LAND USE AND RESOURCE LAW UPDATE

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I. What is Agriculture?

***Schroth v. Kirk* , 564 P.3d 570 (Sup. Ct. Wy. 2025).**
Schroth and Kirk owned lots in a residential subdivision with restrictive covenants. The covenants allow agricultural activities but prohibit commercial activities. Home occupations with no outside employees are allowed. In addition, "high density" animal, poultry, fowl, fish or other high intensity agriculture is prohibited.

Schroth began a winery on the property. The winery was very successful, growing from sales of $100,000 in 2012 to over $2 million in 2022. The winery began to have tastings, and hosting weddings and other events. Kirk filed suit, alleging that the activities were commercial in nature, violating the restrictive covenants.

Consulting the dictionary definition of "agriculture", the court found that the Schroths were not involved in production agriculture, but in a commercial activity. The approval of the local zoning officials of some of these activities does not override the covenants. The winery was enjoined by the court.

***Hart v. Back*, 2025 WL 2176695 (Ct. App. Kentucky 2025).**
Back operated a venue for large-scale social events on their property located in a subdivision with restrictive covenants that prohibited "commercial uses" but allowed "farming and agricultural purposes." The circuit court, persuaded by the state statute defining "agriculture" as including "agritourism" found in favor of Back.

On appeal, the Court of Appeals found that reliance on the state statutory definitions was erroneous as circumventing the plain language of the restrictive covenant. The court concluded:

> It is noteworthy to observe that zoning law (allowing for and sensitive to the vicissitudes of changing economic patterns and lifestyles) is not synonymous with contract law (which generally binds parties to a meeting of minds regardless of extraneous changes). It appears that these two areas of the law were erroneously intermingled or conflated in this case.

II. Agritourism

***Bainbridge Township Zoning Inspector v. Chagrin Valley Learning Collective Co-Op*, 261 N.E.3d 1179 (Ct. App. Ohio 2025).**

The case involves a series of alleged zoning and fire code violations against a nonprofit organization related to a home school program and summer camp. After entry of a consent order to resolve the first round of alleged violations, zoning inspector and fire safety inspector filed a new complaint alleging violation of the consent order.

This discussion is limited to the court's rulings on whether the home school program and summer camp constituted "agritourism." Bainbridge does not dispute that the summer camps and home school program were (1) "agriculturally related" and "educational" and (2) "conducted on a farm." However, Bainbridge argues that the summer camps and home school program (1) were not an "activity" and (2) did not "allow[] or invite[] members of the public to observe, participate in, or enjoy that activity."

The court rejected Bainbridge's attempted distinction between "activity" and "property use." The court further found that the evidence showed that the summer camps allowed or invited the general public to observe, participate in, or enjoy the activities, thus amounting to "agritourism." However, the home school program was not available to the "general public" and therefore did not constitute "agritourism." The court noted that some educational programs may constitute agritourism – "[w]hether a particular activity constitutes 'agritourism' is an issue that shades to gray quite quickly … [g]iven the great variety of factual situations."

III. Conservation Easements

***Peconic Land Trust, Incorporated v. Salvatore*, 238 A.D.3d 1168 (Sup. Ct. App. Div. N.Y. 2025).**

A conservation easement as to certain property was entered into between the plaintiff, as grantee, and the defendant, as grantor. Among other things, the conservation easement required the grantors to provide the plaintiff with written notice before taking any action that could adversely impact the environmental, scenic, open-space, and agricultural values that were the subject of the conservation easement. In 2015, the defendant, Thomas Salvatore allegedly cut down hundreds of trees on the property protected by the conservation easement without prior notice to the plaintiff.

Thereafter, the plaintiff commenced this action, inter alia, for a judgment declaring that the defendants violated certain provisions of the conservation easement and for injunctive relief. The plaintiff subsequently moved for summary judgment declaring that the defendants violated certain provisions of the conservation easement and enforcing the conservation easement by compelling the restoration of the property to the condition that existed prior to such violations. In

an order dated October 19, 2022, the Supreme Court granted the plaintiff's motion. The defendants appeal. The appellate court affirmed.

IV. Eminent Domain/Takings

***City of Fresno v. United States,* 124 F.4th 876 (U.S. Ct. App. Fed. Cir. 2024).**
City, irrigation districts, water districts, and individual growers sued United States, Bureau of Reclamation, and water authority, seeking just compensation for alleged Fifth Amendment taking of their water rights and claiming breach of water delivery contract during wake of water shortages caused by severe drought, by delivering only fraction of river water to which they allegedly were entitled under contract, essentially zero allocation, and instead diverting river water to other water users under prior contract. Following intervention by other water users, as defendant-intervenors, the Court of Federal Claims, granted in part and denied in part defendants' motions to dismiss for lack of subject matter jurisdiction and for failure to state claim, and subsequently granted government summary judgment on remaining claims. City, water districts, and irrigation districts appealed.

The Court of Appeals affirmed, finding that prior contract allowed Reclamation to deliver river water to other water users as substitute water. The prior contract's provisions describing Reclamation's obligations during interruptions in ability to deliver substitute waters were not rendered meaningless by allowing Reclamation to deliver water to other water users as substitute water. The water delivery contract allowed Reclamation to deliver amounts of water it supplied to other water users. Reclamation was immune from liability for any breach of water delivery contract. Finally, Reclamation's delivery of water did not affect a taking.

With respect to the claim, the court found that appellants have no water rights under California law. The California State Water Resource Control Board has held that Reclamation has appropriative water rights in the Central Valley project.

***Becker v. City of Hillsboro*, 125 F.4th 844 (2025).**

Owners of 176 acres of land annexed to city brought action in state court against city for inverse condemnation under federal and state constitutions and violations of their constitutional rights under § 1983, based on allegations that they had been deprived of any and all economical and productive use of the property as result of city ordinances requiring them to connect to city water services at their own cost. Following removal, both sides moved for summary judgment. The United States District Court for the Eastern District of Missouri entered summary judgment for city. Landowners appealed. The Court of Appeals affirmed.

The parcel was divided into eight lots and marketed for sale. The owners, and one purchaser of a lot, assumed that private water wells could be used for water supply. However, the city mandated connection to public water, estimated to cost between $963,000 and $1,578,000, many multiples of the cost of private water wells.

The court found that ordinances did not mandate a permanent physical invasion of landowner's property and thus did not amount to a "taking" on that ground, reasoning that the landowner

could avoid the physical invasion by not developing the property. The ordinances did not deprive landowners of all economically beneficial use of their property. Landowner's expert witness estimated a reduction in value of 70%.

Finally, the court would treat landowners' parcel as a single parcel, rather than eight subdivided lots, when applying the *Penn Central* regulatory taking test. The economic effect on the landowner prong of the *Penn Central* regulatory taking test weighed in favor of city. The interference with reasonable investment backed expectations prong of the *Penn Central* regulatory taking test weighed in favor of city. The character of the governmental action prong of the *Penn Central* regulatory taking test weighed in favor of city.

***Baker v. City of McKinney, Texas*, 145 S.Ct. 11 (Mem) (2024).**

The United States Supreme Court denied the petition for certiorari, but Justices Sotomayor and Gorsuch filed a statement respecting the denial of certiorari. The justices felt that the question raised by the petition, whether the Takings Clause requires compensation when the government damages property pursuant to its police power, is "an important question that has divided the courts of appeal."

In this case, a suspect had hidden in the basement of a private home and threatened to "shoot it out" with the police. To resolve the situation and protect the surrounding community, the police launched dozens of tear gas grenades into the home. When the suspect did not come out, the police detonated explosives to break down the front door and garage door, then bulldozed the home's backyard fence with a "tank-like vehicle."

The explosions left Baker's dog permanently blind and deaf. The gas required the services of a HAZMAT remediation team. Appliances, floors, plumbing and bricks needed to be replaced, along with doors, windows, blinds, and the fence. All of the personal property in the house, including an antique doll collection, was destroyed. The damages totaled $50,000. The Baker's insurance company denied the claim since the damages had been caused by the police. The city denied the claim.

Baker then sued the city, alleging a violation of the Takings Clause. The District Court granted summary judgment to Baker. The Court of Appeals for the Fifth Circuit reversed, finding that the Takings Clause does not require compensation for damaged property "where it was "objectively necessary" for officers to damage the property in an active emergency to prevent imminent harm to persons." The justices opined that whether an "objectively necessary" exception exists to the Takings Clause, and how the Takings Clause applies when the government destroys property pursuant to its police power, "is an important and complex question that would benefit from further percolation in the lower courts prior the [the United States Supreme Court's] intervention."

***DM Arbor Court, Limited v. City of Houston*, 150 F.4th 418 (U.S. Ct. App. 5th Cir. 2025).**
Operator of affordable housing apartment complex for low-income residents brought action against city, alleging that city's refusal to grant permits to operator to repair units damaged in hurricane and subsequent flooding was a regulatory taking under the Fifth Amendment.

Following a bench trial, the United States District Court for the Southern District of Texas ruled against owners, concluding property still had economic life despite permit denial. Operator appealed.

The Court of Appeals reversed, holding that the permit denial effected a categorical taking by depriving DM Arbor Court of all economically viable use of the property. The holding of the property for investment purposes, hoping for some use at a later time, is not an "economically viable use."

***Jones v. Port Freeport*, __ S.W.3d __, 2025 WL 2666066 (Ct. App. Tex. 2025).**
Port Freeport is a 7,600-acre port in Freeport, Texas. 2,800 acres of the port remain undeveloped. The Port is authorized to take property for "the operation and industrial and business development of the ports and waterways." Port desired to take property immediately adjacent to its existing terminal for expansion and "the development of business and industry." The Port filed a petition to condemn stating those broad purposes. County court appoints commissioners and grants Port's motion for summary judgment.

On appeal, landowners allege, inter alia, that the Port failed to plead a public use with specificity. The Court of Appeals reversed and remanded.

The Port could never specify a specific public use. It admitted that it did not have any specific plans because the parcel would be developed by a third party. The Port stated that it would be impossible to plead with more specificity because it doesn't know what will happen to the property until it is condemned. The court found that "[t]he Constitution does not condone this take now, plan later approach." The government must tell the court what it plans to do with the property so the court can assess the public use.

***Muskingum County Convention Facilities Authority v. Barnes Advertising Corporation*, 2025 WL 1483981 (Ct. App. Ohio 2025).**
The Court of Appeals of Ohio ruled the opposite of the Court of Appeals of Texas. In this case, the petition to appropriate easements stated that "[t]he [CFA} is currently undertaking a public project to develop a new facility serving the City of Zanesville and Muskingum County community." The "new facility" was described as "any convention, entertainment, or sports facility, or combination of them, located within the territory of a convention facilities authority, together with all hotels, parking facilities, walkways, and other auxiliary facilities…" The description of facility recites the statutory definition. However, the court found that the statement-of-purpose requirement does not require the petition to contain detailed specifications of the agency's intended use.

***Shehyn v. Ventura County Public Works Agency*, 108 Cal.App.5th 1254 (Cal. Ct. App. 2025).**
Avocado orchard owner brought action against county for breach of contract, negligence, and inverse condemnation, alleging that sediment from county's water delivery system permanently damaged pipes used to irrigate orchard. The Superior Court sustained county's demurrer without leave to amend as to inverse condemnation claim, finding that the orchard owner "invited" the water onto its property. Orchard owner then voluntarily dismissed the breach of contract and negligence claims without prejudice. Orchard owner appealed. The Court of Appeal reversed,

finding that the orchard owner stated claim for inverse condemnation against county.

***The Commons of Lake Houston, Ltd. V. City of Houston*, 711 S.W.3d 666 (Sup. Ct. Tex. 2024).**
Developer of master-planned community in floodplain brought inverse condemnation action against city, alleging that city's amendment of floodplain ordinance following historic hurricane, to require residences to be built at least two feet above the 500-year floodplain, was a regulatory taking under the State Constitution. The County Civil Court denied city's plea to the jurisdiction. City filed interlocutory appeal. The Houston Court of Appeals reversed. Developer petitioned for review.

The Supreme Court reversed and remanded, holding that amendment of ordinance as exercise of police power did not preclude regulatory takings claim, nor did the amendment of ordinance to ensure compliance with federal flood insurance program preclude regulatory takings claim.

***Township of Jackson v. Getzel Bee, LLC*, 480 N.J. Super. 592 (2025).**
Township brought condemnation actions against two separate condemnees, seeking to use eminent domain powers to take condemnees' properties in order to carry out land-swap contract with developer, under which contract township would acquire land owned by developer to use as open space in exchange for land township already owned combined with condemned properties. The Superior Court entered identical orders authorizing condemnation and appointing condemnation commissioners. Condemnees appealed, and their appeals were consolidated. The Superior Court, reversed, holding that the condemnation of properties lacked public purpose required for valid exercise of eminent domain power under Eminent Domain Act. Open space is a valid public purpose but the swap was not for a public purpose.

***The Modern Sportsman, LLC v. United States*, 176 Fed.Cl. 567 (2025).**
Owners of bump stocks for guns brought action against the United States, alleging that Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) final rule clarifying that bump stocks were "machineguns" and requiring their destruction or surrender to an ATF office was a taking under the Fifth Amendment and, in amended complaint, illegal exaction, after Supreme Court struck down rule in separate case under Administrative Procedure Act (APA). The United States moved to dismiss both claims for failure to state a claim upon which relief can be granted, and to preserve argument that rule was unauthorized for Tucker Act purposes pending resolution of related Federal Circuit litigation. Although the Court of Federal Claims found that the owners failed to state an illegal-exaction claim, the court found that a formal demand to destroy or transfer possession of bump stocks amounted to a physical taking.

***Brady v. City of Myrtle Beach*, 137 F.4th 233 (4th Cir. 2025).**
Bar owners and landlord in area of city subject to increased police presence and investigatory activities due to crime wave brought action against city and city manager, alleging city's enforcement actions against bars violated the Takings Clause, Due Process Clause, and Equal Protection Clause, and amounted to civil conspiracy. Following a jury trial, the United States District Court for the District of South Carolina directed verdicts for defendants and the Court denied bar owners' and landlord's motions for reconsideration. Bar owners and landlord appealed.

The Court of Appeals affirmed, holding that bar owners and landlord did not have any constitutionally protected property interest in operating their businesses free from harassment, discrimination and selective law enforcement which could be taken by the city through increased police presence and investigatory activity as a response to violent crime surge. Even though two bars lost their license and a third was forced to close, no property interest was at stake.

***Young v. Texas Parks and Wildlife Department*, 2025 WL 1200947 (Ct. App. Tex. 2025).**
Young breeds white-tailed deer in two breeding facilities on his 1500-acre ranch in Gillespie County. With a herd of 124 deer, Young claims to breed "some of the best 'typical' whitetail bucks in Texas." Due to an outbreak of chronic wasting disease in the herd, the Texas Parks and Wildlife Department decided to euthanize and test all the deer at Young's breeding facility. Young filed suit, alleging due process violations. Young acknowledged that he had only a possessory right in the deer, as opposed to ownership or title. The trial court entered a temporary restraining order.

Analogizing *Tyler v. Hennepin*, Young argued that he had a vested property interest in his breeder deer under the common-law doctrine of *ferae naturae*. The trial court granted the department's plea of jurisdiction. The court had previously held that deer breeders do not have a vested property right in their breeder deer. Tex. Dep't of Parks & Wildlife v. RW Trophy Ranch, Ltd., No. 15-24-00112-CV (Tex. App. – 15th Dist. Apr. 10, 2025, no pet. H.). That ruling applies here. For that reason, no takings or due process claim exists. Young also cannot claim a taking of his permit or business. The department also did not act ultra vires.

***Idaho Power Company v. Bean,* 341 Or. App. 696 (Ct. App. Or. 2025).**
Power company filed petition seeking pre-condemnation entry onto ranch property to conduct surveys, tests, and sampling necessary for siting of transmission line, pursuant to state statute. The Circuit Court denied the petition and determined that the statute allowing such entries was unconstitutional. Power company appealed. The Court of Appeals held that power company's requested entry was not a "per se physical taking" for which ranch owner was due compensation. The court held that landowners are entitled to compensation for pre-condemnation entries only where the entries result in "physical damage" to the property or "substantial interference" with the use or possession of the property.

V. Nuisance/Right to Farm

***Odum v. Frey Spray, LLC*, 2024 WL 4532287 (Nev. Ct. App. 2024) (unpublished decision).**
An organic farmer filed suit against a crop-dusting company and its owner for allegedly spraying her fields with pesticide. Claims included negligence, negligence per-se, assault, battery, trespass, nuisance, conversion, vicarious liability, and exemplary damages. Jury found for the defendants on all claims. The farmer appealed on numerous grounds, including claiming that the Nevada Right to Farm statute was unconstitutional as applied.

The Nevada Court of Appeals held the Right to Farm (RTF) statute constitutional and upheld the verdict. The court rejected her argument that the RTF statute constituted a government-authorized physical taking of her property by allowing pesticides to be sprayed with no associated cost. Additionally, the court rejected the plaintiffs' reliance in *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998) noting the differences between the states' statutes including the rebuttable presumption of a reasonable activity and a limitation on the protection for actions having a substantial adverse effect on public health or safety in the Nevada statute.

***Minnesota v. Anderson*, 2025 WL 1638448 (Minn. Ct. App. June 9, 2025) (nonprecedential).**
Jodi Anderson lived on five-acres zoned agricultural in the City of Minnetrista. She kept Great Pyrenees dogs to protect her livestock. After neighbor complaints about barking dogs, she was charged and convicted of five misdemeanor counts of violating a city nuisance ordinance prohibiting habitually barking dogs. On appeal, she argued that the Minnesota RTF statute precluded her prosecution for violating the noise ordinance.

The Minnesota Court of Appeals upheld her conviction because the Minnesota RTF statute states it does not apply to "any prosecution for the crime of public nuisance." The RTF statute simply does not apply as a defense to the crimes with which Anderson was charged.

***In re Foster Farms*, 340 A.3d 876 (Md. 2025).**
This case involved a farm that stored large quantities of biosolids and soil conditioners. Neighboring landowners filed suit claiming nuisance. The Talbot County Agricultural Resolution Board held that these activities were generally accepted agricultural practices under a county ordinance. The trial court reversed, finding the farm did not qualiy for the protections of the RTF statute because it had not been in existence for at least one year as required by the statute. The Maryland Appellate Court reversed the trial court, holding that the farm's practices were protected under the RTF law and the Board's decision was supported by substantial evidence.

The Maryland Supreme Court reversed the appellate court, siding with the neighboring landowners. The Court made two key findings: (1) the lower courts erred in ruling on the question of the applicability of the RTF law because the Board did not base its decision on the statute; and (2) the Board's decision that the storing of materials was a generally accepted agricultural practice was not supported by the evidence. Specifically with regard to the second finding, the Court held the Board failed to make necessary findings on the impact on public health, safety, and welfare as required by the statute, and did not adequately consider key facts such as the quantity of material stored, or whether stockpiling fertilizers for use on other farms

was a generally accepted practice. Thus, the farm was not entitled to the rebuttable presumption that its storage was a generally accepted agricultural practice.

Justice Eaves penned a dissent joined by Justice Killough. They believe the Court "overreached by substituting its judgement for that of the Talbot County Agricultural Resolution Board." These justices would have deferred to the Board's expertise and believed the Board developed a sufficient factual record to support its findings.

***Shaw v. Calles*, 412 So. 3d 152 (Fla. Ct. App. 2025)**

Neighboring landowners filed a nuisance claim against Calles, who owned over 100 exotic birds seeking damages for loss of quiet enjoyment and diminution in property value and injunctive relief. The Plaintiffs complained of odor, noise, debris, and rodent infestation due to the birds. The bird owners raised the Right to Farm Act as an affirmative defense. The jury returned a verdict in favor of the Plaintiffs, awarding $76,500 in damages. The trial court entered a judgement notwithstanding the verdict, finding that the Plaintiffs failed to pled or prove compensable damages. They court did order Calles to move some cages away from the property line, to cover cages until dusk, and to relocate the loudest birds.

On appeal, the Third District Court of Appeals noted there was no dispute that the birds created a nuisance, merely what damages were permitted to be recovered. The court reversed and remanded, holding that the Plaintiffs had introduced sufficient evidence of a diminished quality of life to support a damage award.

VI. Oil and Gas

***Cactus Water Services, LLC v. COG Operating, LLC*, 718 S.W.3d 214 (Tex. 2025).**
This case involved a critical question under Texas law of who owns the produced water created during oil and gas production on a 37,000-acre ranch in West Texas. COG acquired mineral leases on the land. Historically, it was the oil and gas operator who had the responsibility, liability, and expense to deal with the disposal of produced water. Cactus acquired a groundwater lease from the surface owner that expressly included the right to the produced water. Note that under Texas law, groundwater is owned by the surface estate. COG filed suit seeking a declaration that it owned the produced water. Both the trial court and the El Paso Court of Appeals sided with COG, ruling the mineral owner owns the produced water.

The Texas Supreme Court affirmed but seemed careful not to expressly rule on "ownership" of the produced water. Instead, the Court held that, absent an agreement to the contrary, when an oil and gas lease is executed, the produced water conveys with the lease. The Court reached this decision relying on the distinction between groundwater—which is owned by the surface estate owner—and oil and gas waste—which is conveyed to the mineral lessee. Though the leases at issue did not mention "produced water" or "waste" the Court held that it was understood such waste was part of oil and gas production and, thus, the parties intended the right to such waste to belong to the mineral lessee. The Court held the argument that surface owners own groundwater "simply inapplicable" to this case because "produced water is not water."

Justice Busby authored a concurring opinion, joined by Justices Lehrmann and Sullivan, noting that the question is not whether produced water is water or waste, because it is both. Instead, Justice Busby believed the proper question to be whether the landowners leased the produced water to COG as part of the oil and gas lease. The concurring Justices believed the landowners did just that. The concurrence also noted the majority opinion is a narrow one that does not answer several questions, including the obligation for the mineral lessee to pay royalties on produced water. Finally, the concurring opinion noted that this decision is merely a default rule, and that parties are free to negotiate a different deal when it comes to produced water.

More detailed explanation: *Texas Supreme Court: Produced Water Conveys to Mineral Lessee*

Podcast discussions: Ag Law in the Field Podcast Episode 205; Ag Law in the Field Podcast Episode 209

***Myers-Woodward, LLC v. Underground Services Markham, LLC*, 716 S.W.3d 461 (Tex. 2025).**

This case involved a salt deed that conveyed to Underground Services Markham (USM) "all right, title, and interest, in and to all of the salt and salt formations only, in, on and under and that may be produced from the property." USM filed suit against the surface and royalty owners seeking declarations on how royalties were to be calculated and who owned the pore space, namely, the cavern space after the salt is removed.

The trial court ruled that USM owned the salt caverns created by salt mining on the property, but limited USM's use of the caverns to mining, producing, treating, and transporting salt. The trial court also agreed with USM's royalty calculation based on fixed price royalty agreements. The Corpus Christi Court of Appeals affirmed with regard to the royalty calculation but reversed with regard to the ownership of the salt caverns, holding that the landowners retained ownership of the non-mineral elements of the subsurface, including the pore space. Both parties sought review from the Texas Supreme Court.

The Texas Supreme Court affirmed in part and reversed in part. Most significantly, the Court held that the surface owner owns the pore space. The Court reasoned that USM leased the salt, not the salt *formations*, noting that "empty space is not salt." Additionally, the Court noted that Texas law is "reasonably clear" that underground storage space generally belongs to the surface owner absent a contrary agreement. The Court did note, however, that because of the dominant estate rule, USM has the right to use the pore space, but that use is limited to what is reasonably necessary to recover the salt and would not include storage of other hydrocarbons produced elsewhere. The Court reversed and remanded for further proceedings on the question of royalty calculation, finding the parties intended to create an in kind royalty.

More detailed explanation: *Texas Supreme Court Rules Surface Owner Owns Pore Space Beneath Land Absent Agreement Otherwise*

Podcast discussion: Ag Law in the Field Podcast Episode 205

VII. Renewable Energy

***CVP Stonecrop Solar, LLC v. Hardin County Planning and Development Commission*, 2025 WL 2989424 (Ky. Ct. App. October 24, 2025).**
Stonecrop obtained options to lease 640-acres of property from several landowners to develop an 82-megawatt agrivoltaics operation. The land was zoned for agricultural and rural residential uses. Stonecrop contacted the Hardin County Planning and Development Commission seeking a determination that the proposed operation was exempt from zoning because it was an agricultural use of the property and the Agricultural Supremacy Act and Right to Farm Act applied. The Commission disagreed, responding by letter that the agrivoltaics operation was not an agricultural use of real property. Stonecrop filed suit seeking a declaratory judgment that the operation was an agricultural use and would be exempt from zoning.

The trial court found it lacked jurisdiction over the case because Stonecrop did not exhaust its administrative remedies and the letter did not constitute a final agency decision. Stonecrop appealed.

The Court of Appeals found that the trial court erred in concluding it lacked jurisdiction. Under Kentucky law, Stonecrop had no obligation to obtain a final order from the Commission for its claim to be considered by the trial court. The court remanded the case for the trial court to make a determination on whether an agrivoltaics operation constitutes agricultural use.

***In re Harvey Solar I, LLC,* 179 Ohio St.3d 284 (Ohio 2025).**
This case involved a dispute over an order by the Ohio Power Siting Board granting a certificate to construct a 350-megawatt solar facility on over 2,600 acres. Residents living near the area appealed the Siting Board's decision to approve the certificate, raising concerns about visual impacts, flooding, wildlife, noise, water quality, glare, and economic impacts.

The Court noted its only role was to determine whether the Siting Board acted within the bounds of state law when authorizing the solar farm. The Court can only overturn a Siting Board order for unreasonableness or unlawful activity. The Court walked through the Plaintiffs' concerns, finding that the board adequately considered each. Because there was no evidence of unlawful or unreasonableness by the Siting Board, the Court affirmed the certificate.

Chief Justice Sharon L. Kennedy wrote an opinion concurring in the judgment only. She wrote separately to note that the Siting Board should have required Harvey Solar to submit evidence of the project's negative impacts to conduct a proper analysis.

Johnson v. Energy Facilities Siting Board, 248 N.E.3d 152 (Mass. 2025).
Petitioner lived adjacent to a proposed substation that would connect an offshore wind facility to the New England Power Grid. She raised concerns about the noise impact from the substation. Park City Wind, the project developer, submitted modeling evidence and expert testimony that with certain design features, the noise increase would not exceed the level allowed by state environmental regulations. The Energy Facilities Siting Board approved the petition, subject to several conditions including that PCW must procure equipment meeting lower noise specs, must submit a preconstruction compliance filing confirming the designed level will be met, must

verify the actual as-built noise increase does not exceed the limit, and must cooperate with the Petitioner on any mitigation.

Petitioner appealed, arguing PCW's noise impact argument was not supported by substantial evidence. The Supreme Judicial Court of Massachusetts affirmed the Board's decision. The court held that expert modeling and testimony provided a reasonable basis for the Board's decision. Although some equipment specs were not yet manufactured, the experts opinioned they were commercially feasible. The Board's imposition of both pre-and post-construction compliance conditions were permissive to ensure compliance would be verified at appropriate stages.

VIII. Water

***County Commissioners of Worcester County v. Ayres Creek Investments, LLC*, 2025 Westlaw 2237823 (App. Ct. Md. 2025).**

This case examines whether riparian rights were severed or limited by a deed, a conservation easement, both, or neither. Ayres Creek Investment (ACI) owns a waterfront lot bound by Ayres Creek that is part of a subdivision. Ayres Creek is a wetland the developer purported to convey to the county prior to the sale of the lot to ACI. A conservation easement burdens a 100-foot-wide strip of land along the waterfront edge of ACI's property. ACI asserts the right to apply for a permit to build a pier into Ayres Creek. The County contends that the lot is not riparian and, therefore, ACI has no riparian rights. The circuit court ruled that the lot is riparian property with riparian rights and that ACI is entitled to apply for a permit.

As to whether the lot is riparian property, the court finds that it is, with no genuine dispute that the lot "binds on the navigable waters of Ayres Creek." Further, the deed conveying the wetlands to the County did not sever the riparian rights. Reservation of riparian rights is presumed and no language in the deed severed those rights. However, the riparian rights of ACI are limited by the conservation easement. The easement and the covenants of the subdivision. The issue of whether the easement and/or the covenants would prevent the construction of the pier was not before the court.

IX. Cannabis

Green Room LLC v. Wyoming, ____ F.4th ____, 2025 WL 2999673 (10th Cir. 2025).

Following up on the 2018 Farm Bill, Wyoming in 2019 enacted legislation that legalized and regulated the production and sale of hemp. Wyoming's definition of *hemp* was essentially the same as that of Congress. *See* Wyo. Stat. Ann. § 11-51-101(a)(iii) (2019) (defining *hemp* as cannabis with a "THC concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis when using postdecarboxylation or another similarly reliable testing method"); § 11-51-101(vii) (defining *THC* as "tetrahydrocannabinol, the psychoactive component of the cannabis plant, with the scientific name trans-delta 9-tetrahydrocannabinol").

In 2024, however, the Wyoming legislature changed direction, enacting three major changes to Wyoming's hemp regulatory regime through SEA 24. First, it narrowed the definition of hemp in the regulatory statute to exclude synthetic substances. *See id.* § 11-51-101(a)(iii) (2024) (" 'Hemp' or 'hemp product' means all parts, seeds and varieties of the plant cannabis sativa l., whether growing or not, or a product, derivative, extract, cannabinoid, isomer, acid, salt or salt of isomer made from that plant with *no synthetic substance* and with a THC concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis when using post-decarboxylation or another similarly reliable testing method" (emphasis added)).

Second, SEA 24 further narrowed the definition of hemp by *expanding* the definition of THC. While the prior definition of THC was limited to just delta-9 THC, *see id.* § 11-51-101(a)(vii) (2019), the new definition of THC also includes, among other things, delta-8 THC,[1] *see id.* § 11-51-101(a)(vii)(A), (C) (2024) (defining *THC* as "[*a*]*ny* psychoactive structural, optical or geometric isomers of tetrahydrocannabinol" (emphasis added)). Consequently, the delta-8 and delta-9 THC concentration of a product *combined* must constitute no more than 0.3% of the weight for that product to be considered legally authorized hemp. *See id.* § 11-51-103(f) (2024) ("No person or licensee shall: (i) [p]roduce, process or sell hemp or hemp products containing more than three-tenths of one percent (0.3%) THC on a dry weight basis when using post-decarboxylation or another similarly reliable testing method.").

***3** Third, the legislature added both naturally occurring and synthetic delta-8 THC to Schedule I of the Wyoming Controlled Substances Act, *see id.* § 35-7-1014(d)(xxi), and limited the hemp exemption in that Act to conform to the new definition of hemp in the regulatory statute, *see id.* § 35-7-1063(a)(i), (b)(i). Thus, it became unlawful in Wyoming to "manufacture, deliver, or possess with intent to manufacture or deliver" hemp or hemp products containing more than 0.3% THC (including delta-8 and delta-9) or synthetic substances—even though these products may be legal under federal law. *Id.* § 35-7-1031(a)(ii).

The dispute before us arises from the newly created differences between the federal government's regulation of hemp under the 2018 Farm Bill and that of Wyoming under SEA 24. Businesses that cultivated, distributed, and sold hemp products brought preenforcement action under the Declaratory Judgment Act and § 1983 seeking injunctive and declaratory relief against State of Wyoming, its Governor, Attorney General, and the Director of the Wyoming Department of Agriculture, alleging Wyoming statute that regulated the production, processing, and sale of hemp products was preempted by a federal statute, violated the Dormant Commerce Clause doctrine, constituted an unconstitutional regulatory taking, and was void for vagueness.

The United States District Court for the District of Wyoming denied the businesses' motion for a temporary restraining order (TRO) or a preliminary injunction and granted the defendants' motion to dismiss. Businesses appealed and moved to supplement the record. The Court of Appeals held that the Agricultural Improvement Act of 2018, which excluded hemp from definition of prohibited controlled

substance under federal law, did not create any substantive federal right that would support preemption claim under § 1983. The businesses failed to state claim the statute violated Dormant Commerce Clause doctrine by placing substantial burden on interstate commerce. Wyoming did not effect regulatory taking of businesses' property by enacting the statute, nor was the statute was not unconstitutionally vague under Due Process Clause. Finally, the businesses' appeal of denial of their motion for temporary restraining order or preliminary injunction was mooted by district court's subsequent dismissal of their complaint.

X. Miscellaneous

***Wineries of the Old Mission Peninsula Association v. Peninsula Township,* 2025 WL 1859905 (U.S.D.C. W.D. Mich. 2025).**

This is a trial court order in a case about a group of wineries located on the Old Mission Peninsula ("OMP") in Michigan. Property in the OMP is some of the most sought after in the state, offering summer views and wine. The Plaintiff-Wineries are subject to the zoning ordinances promulgated by Peninsula Township. After decades of strife, arbitrary enforcement, and frustration, the Plaintiff-Wineries sued Peninsula Township.

The essence of the court's opinion is that the zoning regulations of the township, which purported to protect farmland, actually had the purpose and effect of limiting the business of the wineries and protecting NIMBY interests. The township's expert witness testified that allowing agritourism activities like events at the wineries were detrimental to production agriculture and were commercial activities. The wineries presented expert testimony that refuted that view and opined that the events helped to preserve agricultural land. The court went so far as to state that township's expert was not credible.

Plaintiffs pled ten causes of action: Count I: Facial Free Speech Claims; Count II: As-Applied Free Speech Claims; Count III: Freedom of Association Claims; Count IV: Due Process Claims; Count V: Dormant Commerce Clause (Discrimination Against Interstate Commerce); Count VI: Dormant Commerce Clause (Excessive Burden on Interstate Commerce); Count VII: Regulatory Takings Claims; Count VIII: State Law Preemption Claims; Count IX Michigan Zoning Enabling Act Claims; Count X: Injunctive Relief. The court's opinion expresses frustration and skepticism, calling one intervenor "largely a NIMBY group devoted to stifling development on the OMP.

Prior to trial, This court ruled that the following Peninsula Township Zoning Ordinance ("PTZO") sections violated the Dormant Commerce Clause because they require Farm Processing Facilities and Winery-Chateaus to purchase a certain percentage of grapes from Peninsula Township farmers: 6.7.2(19)(a), 6.7.2(19)(b)(1)(ii), 6.7.2(19)(b)(1)(iii), 6.7.2(19)(b)(2)(i), 6.7.2(19)(b)(2)(v), 8.7.3(10)(u)(2)(e), 8.7.3(10)(u)(3), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(d). (ECF No. 162 at PageID.6001).

This court ruled that any subsection of Section 8.7.3(10) that uses the term 'Guest Activity' is unconstitutionally vague and must be stricken from the Township Ordinances. (Id. at PageID.6019).

This court ruled that Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(5)(a) "compel speech because they require a Winery-Chateau to promote Township agriculture at all Guest Activities by doing one of the following: (1) identifying 'Peninsula Produced' food or beverages, (2) providing 'Peninsula Agriculture' promotional materials, or (3) including tours through the Wineries or other agricultural locations." (ECF No. 559 at PageID.21911).

This court ruled that Sections 8.7.3(10)(u)(2)(b) and 8.7.3(10)(u)(2)(c) are unconstitutional prior restraints on speech because the Township required the Wineries to seek township approval before hosting a meeting of a 501(c)(3) non-profit group or agricultural related groups while lacking definite criteria to make an approval determination. (Id. at PageID.21910). This court ruled that Sections 8.7.3(10)(u)(2)(d), 6.7.2(19)(b)(6), 8.7.3(10)(u)(2)(a) are not unconstitutional prior restraints because they do not implicate speech. (Id. at PageID.21909).

This court ruled that Mich. Comp. Laws § 436.1547 preempts Section 8.7.3(10)(u)(5)(i), which says "Kitchen facilities may be used for on-site food service related to Guest Activity Uses but not for off site catering." (ECF No. 525 at PageID.21134).

This court ruled that "the 'No amplified instrumental music is allowed' language" of Section 8.7.3(10)(u)(5)(g) "is preempted by [Mich. Comp. Laws § 436.1916(11)] which expressly allows certain licensees to have musical instrument performances without a permit." (Id. at PageID.21133). However, because the limitation on the amplification level of music is merely a limitation and not a prohibition, "the regulation of the amplification level of music—a mere limitation—is not preempted." Id.

Dr. Thomas Daniels, who was called by PTP to opine on the reasonableness of the PTZO, was not credible. Plaintiffs' counsel stretched Dr. Daniels' credibility on cross examination and was plainly able to impeach his testimony. Aside from effective cross examination, Dr. Daniels' testimony was largely dispelled by Plaintiffs' rebuttal expert witnesses,

The court cited the following testimony of one of the wineries experts as particularly damning for Middle Peninsula Township:

And the one part I was really surprised at is when [Dr. Daniels] talked about trying to reduce the price of farmland. I've just never heard of that before. That was just something with all my years of development, economic development commissions, I did serve over 20 years on the Chippewa County's economic development commission working with the townships, we're always trying to increase land values, that's so important for a farmer, of course, when you retire, that's your retirement. You don't have 401Ks or pension plans. And farmers have to borrow money all the time to operate, to buy equipment. And it's always the bank wants to see your net worth. And the biggest part of that, almost the whole part, is your farm.
(ECF No. 609 at PageID.25231-32).

"This testimony put the PTZO provisions in perspective: it was never about preserving farmland or rural character. These provisions were designed to keep land prices lower, so the Township could purchase more development rights, which would again, protect NIMBY landowners. Mr. McDowell testified that to preserve agriculture, farms need to be profitable and have the opportunity to engage in typical accessory uses and marketing. "

The record does not show that the regulations directly advance the Township's purported interests. Even if the regulations advance the Township's purported interests, the regulations are not sufficiently tailored. The court struck down numerous regulations of the township that limited the activities of the wineries. Declining to grant injunctive relief, the court granted millions of dollars in damages to the individual wineries.

***Iron Bar Holdings, LLC v. Cape*, 131 F.4th 1153 (U.S.C.A 10th Cir. 2025).**
The American West contains millions of acres platted into alternating squares of public and private land in a manner resembling a checkerboard. The question presented in this case is whether a private landowner can prevent a person from stepping across adjoining corners of federal public land—a technique called "corner-crossing." Iron Bar asserts a property right to the airspace above its land, and the corresponding right to exclude corner-crossers from that airspace.

This case turns on the interplay of state and federal law enacted against the backdrop of private settlement of public lands and the property disputes that inevitably followed among rival interests. Over a century ago, the Supreme Court held that private landowners cannot erect barriers which bar complete access to public lands based on the 1885 Unlawful Inclosures Act. And the Tenth Circuit has interpreted the UIA to allow corner-crossing if access to public lands is otherwise restricted. Those cases control. Iron Bar cannot implement a program which has the effect of denying access to federal public lands for lawful purposes.

More Detailed Explanation: *Court Rules in Corner-Crossing Trespassing Case*

***Urban v. City of South Charleston*, Case No. CC-20-2023-C-683 (Cir. Ct. Kanawha County, WV January 23, 2025).**

South Charleston banned beekeeping in city limits under City Code § 505.06. Urban applied for a permit under the city's permitting process for keeping "animals", while disputing the city's position that a honeybee is an "animal." The city denied the application and Urban filed suit. The city filed a motion to dismiss, and the West Virginia Department of Agriculture filed a motion to intervene, which the city challenged. The court granted the WVDA's motion to intervene and denied the city's motion to dismiss.

All parties filed motions for summary judgment. The court ruled that the city's ban on beekeeping exceeds the city's authority under West Virginia Code § 8-12-15(25) because bees are not "animals" within the meaning of that code section. Although that code section does not define "animal", no definition of animal in the West Virginia Code supports the city's position. Nor does the broad authority under West Virginia Code § 8-12-15(43) to protect the public morals, safety, health, welfare, and good order authorize regulation of beekeeping without any factual basis that bees pose a public threat.

Municipalities hold no authority unless granted by the state. According to the court, no authority has been granted to regulate beekeeping. To the contrary, the court finds that the West Virginia Apiary Act vests express authority to the Commissioner of Agriculture to regulate bees and beekeeping in the state. West Virginia Code §§ 19-13-1, *et. seq.*

Even if bees are considered "animals", the city code provision contradicts the West Virginia Apiary Act. That act, according to the court, grants sole authority to regulate beekeeping to the WVDA. The Apiary Act limits the liability of beekeepers who operate in conformity with the Act and authorizes the Commissioner of Agriculture to cooperate with political subdivisions of the state to carry out effective administration.

In addition, the ban on beekeeping in the city contravenes the public policy set forth in West Virginia Right to Farm Act, West Virginia Code §§ 19-19-1 to 19-19-8. Within that act, the legislature sets out a policy to protect and preserve agricultural production. Agriculture is defined as including apiary operations. Therefore, the circuit court granted summary judgment to Urban and to the WVDA and denied the summary judgment motion by the city. This case has been appealed.

***Thomas v. Patriot Square Homeowners' Association, Inc.,* 2025 WL 427747 (App. Ct. Md. 2025).**
This routine case focusing on notice is notable only for the court's choice to wax poetic on the mundane.

The court begins its opinion with, ""The quality of mercy is not strained. It droppeth as the gentle rain from heaven." Shakespeare, *The Merchant of Venice*, Act IV, Scene 1, lines 1-3…but not necessarily in every case." Then the court describes the case as one "about some modern-day descendants of the dinosaurs, i.e., chickens, and the U.S. mail."

Thomas kept chickens on his property in violation of the restrictive covenants. The issue focused on whether mailing by certified mail (Thomas never picked up the letter) and email were sufficient. The lower court found that Thomas had actual notice. On appeal, the court affirms but takes the opportunity to note that certified mail "is not superior inherently to ordinary mail in this context." The court affirms only because the lower court made the factual finding that Thomas had actual notice. Sending only by certified mail, and not certified and ordinary mail, would not otherwise substantially comply with the Declaration's notice requirements.