes the Village from issuing citations for their alleged violations of the ordinances. The court considered Wisconsin's nuisance statutes and whether the state's right to farm law authorizes municipalities to maintain actions "to recover damages or to abate a public nuisance." The court determined that "the right to farm law protects "*agricultural use(s)* and *agricultural practice(s)* from actions for damages or abatement and nothing more. Nothing in the right to farm law strips municipalities of any authority they may have to impose forfeitures, including authority to regulate an agricultural use pursuant to their police powers."

Here, the plaintiff, Village of Black Earth, did *not* bring a nuisance action against the defendant to recover damages or to abate a public nuisance. Instead, the plaintiff issued forfeiture citations for ordinance violations pertaining to noisy animals, street obstruction, street pollution, and an idling vehicle. The plaintiff never issued a nuisance citation. The court also rejected BE Meats' argument that an action for forfeiture, where the remedy sought is a monetary forfeiture for an ordinance violation, amounts to a nuisance action to abate or to enjoin a public nuisance.

***Tinicum Tp. v. Nowicki*, 2016 WL 1276158, Not Reported in A.3d (Commonwealth Ct. Pa. 2016).**

Nowicki had earlier operated a mulching operation on a three-acre former quarry within the Township. That operation was subject to several enforcement actions, culminating in an injunction prohibiting the mulching operation on the three-acre site. The Board decided there that the mulching operation that the mulching operation was not a permitted use on the Property. In reaching this conclusion, the Board held that the mulching operation did not qualify as an A–1 crop farming/nursery use or an A–6 forestry use under the Ordinance. The trial court, and the Commonwealth Court affirmed, and issued the injunction. On April 24, 2013, four months after the trial court enjoined Mr. Nowicki and River Road, Mr. Nowicki's wife formed RRQ. RRQ purchased the Property on May 7, 2013. The Property is a 56–acre active quarry that surrounds the 3–Acre Parcel at issue in *Tinicum Township* and the 2013 Injunction on three sides. Like the 3–Acre Parcel, the Property is located in the Township's E (Extraction) Zoning District.

Following the purchase of the Property, the mulch operation operated by Pennswood on the 3–Acre Parcel was moved to the Property. On August 20, 2013, the Township issued an Enforcement Notice to RRQ. On October 3, 2013, the Township filed a Complaint in equity and a Petition. In the Petition, the Township alleges that Appellants: (1) continue to manufacture and sell mulch on the Property in violation of the Ordinance, "causing noise, dust and excessive truck traffic," which "constitutes a nuisance to the neighboring properties", and other allegations. The trial court found in favor of the township. Nowicki argues that the operation is an agricultural operation protected by the Right to Farm Act.

The Commonwealth Court explained in order to qualify as either an agricultural operation or a forestry activity as defined by Section 107 of the MPC and protected by Section 603(f) and 603(h), the use in question must have some connection to or utilization of the land itself for production of trees, livestock or agricultural, agronomic, horticultural, silvicultural, or aquacultural crops or commodities. The court concluded that, under the circumstances of this case, the mulching operation at issue does not qualify as an agricultural operation or forestry activity under the MPC.

Citing their previous decision with respect to the 3-acre parcel (*Tinicum Township v. Nowicki,* 99 A.3d 586 (Pa.Cmwlth.2014)), the court explained that the mulching operations fall under the protections of the Right to Farm Act if the mulching operation has "some connection between the use at issue and the employment of the property in question for the production of an agricultural, agronomic, horticultural, silvicultural, or aquacultural crop or commodity." *Id.* at 593. Applying the above principles to the facts in the case, we held that "[b]ecause none of the raw materials from the mulching operation are produced on the [3–Acre Parcel] and none of the resulting mulch is used for the production of livestock, crops, or agricultural commodities on the [3–Acre Parcel], the mulching operation is not a 'normal agricultural operation' as defined by Section 2 of the Right to Farm Act." *Id.* (quoting 3 P.S. § 952).

The Commonwealth Court affirmed the trial court because Nowicki failed to preserve the issues for appeal, but even if he had, the trial court would have been affirmed since the mulching operation is not agricultural or forestal in nature.

***Charter Tp. of White Lake v. Ciurlik Enterprises*, 2016 WL 2772160, Not Reported in N.W.2d (Ct. App. Mich. 2016).**

Township brought action against property owner, seeking to enjoin owner's operation of commercial composting facility in a zoned agricultural (AG) district. The Circuit Court, Oakland County, granted summary disposition for township and ordered abatement of nuisance. Property owner appealed. The Court of Appeals affirmed, holding that composting facility was not a "farm" under zoning ordinance, the zoning ordinance did not violate exclusionary zoning statute, and facility did not qualify as a "farm" or "farm operation" entitled to protection under the Right to Farm Act.

***Pierczyk Straska Farm v. Town of Rocky Hill*, 61 Conn. L. Rptr. 700, Not Reported in A.3d (Sup. Ct. 2016).**

The Petitioner, Pierczyk Straska Farm (Straska Farm), appealed a decision to enforce a citation issued by the Town of Rocky Hill (Town), after Straska Farm failed to comply with a notice of violation issued by the Town for numerous violations of the Town's Blighted Premises Ordinance on property owned by the Straska Farm. The property is located at 374 New Britain Avenue, Rocky Hill. (Property.)

The property consists of eighty-five (85) acres of land, on which Anthony Straska lives and operates a farm. On May 28, 2015, the zoning enforcement officer sent a notice of violation warning letter to Straska Farm that the Town found violations of Chapter 98 of the Town's Blighted Premises Ordinance (Ordinance) on its Property. Straska argued that the ordinance did not apply to farm property and that the Right to Farm statute prevented enforcement of the ordinance. The Superior Court held that Right to Farm applies to nuisance suits, but does not apply to the Blighted Premises Ordinance, and that the ordinance covered farm property.

II. Zoning

***City of Sparta v. Page*, 2015 IL App (5th) 140463-U, 2015 WL 6440338 (2015).**

City of Sparta brought an ordinance violation action against Page, alleging that raising chickens in a residential district violated the zoning ordinance. Page owns a 1.5-acre lot in city limits zoned R-4. He had been raising chickens for 4 years, and considered the chickens as pets (no evidence as to whether he kissed his chickens or not). The trial court found that since the chickens were pets and were not being raised commercially, the activity was not "agricultural use" and therefore allowed by the ordinance. City appealed, alleging that the trail court's decision was against the manifest weight of the evidence and contrary to law.

The appellate court found that the principal use of the property was residential since the Pages resided on the lot. Incidental uses of residential property include having pets. While the zoning ordinance prohibits swine, cattle, horses, mules or game birds, chickens are not specifically prohibited. Since the chickens were not a commercial enterprise, but pets, no agricultural use occurred. The chickens are therefore an allowed incidental use of the property and the trial court decision is affirmed.

***County of Lake v. Pahl,* 28 N.E.3d 1092 (Ind. 2015).**

Pahl purchased a 10.08 acre parcel of land in Lowell, Indiana in 2006. A realtor's listing for the Property indicated that it was zoned "Ag–Res." The Pahls reviewed a real property maintenance report issued by the Lake County Assessor's Office on its website, which, under "Parcel Type," indicates "101 AG—Cash Grain/General Farm," but the Pahls did not go to or check with the Plan Commission on the Property's zoning classification. When the Pahls purchased the Property, corn and soybean stubble from the prior year's harvest was visible on the Property.

While constructing a home, agricultural activity on the property ceased for approximately 8 months. In May 2008, Pahl broth alpacas onto the property, which already contained chickens, ducks, rabbits, riding horses, mini-horses and goats. The Plan Commission notified Pahl in 2009 that they violated the zoning ordinance, which prohibits alpacas on the property. Pahl responded by filing petitions for variances - one to operate as a hobby farm, and another to build an accessory building. They withdrew the petitions when they discovered, through the Indiana Department of Agriculture and the Indiana Farm Bureau, that their Property might qualify as an agricultural nonconforming use under Ind.Code § 36–7–4–616, which, in general, provides protection for the use of land for agricultural purposes in an area where such use would not be permitted by the applicable zoning ordinance. Subsection (c) of that statute defines "agricultural nonconforming use" as "the agricultural use of land that is not permitted under the most recent comprehensive plan or zoning ordinance, including any amendments, for the area where the land is located". However, Subsection (f) allows a local government to subject nonconforming agricultural uses to the same zoning requirements as conforming agricultural uses.

Pahl then applied for a permit to construct the building, which the county denied as being too large for the residential district. County filed a complaint for injunctive relief against Pahl, alleging that the property was located in a residential district, did not qualify as a hobby farm, and violated the zoning ordinance. The trial court found in favor of Pahl. The county filed a motion asking the court to correct errors, where the court allegedly failed to consider certain evidence. The motion was denied. The county appealed, alleging that the trial court erred in denying the injunction and that the court abused its discretion by prohibiting the county from correcting the court's error.

The appellant court began by noting that, even if the property qualifies as "agricultural use", the property must still adhere to the same rules under the zoning ordinance as conforming agricultural use. Section 2.7(G) of the zoning ordinance states that "keeping, raising or breeding of farm animals, including horses and ponies, or poultry shall not be permitted in any zone, except on farms of twenty acres or more, or on hobby farms". "Hobby farms" are not permitted in subdivisions unless "80% of the platted lots are five (5) acres or more in size". The 4 other lots in the subdivision in which Pahl lives are less than 5 acres. The Pahl property, Ci, does not qualify as a hobby farm.

Likewise, the accessory structures, including fencing, and business activities are prohibited. Therefore, the trial court erred and abused its discretion. The matter was reversed and remanded.

***Etherton v. City of Rainsville*, 2015 WL 6123213 (U.S.D.C. N.D. Ala. 2015).**

The city amended its zoning ordinance in 2001 to change chicken farming from an of-right use in an agricultural zone to a special exception (or special use or conditional use). If a special exception is granted, the chicken farm may exist with certain safeguards and limitations. At the time the ordinance was adopted, Owens operated a cattle and poultry farm in the agricultural district, which included 5 poultry houses, each worth more than $100,000. Owen continued to use the farm as a nonconforming use after adoption of the ordinance. In 2005, Etherton purchased the property from Owen. Etherton, nine years later, tried to sell the property but could not because of the nonconforming use status. The purchasers would have had to go through the special exception process. The Ethertons filed suit against the city and certain city officials in their official capacity.

The court first dismissed the official capacity claims as redundant. The 42 U.S.C. § 1981 and § 1982 claims were dismissed since no discrimination based on race was claimed. Similarly, the conspiracy claim under 42 U.S.C. § 1985 and the "neglect to prevent" claims were dismissed. The court, stating that laches was a shield and not a sword, also dismissed the laches claim (that Etherton had farmed it for 9 years without incident). The claim that the ordinance was facially unconstitutional was dismissed due to lack of standing. The contract clause claim was dismissed since Etherton failed to make a showing that the ordinance serves a "significant and legitimate public purpose". The equal protection, just compensation, due process and takings claims were dismissed as unripe. Qualified immunity applied to individual defendants. Having disposed of all of the federal claims, the court declined to exercise supplemental jurisdiction.

***Berner v. Montour Tp. Zoning Hearing Bd*., 2016 WL 464225, Not Reported in A.3d (Pa. Commonwealth Ct. 2016).**

In April 2013, Berner filed an application for a special exception with the Zoning Hearings Board (ZHB) for his proposed intensive agricultural use on his property zoned agricultural. Berner sought to construct a 78½ foot by 201 foot swine nursery barn with under building concrete manure storage with a usable capacity of approximately 645,000 gallons. Applicant's special exception application included a completed application form, detailed site plans, a Manure Management Plan, and the Pennsylvania Department of Environmental Protection's (DEP) Manure Management Plan Guidance document.

After the hearing, the ZHB issued a decision in which it granted Applicant's special exception application subject to two conditions. Objectors appealed to the trial court. Ultimately, the trial court determined public notice of the ZHB hearing was deficient. Thus, the trial court remanded to the ZHB for the purpose of taking additional testimony from any person who was not present at the ZHB hearing, after proper public notice of the new hearing was provided.

On remand, the ZHB held two hearings at which it heard testimony from several Objectors and a professional geologist and soil scientist. After the remand hearings, the ZHB unanimously reaffirmed its prior decision granting Applicant's special exception application subject to two conditions. Section 402(1)(E) of the zoning ordinance provides that "Intensive Agriculture and Agricultural Support," which specifically includes hog raising, is permitted by special exception in an agricultural district. The ZHB concluded Applicant's proposed swine nursery qualifies as an Intensive Agriculture and Agricultural Support use as defined by the zoning ordinance.

Further, Section 402(1)(E) of the zoning ordinance sets forth seven specific criteria that an Intensive Agriculture use must satisfy. The ZHB concluded Applicant satisfied each of these criteria through his application, exhibits and testimony. Additionally, Section 1101(3) of the zoning ordinance sets forth six general criteria for the granting of a special exception. The ZHB concluded Applicant satisfied each of those general criteria through his application, exhibits and testimony.

Objectors presented the testimony of neighboring property owners, that raised concerns about the proposed use regarding odor, manure application, potential contamination of groundwater, disease, traffic and diminution in property value. A professional engineer, testified regarding the increased truck traffic on Tower Road from the proposed use and its impact on the condition of Tower Road. The engineer was not aware of planning road repairs or maintenance, and had used incorrect finish weight date for the hogs in his calculations. A soils scientist presented testimony on the soil suitability of the property, but his testimony was found be lacking in several respects. The ZHB found credible the testimony presented by Berner and his expert.

Ultimately, the ZHB concluded Applicant's proposed swine nursery qualified as an Intensive Agricultural and Agricultural Support use under the zoning ordinance. The ZHB further concluded Applicant met the zoning ordinance's objective criteria for such a use under Section 402(1)(E) of the zoning ordinance and the general requirements for a special exception under Section 1101(3) of the zoning ordinance. Thus, the ZHB determined, Berner's special exception application was entitled to approval under those sections of the zoning ordinance, subject to conditions. Without explanation, the ZHB also concluded the preemption language in Section 519(b) of the NMA applied to Berner's proposed use, but made no specific findings. Presumably this conclusion meant that the ZHB felt that since the state requirements were meet, the permit had to be granted. Based on these determinations, the ZHB granted Applicant's special exception request pursuant to Sections 402(1)(E) and 1101(3) of the zoning ordinance subject to two conditions. Objectors again appealed to the trial court.

Without taking additional evidence, the trial court issued an order denying Objectors' appeal. The trial court determined the ZHB did not commit an error of law or abuse of discretion in reaching its decision. Objectors appealed. Objectors argue the ZHB erred in: (1) failing to decide whether there was a conflict between the Nutrient Management Act (NMA), 3 Pa.C.S. §§ 501–522, and the Montour Township Zoning Ordinance (zoning ordinance) that required preemption of the zoning ordinance; (2) determining Applicant presented substantial evidence to satisfy the zoning ordinance's objective criteria for a special exception; and, (3) capriciously disregarding competent evidence of the unsuitability of the soil for application of manure and the condition of a local road that abuts a portion of Applicant's property. The Commonwealth Court held that the ZHB had not based its ruling on preemption grounds, but had relied on the zoning ordinance requirements. In addition, the ZHB failed to make specific findings with respect to numerous issues before it. Therefore, the decision of the trial court was vacated, and the matter was remanded to the trial court with instructions to remand to the ZHB to make the requisite findings.

***Perschbacher v. Freeborn County Bd. of Com'rs*, 883 N.W.2d 637 (Minn. 2016).**

The zoning ordinance provided that, in agricultural districts, "any agricultural building or structure for the housing of livestock when located outside of a farmyard" requires a conditional use permit. The ordinance also provides that those voting against the conditional use permit must state their reasons, on the record. Livestock producer applied for a conditional use permit to construct a barn capable of housing 2,490 swine. At the public hearing, the zoning administrator presented evidence about the neighbors to the proposed facility, the odors, and the possible use of trees as a windbreak to reduce annoyance to the neighbors. The conditional use permit was denied by a vote of 3-2. The reasons for the no votes were stated on the record at a meeting two weeks later. Livestock producer brought action for writ of mandamus seeking to compel county board of commissioners to issue conditional use permit for a large swine barn. The producer argued that reasons must be provided on the record contemporaneously with the denial, and that the county's failure to do so meant that they county had not denied the application within 120 days, requiring the issuance of the permit. Producer further argued that the proffered reason for denial - odors that would have impacted the neighbors' enjoyment of their property - was arbitrary and capricious. The District Court, Freeborn County, denied the petition, and producer appealed. The Court of Appeals held that a vote against conditional use permit, combined with statement by voters on the record two weeks later as to why they opposed the requested permit, constituted a denial of the permit. The denial of conditional use permit was not arbitrary and capricious.

County board's denial of conditional use permit for large swine barn was not arbitrary and capricious; board denied the permit based on determination that use would be injurious to the use and enjoyment of other nearby property and that barn would constitute a nuisance, neighbors spoke of their actual experience regarding the potential impact of the project on the neighborhood and commented about living near existing livestock operations and about their inability to enjoy the outdoors at certain times of the day or when the wind is blowing in a certain direction, and, even according to university annoyance estimation, neighbors would be impacted by odors from the proposed barn, and neighbors expressed concern about the cumulative effect of odors from the proposed barn and other livestock operations in the area.

***Queen v. Union Township Board of Zoning Appeals*, 2016 WL 228268, 2016 -Ohio- 161 (2016).**

County residents sought judicial review of decision of Board of Zoning Appeals (BZA) to approve property owners' application for conditional use permit for operation of kennel for dogs and cats. The Court of Common Pleas, Fayette County, affirmed. Residents appealed. The Court of Appeals held that the BZA did not operate under mistaken belief that it could only grant the application; the BZA was not required to make express findings in connection with approval of application; and the BZA sufficiently considered and addressed factors for deciding whether to grant permit.

Kennels are a conditional use in agricultural districts in Union Township. Landowners filed an application with the BZA requesting a CUP for a kennel for dogs and cats on an approximately 10-acre parcel. The BZA granted the CUP. Objectors appeal, claiming that the BZA felt that it was compelled to grant the CUP, the court below erred in affirming the BZA's decision because the BZA "failed to make any findings, oral or written, that it considered all requirements for conditional uses set forth in the zoning resolution". The zoning resolution, however, clearly stated that the BZA "may" grant CUPs. In addition, the BZA was not required to make specific or express findings. The court below had also held that the

findings were "implicit in its decision to grant the conditional use permit with supplemental conditions".

The objectors also claimed that the decision to grant the CUP was not supported by the preponderance of the evidence because the BZA had failed to consider and address the factors listed in the ordinance. The court found that there was "ample evidence" in the record that the BZA had considered the factors and addressed them in the discussion of the CUP and in prescribing additional conditions in the CUP.

***Lake Hendricks Imp. Ass'n v. Brookings County Planning and Zoning Commission*, 882 N.W.2d 307 (S.D. 2016).**

County taxpayer, Minnesota city, and improvement association petitioned for writ of certiorari to challenge county board of adjustment's decision to grant developer conditional use permit for concentrated animal feeding operation. The plaintiffs asserted that the board acted without jurisdiction since the county had failed to validly enact its ordinances governing CUPs in 2007.The Circuit Court refused to consider whether the ordinance was validly enacted, finding such review outside the scope of the writ. On appeal, developer asserted that the district court lacked subject matter jurisdiction because petitioners lacked standing, The Third Judicial Circuit, Brookings County, affirmed. Taxpayer, city, and association appealed, and developer filed notice of review.

The South Dakota Supreme Court reversed and remanded, holding that developer's claim, that taxpayer lacked standing to petition for writ of certiorari to challenge board's decision, was jurisdictional issue that could be raised at anytime. The taxpayer had standing to petition for writ of certiorari to challenge board's decision. Finally, the validity of county's ordinances was not beyond Circuit Court's scope of review of petition for writ of certiorari. Court found that statutory language gave the circuit court authority to rule on the petition. The statute also identified those entitled to appeal as "any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer…of the county". "[T]axpayer of the county" constitutes an additional class of persons having standing, above and beyond the usual "aggrieved person".

The court also found that if the county commission failed to follow statutory provisions when adopting the ordinance in 2007, the board would lack jurisdiction to approve the application for a CUP. The circuit court erred in finding that such review is beyond the scope of the writ. The matter was remanded to determine whether the ordinance was properly adopted.

***Central Oregon Landwatch v. Deschutes County*, 276 Or.App. 282, 367 P.3d 560 (2016).**

The Court of Appeals of Oregon considered the definition of the term "private park" as applied to conditional use permits for weddings and other events on property zoned for exclusive farm use (EFU). Oregon Revised Statutes 215.283(2)(c) provides in part that "private parks, playgrounds, hunting and fishing preserves and campgrounds" may be established as nonfarm uses on property zoned for exclusive farm use. The court concluded that the specific proposed use of the property by the petitioners was not for a private park, but more accurately, for a commercial event venue.

The court considered the case of John and Stephanie Shepherd, owners of a 216-acre parcel in Deschutes County zoned for exclusive farm use within a wildlife area. The property at issue was a 2.6 acre portion of a parcel that contained a single-family dwelling, a gazebo, a circular driveway, a grassy area and a one-acre parking area. (At the time of their application, the remainder of their larger parcel was not used for agriculture, but for two acres used to raise poultry). In 2013, the Shepherds submitted an application to the county to establish a "private park" on their entire 216-acre parcel to host weddings and other events and it was denied. In 2014, they applied again to establish a private park, but this time, only on the 2.6-acre portion of the property. That application emphasized "recreational activities" that would occur during hosted weddings and events. The county approved the 2014 petition for the private park.

Per the county's reasoning, wedding ceremonies are not recreation, but other activities that occur during wedding receptions and special events would fall within the definition of "recreation" and under the "private park" use as intended by the statute. The county concluded that weddings and other events could occur in a private park as long as they remained "incidental and subordinate to" any recreational activities.

The environmental organization Central Oregon Landwatch, petitioned the Land Use Board of Appeals (LUBA) to review the decision, arguing that the Shepherd's use of their property did not qualify as a "private park" under the statute. LUBA reversed the county's decision and declared that the determining factor for whether a proposed use qualified as a park or private park was whether the proposed use was "recreational." The county appealed LUBA's decision and the Court of Appeals considered whether the Shepherd's proposed use for their property fell within the term "private park."

The court first noted that the statute does not define "park" or "private park" for purposes of the statute, but lists 27 nonfarm conditional uses that a county may allow in an EFU zone if the county determines that the use "will not significantly affect surrounding lands devoted to farm use." The court reasoned that the text of ORS 215.283(2)(c) indicates that the legislature intended to allow "low-intensity outdoor recreational uses," for which enjoyment of the outdoors in an open space or on land in its natural state is a necessary component. Notably, however, the court stated that "legislative history does not support an expansive construction of 'private park' that would allow a primarily commercial activity that is not such a park use."

In this case, the petitioners (the Shepherds) intended to "host weddings, wedding receptions, family reunions, fundraisers and charity balls." The court concluded that the Shepherds did not intend to maintain a tract of land for natural enjoyment and outdoor recreational use, but rather sought to rent out their lawn for up to 18 events a year and "for no other purpose." Specifically, the Shepherds "did not

propose to establish a private park as a park, but wanted to establish a private park solely for use as a commercial venue." The Court of Appeals affirmed LUBA's decision, narrowing permitted uses in EFU zones.

***Concerned Citizens of Ferry County v. Ferry County*, 191 Wash.App. 803, 365 P.3d 207 (2015).**

Ferry County lies in Eastern Washington, and largely consists of the Colville Indian Reservation and forest lands under the jurisdiction of the Washington State Department of Natural Resources or the United States Forest Service. According to the office of financial management, the County had an estimated population of 7,400 in 2005, projected to increase to 10,250 by 2030. Cattle ranching is Ferry County's major agricultural industry.

The County's designation of Agricultural Resource Lands (ARL) under the Growth Management Act (GMA) was challenged before the Growth Management Hearings Board (Board) in 2001. The Board issued a series of orders, culminating in 2013, finding the County's designation of ARL not in compliance with the GMA. The County responded to the Board's 2013 order by adopting Ordinance No. 2013–03, which amended its comprehensive plan and designated ARL, as well as Ordinance No. 2013–05, which adopted criteria and standards for the designation of ARL.

As amended by Ordinance No. 2013–03, the comprehensive plan sets forth a "Natural Resource Goal" and 13 "Natural Resource Policies." Administrative Record at 6341–43. The Natural Resource Goal is to "[m]aintain and enhance natural resource-based industries in the county and provide for the stewardship and productive use of agricultural, forest and mineral resource lands of long-term commercial significance." Of particular relevance, Natural Resource Policy 2 states that

> it is the Natural Resources Policy of Ferry County to ... [d]esignate sufficient commercially significant agricultural ... land to ensure the County maintains a critical mass of such lands for present and future use.

As amended, the comprehensive plan generally describes the standards for designating ARL in the following terms:

> Designated agricultural lands are lands that include the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the lands [sic] proximity to population areas, and the possibility of more intense uses of the land. To be included in this designation, lands also must not be already characterized by urban growth and must be primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2). Long-term commercial significance means the land is capable of producing the specified natural resources at commercially sustainable levels for at least the twenty year planning period, if adequately conserved.

Ordinance No. 2013–05, in turn, establishes the detailed process for the identification and designation of ARL. The process enumerates certain criteria that disqualify a parcel from consideration and others that earn or lose parcel points, ultimately designating qualifying parcels scoring five points or more as ARL. The point criteria at issue in this appeal concern soil classification, availability of public services, proximity to an urban growth area (UGA), predominant parcel/farm ownership size, proximity to markets and services, and history of nearby land uses.

Once points are assigned, the process set forth in Ordinance No. 2013–05 removes from consideration parcels that are not part of "a contiguous block of 500 acres or more." The contiguous blocks "may include multiple ownerships."

Ordinance No. 2013–05 determined that parcels scoring five points or more qualified for designation as ARL, as long as the 500–acre block group minimum was met. The ordinance also provided that land subject to long-term grazing allotments or leases through the United States Forest Service or the Washington State Department of Natural Resources and land subject to long-term conservation easements were prescriptively subject to designation as ARL, apart from the point system.

After navigating the process set out in Ordinance No. 2013–05, the County designated 479,373 acres as ARL. Of this, 459,545 acres consisted of federal grazing allotments and 19,423 acres comprised state land similarly leased for grazing. The remaining 405 acres consisted of privately held land prescriptively designated as ARL because it was subject to long-term conservation easements.

Citizens and public interest groups filed petition in the Superior Court, Thurston County, for review of Management Hearings Board order finding county in compliance with Growth Management Act (GMA) for designation of agricultural lands of long-term commercial significance. The Board then granted certificate of appealability allowing direct review which was granted.

The Court of Appeals affirmed the Management Hearings Board Order with the exception of one issue, finding that:

- county's point system for designating agricultural resource lands was consistent with GMA;
- ordinance assigning point values to parcels from least to most suitable soils was consistent with GMA and comprehensive plan;
- ordinance could assign one point to parcels more than five miles from urban growth area and zero points to parcels within five miles;
- ordinance could calculate farm size based only on ownership of contiguous parcels;
- setting contiguous block of 500 acres or more for designation as agricultural land was reasonable attempt to find the smallest minimum size that would prevent scatter; but,
- failure to designate as agricultural resource land over 2,816 acres qualifying under county ordinance failed to comply with comprehensive plan and GMA.

III. Marijuana

***The Kind and Compassionate v. City of Long Beach*, 2 Cal. App. 5th 116, 205 Cal. Rptr.3d 723 (2016).**

Municipal ordinance first regulated, then banned the operation of medical marijuana dispensaries within the city. Plaintiffs were two medical cannibas "collectives/dispensaries" and three medical patients of the Kind and Compassionate. The plaintiffs allege 11 causes of action against the City of Long Beach and 3 of its employees and officers. The primary claim was that the ordinance discriminated against plaintiffs and discriminated against persons with disabilities. The Superior Court, Los Angeles County, sustained demurrer with leave to amend and then dismissed after dispensaries and members failed to amend. Dispensaries and members appealed. The Court of Appeal held that ordinances banning medical marijuana dispensaries within city did not discriminate against medical marijuana users in violation of state or federal law. No right to convenient access to marijuana exists. The enforcement of medical marijuana ban by allegedly issuing threats and citations to landlords and members did not violate the Bane Act. The operators' and members' causes of action for intentional interference with contractual relations lacked sufficient detail. Finally, allegations of warrantless police raids were insufficient to establish intentional infliction of emotional distress. The Superior Court decision was affirmed.

***Baird Properties, LLC v. Town of Coventry,* 2015 WL 5177710 (R.I. Super. 2015).**

Baird owns a large building of self-storage units in an industrial zone. Baird rented these units to individual tenants. Two of the tenants were growing medical marijuana as licensed caregivers in their rental units. The zoning enforcement officer issued two notices of violation, alleging that agriculture and horticulture were prohibited activities in an industrial zone. Tenants alleged that they were engaged in pharmaceutical manufacturing. The court found that the definition of "pharmaceutical manufacturing" in the zoning ordinance was subject to more than one reasonable interpretation, so the court deferred to the zoning board's interpretation. Tenants also alleged that they had not received sufficient notice that they had to obtain a zoning certificate. The court agreed, but found this as harmless error since the violation involved other actions.

Finally, the tenants argued that the Rhode Island Right to Farm Act protected their activity. The court found that growing plants in a warehouse did not implicate agricultural use of the land, nor was the activity a use of Rhode Island's natural resources, as protected by the Rhode Island Constitution. Finally, the activity was not a "traditional agricultural land use" protected by Right to Farm. Therefore, the court affirmed the decision of the zoning board.

***Armada Township v. Hampson,* 2016 WL 4484102 (Ct. App. Mich. 2016).**

The Court of Appeals dismissed the appeal as moot, but the underlying case is of interest. In November 2013, Armada filed a complaint against defendants Ken Hampson and Jack Medley alleging that defendants' growing of medical marijuana outdoors in greenhouses, that were accessory to the single-family residence on the property and constructed without permits in violation of Armada's zoning and building ordinances, was a nuisance per se. The parties filed cross-motions for summary disposition. The trial court held that Armada's ordinance confining the growing of marijuana to accessory structures was preempted by section MCL 333.26423(d) of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. The trial court also found that the constructing of the greenhouses without permits was a nuisance per se, but gave Hampson additional time to apply for permits. The greenhouses were removed, mooting the case.

IV. Water

Siskiyou Cnty. Farm Bureau v. Cal. Dep't of Fish & Wildlife, 188 Cal. Rptr. 3d 141 (Cal. Ct. App. 2015), as modified on denial of rehearing (2015).

(Drew Levinson, Pace University School of Law JD Candidate, May 2016 dlevinson@law.pace.edu)

California's Third District Court of Appeal (the "Court") overturned an injunction against the California Department of Fish and Wildlife ("CDFW"), which had prohibited the agency from bringing any enforcement action against agricultural water diverters for failing to notify CDFW of plans to divert water. The Siskiyou County Superior Court granted declaratory relief to the petitioner, the Siskiyou County Farm Bureau ("the Farm Bureau"), finding CDFW's interpretation of Fish and Game Code section 1602, that the section's notification requirements to apply to any diversion of water, "would lead to absurd results, raise doubts about the constitutionality of the statute, and cause a conflict between the Department's duties and the [State Water Resource Control] Board's duties." Id. at 147. The Court disagreed, holding that Section 1602 of the Fish and Game Code applies to the diversion of water without a concurrent modification to the bed or bank of the watercourse. Id. Under Section 1602, any person contemplating activity that substantially diverts or obstructs the natural flow of a watercours e is required to give prior notice to CDFW. CAL. FISH & GAME CODE § 1602 (West 2004). CDFW must then determine whether the activities could adversely affect the fish and other wildlife that depend on instream resources. Siskiyou Cnty. Farm Bureau v. CDFW, 188 Cal. Rptr. 3d. at 152. Historically, CDFW only targeted new or modified diversions that physically altered the bed or bank of the watercourse. Id. at 147. However, in 2005, CDFW expanded its definition of "substantial," subjecting any diversion of water to the notification requirements of Fish and Game Code Section 1602. Id. In response, the Farm Bureau filed a declaratory relief action on behalf of agricultural water users, challenging CDFW's expansive interpretation of Section 1602. Id. The Farm Bureau argued that Section 1602 was never meant to apply to the mere act of exercising a water right and that such a broad interpretation would fundamentally alter the administration of water rights in California. Id. at 167-71. The Siskiyou County Superior Court granted an injunction prohibiting CDFW from bringing any enforcement action against agricultural water diverters for failing to notify CDFW of plans to divert water without physically altering the bed or bank of the watercourse. Id. at 147. On appeal, the Court reversed the trial court's decision, upholding CDFW's interpretation of Section 1602 as applying to existing water rights diversions even if they do not physically alter the bed or channel of a stream. Id. First, the Court rejected the argument that the Legislature enacted Section 1602 to prevent only diversions from mining and other industrial activities that physically alter the bed of a stream. Id. at 150-52. While acknowledging such activities and physical alterations might have motivated the adoption of Section 1602, the Court expressed that these motivations did not limit the meaning of "divert." Id. Rather, the term "divert" is used in California water rights law to refer to water extraction regardless of physical alterations to a streambed, and contemporaneously enacted statutes expressly limited the definition of "divert" where the Legislature intended to exclude pumping. Id. at 148-50. Furthermore, the Court also found no conflicts between the State Water Resources Control Board's ("Board's") regulation of water rights and CDFW's regulations of substantial diversions under Section 1602. Id.at 167-71. In doing so, the Court relied heavily on an amicus brief in which the Board argued that it and CDFW have "always had the statutory authority an d duty to work cooperatively on issues of common concern." Id. at 169. The Court further noted that CDFW does not seek or establish appropriative rights in enforcing Section 1602, but only seeks to determine whether a diversion is substantial enough to harm fish. Id. Accordingly, the Court ruled that in enforcing Section 1602, CDFW acts consistently with its role of informing the Board of "piscatorial needs before new appropriations are made." Id. at 170. The Court therefore found that CDFW's plain

meaning interpretation of Section 1602 does not impermissibly intrude on the Board's powers or duties. Id.

Edwards Aquifer Authority To Pay $4.5 Million Settlement to Braggs.

(From Texas Agriculture Law Blog)

After 10 years of litigation, the Medina County pecan farmers at the center of one of the biggest water law cases in Texas will be paid by the Edwards Aquifer Authority for a taking of their private property. The trial and appellate courts found that by denying Mr. Bragg's permit request to pump groundwater beneath his property, the EAA committed a taking, for which just compensation was owed. The Edwards Aquifer Authority Board approved paying the settlement, which is based on a $2.5 million jury verdict in the Braggs' favor plus interest. This case marks the first in Texas where the denial of a groundwater permit was found to constitute a taking.

***Coyote Lake Ranch, LLC v. City of Lubbock*, 59 Tex. Sup. Ct. J. 967, --- S.W.3d ---- (2016).**

(From Texas Agriculture Law Blog)

In this case, the Texas Supreme Court applies the accommodation doctrine, a legal principle heretofore confined to oil and gas, to groundwater.

Coyote Lake Ranch is a farm that includes cattle, crops and recreational hunting. The City of Lubbock purchased groundwater rights on the 26,600 ranch in 1953. The groundwater rights include the right to use the water for domestic wells, ranching, oil and gas production and agricultural irrigation. The deed included "lengthy, detailed provisions regarding the City's right to use the land". The dispute centered on the extent of the City's right to use the surface of the land to access and utilize the groundwater.

Borrowing the accommodation doctrine from oil and gas, the ranch owners filed suit, claiming that the City was required "to use only that amount of surface that is reasonably necessary to its operations" and had a duty "to conduct its operations with due regard for the rights of the surface owners". The City argued that the deed set out its obligations and that the accommodation doctrine does not apply to groundwater.

For at least the second time, the Texas Supreme Court declared that oil and gas are comparable to water and that identical or similar legal rules should apply. Like oil and gas, the court decided that the groundwater rights are dominant to the surface rights. This ruling means that if the ownership groundwater and the land are separated, then the owner of the groundwater has the right to use the land to access and use the water. This right is implied and need not to be set out in the legal document. Therefore, the accommodation doctrine (the implied right to use the surface of the land to access and use the minerals below) applies to groundwater as well.

In the aftermath of the decision, many now question whether the landowner "won". Now, if the owner of groundwater is different than the owner of the overlying land, the water rights holder has a powerful legal doctrine that allows them to do whatever is necessary to exploit the groundwater. As usual, we will have to wait to see how this will play out.

***Clark Fork Coalition v. Tubbs*, __ P. 3d __, 2016 WL 4877764 (Mt. Supreme Court 2016).**

(Full Disclosure- I drafted an amicus brief supporting the Montana Well Drillers Association)

The Water Use Act provides a comprehensive permit based system for new appropriations of water in Montana. The Act permits certain groundwater appropriations to be exempt from the permitting process. Relevant here, § 85-2-306(3)(a)(iii), MCA, provides an exemption when a groundwater appropriation does not exceed 35 gallons per minute and 10 acre-feet per year. However, the subsection also provides an "except[ion]" to the exemption when a "combined appropriation" from the same source by two or more wells or developed springs exceeds 10 acre-feet per year, regardless of flow rate.

The term "combined appropriation" is not defined within the Water Use Act. In 1987, three months after adoption of the "combined appropriation" language, language, the Department of Natural Resources and Conservation promulgated Admin. R. M. 36.12.101(7) (1987), which provided that "[g]roundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.' " However, in 1993, the DNRC, finding that definition difficult to apply, adopted the administrative rule, Admin. R. M. 36.12.101(13), which applied until this court decision. This provision states that the term "combined appropriation" means "groundwater developments, that are physically manifold into the same system."

After an adverse ruling from the DNRC Hearings Examiner, a group of senior water users and the Clark Fork Coalition (collectively, the Coalition)—challenged the validity of Admin. R. M. 36.12.101(13) in the First Judicial District Court, Lewis and Clark County. The Coalition maintained that the DNRC's definition of "combined appropriation" was inconsistent with the applicable statute arguing that the statute does not require physical connection. The District Court agreed. The court invalidated Admin. R. M. 36.12.101(13), reinstated Admin. R. M. 36.12.101(7) (1987), and directed the DNRC to formulate a new administrative rule consistent with the court's order. The Montana Well Drillers Association, the Montana Association of Realtors, and the Montana Building Industry Association (collectively, the Well Drillers) appeal from that order. The Montana Supreme Court affirmed.

The questions on appeal consisted of:

1. Whether the District Court erred by invalidating Admin. R. M. 36.12.101(13).

2. Whether the District Court erred by reinstating Admin. R. M. 36.12.101(7) (1987).

3. Whether the District Court erred by directing the DNRC to institute rulemaking consistent with the court's order

The court answered questions 1. And 2. In the affirmative, and 3. In the negative. Both the majority opinion and the dissent purport to apply customary rules of statutory interpretation, but come to opposite results. The majority, cited Webster's dictionary for the definition of "combined" and noted that "combined" modifies "appropriation", not "wells" or "combined springs", so can be referred to as the "combined quantity of water which an appropriator has the legal right to use". The majority concluded that the term, therefore, does not refer to the manner in which wells or developed springs are connected. The 1993 rule contradicts the plain language of the statute by adding a connectivity requirement which "[swallows] up the underlying exception that the legislature created".

Citing Ninth Circuit Sixth Circuit authority interpreting the Administrative Procedure Act, and found that the current rule was "invalid from its inception" so that the prior regulation is reinstated until the agency takes further action. The majority agreed with the appellants that the lower court lacked authority to order the administrative agency to initiate rulemaking. Such decision is left in the discretion of the agency.

Justice Rice dissented.

> Everyone who has considered the statute—except the Court—has agreed: the subject statute is not clear and legislative intent cannot be "readily derived." However, the Court sweeps away the messy business of considering and analyzing the legislative record and history, preferring instead to employ the *ipse dixit* canon of statutory construction: the statute is absolutely clear on its face because we say so.
>
> Perhaps the reason for this is found in ¶ 13 of the Opinion. While this case is about the validity of an administrative rule, the Court is alarmed about the policy ramifications of the rule: that exempt appropriations "have grown steadily" and are "consuming significant amounts of water"; that it is anticipated that "appropriations will continue to grow rapidly"; that exempt appropriations will be added in "already over-appropriated basins"; that there are concerns that the "cumulative effects of these exempt appropriations are having a significant impact" on groundwater and surface flow levels; and that these appropriations "may be harming senior water users' existing rights." While it is always tempting to act decisively in response to a perceived policy problem, and to legislate a solution, legislating is neither our duty nor our prerogative. By deciding to solve the problem by simply declaring that the statute is unambiguous, and thus avoid the trouble of considering the troublesome history, the Court is holding that the DNRC inexplicably misinterpreted and misapplied a clear statute for the past 23 years, despite the fact the agency undertook rulemaking in 1993 for the very purpose of more accurately applying the statute and removing ambiguity in the former rule. Nobody has argued or even hinted at such a proposition, because nobody believes it.

This case illustrates the continued struggle with exempt wells between providing a *de minimus* exception wells, and the development of large residential subdivisions using these exceptions. The battle in Montana will now shift back to the legislature, where the legislature passed a statute supporting the well drillers' position previously, only to have the Governor veto the bill.

Draft Report from Texas v. New Mexico Litigation.

The Special Master in the Supreme Court case involving a dispute between Texas and New Mexico released a draft report on. The Special Master recommends that the Court deny New Mexico's Motion to Dismiss, and would find that Texas has stated a claim based upon the unambiguous language of the Compact, the purpose of the Compact, and the Equitable Apportionment Doctrine. Further, the report recommends that while the United States should be permitted to intervene as a party to the case,

motions to intervene filed by the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1 should be denied.

V. Oil and Gas

***City of Longmont v. Colorado Oil and Gas Association*, 2016 Co. 29, 369 P.3d 573 (2016).**

> As the briefing in this case shows, the virtues and vices of fracking are hotly contested. Proponents tout the economic advantages of extracting previously inaccessible oil, gas, and other hydrocarbons, while opponents warn of health risks and damage to the environment. We fully respect these competing views and do not question the sincerity and good faith beliefs of any of the parties now before us. This case, however, does not require us to weigh in on these differences of opinion, much less to try to resolve them. Rather, we must confront a far narrower, albeit no less significant, legal question, namely, whether the City of Longmont's bans on fracking and the storage and disposal of fracking waste within its city limits are preempted by state law.

Longmont, at 576-577.

The Colorado Supreme Court examined another hydraulic fracturing ban. In the Fall of 2012, Longmont instituted a ban on hydraulic fracturing. The Colorado Oil and Gas Association brought action against Longmont (a home-rule city), seeking declaratory judgment and injunction enjoining enforcement of city's ban on hydraulic fracturing, or fracking, on ground that ban was preempted by Oil and Gas Conservation Act. The district court allowed Our Health, Our Future, Our Longmont; the Sierra Club; Food & Water Watch; and Earthworks (collectively, the citizen intervenors) to intervene as defendants in support of the ban. In addition, TOP Operating Company, a local oil and gas company, and the Colorado Oil and Gas Conservation Commission (the Commission), the state agency tasked with administering the provisions of the Oil and Gas Conservation Act, joined the lawsuit as plaintiffs.

The District Court, Boulder County, granted summary judgment in favor of association, finding operational conflict between the Oil and Gas Conservation Act and the ban "obvious and patent on its face". City appealed, and matter was transferred to Supreme Court from the Court of Appeals.

On appeal, Longmont and the citizen intervenors now argue that (1) the district court erred in its preemption analysis and (2) the inalienable rights provision of the Colorado Constitution trumps any preemption analysis and requires the conclusion that the ban supersedes state law.

The Colorado Supreme Court first rejected the citizen intervenors' contention that the beyond reasonable doubt standard applies to question of preemption. In examining the preemption issues, the court noted that Colorado precedent establishes that when a home-rule ordinance conflicts with state law in a matter of either statewide or mixed state and local concern, the state law supersedes that conflicting ordinance. Applying the factors to determine whether a matter is of local, statewide or mixed concern, the court found that the need for uniform statewide regulation and the extraterritorial impact of a fracking ban favor the state's interest. The third factor, however, recognizes, in part, Longmont's traditional authority to exercise its zoning authority over land where oil and gas development occurs. The court concluded that the ban involves a matter of mixed state and local concern. Analyzing

preemption, although neither express nor implied preemption applies to this matter, a clear operational conflict exists, so the ban is preempted. The Oil and Gas Conservation Act and the Commission's pervasive rules and regulations, which evince state control over numerous aspects of fracking, from the chemicals used to the location of waste pits, convinced the court that the state's interest in the efficient and responsible development of oil and gas resources includes a strong interest in the uniform regulation of fracking. The ban, however, prevents operators from using the fracking process even if they abide by the Commission's rules and regulations, rendering those rules and regulations superfluous. Thus, by prohibiting fracking and the storage and disposal of fracking waste, the ban materially impedes the effectuation of the state's interest.

The citizen intervenors relied on the Pennsylvania Supreme Court in *Robinson Township v. Commonwealth,* 623 Pa. 564, 83 A.3d 901 (2013), in their claim that preemption of the ban violates the inalienable rights of Colorado citizens. The court finds this case inapposite. In *Robinson Township,* 83 A.3d at 985, the Pennsylvania court struck down a state law prohibiting local regulation of oil and gas operations. In doing so, the court relied on a "relatively rare" provision in the Pennsylvania Constitution, the Environmental Rights Amendment, which, in part, established the public trust doctrine. *Id.* at 955–56, 962 (plurality opinion); *see also id.* at 962–63 (plurality opinion) (noting that "Pennsylvania deliberately chose a course different from virtually all of its sister states" and contrasting that choice with, among other state constitutional provisions, article XXVII, section 1 of the Colorado Constitution, which ordered the creation of the "Great Outdoors Colorado Program" to preserve, protect, enhance, and manage the state's wildlife, park, river, trail, and open space heritage). Therefore, the inalienable rights provision of the Colorado Constitution did not preclude preemption. The decision of the lower court was affirmed and remanded.

***City of Fort Collins v. Colorado Oil and Gas Association,* 2016 Co. 28, 369 P.3d 586 (2016).**

In a companion case to the Longmont case, the Colorado Supreme Court considered a moratorium on hydraulic fracturing adopted by the city, also a home rule city. State oil and gas association brought action against home-rule city requesting declaration and permanent injunction related to city's fracking moratorium. The District Court, Larimer County, granted association's motion for summary judgment. City appealed, and the Court of Appeals requested a transfer of the case to the Supreme Court.
We conclude that because fracking is a matter of mixed state and local concern, Fort Collins's fracking moratorium is subject to preemption by state law. Using a similar analysis, the Colorado Supreme Court applied well-established preemption principles to conclude that Fort Collins's five-year moratorium on fracking and the storage of fracking waste operationally conflicts with the effectuation of state law. Accordingly, the court held that the moratorium is preempted by state law and is, therefore, invalid and unenforceable. The district court's order was affirmed and the case was remanded for further proceedings consistent with the Colorado Supreme Court's opinion. The court again found an operational conflict.

VI. Wind

Union Neighbors United v. Jewell, 2016 WL 4151237, __ F. 3d __ (U.S. Ct. App. D.C. Circ. 2016).

The U.S. Court of Appeals for District of Columbia Circuit held that the U.S. Fish and Wildlife Service violated the National Environmental Policy Act by approving an Ohio wind energy project without looking at all reasonable alternatives for reducing deaths to the endangered Indiana bat. However, the FWS prevailed on a separate ESA claim, in which the court held that the FWS's interpretation of the ESA was entitled to deference.

Buckeye Wind LLC sought to build and operate a commercial wind energy facility in Champaign County, Ohio. The proposed project would include up to 100 wind turbines, for a total generating capacity of approximately 250 MW. Buckeye began consulting with the FWS, which worked with Buckeye to draft a Habitat Conservation Plan to address the impacts of Buckeye's proposed project. The FWS issued Buckeye an incidental take permit subject to the terms of the HCP, which proposed numerous steps to reduce impacts on the Indiana bat and its habitat. Among other measures, the HCP included operational restrictions in which Buckeye committed to both "turbine feathering" and increased "cut-in speeds." Turbine feathering is a reduction in the blade angle to the wind to slow or stop the turbine from spinning until a particular cut-in speed is reached. A cut-in speed is the wind speed at which the rotors begin rotating and producing power. The HCP varied the cut-in speeds up to 6.0 meters per second (m/s) based on the location of the turbine, the season and the time of day—resulting in a 2.5% reduction in clean energy production and $980,000 in lost annual revenues (totaling $24.5 million in lost revenues over the permit's term). The HCP estimated that without any of the operational restrictions, approximately 6.9 to 25.4 bats would be killed per year. With the operational restrictions, an estimated 5.2 bats would be killed per year, with no more than 26 bats in a 5-year period. The FWS determined that this level of take would not have significant consequences for the Indiana bat.

Union Neighbors United Inc. filed a complaint seeking declaratory and injunctive relief, alleging that the issuance of the incidental take permit was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law under NEPA and the Endangered Species Act.
Union Neighbors claimed the FWS did not satisfy NEPA's requirement to consider a reasonable range of alternatives. Under NEPA, the discussion of alternatives must rigorously explore and objectively evaluate all reasonable alternatives. Union Neighbors claimed the FWS failed to include among the alternatives an economically viable plan that would have taken fewer Indiana bats than Buckeye's compliance with the HCP.

During scoping, the FWS considered six alternatives to Buckeye's proposal, and three of these were analyzed in depth: (1) a no action alternatives; (2) a maximally restricted operations alternative (Max Alternative); and (3) a minimally restricted operations alternative (Minimal Alternative).

- Under the no action alternative, the FWS would not issue the permit, Buckeye would not construct the project and no bats would be taken.
- The Max Alternative would shut down all turbines at night when the Indiana bats are active, thus eliminating the take of any bats. However, this would result in a 22.7% reduction in clean energy production and $8.65 million in lost annual revenues (equating to $216.5 million in lost revenues over the permit's term).

- The Minimal Alternative would feather all turbines to a cut-in speed of 5.0 m/s during the fall migration period during hours when the bats were most active, resulting in a higher estimated take of 12 bats per year.

In its comments on the Final EIS, Union Neighbors asked the FWS to consider a cut-in speed of 6.5 m/s as another alternative to Buckeye's proposal. The FWS responded that, because of the "infinite combinations" of cut-in speeds higher than the proposed action that could reduce bat mortality further, the Max Alternative was a reasonable alternative to consider in lieu of Union Neighbors' proposed speed.

The D.C. Circuit disagreed: "Viewing the range of alternatives through the lens of its stated goals, the [FWS] failed to consider a reasonable range of alternatives because it did not consider any reasonable alternative that would be economically feasible while taking fewer bats than Buckeye's proposal."

As the court explained, the only alternative the FWS considered that would take fewer bats than Buckeye's proposal was the Max Alternative. All parties conceded, however, that the Max Alternative was not an economically feasible alternative. The court pointed out that the FWS knew the Max Alternative was not economically viable, and it was aware that other, more viable measures would take fewer bats than Buckeye's proposal—especially since Union Neighbors had repeatedly suggested using a cut-in speed of higher than 6.0 m/s. Nevertheless, the FWS failed to consider any higher cut-in speed in either the Draft or Final EIS. The court seemed particularly swayed by the fact that the FWS's own responses to Union Neighbors' comments reflected the potential for a higher cut-in speed to more effectively align with its stated goals.

The FWS argued that it did not need to consider another alternative because there would be an "infinite array of potential protective measures that could be varied depending on habitat, feathering, cut-in speed and season, among many other factors." The court rejected this argument, explaining that the FWS "would not need to examine an 'infinite array,' nor even examine Union Neighbors' proposed 6.5 m/s speed. An analysis of a realistic mid-range alternative with a cut-in speed that would take materially fewer bats than Buckeye's proposal while allowing the project to go forward would suffice."

The court therefore determined that the FWS had violated NEPA by failing to consider a reasonable range of alternatives, because it did not consider any reasonable alternative that would have taken fewer Indiana bats than Buckeye's plan. The court reversed the district court on Union Neighbors' NEPA claims.

Union Neighbors also claimed that the FWS had failed to comply with Section 10(a)(2)(B) of the ESA, which requires a finding that the applicant for an incidental take permit "will, to the maximum extent practically, minimize and mitigate the impacts of such taking." 16 U.S.C. § 1539(a)(2)(B)(ii).

The FWS made an official finding that Buckeye minimized and mitigated the impact on the Indiana bat to the maximum extent practicable. After considering the text, legislative history and prior interpretations of the ESA, the court was persuaded that the "minimize and mitigate" language in section 10(a)(2)(B)(ii) refers to populations of the species as a whole, rather than the discrete number of individual members of the species that are taken. Looking at the interplay between the phrases "to the maximum extent practicable" and "minimize and mitigate such impacts," the court also determined that if the minimization and mitigation measures fully offset the take, the ESA requirements have been met, and there is no need to do more to satisfy the ESA's "maximum extent practicable" test.

The court therefore held that the FWS's interpretations of the ESA were persuasive and entitled to deference. In light of its interpretation, the FWS complied with its ESA obligations.

Miller v. Grundy Board of Supervisors, 2015 WL 1817096 (Ct. App. Iowa 2015).

On August 29, 2013, MidAmerican Energy Company (MidAmerican) filed a request with the Grundy County Board of Supervisors, seeking to amend the county zoning ordinance to rezone approximately 1200 acres from an A–1 Agricultural District to an A–2 Agricultural District. Wellsburg Wind Energy, LLC (Wellsburg) had obtained certain "Wind Farm Option Agreements." These agreements had been assigned to and assumed by MidAmerican Energy Company (MidAmerican) on May 24, 2013. The rezoning sought by MidAmerican would allow MidAmerican to place larger wind turbines on the land than the wind turbines that would be permitted in an A–1 Agricultural District. The Grundy County Planning and Zoning Commission voted 6–1 to recommend that the rezoning request be denied at its September 17, 2013 meeting. The Grundy Country Board of Supervisors set the matter for a public hearing on September 30, 2013. Following the hearing, the board voted 4–0 to approve the proposed amendment and rezone the property.

On October 30, 2013, Miller filed a petition for a writ of certiorari with the district court, alleging the board acted improperly in approving the amendment. Trial without a jury was held on April 2, 2014. At the close of Miller's case, the board and MidAmerican moved to dismiss the action. The district court granted the motion and annulled the writ. Miller first contends the board acted illegally because it failed to comply with the requirements of Iowa Code section 352.6 (2013). Specifically, she argues that rezoning the land was impermissible under subsection 3 of the statute, which states:

The county board of supervisors may permit any use not listed in subsection 2 in an agricultural area only if it finds all of the following:

a. The use is not inconsistent with the purposes set forth in section 352.1.

b. The use does not interfere seriously with farm operations within the area.

c. The use does not materially alter the stability of the overall land use pattern in the area.

Iowa Code § 352.6(3).

Miller argues the board acted illegally by failing to make the findings required under that section. The court found that Miller erroneously presumed that that section applies to the land at issue. Iowa Code section 352.2(1) refers to Section 352.6 when defining "agricultural area". The context makes clear that "agricultural area" refers to land designated by the county. There is no evidence in the record that the Grundy County Board of Supervisors has ever designated any of the land involved in the zoning amendment as an "agricultural area." Nor, for that matter, is there any evidence in the record that any owner of any of that land has ever consented to the owner's land being included in an area designated as an "agricultural area". Miller also claimed that two of the supervisors had conflicts of interest. The court found no conflicts of interest.

VII. **Regulatory Takings**

***Harris County Flood Control District v. Kerr*, __ S.W. 3d __, 2016 WL 3418246 (Tex. Sup. Ct. 2016).**

The Texas Supreme Court, by a vote of 5-4, rejected a takings claim based on the theory that Harris County should be held liable for property damage allegedly caused by the county's prior approval of upstream development without adequate flood mitigation. The headline is that the Court's recent decision supersedes the Court's prior decision in this case, issued on June 12, 2015, *supporting*, again by a 5 to 4 vote, the plaintiffs' takings theory. The change in outcome was explained by Justice Eva Guzman's decision, in response to an application for rehearing, to switch her vote.

The plaintiffs in the case were more than 400 residents and homeowners in the Upper White Oak watershed in Harris County, Texas, which surrounds the City of Houston. They brought suit under the Texas Takings Clause, Article 1, Section 17 of the Texas Constitution. The plaintiffs' case was based on the theory that the county should be held liable for just compensation under the Takings Clause because (1) the county was substantially certain at the time it approved the development that it would cause downstream flooding and (2) the upstream development in fact caused increased flooding downstream resulting in property damage. The trial court and the intermediate court of appeals ruled that the county was not entitled to dismissal of the case on summary judgment, saying that plaintiffs had created a factual dispute about whether they could prevail on their takings claim. In its latest decision, the Texas Supreme Court ruled that plaintiffs' claims were insufficient as a matter of law, principally because they had offered no evidence that the county was "consciously aware" that approval of any particular development upstream was substantially likely to lead to flooding of plaintiffs' specific downstream properties.

The Court stated that, "[t]he homeowners' theory of takings liability would vastly and unwisely expand the liability of governmental entities." The court also observed that plaintiffs' theory "lacks any discernible limiting principle and would appear to cover many scenarios where the government has no designs on a particular plaintiffs' property, but only knows that somewhere, someday, its routine governmental operations will likely cause damage to some as yet unidentified property." In its parade of horribles that it thought might follow from awarding plaintiffs a victory in this case, the Court cited a potential climate takings lawsuit by victims of sea level rise against the government for issuing permits to oil and gas drillers or power plant operators.

The Court also expressed concern that a ruling in favor of plaintiffs could undermine the doctrine of sovereign immunity, observing that if the plaintiffs were allowed to proceed under takings doctrine, as opposed to, say, tort doctrine, sovereign immunity would not defeat the plaintiffs' claim. The Court stressed, quoting one of its venerable precedents, that "the doctrine of the non-suability of the state is grounded upon sound public policy," for "[i]f the state were suable and liable for every tortious act of its agents, servants, and employees committed in the performance of their official duties, there would result a serious impairment of the public service and the necessary administrative function of government would be hampered." In a striking final flourish, the Court justified its ruling by citing Justice Robert Jackson's famous caution that the Bill of Rights should not be converted "into a suicide pact."

The dissenting opinion argued that the plaintiffs had raised factual issues that could amount to a regulatory taking.

VIII. Conservation Easements

***Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153, 782 S.E. 2d 131 (Va. Sup. Ct. 2016).**

A recent Virginia Supreme Court case addressed the tension between agricultural production and land conservation in the context of interpreting the provisions of a conservation easement. In 2001, Wetlands America Trust, Inc. ("WAT") was the grantee of a conservation easement on farm property. White Cloud Nine Ventures, LP ("White Cloud") later acquired a portion of the land subject to the easement, which was adjacent to a parcel already owned by White Cloud.

White Cloud commenced construction of a building on the easement property. The building would be used for a creamery and bakery (using milk and wheat raised on the adjacent property), storage of aging wine (produced from grapes grown on both properties), and a tasting room. The plans included the sale of wine, cheese, and bakery products produced on the site, and the property would be open to the public.

WAT filed suit for declaratory judgment, claiming that construction of the building and the intended uses violated the conservation easement. After a five-day trial, the trial court ruled in favor of White Cloud, with the exception of some rulings on affirmative defenses not relevant given the ultimate outcome of the case. WAT appealed, claiming as error, inter alia, the court's application of the common law strict construction principle for restrictive covenants to a conservation easement.

Several provisions of the easement appear to conflict with each other. Section 1.1 sets out the purpose of the easement.

It is the purpose of this Easement to assure that the Protected Property will be retained *in perpetuity* predominantly in its natural, scenic, and open condition, as evidenced by the [Baseline Document] Report [BDR], for conservation purposes as well as permitted agricultural pursuits, and to prevent any use of the Protected Property which will impair significantly or interfere with the conservation values of the Protected Property, its wildlife habitat, natural resources or associated ecosystem.

Section 3.3(A)(iv) of the easement states: "No permanent or temporary building or structure shall be built or maintained on the entirety of the Protected Property other than . . . farm buildings or structures . . . ." The easement fails to define either "farm buildings" or "farm structures."

On the other hand, Section 3.1 of the easement allows "'[i]ndustrial' and 'commercial' agricultural services." Neither "industrial" nor "commercial" is defined. Similarly, the easement fails to define the term "agricultural services." Additionally, Section 4.1 provides that "changes in agricultural technologies, including accepted farm and forestry management practices may result in an evolution of agricultural activities on the Protected Property."

WAT maintained that Section 1.1 unambiguously acts to prohibit any significant changes to the property. "So if you come back to that property a hundred years from now, . . . it should look almost exactly like it looked in 2001 . . . ." The Virginia Supreme Court, based on provisions of the easement allowing farm buildings and industrial and commercial activities, rejected WAT's conclusion. In doing so,

the court acknowledged an "inherent tension between the 'conservation purposes' and the expressly 'permitted agricultural pursuits"' and noted that the easement requires a balance between the two.

The Virginia Supreme Court held, *inter alia*, that the common law strict construction rule applied to the provisions of the easement, affirming the trial court decision. Two justices dissented, maintaining that common law was abrogated for conservation easements "long ago," based upon the clearly delineated public policy in the state favoring land conservation. The divided court further demonstrates the uncertainty that conservation easements introduce into farm operations.

***The Nature Conservancy v. Deep Creek Grazing Ass'n*, No. DV 14-015, 2015 WL 1872214 (9th Jud. Dist. Ct. Teton County, MT 2015).**

The Nature Conservancy (TNC) purchased a conservation easement on 11,325 acres in 2008 from the Deep Creek Grazing Association (Deep Creek) for $3.5 million. The easement permitted livestock grazing and other agricultural activities, subject to certain limitations. In particular, new ponds were permitted only with the prior approval of TNC, and various surface alterations were prohibited. In late 2013 and early 2014, a TNC employee observed seven new ponds and gravel fill placed in wetlands during two monitoring visits. TNC demanded restoration of the pond and wetland sites within a few months. In a written response to TNC, Deep Creek acknowledged constructing the ponds without seeking approval, but refused to restore the protected property. TNC filed suit and moved for summary judgment. Deep Creek submitted expert testimony that the ponds were not true "ponds" but were merely "earthen berms." Deep Creek also filed a counterclaim alleging bad faith by TNC in not considering whether the ponds should be permitted to remain on the protected property.

The trial court granted summary judgment for TNC on all counts. The court dismissed the "earthen berms" versus "ponds" distinction as a matter of semantics, especially in light of the fact that Deep Creek itself referred to them as "ponds" in numerous documents. Likewise, the court dismissed Deep Creek's argument on the grounds that the litigation was caused by its failure to seek prior approval for the pond construction. Next, the court ordered each party to pay its own attorney fees, essentially declining to rule that the failure to seek prior approval was a "material violation," the easement's standard for payment of attorney fees. Finally, turning to remedy, the court ordered Deep Creek to submit a restoration plan; upon its failure to do so or upon a determination that the plan was inadequate, TNC would have the right to undertake restoration activities directly.

***Crain v. Hardin Cty. Water Dist. No. 2*, No. 2015-CA-000-499-MR, 2016 Ky. App. Unpub. 2016 WL 3453206 (Ct. App. Ky. June 17, 2016) (UNPUBLISHED).**

In 2004, Norman and Mona Crain sold an agricultural conservation easement on their 270-acre farm to the Kentucky Department of Agriculture (KDOA). The easement was purchased in part with federal funds and the United States Department of Agriculture (USDA) held an executory interest in the easement. In 2013, Hardin County negotiated with Crain to purchase a sewer line easement across a portion of the protected property, but the parties were unable to reach mutually agreeable terms. Thus, the County exercised its power of eminent domain. Neither the KDOA nor the USDA objected to the condemnation, but Crain claimed that the agricultural conservation easement prohibited the taking based, in part, on the prior public use doctrine. This common law doctrine holds that land already devoted to a public use may not be condemned for another public use except by

express statutory authorization or by necessary implication. The trial court ruled that the conservation easement did not prohibit the sewer line condemnation.

The appellate court affirmed, noting that the state enabling legislation for agricultural conservation easements expressly allows for sewer lines. The appellate court also rejected the application of the prior public use doctrine, finding that the easement's restriction against certain kinds of uses does not constitute an affirmative public use, even if it serves a valid public purpose.

***Argyle Farm & Properties, LLC v. Watershed Agricultural Council of the New York City Watersheds, Inc.,* No. 2013-1270 (Supr. Ct., Cty. of Delaware, Oct. 17, 2014)(Order), aff'd --- N.Y. App. Div. --- (N.Y. App. Div. 3rd Dept., Jan. 28, 2016).**

In 2006, Argyle Farm and Properties, LLC (Argyle) entered into a purchase and sale agreement to sell a conservation easement to the Watershed Agricultural Council of the New York City Watershed, Inc. (WAC) on a 475-acre farm in the Town of Andes. The transaction closed in 2008 for $770,000. The funding for the easement came from a program designed to protect New York City's water supply. The easement granted the New York Attorney General a third party right of enforcement. The easement required Argyle to prepare a Whole Farm Plan, but Argyle never completed this plan. Disputes arose between Argyle and WAC over the location of a septic system and a covered feeding area for animals. In the process of converting a barn into a residence, in 2011 Argyle established the septic system outside of the easement's Acceptable Development Area (ADA). In 2013, the WAC issued guidelines generally requiring septic systems to be placed within ADAs, but allowing already existing ADA's to be amended at the landowner's expense to cure nonconforming septic systems. Argyle did not avail itself of this amendment process and instead filed suit against WAC, the City, and the New York State Department of Environmental Protection. The suit sought rescission of the easement based on a variety of causes of action including mutual mistake, false misrepresentation, negligent misrepresentation, and violation of a consumer protection statute. Argyle also claimed that WAC's voting policies and procedures relative to the siting of septic systems unfairly caused Argyle's property to lose value. WAC and the other defendants filed motions to dismiss based on a variety of grounds, including the failure to join the Attorney General as a necessary party, lack of injury, the statute of limitations, and the specific restrictions on conservation easement terminations set forth in New York's easement enabling statute.

The trial court held that the Attorney General was a necessary party due to the express third party right of enforcement in the easement and because its interests could be compromised as a result of the suit. But because the six-year statute of limitations had now run, it was too late for Argyle to amend the complaint and add the Attorney General as a defendant. Next, the court held that the limitations period for most of the claims began upon the execution of the purchase and sale agreement in 2006, not upon the closing in 2008, and thus Argyle's claims were time-barred. This was especially the case because the 2006 agreement included the easement as an exhibit. Third, the court found that Argyle had not suffered any injury. The lack of a Whole Farm Plan only harmed WAC, not Argyle, and the other alleged injuries were speculative or non-existent. Fourth, the court held that the easement included a strict termination provision requiring the assent of the holder and the Attorney General. Other than as stated in the easement itself, New York State's conservation easement enabling statute only allows termination where the purposes are no longer being fulfilled. Because Argyle did not allege that those conditions applied, termination would "contravene the legislative intent of the statute and defeat the conservation

policy of the state." Finally, the court found the easement transaction outside the scope of the consumer protection statute.

The appellate court affirmed, holding that New York's conservation easement enabling statute precluded termination of the easement under any of the theories proffered by Argyle. Furthermore, the appellate court held that New York's consumer protection statute did not apply because there was no allegation that WAC's actions and practices were directed at or had a broader impact on consumers at large. Finally, the appellate court held that Argyle's arguments about WAC's policies and procedures were too speculative to be justiciable because Argyle never went through the available amendment process with respect to its non-conforming septic system.

***Cheshire Land Trust, LLC v. Casey*, 156 Conn. App. 833, 115 A.3d 497 (Conn. App. 2015).**

Betty Ives owned a large farm, which included a residence, in the Town of Cheshire. From 1986 until her death in 2006, Ives orally leased part of the farm to Timothy Casey. Ives funded most of the farming costs and split the profits with Casey. By 2006, there were seven greenhouses on the property, some paid for by Ives and some by Casey. Ives additionally paid for the site preparation, utilities, and oil to operate the greenhouses. In her will, Ives bequeathed the farm to Cheshire Land Trust (CLT). She also left the greenhouses and all farm equipment to Casey. In 2007, CLT entered into a written lease with Casey, granting him the right to live in the residence and conduct farming on 47 acres of the property. In 2011, CLT filed suit to evict Casey for nonpayment of rent and expiration of the lease. At trial, Casey admitted that he had failed to pay rent in accordance with the terms of the lease and that the leases had expired. But he contended that CLT had failed to provide unequivocal notice of eviction, and that he was entitled to an easement by implication as a result of his need to access and use the greenhouses.

The trial court held for CLT, finding that CLT had given proper notice of eviction, and that the greenhouses were not fixtures but rather were removable personal property. In particular, the trial court noted that the attachment of the greenhouses to the land was through a series of simple metal stakes, and that removing the greenhouses was possible. Casey appealed. The appellate court affirmed in both respects, finding no unreasonable or illogical conclusions by the trial court. The appellate court also noted that even if greenhouses were deemed to be fixtures, there is little support in Connecticut common law for an easement in gross by implication.

IX. Miscellaneous

***U.S. v. Estate of E. Wayne Hage*, 810 F.3d 712 (9th Cir. 2016).**

The Ninth Circuit reversed a decision by a Nevada district court which had ruled that a family did not violate trespassing laws by grazing their cattle on federal lands without a permit. The court of appeals rejected the family's argument that family's cattle were not trespassing as they had water rights to nearby lands, and held that the district court's "easement by necessity" theory "plainly contravenes the law." The Ninth Circuit stated that "[w]ater rights are irrelevant" to the basic permit requirement and that "[d]efendants openly trespassed on federal lands." Stating that the trial judge's rulings were marked by "bias and prejudgment," the Ninth Circuit remanded the lawsuit and requested the Chief Judge of the district court to assign a new judge. In its remand order, the Ninth Circuit concluded that the trial judge should enter judgment in favor of the government, impose an injunction, and calculate appropriate damages.