TAB 1: Session A: Condemnation Case Study

Laura A. Curliss, Esq, Laura A. Curliss Co. LPA
David Watkins, Esq, The Plank Law Firm

Outline **2**

Background Materials

1. Appendix A – Summary of US Cases on Prior Public Use 27
2. Appendix B – Eminent Domain and Exaction Summaries 34
3. Arno Renner Deed of Ag Easement 66
4. Amendment to Arno Renner Ag Easement 115
5. Correspondence dated 1/7/21 118
6. Correspondence dated 3/3/20 138
7. Landowner Complaint 146
8. Landowner petition for mandamus 158
9. Amicus brief 171
10. Columbia v. Bailey Decision of Trial Court 202
11. Columbia v. Bailey Decision of 3rd Circuit 208

An Agricultural Easement and the

Prior Public Use Doctrine in the Context of Eminent Domain:

The *Bailey* Case in Ohio

PRESENTERS:

Laura A. Curliss, Esq.

Laura A. Curliss Co. LPA, Yellow Springs, Ohio

David Watkins, Esq.

The Plank Law Firm, Columbus, Ohio

June 11, 2025 – 12:00 noon – live virtual session

I. Introduction:

A. In this presentation we tell the story of the Bailey family, their 231 acres of protected farmland in Union County, Ohio, and how they resisted an attempted condemnation[1] of 13+ acres for a commercial gas pipeline (the "Marysville Connector Project" or "Project").

B. The taking would have amounted to 5.6% of their total farmland, almost all of which consists of the most productive soils in the world known as "prime soils".[2] The Baileys accomplished this through a robust defense on the issues of 1) challenging the necessity, 2) showing that there was "bad faith" by the appropriator in its differing presentations before OPSB and at hearing, and 3) the prior public use of the land and whether there was a right to take based on the pre-existing state-held agricultural easement.

C. While the Petitioner, Columbia Gas of Ohio, Inc., dismissed their condemnation petition upon remand, the appellate court laid a framework for future Ohio courts to address whether farmland protected by a state-held agricultural easement is a **prior public use** and, consistent with Ohio's version of the prior public use doctrine, not subject to eminent domain. Combined with other legal grounds to defend against a taking, the public use argument can be persuasive and might tip the scales where the court must balance the interests involved in the taking. The trial court did not have the opportunity to address the issue of whether the state-held agricultural easement was a prior public use preventing the subsequent use – a taking for a pipeline easement.

D. We will review 1) Eminent domain law and procedures generally, and Ohio's procedure and law, 2) the Prior Public Use Doctrine and case law, 3) impact of other public policies and laws (e.g., enabling statutes) and 4) the strategy of litigating Columbia Gas of Ohio, Inc. v. Bailey, 2023-Ohio-1245 (Ct. App. Ohio, 3rd App. Dist. April 17, 2023) which resulted in the eventual dismissal of the petition for appropriation.

---

[1] For the purposes of this outline, the terms condemnation, appropriation and taking will be used interchangeably and shall have the same meaning.

[2] Prime soils provide the greatest crop return with the least number of inputs and insure a stable food supply. Ohio has an abundance of prime soils. Ohio has experienced a huge loss of prime farmland, largely due to the metropolitan areas. A recent study (9/24) by Ohio State University agriculture professors emeriti calculated Ohio has lost 268,340 acres of agricultural land between 2001-2023, over half due to development, mostly in MSA areas. Prime soils are one reason why agriculture is the largest sector of Ohio's economy, in a state with relatively large population (11,000,000).

E. While this presentation will focus on the ***Bailey*** case and the Prior Public Use doctrine, we touch on eminent domain law and prior public use as a doctrine, defense, or an argument in other states. **Appendix A** to our materials provides a summary of cases that include a prior public use argument or are notable for the omission of making the argument, or where a prior public use argument was made not based on common law.

F. Finally, we ask, can this success be repeated? In Ohio? Elsewhere? Is this the best way to protect conservation lands from eminent domain? Given the strain on land trust personnel and resources, is it desirable to protect conserved properties from eminent domain for every property? Or just the most unique, special and important properties? Shouldn't the public expect government entities to treat conservation easements, most of which are at least partly donated under public oversight principles? What is the cost in public trust and supporter goodwill of not fighting for permanent preservation?

II. Overview of the Doctrine of Eminent Domain

A. 5th Amendment to U.S. Constitution

1. Fifth Amendment: "nor shall private property be taken for public use, without just compensation." Applied to states through 14th Amendment.

B. *Kelo v. City of New London*, 545 U.S. 469 (2005)

1. Supporting a broad interpretation of "public use" in the eminent domain context where private land was being taken for re-development. Justice John Paul Stevens writing for the majority in affirming the Connecticut Supreme Cout argued that the Fifth Amendment did not require a "literal" public use, but rather a broader and more natural interpretation of public as "public purpose."

C. ***Norwood v. Horney,*** 110 Ohio St. 3rd 353, 2006-Ohio-3799, 853 N.E.2d 115. Ohio has clearly stated that defining the parameters of the power of eminent domain is a judicial function. When the state's right to take property is delegated to another (like a private utility) a court "must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner." ***Norwood v. Horney***, at ¶ 70 (no deference by court, heightened scrutiny).

1. Ohio was responding to ***Kelo v. New London***, 545 U.S. 469 (2005) (expanding "public use" to include private economic development). Many states narrow the permissible

reasons or the process for a taking by eminent domain after *Kelo* or require heightened court scrutiny of takings.

D. Role of Authorizing Entity – Private companies obtain the power of the sovereign - Ohio Power Siting Board (OPSB) – Ohio Revised Code (O.R.C. or R.C.) R.C. 4906.04 provides that no person shall construct a major utility facility in the state without first obtaining a certificate from the Ohio Power Siting Board (Board).

1. In seeking a certificate, applicants must comply with the filing requirements outlined in R.C. 4906.06, as well as Ohio Adm. Code Chapters 4906-3 and 4906-5. On Dec. 20, 2019, Columbia Gas of Ohio, Inc. filed its Letter of Notification application seeking OPSB approval for the Marysville Connector Project, which it considered a major utility facility.

E. Judicial Review of the Administrative Process - Role of Court – Review of the process for authorizing a taking by a public or private entity (to perform a taking for a public purpose) is a judicial function, standards of review will vary. The Court may be asked to determine the legal grounds for the taking and the compensation paid.

1. Eminent Domain Procedure – The appropriation process will vary from state to state, and the procedure and procedural rights will vary depending upon the scope of the appropriation (localized, intrastate, interstate, the length). The procedural rights afforded to all interested parties or parties with standing provide the means for raising legal, equitable or other arguments/objections to the taking, such as on the issues of

   a) whether there is a right to take,

   b) whether there is necessity for the taking or the scope of the taking,

   c) holder or landowner specific objections based upon the language of the document giving them the property right, and

   d) actions which may amount to "bad faith" on the part of the appropriator.

2. In the context of a conservation easement, additional questions arise:

   a) Preliminary Communications – What is being communicated to the landowner and easement holder regarding their property and a potential taking? Keep and review communication from any source – surveyors, land agents, companies, government entities – about an interest in the land as these may include important disclosures, facts or admissions (or procedural omissions).

b) Determine the real property right being appropriated. The real property sought is often a utility or roadway easement. Easements are cheaper to acquire than the fee simple.

i. In the ***Bailey*** case which we will discuss, it was critical to the outcome that there was not clarity throughout the process regarding what, exactly, was being appropriated. Thus, it became important to know what role the court would play and what standard of review to apply to its review of the administrative process and decision. Heightened scrutiny was applied.

c) Necessity – The issue of necessity for the taking is, of course, one of the key issues where a landowner/holder of a property interest can challenge the taking. State laws should provide the right to a necessity hearing on the issue of the public's interest and necessity for this taking.

d) Rebuttable and Irrebuttable Presumptions. Often there are rebuttable or irrebuttable presumptions as to the necessity issue.

e) Valuation and compensation; the compensation hearing. Once the necessity issue is resolved, there must be agreement of the parties or court proceedings to determine the compensation due for the real property right taken, including partial or full takings of conservation easements. This often involves the landowner/holder getting an appraiser to counter the offer or evidence of value presented by the appropriator.

III. The *Bailey* Case

A. Parties Involved:

1. Petitioner: Columbia Gas of Ohio, Inc.
2. Respondents: Farm #1 - Don Bailey, Trustee of the Arno Renner Trust, Charles Renner. Farm #2 - Patrick & Whitney Bailey. All are successive property owners of farmland protected under an agricultural easement granted to the Ohio Department of Agriculture (ODA) by their ancestor, Arno Renner in 2003, amended in 2006 (to prohibit road building).

B. In Union County (Ohio) Common Pleas Court

1. On July 22, 2021 - Columbia Gas of Ohio, Inc. filed two Petitions for Appropriation.

a) one versus Don Bailey, Trustee of the Arno Renner Trust and Charles Renner, owners of one farm, and

b) one against Patrick and Whitney Bailey, owners of the other farm covered by the Arno Renner agricultural easement. Case Nos. 21 CV 0112 and 21 CV 0113, Union County (Ohio) Common Pleas Court (unpublished decision on April 26, 2022 – in materials), consolidated on appeal (collectively, the "***Bailey***" case).

C. Key Issues:

1. Whether there was a necessity for the taking of a *perpetual* "temporary" 25-foot easement in addition to the taking of a 50-foot easement. Specifically, Columbia Gas enjoyed a rebuttable presumption of necessity pursuant to O.R.C. 163.09(B)(1) after obtaining the certificate from the Ohio Power Siting Board, (OPSB) but the Baileys argued that "bad faith" tainted the appropriation process when Columbia Gas presented an additional 25-foot easement for construction purposes as "temporary" when in fact it would be perpetual.

2. Whether an agricultural easement constitutes a prior public use that prevents the appropriation of property under the doctrine of eminent domain.

D. Pre-litigation efforts – letters to ODA, the Governor

a. After Don Bailey's letter to Governor DeWine (03/20/2020), ODA Farmland Preservation ED Sarah Huffman responds that "…Farmland Preservation deeds [of agricultural easement] do not prevent eminent domain."

b. 09/17/2020 – Union County Soil and Water Conservation District letter to Dir. Pelanda in support of the Baileys' request oppose the taking.

c. 10/09/2020 – Ohio Farm Bureau Letter to Dir. Pelanda expressing concern about the failure of ODA to object in the OPSB proceeding.

d. 01/07/2021 Attorney Curliss sends letter to ODA's Farmland Preservation Office explaining the easement, providing notice of an action adverse to conservation values.

E. Prior Public Use Doctrine in Ohio before *Bailey*

a. *Two Ohio Supreme Court Cases - Village of Blue Ash v. City of Cincinnati*, 173 Ohio St. 345, 351 (1962) *and City of Worthington v. City of Columbus*, 100 Ohio St. 3d 103, 2003-Ohio-5099 (2003) -- set forth the "prior public use doctrine" in Ohio:

a. *City of Worthington,* at 10 - “In *Blue Ash*, this court observed: "It is a general rule, and one of long standing, that when a condemnor, to which the power of eminent domain is given by law, seeks to exercise its power with respect to property already devoted to public use, its action may be enjoined if the proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction, unless the law has authorized the acquisition either expressly or by necessary implication."

b. *Blue Ash v. Cincinnati*, 173 Ohio St. 345, 351, 19 Ohio Op. 2d 274, 182 N.E.2d 557. This rule is commonly denominated the "prior public use" rule or doctrine. See, e.g., *Las Cruces v. El Paso Elec. Co.* (1998), 1998 NMSC 6, 124 N.M. 640, 954 P.2d 72; Naiman, Judicial Balancing of Uses for Public Property: The Paramount Public Use Doctrine (1990), 17 B.C.Envtl.Affairs L.Rev. 893, 896; Arena, The Accommodation of "Occupation" and "Social Utility" in Prior Public Use Jurisprudence (1988), 137 U.Pa.L.Rev. 233.”

F. In the Trial Court

1. Petitioner (Columbia Gas):
   a. Claimed the pipeline project satisfied public-use and necessity requirements. They were granted the Certificate of Necessity, so this created a rebuttable presumption of the necessity of the take for a public use.
   b. Argued that agricultural easements do not preclude utility projects.
2. Respondents (Baileys)
   a. Countered that Columbia Gas acted in bad faith in misrepresenting the “temporary” construction easement. It is perpetual by its terms. The Baileys also asserted that there was ***no right*** to take their land because the agricultural easement constituted a prior public use, preventing Columbia Gas from appropriating the property.
   b. There was key language in the easement preventing the pipeline use: Commercial and industrial uses were prohibited; more than de minimis excavation of soils was prohibited, non-farm utilities were prohibited; new road building prohibited, and any non-agricultural structures prohibited. Preservation of the farm’s prime soils was a key reason for the easement.

i) The Marysville Connector project would involve a high-pressure commercial gas pipeline crossing the farm, with no possibility of on-farm use, and so was specifically prohibited by the easement.

ii) The Baileys highlighted the damage the pipeline would cause to the soil, contradicting not only plain language in the easement that is violated by this project, but also the easement's purpose.

3. Three days of evidentiary hearings on the issue of necessity of the taking followed – Nov. 12, 2021, Feb. 22 and 25, 2022. Regarding the Bailey's right to take argument, there was powerful testimony on the history of the donation program, its intent and purpose, and on destruction to prime soils.
   a. Trial court believed that the Ohio Power Siting Board "did not do its job" in the review process as to the reality of the taking of the 25-foot "temporary" easement. "Given the particular fact of this case where the 25 foot easement was labeled "temporary" before the Siting Board and transformed itself to 'perpetual' before this Court, this Court is of the opinion that the Siting Board did not do its job.
   b. This Court finds it was 'bad faith' to represent one thing to the Siting Board and then ask this Court to approve something greater." *Id.* at p. 3.
4. Holding: The Court ordered the Petition of Columbia Gas to appropriate dismissed. In so doing, the Court reasoned that the burden was on the Petitioner (Columbia Gas) to prove that the appropriation was taking "no more than is necessary to promote the public" [sic]. "The Ohio Power Siting Board in failing to examine the applicable [utility] easement documents itself, failed to determine if the appropriation was taking only that which was necessary."
   a. The trial court applied heightened scrutiny and held that bad faith required the loss of the presumption per O.R.C. §163.09 of necessity of the taking.
   b. As to the "right to take" argument, the Trial court believed that the agricultural easement **did not** prevent the taking. The Court believed that ODA had the right to determine whether the easement language prevented eminent domain and not the Court. "This [urging the Court to supplant its judgment for that of the current position of the ODA] is contrary to the easement and contrary to the State's historic right to exercise the right of

eminent domain." *Citing* the *U.S. Const., 5th Am*. and the *Ohio Const. Art. 1, sec. 19.*

c. Columbia Gas appealed this decision, and the Baileys filed a counter-appeal, continuing the same arguments. The Baileys engaged amicus at the appellate level - Ohio Farm Bureau and the Coalition of Ohio Land Trusts.

G. Third District Court of Appeals - Columbia Gas of Ohio, Inc. v. Arno Renner Trust, Don Bailey, Trustee, et. al., 2023-Ohio-1245 (3d Dist.)

1. Appellate Court's Holdings
2. Necessity and Public Use:
   a. Necessity hearing was warranted.
   b. Columbia Gas failed to demonstrate the irrebuttable presumption of necessity under R.C. 163.09(B)(1)(c).
   c. OPSB approval of the pipeline project did not extend to individual property appropriations.
   d. Columbia Gas acted in bad faith
3. Agricultural Easement:
   a. Evidence sufficient to support determination that Ag Easements were for public use.
   b. Significant public benefit by maintaining the farmland's soil structure and agricultural viability.
   c. Installation of the pipeline would irreparably harm the soil, violating the easement's terms.
   d. Excluded testimony of Bailey's prior attorney admissible.
   e. Excluded testimony of legal expert in conservation easements was admissible (including proffer about federal law implications of a tax-deductible easement).
4. Prior Public Use Doctrine: Whether the agricultural easement qualifies as a prior public use under Ohio law.
   a. Columbia Gas did not show legislative authority to override the agricultural easement. The court believed it possible that the language of the agricultural easement prevented the taking but remanded on that issue and the issue of the easement as a prior public use.

H. Implications of the Ruling

1. On remand, Columbia Gas dismissed its petition. So, the agricultural easement language and prior public use issues were not reached or determined. The prior public use doctrine as to state-preserved farmland has yet to be tested. Columbia Gas did not apply for *certiorari* to the Ohio Supreme Court.
2. Columbia Gas applied for and, on June 15, 2023, received from the OPSB an extension of their certificate to appropriate.
3. Columbia Gas has an extension until June 2026 to start a continuous course of construction. OPSB Case No. 19-2148-GA-BLN.

IV. **Conclusion**

A. Summary: The appellate court recognized that it is very likely that the agricultural easement is a prior public use, emphasizing its role in preserving farmland as a public resource.

B. Key Takeaway: Agricultural easements may be a protected public use that can limit the scope of eminent domain.

V. **Summary of the Prior Public Use Doctrine in the context of Eminent Domain**

A. Working definition of Prior Public Use: A doctrine or argument that an appropriation is/or should be barred because the property sought to be appropriated already is devoted to a public use (unless otherwise authorized by legislation).

1. Is there a Public Use?
2. Is it a Prior Public Use?
3. If it is, does that provide any protection from a subsequent taking by a public entity or a private entity with a legal right to take with the power of the sovereign?
4. Are there any exceptions to the prior public use doctrine, if it exists, in other states? How is it to be applied? Is the subsequent use permitted if it is not inconsistent with the prior use or will not destroy the prior use? Will the court have to "balance" the public uses? Is one public use going to be given more weight if the court is to "balance" the uses (e.g., open space may be given the higher priority)? What test or factors will the court be considering? As the appellate court observes in ***Bailey***, "[t]he Supreme Court of Ohio has not refined

the prior public use doctrine to permit courts to balance the competing public uses to determine which necessity best serves the public interest," ***Bailey*** at ¶105 (citing Justice Pfeiffer's dissent in ***City of Worthington***).

B. Statutes and Cases involving Prior Public Use and its application. For a review of U.S. statutes and cases about or related to the Prior Public Use Doctrine, see **Appendix A** and also *Rob Levin's Non-Federal Tax Summaries*, Part (8) Eminent Domain, available in LTA's Resource Center.

C. Prior Public Use Doctrine - Generally

a. *Uniform Conservation Easement Act (UCEA)* – promulgated in 1981 by the National Conference of Commissioners on Uniform State Laws. *It is neutral on the topic of Eminent Domain*. "The drafters of the UCEA declared a limited goal of abolishing traditional common law restraints on perpetual and negative easements in gross. Thus, the UCEA is intentionally confined in scope, remaining silent or neutral on issues such as amendment, termination, taxation and *eminent domain*." Emphasis added. See *Guide to State Conservation Easement Enabling Statutes*, Rob Levin, p. 10.

b. *State Conservation Easement Enabling Statutes and Eminent Domain* (as of 2023). Generally speaking, the state statute 1) may be silent on eminent domain, 2) may provide some protection for a conservation easement as a public use, the highest and best use, protective actions required by the state, or 3) could treat the conservation easement as a legal fiction in the eminent domain context (KY). States where eminent domain is mentioned in some way in the state enabling statute: AL.; AK; CA; FL; GA; HA; ID; IA; KA; KY; MA; MS; MO; MT; NE; OK; OR; RI; SC; TN; UT; VA; WA; WV. Ohio's enabling statute O.R.C. §§ 5301.68-70 is silent on eminent domain.

c. Administrative Law. Be aware of codified administrative law applicable to the easement or to the eminent domain proceeding. At the hearing in ***Bailey***, testimony from former ODA Director Fred Dailey highlighted that the codified administrative guidelines for the Ohio Agricultural Easement Donation

Program (2006) say that "[t]here cannot be any third-party interest in land that are not conducive to agriculture as determined by the Director of ODA. Examples of such interest would be surface mining lease, water, sewer, utility lines or roads and highways outside of the existing rights-of-way or other development activities that would damage the topsoil or subsoil of the farm."

VI. **BIG PICTURE - What is the legal context of this taking?**

a. Conservation Easement Enabling Statutes, Real Property and Contract Law and Public Benefit or Equitable Law and Principles[3]

1. Conservation Easement Enabling Statutes – Some address eminent domain in some way, most do not. Ohio's does not. Kentucky's statute treats conservation easements as if they did not exist in the eminent domain context. California and Massachusetts provide protection for conserved lands absent voter approval or legislative action. Or an enabling statute (CA, PA, WA) or the easement itself[4] might allow for liberal construction in favor of conservation. *See A Guided Tour of Conservation Easement Enabling Statutes*, by Rob Levin, Esq. (updated March 2025) available in the Land Trust Alliance Resource Center at www.lta.org.
2. Contract Law – Some states rely more on contract law principles. Ohio is primarily a contract state. The terms of an easement and its enforcement are matters of the intent of the parties as expressed in the four corners of the document and interpreted under contract law and principles. See *OPWC v. Silestone Resources*, 168 Ohio St. 3rd 439, 2022-Ohio-483 (applying contract principles and law of restrictions related to charitable gifts) or see *Zagrans v. Elek*, 2009-Ohio-2942 (Ohio Ct. App. 9th Dist. 2009) (pursuant to common law (no privity) on standing and the enabling statute, neighbors did not have standing to challenge a modification of a conservation easement removing land made by a government holder and landowner).

[3] Additional resources: *When Eminent Domain Comes Knocking*, Robert H. Levin, Exchange, The Journal for Land Conservation, Spring 2001. Also see Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation, Nancy J. McLaughlin, 41 U.C. © Land Trust Alliance, 2024. Prepared by Robert H. Levin, Esq. 376 Davis L. Rev. 1897 (2008). CNLM was represented by students and advisors of the Environmental Law Clinic at Columbia University School of Law.

[4] *Taylor v. Taylor*, 12th Dist. Butler CA2017-05-061, 2018-Ohio-1571 Para. 27. *Taylor* involved the attempted partition of a farm under a conservation easement. The Ohio 12th District Court of Appeals upheld the "no subdivision" restriction in the easement, thanks in no small part to LTA's Amicus filing in support.

3. Review the Easement language – What is in the "four corners" of the document? What in the easement language itself will affect the rights of the parties, grounds for challenge or defense? If the program was set up to protect farm soils and productivity, and has many restrictions to prevent commercial use, including utilities, will a Court enforce the language against the State?

   a. One point worth mentioning is that, in ***Bailey*** and in Ohio's agricultural easement template generally, there is a tension in the language and law about preserving the farmland, saying that it will be preserved both "predominantly" in agriculture and "exclusively for agriculture. Ohio's state deed of agricultural easement template has long had this internal contradiction in its language, arising from statutory requirements. The word "exclusively" for agriculture is tracking both O.R.C. 5713.30 and 26 U.S.C. 170(h), in states where they contemplate that landowners will be applying for the federal tax deduction, this reference is often made.

   b. It was clear from the testimony of then Director of the [ODA] Office of Farmland Preservation Sarah Huffman that ODA was focusing on the word "predominantly" [in agriculture] in interpreting the easement and that ODA believed it had "discretion" to allow *any* activity, even those directly prohibited by the deed language, so long as the land remained *"predominantly*" in agriculture, [whatever that means (over 49%?)].

   c. Upon cross-examination, however, she admitted that "[t]he protected property cannot be retained predominantly in agriculture if its soils are not preserved and protected." (Testimony of Sarah Huffman, at 55).

   d. The Bailey easement also prohibits the granting of commercial (non- farm) utility easements.

      "The following activities are expressly prohibited: (3) Prohibited Uses/Restrictions: Any activity or use of the Protected Property inconsistent with the purposes of this Easement is prohibited. The following activities are expressly prohibited…

      3.1. Industrial or Commercial Activity. There shall be no industrial or commercial activity allowed….No right of passage shall be granted [in relation to prohibited activities]. 3.2 Structures. There shall be no new

structures including…utility pole…conduit line or any other temporary or permanent structure or facility…."

d. These are just two sections that would prevent the project if enforced. Other provisions typically found in easements would also be grounds for defending the conservation values as a public use of the land (no roadbuilding, no excavation of soils, etc.)

d. Equitable and Public Oversight Principles - The charitable intent of the donor matters. Both citizens and decision-makers may feel that such gifts *should be administered for the public benefit.* For an example of the application of charitable principles in the context of a taking, see ***Report of the New Hampshire Attorney General****, Lamprey Field Conservation Easement (2015)* for a case applying where the state Attorney General is applying Charitable Trust principles in the context of a violation case. Please note that this Report has been contracted in scope in the past few years.

B. Federal tax deduction – implications. In ***Bailey***, we attempted to present evidence that the fact that the easement qualified for a federal tax deduction added to the public purpose of this easement under federal law.

1. Prior to the exclusion of the proffered testimony on 26 U.S.C. 170(h), we intended to argue that the donation of the easement to the state was both
   a. evidence of the public purpose/public use and b
   b. that federal law required that the qualified conservation contribution be used exclusively for conservation purposes.
2. In ***Bailey***, the appellate court reversed the trial court's exclusion of expert testimony about the federal tax deduction available for donation of a qualified conservation contribution (easement) related to Arno Renner's 2003 easement donation to ODA. Further, there is language in the agricultural easement that mirrors 26 U.S.C. §170(h) regarding the property being used "exclusively" for agriculture. This make sense only with regard to federal law and 26 U.S.C. §170(h) as this language is not required by the enabling statute, and so the appellate court reversed on this excluded testimony. See also O.R.C. §901.21(B) (referencing that Ohio agricultural easements may include any terms "necessary or appropriate to preserve on behalf

of the grantor of the easement the favorable tax consequences of the gift, devise, or bequest under the [I.R.C.]."

a. One argument is that if the land is to be protected for and used exclusively for agriculture, then ODA should oppose every taking and the Attorney General should protect the gift made to the state by the landowner as a charitable trust, and yet they did not.

C. Public Support/Initiatives – public support for environmental protection can provide legal or persuasive arguments for a court to find that the easement is for a public purpose/public use. In 2000, a citizen ballot initiative resulted in the Clean Ohio Constitutional Amendment which created a bond fund for environmental protection, restoration, and preservation of land.

1. See Ohio Constitution Art. VIII, Sec. 2o (emphasis added):

> *(A) It is determined and confirmed that the environmental and related conservation, preservation, and revitalization purposes referred to in divisions (A) (1) and (2) of this section, and provisions for them, are proper public purposes of the state and local governmental entities and are necessary and appropriate means to improve the quality of life and the general and economic well-being of the people of this state; to better ensure the public health, safety, and welfare; to protect water and other natural resources; to provide for the conservation and preservation of natural and open areas and farmlands, including by making urban areas more desirable or suitable for development and revitalization; to control, prevent, minimize, clean up, or remediate certain contamination of or pollution from lands in the state and water contamination or pollution; to provide for safe and productive urban land use or reuse; to enhance the availability, public use, and enjoyment of natural areas and resources; and to create and preserve jobs and enhance employment opportunities. Those purposes are:*

(*1) Conservation purposes, meaning conservation and preservation of natural areas, open spaces, and farmlands and other lands devoted to agriculture, including by acquiring land or interests therein; provision of state and local park and recreation facilities, and other actions that permit and enhance the availability, public use, and enjoyment of natural areas and open spaces in Ohio; and land, forest, water, and other natural resource management projects….*

D. Challenge of Changing Administrations - The changing of administrations and administrators charged with stewarding easements is a tremendous problem, difficult to overcome by law alone, even strong easement language with good communication. In *Bailey,* twice before the judicial proceedings, the ODA Director or the Ohio Attorney General had defended this easement from a taking.

1. Now, it was a non-issue as far as ODA was concerned. In fact, ODA failed to perform its role as an independent reviewer of the taking at the OPSB level and it relied on a letter from Columbia Gas' Director of Regulatory Policy, and not on its own independent evaluation, in determining that the pipeline "does not violate the terms of the Agricultural Easement," *Affidavit of Huffman*.
2. ODA recused itself from the Ohio Power Siting Board proceedings and requested to be excused from the appropriation-necessity hearing because it "did not interpret the proposed utility easement as violating the existing agricultural easement." Fred Dailey testified that Huffman's affidavit averring that the utility easement does not violate the terms of the Agricultural Easement "looks incestuous," referring to the fact that ODA did not do any independent evaluation of the taking prior to communicating to the OPSB that it had no objection, and that the utility easement would be consistent with the agricultural easement.
3. How ODA's position changed over time.
    a. In 2005, the City of Marysville proposed a 72" diameter sewer trunk line project, the Trunk Interceptor Project, to go across the Renner [now Bailey] farmland. In November 2005, then Ohio Agriculture Director Fred Dailey wrote to the city's Mayor in defense of the easement: "The people of Ohio have entrusted their grants of deeds of agricultural easements with ODA. As the Director of

Agriculture, it is my duty to enforce the agricultural law of Ohio by protecting the rights of the people of Ohio. I do this in part by ensuring that property interests generously donated to Ohio, by citizens such as Mr. Renner, remains farmland for future generations to benefit from and enjoy. If an agricultural easement is threatened or violated, it is my duty to act to protect it…I must inform you that ODA plans to oppose any attempt to take an easement of this property by eminent domain. My recommendation is that the City of Marysville consider other alternatives."

b. 2008 another project threatened. The Ohio Attorney General Nancy Rodgers's office sent a letter to the Mayor of Marysville stating that ODA's position was that a proposed 36" water line should be built in the ROW, not in a 20' wide utility easement parallel but on the preserved farmland.
c. In March 2020, Don Bailey wrote to Governor DeWine asking his administration to oppose the Marysville Connector pipeline project and instruct ODA to enforce the plain terms of the agricultural easement against the taking, bring up the trust and duty of the State to protect this farmland. "It always takes much more effort to do the right things, and do it right" wrote Don Bailey about ODA's failure to take action to preserve the farm in face of this latest threat.
d. November 29, 2020 Email from ODA Director Dorothy Pelanda to Governor DeWine. Dir. Pelanda (wrongly) believes that the project will not affect agriculture and, in any event, believes ODA can unilaterally extinguish the easement. "ODA could also extinguish the Renner/Bailey easement entirely or transfer the easement to a local land trust. This property was zoned heavy manufacturing and is not enrolled in an agricultural district. Given the location of the property, which is between Route 33 and Industrial Parkway in Marysville, it is likely to encounter continued pressure from surrounding development."
e. January 7, 2021 – Attorney Curliss writes to Sarah Huffman, then Executive Director of the Office of Farmland Preservation at the Ohio Department of Agriculture (Huffman) attempting to get ODA to oppose the project as contrary to the terms of the easement and a violation of their duty, as holder of a donated easement, to steward the easement.

f. January 20, 2021 – In a very brief letter, Huffman responds: "As previously conveyed to prior [landowner] counsel, Ryan Conklin, ODA does not have an objection with the easement on the condition that the protected property be retained predominantly in agricultural use." ODA does not oppose the filing of Columbia Gas at the Ohio Power Citing Board.

g. Mandamus action. This is a way in some states to force the state agency to "do its job" under the terms of the easement or under eminent domain law in your state. Does the easement require the holder to oppose the appropriation? Generally, a writ of mandamus is a statutory or common law remedy that allows a court to order government officials to perform their public duty under the law.

h. EXAMPLE: The Baileys originally also filed a mandamus action against ODA in Union County Common Pleas Court, later dismissed for strategic reasons. *State Ex Rel. Don Bailey, Trustee, Charles Renner, Patrick & Whitney Bailey v. Dorothy Pelanda, Ohio Department of Agriculture, Union County Commissioners*, 21 CV 0098 (filed Union Co. Common Pleas Court, July 12, 2021)– Given ODA's prior actions to enforce the easement terms, the idea was to obtain a court order mandating ODA to do the same now, to enforce the easement terms. Baileys dismissed to focus on the primary case.

VII. **Professional and Stewardship Considerations**

A. *Land Trust Standards and Practices*. Practice 11I (conservation easements) and 12E (fee lands) – Be aware of these professional standards:

1. S&P 11I – Condemnation of Conservation Easements
    a. If a conservation easement is threatened with condemnation,
    b. Take steps to avoid or mitigate harm to conservation values and document the actions taken;
    c. Have or obtain appropriate documentation of the percentage of the full value of the property represented by the conservation easement;
    d. Document the land trust's attempts to receive its proportional share of the proceeds in a manner consistent with the conservation deed.
2. S&P 12E – Condemnation of Fee Lands

a. If a conservation property is threatened with condemnation, take steps to avoid or mitigate harm to conservation values and document the actions taken.

B. Monitoring & Landowner Education –

1. Talk with landowners about contacting the land trust immediately if they
   a. get a communication from a "land agent" seeking a utility easement,
   b. get a communication from a County Engineer about a roadway widening,
   c. see a notice in the newspaper,
   d. hear gossip or
   e. see surveyors on their land.
2. Include some relevant questions on any monitoring survey for the landowner to complete, for example, have you received any communications in the past year about others interested in acquiring your land for public or utility purposes?
3. Contact your land trust attorney immediately. Your land trust attorney will need to connect with an attorney who practices eminent domain in your state. The land trust and landowner need advice from need an experienced eminent domain attorney (likely not the same one). Understand the process, time for filing comments, intervention, objections, and the implications for the land trust – staff time, expense.
4. Read the Easement – How strong is the language in protecting the conservation purposes? The easement language could be helpful, or not. Anyone with notice of a possible eminent domain action may have to provide notice to others – for example, if the landowner sees a land agent or surveyor on their land they may need to notify the land trust or other holder within a certain amount of time. For example, in ***Bailey***, we felt there was easement language that required the landowner to give notice to ODA of an adverse action about to happen even though ODA knew about the appropriation. Further, sometimes the landowner or land trust is not aware of what notice other interested parties have or have not received from the prospective appropriator.
5. Early Action - Intervene, Intervene, Intervene – The landowner and the holder of the easement would have a right to intervene, perhaps to be heard, at the administrative level and to be a party to the appropriation. At the administrative

level, the window to intervene might be narrow – 30 days even. Once you get notice of an administrative process related to the taking, make sure to register as an intervenor, to get notices, etc. Send your comments and concerns and position to the administrative body processing the Notice to Appropriate (or similar document).

6. Count the Costs. *Terrafirma does not cover defense costs for eminent domain*. This is one reason that land trusts need a legal defense fund. Even if the land trust is not involved in litigation related to the proposed taking, the land trust does need to respond and protect its rights at every stage – early and often. Reach out to interested parties, hire an eminent domain attorney, file an intervention in any administrative proceeding, exercise the rights the land trust has in the process, get ready to negotiate, be able to prove the value of the taking, maybe even in court. The land trust needs to be represented.

C. Does a government entity hold the Easement or Land (as a land trust co-holder or partner)? Attitudes toward enforcement will change over time, perhaps differing drastically from past administrations. Get used to disappointment. Many efforts were made on behalf of the Bailey family to get the state (ODA/Governor) to change their position, but all efforts were stonewalled or refused. No one knew how drastically the state had changed their "enforcement" or "defense" stance toward this easement, probably agricultural easements in general. Over time, the will to defend their easement had eroded.
   1. Landowners – In this particular case, the landowners felt that a charitable trust was established, even if not legally; they think and feel that the holders of the easement should be defending the easement and experience deep disappointment when they do not.
   2. Many landowners will not be able to support the costs of litigation to fight. Your members and supporters might think that some properties are worth a fight and that the land trust should do so.

D. Valuation – Lots to do here.
   1. If the appropriation does NOT go to court, then there will be NEGOTIATIONS. Be sure the land trust (and any co-holder) are a party to those.

2. The landowner will have questions (including the split of proceeds). Landowners are not pleased if the condemnation proceeds must be split with them and any state entity co-holder (the state entity who failed to protect the easement, in their eyes).
3. Land trust holders must also receive a portion of the proceeds. However, the land trust needs to know that the negotiations are happening (because the appropriators do not know or understand requirements like proportionate share).
4. Landowners may not realize the land trust needs to be involved in the negotiations or give you notice. Back to monitoring, the land trusts should keep up on the news (local, state, national) for pipeline or other projects that would affect protected properties. Board, staff, and supporters can help with this.
5. Appropriators want to keep things quiet until they file their accelerated petition for a taking.
6. The land trust should be prepared to negotiate (help the landowner negotiate) for the proportionate share per the easement language. There may be an opportunity to negotiate for other concessions to get some conservation value back in some other way – in terms of land, money, invasives removal, etc.
7. The land trust should have an appraisal in its files determining fair market values from the time of recording. Dig it out, determine the proportionate share, check with legal counsel. Even if the land trust does not fight the taking, it does have a significant and important role to play in the process to help with how to accurately value the taking (particularly a conservation easement) and what proportionate share should come to the holder(s) of the conservation easement, implications of easement language in this regard, federal tax law, etc. Notice that the Standards and Practice stress this task – valuation – not about evaluating the threatened take for a possible objection or defense.
8. Want to fight a low offer? Eminent domain proceedings are a two-step process
    a. first the necessity issue or other legal issues related to the validity of the taking are resolved by negotiation or court action, and then
    b. the compensation is determined, often by a jury. Evidence must be presented as to value. The landowner/holder can also go to court just on Step 2 – valuation – and state law probably provides a right to a jury trial on the issue of valuation.

c. So…the land trust will incur some costs to prove in court the value of the proportionate share, but it might be well worth it to prove the high value of this taking. Community members on the jury may agree.

E. Restoration, Removal of Equipment, Other Terms. There are likely other terms that the land trust can help with negotiating and should do so to protect the conservation values.

1. In ***Bailey,*** Columbia Gas had to include its Agricultural Impact Mitigation Plan in its appropriation application, which included language such as "if it's convenient" or "if it's possible" regarding restoration activities, and according to Bailey's agronomist expert, "falls far short of the specifics needed" and there is "room for improvement." ODA did not show any interest in providing comments or input regarding its terms.
2. What terms are needed to ensure quality restoration of the construction site? What rights will the appropriator have to affect the restoration (i.e., likely will have the right to make repairs and thus excavate in future), what about removal of all equipment if operation ever cease? What other terms could be negotiated in the taking?
3. In ***Bailey***, para. 7.1 of the Easement gave ODA the right to require the restoration of land damaged "to its condition at the date of the grant of this Easement," but ODA's intentional absence from the proceedings (unless subpoenaed) have made it clear from January 2021 that they had no intention of negotiating anything, including the standard of restoration, restoration costs, etc.

F. Amendment to Easement? Update Present Conditions Report? Assuming the terms of the taking are successfully negotiated, then the Easement may need to be amended to reflect changes, such as a restoration plan, that perhaps should now be in the easement.

1. Remember that amendments are reported to the IRS on the form 990.
2. The mitigation/restoration plan should be added as an update to the prior conditions report, and other information about the condemned area as well.
3. Will the state holder provide meaningful oversight/restoration work for compliance with the plan? Will that be left to the land trust to monitor?
4. Partial Extinguishment? Consideration should be given to whether it might be advantageous to have a partial extinguishment of the easement or to exclude the utility corridor from the Easement (redraw the boundary). Another idea would be partial extinguishment with a right of reverter in the event the corridor is not used for the

appropriated purpose. A court order may be needed for a partial extinguishment, perhaps amendment of the easement. If excluding the condemned area is desirable this might provide some advantages to the land trust and landowner, e.g., so many violations will be occurring in the condemned area excluding might relieve stewardship headaches.

VIII. **Final observations**

A. **What are the elements of a robust prior public use doctrine**? What features of a robust prior public use doctrine would protect the public interest in conserved lands?

1. State constitutional or statutory law. Constitutional or statutory language supporting the public purpose/public use of property protected by the easement or by public investment in the protected property (e.g., deed restrictions in favor of conservation in a fee simple purpose). Does your state enabling or other statute have language requiring a court to "liberally construe the easement or deed restrictions in favor of conservation"? Or does your state treat a conservation easement as legal fiction in the context of eminent domain?
2. Case law – Is there a prior public use doctrine in your state? How robust is it? Does it *exclude* the late-coming public use in favor of the existing public use? Does it give *priority* to conservation uses and purposes over other types of public uses? Does it give *priority* to commercial/industrial public uses? Does it require the Court to *balance* the interests of the public entities (or publicly empowered entities)?
3. Easement language – The language in the easement may provide grounds for arguments based upon contract law and principles or language that ties to statutes giving conservation priority. Is the easement language robust in its restrictions on typical uses sought by appropriators (e.g., no commercial or industrial uses or pipelines, no roads, no restrictions, no damage to prime soils). Does the easement say it is for a public purpose/public use, even if it should be obvious? Can the language of the easement be improved at the drafting stage to be more protective of the Conservation Values?

EXAMPLES OF EASEMENT LANGUAGE THAT MAY HELP DEFEND AN EASEMENT AGAINST APPROPRIATION OR HELP WITH A MORE COMPLETE RESTORATION

(NOTE: These examples are not approved by the Land Trust Alliance and are suggestions of the authors only for the purpose of stimulating ideas and discussion):

Public Purpose/Public Use. This easement was acquired by Holder in a sale, part-sale, part-donation or complete donation of value, as applicable, of a property right, to be held and protected in perpetuity, and this transaction is intended by the parties to serve the **public purpose** of permanently preserving the Protected Property and its associated Conservation Values. Though the Grantor retains the right to exclude the public from the Protected Property, the parties recognize that the preservation of the Conservation Values is a public purpose and public use of this easement and that this public purpose and public use was bargained for and paid for, in part or in whole, by a public investment in this easement either in the form of the purchase price, a federal tax deduction for the part-donation/donation of value related to the property rights restricted by this easement, or in the form of a state tax credit for the same restrictions.

Eminent Domain. The Grantor and Grantee agree that this Conservation Easement is entered into for a public purpose and provides significant public benefits, in perpetuity, by preserving the prime soils and agricultural use of the Protected Property and other public benefits specifically identified by the State of Ohio and the United States related to the preservation of open space. As such, this Conservation Easement represents a prior public use of the Protected Property. The Grantor intends, to the extent allowed by law, to claim the benefit of any tax deduction allowed pursuant to 26 U.S.C. 170(h) for a qualified conservation contribution made for the benefit of the public**.** It is the intent of this Grant to convey to Grantee, its successors and assigns, such an interest in the Protected Property as is sufficient to discourage the exercise of the power of eminent domain by public utility and any other body or person. If all or any part of the Protected Property is taken, whether such taking involves the fee simple interest or a lesser interest, under the power of eminent domain by public, corporate, or other authority, or otherwise acquired by such authority through a purchase in lieu of a taking, Grantor and Grantee shall join in appropriate proceedings at the time of such taking to recover the full value of the interests in the Protected Property subject to the taking and all incidental or direct

damages resulting from the taking. All expenses reasonably incurred by Grantor and Grantee in connection with such taking shall be paid out of the recovered proceeds. Grantor and Grantee shall be respectively entitled to compensation from the balance of the recovered proceeds in conformity with the provisions of subparagraph 15(a) (with respect to the allocation of proceeds). Such allocation shall be absolute and shall not take into account or be modified based on the relative impact of the taking on the respective interests of the parties. The respective rights of Grantor and Grantee set forth in this paragraph 16 shall be in addition to, and not in limitation of, any rights they may have at common law.

Duty to Defend Against Appropriation. If a proposed appropriation would partially or completely harm one or more Conservation Values of the easement, or if the proposed use is one that is explicitly prohibited by the easement, the Holder shall take reasonable actions to oppose the appropriation including, but not limited to, at 1) making a good faith and independent investigation of the harm to the conservation purposes of the proposed appropriation, and 2) asserting all defenses of the Conservation Values and easement language in all forums where the appropriation will be adjudicated (administrative and judicial). The Holder shall be the sole party responsible for determining whether the proposed appropriation harms one or more Conservation Values. The Holder, and not Grantor, is responsible for any costs associated with defending against an appropriation.

Restoration. In the event of an unsuccessful defense of this easement from appropriation, the appropriator shall be required to fully restore the Protected Property and its Conservation Values to standards determined by the Holder in Holder's sole discretion. Holder has the right to review the restoration plan at every stage of review of the appropriation, to provide restoration standards to the appropriator and any decision making entities, to require that the appropriator pay all costs associated with the restoration, and to take all other actions to effectuate the restoration of the Conservation Values in the same or similar manner as the Holder would in the event of an easement violation by a third party that harms the Conservation Values of the Protected Property.

APPENDIX A

SUMMARY OF U.S. CASES ON THE PRIOR PUBLIC USE DOCTRINCE/ARGUMENT

Prior Public Use Doctrine: A common law doctrine that generally 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. In some states, the prior use of land for some other purpose (e.g., farmland) may exempt that land from a subsequent public use by statute. This summary is of cases only and does not include a review of state statutes that may impact the prior public use doctrine or provide a statutory argument why a prior public use does or does not prevent eminent domain, [1] including any legal protection that may be provided by state enabling statutes. See *A Guided Tour of Conservation Easement Enabling Statutes*. *Source: Rob Levin, Case Law Summaries.*

ILLINOIS

Town of Libertyville v. Bank of Waukegan, 152 Ill.App.3d 1066 (Ill. App. Ct. 2 Dist. 1987). Town of Libertyville sought a conservation easement on farmland pursuant to the Illinois Township Open Space Act. The Act authorized such a taking for open space but exempted farmland. Landowner challenged the taking of the easement on the farmland. Town argued that it was taking only the right to develop in the future and that the Act applied only to fee takings. The trial court ruled that the Act applied not only to a fee taking but lesser takings such as a conservation easement. The appellate court agreed.

KENTUCKY

A conservation easement . . . . shall not operate to impair or restrict any right or power of eminent domain created by statute, and all such rights and powers shall be exercisable ***as if the***

[1] E.g., in California, where one public agency seeks to condemn the land of another, a court would decide which of the public land uses is the "best and most necessary" public use. Pub. Resources Law §5540 *et seq*. creates a presumption that open-space use is the best and most necessary, a rebuttable presumption.

conservation easement did not exist. **Ky. Rev. Stat. § 382.850.** Commonwealth of Kentucky v. Louisville Gas & elec. Co., No. 2020.-CA-0882-MR, 648 S.W.3d 76 (Ky. App. April. 22, 2022), discretionary review denied (Aug. 10, 2022); Isacc W. Bernheim Found. V. Louisville Gas & Elec**.** Co., No. 2023-CA-0458-MR, 2024 Ky. App. LEXIS 38, ____ Ky. ____ (Ky. App. April 19, 2024) (holding that a state-held conservation easement did not prevent a subsequent taking due to legal fiction that, in the context of eminent domain, the easement was deemed not to exist). Unpublished opinion: *Crain v. Hardin Cty. Water Dist. No. 2*, No. 2015-cA-000-499-MR, 2016 Ky. App. Unpub. LEXIS 416 (Ct. App. Ky. June 17, 2016). Agricultural easement purchased by Kentucky Department of Agriculture with federal funds. Hardin County exercised eminent domain for a local sewer line easement, landowner objected on ground that the state-held easement was a prior public use. Neither KDOA or USDA objected. Trial court ruled that the agricultural easement did not prevent the taking, appellate court affirmed. "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." – Rob Levin[2]

MAINE

Mabee v. Nordic Aquafarms, Inc., 2023 ME 15 (Maine 2023) (Active). 2018 Nordic Aquafarms launched plans to build a $500 million land-based salmon farm in City of Belfast using water piped to and from Penobscot Bay. Adjacent upland LO claimed the intertidal zone and that land was restricted to residential use. LO donated an easement on the intertidal land to a newly formed group who conveyed it to another newly formed group. Maine's enabling statute required court approval to terminate the easement. Trial court ruled in favor of Nordic/the City, but Maine S.Ct. reversed Feb. 2023. S.Ct. upheld LO interest, upheld restrictive covenant and the validity of the easement. Case where conservation easement was used to ward off eminent domain.

[2] Commentary by Rob Levin, Esq. taken from his summary of Non-Federal Cases found in the Resource Center at www.lta.org (membership required to access).

MASSACHUSETTS

Tennessee Gas Pipeline Co. ("TPG"), LLC v. Commonwealth of Massachusetts, 2016 Super. Ct. Mass Berkshire Cnty. An interstate natural gas pipeline built by TPG was to cross a 2+ mile stretch of state forest land. TPG had the permission of FERC to do the project and sought to take a pipeline easement from Massachusetts across Otis State Forest. Pursuant to Article 97 of the Massachusetts Constitution, no state agency or municipality can transfer any interest in conservation land for a non-conservation purpose unless authorized by a supermajority vote of the Massachusetts Legislature A bill had been introduced to allow the pipeline easement, but not brought to vote. TPG filed for eminent domain after failed negotiations with the state (and no vote on the bill). TPG argued federal pre-emption, to which Massachusetts responded that Article 97 was a "unique constitutional provision" and should control, being exempt from pre-emption. The trial court held that the federal Natural Gas Act did preempt Article 97. No appellate decision. Rob Levin notes that Article 97 (and heavy local opposition) may be having some effect in dissuading companies with similar projects from considering a route across state land.

OHIO

Columbia Gas of Ohio, Inc. vs. Don Bailey, Jr., Successor Trustee of the Arno Renner Trust, et al. Case No. 14-22—12 and -13 (Third District Ct. App. 4.17.23), appeal from the Union County (Ohio) Common Pleas Court, Trial Court Nos. 21-CV-00112 and -0113 (4.6.22) (collectively, "Bailey"). Ohio's prior public use doctrine provides that when a condemner, to which the power of eminent domain is given by law, seeks to exercise its power with respect to property already devoted to public use, its action may be enjoined if the proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction, unless the law has authorized the acquisition either expressly or by necessary implication. See *Blue Ash v. Cincinnati*, 173 Ohio St. 345, 351 (1962) and *City of Worthington v. City of Columbus*, 100 Ohio St.3d 103, 2003-Ohio-5099, ¶ 19 (addressing "that the prior public use doctrine arose as the result of interpretation of statutes vesting municipalities and other public entities with the power of eminent domain"). The Bailey farms were protected by an agricultural easement

donated to the Ohio Department of Agriculture (ODA). The plain language of the easement prohibits non-farm utility lines and the granting of easements for the same. Columbia Gas sought and received a certificate of need to appropriate from the Ohio Power Siting Board.

After a trial court hearing on the issue of necessity for the taking, the court determined that there was no necessity for the appropriation of 13 acres of the Bailey's land as part of a 4.8 mile long high pressure commercial gas pipeline project. The court based it's decision on "bad faith" by Columbia Gas in its representations during the process and that a so-called "temporary" construction easement was really perpetual. The Baileys had also raised the issue the Columbia Gas's right to appropriate based upon the *prior public use*, the fact that their land was preserved farmland because of the state-held ag easement. The trial court rejected the Bailey's prior public use argument, but the appellate court reversed and remanded on the issue of prior public use and the right to take. Upon remand, Columbia Gas dismissed the case. Columbia Gas did seek and received from the Ohio Power Siting Board a 3-yr extension on the time period required for it to begin a continuous course of construction on the pipeline, which said extension expires in June 2026.

City of Sidney v. Spring Creek Corp., 2017-Ohio-8785 (3rd Dist. Ohio App. Ct. Dec. 4, 2017)

Intergovernmental struggle over a water resource. Use first by Washington Township. Twp. Acquired a purported "conservation easement" in 2013 over the parcels, but the easement allowed mining operations (and destruction of surface) to continue as long as the acquifer was unaffected. Twp's motivation was to prevent City from taking the 237-acres through eminent domain (e.g. PRIOR PUBLIC USE DOCTRINE IN OHIO – though this is not mentioned in the case!). The City then filed an eminent domain action, arguing that the easement was not valid in that it did not meet the requirements of Ohio's enabling statute. Trial court invalidated the easement as "void as a matter of public policy." On appeal, one of the Township's arguments was that Ohio law favored conservation easements over eminent domain (no citation). Id at ¶6. The Appellate court agreed because the enabling statute requires that the surface be protected. The Township did not make an argument in the alternative, namely, that 1) if the conservation easement is invalidated as a 5301.67 conservation easement, it is 2) still an easement and

granted to a public entity for a public purpose (protection of the aquifer from mining operations. Therefore, as such, it is prior public use and the City cannot now seek to take this land from the township given that 1) the Township uses the aquifer as its water supply and 2) has taken legal action to protect it given the mining operation. Rob Levin observed: "The purported conservation easement was used as a shield by the Township against eminent domain, because although the City had the right to take the private property of Spring Creek, it did not have the right to condemn the Township's interest in the easement. Thus the City's strategy was to invalidate the easement, which then paved the way for its taking action against Spring Creek."

NEW JERSEY

NJ Supreme Court held that even though the prior public use doctrine is inapplicable due to defendant's status as a private nonprofit corporation, defendant's devotion of the property to conservation purposes heightens the condemnor's obligation to show that the condemnation was not arbitrary. Texas Eastern Transmission Corp. v. Wildlife Preserves, 225 A.2d 130 (N.J. 1966), 230 A.2d 505 (N.J. 1967).

Mount Laurel Twp v. Mipro Homes, 379 N.J. Super. 358 (N.J. Super. Ct. App. Div. 2005)Town wanted to condemn property for use a open space using funds voted for such purpose. Property sought to be taken was currently held by a developer for high-end housing. While not explicitly a "prior public use" case, the trial court indicated that it would have ruled differently had the prior use been some compelling public purpose such as the original plan to use the condemned property for low-income housing.

NEW YORK

Matter of City of New York v Yonkers Indus. Dev. Agency, 2019 NY Slip Op 02087, Second Dept 3-20-19. Under the doctrine of prior public use, land already devoted to a public use may not be condemned absent legislative authority for the particular acquisition at issue … . However, land

already devoted to a public use may be condemned without legislative authority " where the new use would not materially interfere with the initial use'."

VERMONT

In re Vermont Gas Systems, Inc., 2017 VT 83 (Vt 2017). Vermont Gas Systems, Inc. (VGS) petitioned the Vermont Public Services Board (Board) for initial approval of a 41-mile subsurface natural gas pipeline expansion, part of which crossed an 85 acre park in Hinesburg, VT. Park was donated to the town for park and recreation purposes, restrictive covenant. In 2013, the Board had determined that allowing the appropriation of a 50-ft wide gas pipeline easement would not impose "undue negative consequences" on the land (and commented on the benefits of the project). Residents intervened arguing, inter alia, that the prior public use doctrine barred the condemnation. Vermont's law allowed for condemnation if the subsequent public use did not "materially interfere " with the prior public use. HELD: That the prior public use doctrine did not apply when the proposed second use of land does not materially interfere with the prior public use. Park land did not get special protection in this analysis. S.Ct. gave deference to the reasonable determinations of the Board. Finally, the Court held that the restrictive covenant in the deed from the donor did not limit the State's eminent domain authority. Dissent: the pipeline easement does materially impair the public use of the Park because of the control VGS would have over the surface estate, and emphasized the donor's intent, restrictive covenant. The prior public use doctrine provides that property already appropriated for a public use may not be condemned for another public use in the absence of express or implied legislative authority. *See Vt. Hydro-Elec. Corp. v. Dunn*, 95 Vt. 144, 149, 112 A. 223, 225 (1921); *Rutland-Canadian R.R. v. Cent. Vt. Ry. Co*., 72 Vt. 128, 133, 47 A. 399, 400 (1900).

OTHER CASES RELATED TO PRIOR PUBLIC USE DOCTRINE/ARGUMENTS

CALIFORNIA

Johnson v. Sonoma County Agricultural Preservation and Open Space District, 123 Cal. Rptr. 2nd 226 (Cal. App. 2002). The Sonoma Cty Ag Preservation and Open Space District ("District") held a "forever wild" easement on 1400 acres of Mayacamas Mountain Sanctuary, owned by real

party in interest, the National Audubon Society. Pub. Resources Code sec. 5540 (§ 5540) required legislation or voter approval for transfer of interest in protected District lands. In 1998, the City of Santa Rosa ("City") threatened condemnation for a 40-mile long water reclamation pipeline project. Negotiations went on for 3 years as the District and Audubon viewed the taking as inevitable and were able to extract significant additional conservation benefits/protections and $1.3 million paid to Audubon for use in the preserve. Audubon joined the City's request.

A dissatisfied landowner in the county (non-party) filed suit, first a Petition for a Writ of Mandate against the District arguing that Pub. Resources Code § 5540 required voter or legislative approval of preserved property. Trial court denied the Petition finding § 5540 inapplicable to this disputed conveyance. The appellate court affirm holding that § 5540 applies only to *voluntary* transfers of real property interest, not *involuntary* transfers, and that the negotiated resolution was based upon a credible and imminent threat of the City's exercise of its eminent domain power. The common law prior public use doctrine/argument was not raised.

NEW JERSEY

Twp. Of Readington v. Solberg Aviation Co., No. A-3964-15T4, 2019 WL 994105 (N.J. Super. Ct. App. Div. March 1, 2019) (Unpublished). Case stands for the proposition that condemning authorities must avoid "bad faith" and be "forthright in justifying their reasons for a taking, and that a purported open space rationale can be rejected under the right circumstances." – Rob Levin.

PENNSYLVANIA

Reading Area Water Authority v. Schuylkill River Greenway Ass'n, 100 3rd 572 (Pa). Prior public use not argued, but conservation easement prevented the use of a water/sewer easement taken by a public water authority (RAWA) for sewer where half the easement was for a sewer line benefiting only a private development pursuant to Pennsylvania's Property Rights Protection Act (PRPA).

(8) EMINENT DOMAIN AND EXACTION
Summaries by Rob Levin
for Land Trust Alliance

CASES

- Commonwealth of Kentucky v. Louisville Gas & Elec. Co., No. 2020-CA-0882-MR, 648 S.W. 3d 76 (Ky. App. Apr. 22, 2022), discretionary review denied (Aug. 10, 2022); Isaac W. Bernheim Found. V. Louisville Gas & Elec. Co., No. 2023-CA-0458-MR, 2024 Ky. App. LEXIS 38, --- Ky. --- (Ky. App. April 19, 2024)
  - State: Kentucky
  - Procedural Status: Case concluded.
  - Date: 2024
  - Keywords: Eminent domain; enabling statute; prior public use doctrine; public conservation easement; res judicata; state conservation easement; sovereign immunity; Uniform Conservation Easement Act; utility easement.
  - Summary of Facts and Issues: In 2018, the Isaac W. Bernheim Foundation (the Foundation) purchased 494 acres in Bullitt County with grant funding from the Kentucky Heritage Land Conservation Fund Board (Board), a state agency. As a condition of the grant, the Foundation conveyed a conservation easement to the Board. One year later, Louisville Gas & Electric (LG&E) filed an eminent domain action against the Foundation and the Board to acquire a portion of the protected property for an underground natural gas pipeline. The Board filed a motion to dismiss the action based on the sovereign immunity and prior public use doctrines, claiming that the utility company's eminent domain authority did not supersede the state's conservation easement interest. Kentucky's conservation easement enabling statute mostly follows the Uniform Conservation Easement Act, except insofar as it includes an unconventional provision (§ 382.850(2)) stating that a conservation easement "shall not operate to impair or restrict any right or power of eminent domain created by statute, and all such rights and powers shall be exercisable as if the conservation easement did not exist."

- Holding(s): The intermediate appellate court held that § 382.850(2) constituted a statutory waiver of sovereign immunity. The court reasoned that "By employing the legal fiction that a conservation easement does not exist upon the exercise of a statutory power of eminent domain, the General Assembly expressed its intention that a conservation easement held by a governmental entity is subject to the exercise of any statutory power of eminent domain." Next, the court found that even though LG&E generally did not have eminent domain authority over state real property interests, because the conservation easement was deemed not to exist, then its eminent domain authority against the private landowner was exercisable. Finally, the court held that the prior public use doctrine was inapplicable based on the same statutory provision: "If it is assumed that the Board's conservation easement does not exist, then there is no prior public use to impede the exercise of LG&E's right of eminent domain."
    - July 2024 Update: In an April 2024 opinion addressing the Foundation's appeal, the same intermediate appellate court largely reiterated its April 2022 ruling.
- Analysis and Notes: According to *A Guided Tour of the Conservation Easement Enabling Statutes*, twelve other states have enabling statutes with similar language to Kentucky's. That said, Kentucky's statutory formulation is uniquely robust in stating that all eminent domain powers are exercisable "as if the conservation easement did not exist."

- Columbia Gas of Ohio, Inc. v. Bailey, 2023-Ohio-1245 (Ct. App. Ohio, 3rd App. Dist. April 17, 2023)
    - State: Ohio
    - Procedural Status: Case active.
    - Date: 2023
    - Keywords: Bad faith; eminent domain; enabling statute; prior public use; public conservation easement; state conservation easement.
    - Summary of Facts and Issues: Columbia Gas of Ohio (Columbia) sought to build a 4.78-mile gas pipeline in Union County, Ohio. In its eminent domain filings, Columbia described the easement as having a 50-foot-wide perpetual easement, as well as a 25-foot-wide "temporary perpetual" construction easement. At trial Columbia conceded that the additional 25 feet of taking was essentially perpetual, as it entailed the right to maintain that area in perpetuity. The proposed pipeline route crossed a property that was protected by an agricultural easement granted in 2003 to the Ohio Department of Agriculture ("ODA"). The ODA staff concluded that the pipeline easement did not violate the conservation easement and did not oppose the eminent domain action. These actions were inconsistent with how ODA responded to previous requests regarding non-gas utility crossing of easement-protected lands. However, the owners of the protected farm did oppose the taking by invoking the prior public use doctrine, claiming that the agricultural easement devoted the property to a prior public use. At trial, the landowners proffered the testimony of the former director of ODA that the pipeline would indeed be destructive of the agricultural uses of the property.

- Holding: The trial court ruled for the landowners in certain respects on technical and procedural grounds, finding that Columbia Gas acted in bad faith by minimizing the import of the additional 25-foot taking. But the trial court also found that the agricultural easement did not prevent the eminent domain action, and did not even entertain the prior public use argument. The appellate court reversed on this last issue, finding that the prior public use doctrine did apply, and remanding to the trial court for a determination of whether the pipeline easement would destroy the agricultural uses of the property.
- Analysis and Notes: This is a significant victory for the Ohio conservation community. The appellate court's framing of the issues and recitation of evidence suggests that it's a very good bet that the trial court will have to find that the pipeline is destructive of the agricultural uses. Much of the trial testimony is rather embarrassing to ODA, reflecting how it did not want to wade into the details of this proposed taking and sought to avoid opposing the utility.

- Mabee v. Nordic Aquafarms, Inc., 2023 ME 15 (Maine 2023)
  - State: Maine
  - Procedural Status: Case active.
  - Date: 2023
  - Keywords: Attorney general; eminent domain; enabling statute; intervention; neighbor; private conservation easement; restrictive covenant; sovereign immunity; termination; title.
  - Summary of Facts and Issues: In 2018, Nordic Aquafarms (Nordic) launched plans to build a $500 million land-based salmon farm in the City of Belfast, using water piped to and from Penobscot Bay. Nordic purchased a shoreland parcel and gave it to the City for use as a park in exchange for a permanent easement for its pipe system. As part of a broader deal between Nordic and the City, the City would have the right to extend a public trail along the shore, and the Belfast Water District would enjoy an increased revenue stream. In response to the salmon farm threat, in 2019 Jeffrey Mabee, who owned a nearby upland parcel, claimed ownership of the intertidal zone fronting the former Nordic parcel. Mabee's ownership claim stemmed from a 1946 deed that identified the relevant boundary as the "high water mark of Penobscot Bay" and did not include a customary reference to include the intertidal land. Mabee donated a conservation easement on the intertidal land, including where the proposed pipe was to be located. The conservation easement was originally conveyed to an organization called Upstream Watch, and was later assigned to the Friends of the Harriet L. Hartley Conservation Area. Neither organization held any other fee lands or conservation easements and both appear to have been formed expressly in opposition to the salmon farm proposal. In addition, Mabee claimed enforcement rights in a restrictive covenant included in the same 1946 deed, which limited the parcel to "residential purposes only." Mabee filed suit against Nordic and the City, seeking a declaratory judgment that he owned the disputed intertidal area and injunctive relief to enforce the conservation easement and the restrictive covenant. Countering Mabee's ownership claims and conservation easement, in August 2021 the City brought an eminent domain proceeding in the intertidal

land, to secure the right to place the pipe. Meanwhile, the Maine Attorney General intervened in the suit to state, seeking a declaratory judgment that if Mabee were found to have an ownership interest in the intertidal land and the conservation easement was a valid instrument, that the City is prohibited from unilaterally terminating the easement through an ordinary eminent domain process, and that court approval would be required for any termination, in accordance with Maine's conservation easement enabling statute.

- Holding: In October 2021, the trial court ruled in favor of Nordic and the City, finding that Mabee did not own any interest in the disputed intertidal area. But the Maine Supreme Court reversed in February 2023. The Supreme Court found several details from the 1946 deed, especially when compared to subsequent deeds with differing language, that suggested the intent of the parties was for Mabee's predecessor to retain the intertidal land. The Supreme Court also upheld Mabee's enforcement of the restrictive covenant, finding that a restriction to residential uses was reasonable and furthered the original intent of the parties. Finally, the Supreme Court acknowledged the validity of the conservation easement but declined to order injunctive relief, finding no evidence that a violation would occur in the future.
- Analysis and Notes: This case presents a rare instance of a conservation easement being used to ward off a specific development threat. Another unusual feature of this case is that the easement protects only intertidal land, and not any upland. In any event, in the wake of the Supreme Court's reversal, the obstacles facing the City and Nordic have multiplied, and they will have to decide whether the project remains viable. Among other challenges, the lack of ownership means a State-issued lease is probably in jeopardy. From a land conservation perspective, the City's eminent domain action to terminate the conservation easement, and the Attorney General's position insisting on court approval, raise interesting questions about the interplay between the state's eminent domain law and the conservation easement enabling statute. If Nordic backs down and withdraws its application then those issues will remain unresolved. But it is significant that the Maine Attorney General has taken a formal position in a court filing that terminating a conservation easement through eminent domain requires court approval under the enabling statute, just like any other form of termination.

- Montgomery Cnty. Transportation Authority v. 106 Dekalb, Inc. 2021 WL 1541525 (Pa. Commw. Ct. Apr. 20, 2021)
  - State: Pennsylvania
  - Procedural Status: Case active.
  - Date: 2021
  - Keywords: Eminent domain; public access; recreation; trail.
  - Summary of Facts and Issues: The Montgomery County Transportation Authority (MCTA) undertook an eminent domain process to build a 3.8-mile extension of the Chester Valley Trail, used for biking, jogging, and walking. A portion of the trail would run through a property in Bridgeport Borough. The landowner filed suit against MCTA, challenging the condemnation on a number of procedural and substantive grounds. In particular, the plaintiff claimed that MCTA did not

properly consider safety for individuals using the trail and for the greater community.
    - Holding(s): The trial court found that MCTA had adequately considered safety issues in choosing the route of the trail, and the appellate court affirmed, finding no abuse of discretion by MCTA.
    - Analysis and Notes: There's nothing particularly exciting or groundbreaking in this case, but it is included to show another example of how landowners will oppose recreational trails using all sorts of creative arguments.

- Mountain Valley Pipeline LLC v. 23.74 Acres of Land, No. 7:18-cv-608, 2020 WL 1609510 (W.D. Va. March 31, 2020)
    - State: Virginia
    - Procedural Status: Case active.
    - Date: 2020
    - Keywords: Eminent domain; just compensation; private conservation easement; temporary easement; termination proceeds; utility easement.
    - Summary of Facts and Issues: Mountain Valley Pipeline (MVP) sought to construct an interstate natural gas pipeline and commenced a condemnation action under the federal Natural Gas Act. MVP aimed to acquire a permanent easement on 8 acres and temporary easements on 16 acres of property in Roanoke County owned by Mark Cronk. The Nature Conservancy (TNC) held a 900-acre conservation easement on Cronk's land, which included the condemned property. In 2018, the court entered an order granting MVP immediate possession of its easement. Subsequently, TNC filed for summary judgment on the proper allocation of the condemnation award between TNC and Cronk. The conservation easement had been donated to TNC by a previous landowner in 1996. The easement contained a standard termination proceeds provision based on the proportionate value of the easement compared to the land's before value, consistent with Treasury Regulation §1.170A-14(g)(6). In addition, the easement included a separate provision addressing eminent domain, which called for a division of any proceeds based on the proportionate value whenever a condemnation "abrogated" the easement's restrictions. A 1996 appraisal for deduction purposes found a before value of $930,800 and an after value of $105,000, for an easement value of $825,800, or a proportionate value of 88.72%. Cronk agreed to the 88.72% allocation to TNC for the eight acres subject to the permanent easement, but not for the 16 acres subject to the temporary easements. TNC claimed that the temporary easements temporarily "abrogated" the conservation easement in the affected area, thus triggering the eminent domain provision. In contrast, Cronk argued that the temporary easements merely "adversely affected" the conservation easement, which fell short of an "abrogation."
    - Holding(s): The court granted summary judgment to TNC on the eight acres subject to the permanent easement, which was not contested by Cronk. However, the court denied summary judgment with respect to the temporary easements, noting that the parties had not presented evidence as to which specific restrictions in the easement were "abrogated" or "adversely affected." Thus, a genuine issue

of material fact remained on the question of whether the temporary easements abrogated the conservation easement. The court looked to a legal dictionary for a definition of "abrogate," finding that it requires an action that effectively destroys or cancels a right—not just adversely affects it. And read in context with the termination provision, the court found that "abrogate" means to make the restrictions of the easement impossible or impractical for its purposes.
    - Analysis and Notes: This case is the first time that a court has considered how the termination proceeds provision might apply to a temporary taking. Although the ultimate issue remains unresolved by the decision, easement drafter might want to consider refining their termination proceeds and eminent domain provisions to address how they will apply to temporary takings, to avoid this kind of dispute.

- 968 Franklin Manor LLC v. Anne Arundel Cnty. Office of Planning & Zoning, No. CCB-20-1250, 2020 WL 6585950 (D. Md. Nov. 9, 2020)
    - State: Maryland
    - Procedural Status: Case concluded.
    - Date: 2020
    - Keywords: Eminent domain; exaction; municipal conservation easement; public conservation easement; recording; termination; zoning.
    - Summary of Facts and Issues: In 2005, a previous landowner granted a conservation easement to Anne Arundel County in connection with a proposed senior housing development project. The project never came to fruition, and eventually 968 Franklin Manor LLC (Franklin Manor) purchased the protected property. Franklin Manor unsuccessfully sought the County's rescission of the easement, and then filed federal and state takings claims in state court. The County removed to federal court.
    - Holding: The District Court granted the County's motion to dismiss on the federal takings claim, relying on existing precedent that a government's inaction (in this case, the failure to terminate the conservation easement) does not constitute a taking of property. The District Court then remanded the case back to state court to address the remaining state claims.
    - Analysis and Notes: This suit seemed like a long shot at best. The Court rightfully noted that Franklin Manor purchased the property with at least record notice of the conservation easement.

- Manatee County v. Mandarin Development, Inc., 301 So.3d 372, No. 2D18-4053 (Dist. Ct. App. Fl. 2d Dist. March 18, 2020)
    - State: Florida
    - Procedural Status: Case concluded.
    - Date: 2020
    - Keywords: County conservation easement; eminent domain; exaction; public conservation easement; statute of limitations; wetlands.
    - Summary of Facts and Issues: Pursuant to state statutes, in 1990 Manatee County adopted a Comprehensive Plan and a Land Development Code that contained various wetland protection provisions. The Comprehensive Plan required property owners to set aside and maintain certain buffer areas around all identified

wetlands, depending on the classification of the wetlands. In addition, the Land Development Code required that, as a condition of any property development, the property owner dedicate a conservation easement to the County over any identified wetland buffers. In 2007, a developer obtained approval of a 126-unit subdivision on a 41-acre parcel. The parcel contained wetlands that comprised approximately three acres. As a condition of approval, the County identified 9.6 acres of wetlands buffers and required the dedication of a conservation easement over the buffers. An interim landowner amended the subdivision plan in 2010, scaling it back to 86 units, but did not request any changes to the wetlands buffers. Mandarin Development (Mandarin) subsequently purchased the parcel and commenced development. In 2012, Mandarin requested a variance to the wetland buffers and when this was denied requested compensation, claiming that the conservation easement was an impermissible taking. Then Mandarin filed suit against the County, claiming that the Comprehensive Plan and Land Development Code were facially unconstitutional under the doctrine of unconstitutional conditions and that they were uncompensated takings.

- Holding: After a bench trial, the trial court found that the challenged provisions of the Comprehensive Plan and most of the challenged provisions of the Land Development Code were not facially unconstitutional; however, it determined that one section of the Land Development Code did violate the doctrine of unconstitutional conditions. The trial court also found in favor of Mandarin on the County's liability under the takings claim, and it scheduled a jury trial on the issue of the compensation due Mandarin for the taking. Shortly thereafter, Mandarin and the County reached an agreement on the value of the takings claim. The County appealed. Without discussion, the appellate court rejected the County's arguments concerning Mandarin's takings claim. However, the appellate court agreed with the County that the statute of limitations barred Mandarin's claim based on the alleged unconstitutionality of the Land Development Code.
- Analysis and Notes: None.

- Welty v. United States, 926 F.3d 1319, 2019 WL 2479594 (Fed. Cir. June 14, 2019)(Welty II), aff'g 135 Fed.Cl. 538 (Fed. Cl. Dec. 8, 2017)(Welty I)
  - State: Missouri
  - Procedural Status: Case concluded.
  - Date: 2019
  - Keywords: Agency; Conservation Reserve Program; eminent domain; federal conservation easement; flooding; public conservation easement; statute of limitations; surface alterations; wetlands.
  - Summary of Facts and Issues: Terry Givens purchased a farm in Cape Girardeau County in 1998 and subsequently enrolled the property in the Conservation Reserve Program (CRP). Under the CRP, landowners enter into contracts to remove environmentally sensitive land from agricultural production and manage it in accordance with an approved conservation plan. In 2014, neighboring landowners (Welty) filed suit against Givens in Missouri state court, alleging that the levee system that Givens had built pursuant to the CRP had resulted in periodic flooding on Welty's farm. By 2019 both a trial court and an appellate

court had dismissed the state court action. Meanwhile, in 2016 Welty filed an inverse condemnation suit in the U.S. Court of Federal Claims.
    - Holding(s): The Court of Federal Claims dismissed Welty's suit on a 12(b)(6) motion for failure to state a claim, and Welty appealed. The appellate court affirmed, finding that Given's participation in the CRP and his decision to construct the levees was voluntary and thus there was no taking. Givens did not act as an agent of the United States and was not coerced into the CRP by virtue of the monetary consideration offered for participation.
    - Analysis and Notes: For another case in which a landowner filed suit against a neighbor for flooding allegedly due to a federal conservation easement, see Schwent v. United States, No. C16-5708 BHS (W.D. Wash. Oct. 19, 2017), above in Standing section.

- Twp. of Readington v. Solberg Aviation Co., No. A-3964-15T4, 2019 WL 994105 (N.J. Super. Ct. App. Div. March 1, 2019)(Unpublished)
    - State: New Jersey
    - Procedural Status: Case concluded.
    - Date: 2019
    - Keywords: Arbitrary and capricious; bad faith; eminent domain; open space; public purpose.
    - Summary of Facts and Issues: The Solberg Aviation Company (Solberg) owned a 726-acre airport property in Readington Township. The property contained a 102-acre facilities area that included the runways, hangars, and a terminal building. The bulk of the property was composed of farmland, forest and wetlands. As early as the late 1960's, the Township opposed efforts to expand the airport. This opposition culminated in a referendum and resulting condemnation action brought by the Township in 2006 to acquire the development rights in the 102-acre facilities area and the fee interest in the 624-acre balance of the property for a purchase price of $21.4 million. The stated reasons for the condemnation were to protect open space. Solberg challenged the condemnation in court.
    - Holding(s): The trial court initially granted summary judgment for the Township. But the Appellate Division reversed and remanded for a trial. The trial court then held a trial and found for Solberg, ruling that the open space rationale was a pretext for the Township's true purpose of limiting the airport's economic viability and expansion. The Township appealed. The second time around, the Appellate Division affirmed the trial court. Although the appellate court noted that open space is a perfectly valid reason to exercise eminent domain authority (citing Mount Laurel Twp. v. Mipro Homes, 379 N.J. Super. 358 (N.J. Super. Ct. App. Div. 2005), in this case it was a bad faith excuse for the true purpose of opposing the airport. The appellate court issued its decision without prejudice to the Township's ability to pursue a future eminent domain action concerning portions of the Solberg parcel that was suitable in scope and not tainted by bad faith motives.
    - Analysis and Notes: This case demonstrates that condemning authorities must be forthright in justifying their reasons for a taking, and that a purported open space rationale can be rejected under the right circumstances.

- Campbell v. Village of Deforest, 2018 WI App 8 (Ct. App. Wis. Dec. 14, 2017)(Unpublished)
  - State: Wisconsin
  - Procedural Status: Case concluded.
  - Date: 2017
  - Keywords: Eminent domain; municipal conservation easement; overburden; public conservation easement; trail; scope of easement; trail easement; vagueness.
  - Summary of Facts and Issues: In 1993, the Sunnybrook subdivision was approved by the Village of Deforest. The recorded subdivision plat included a public pedestrian and bicycle easement held by the Village along the bank of the Yahara River, crossing several of the lots. The full text of this easement, as included on the plat and not elaborated upon elsewhere, was "30' Wide Public Pedestrian and Bicycle Easement." In 1999, Angela Campbell purchased one of the burdened lots, with notice of the public easement and the potential for a trail to be built in the future. In 2015, the Village constructed a boardwalk on the easement. The boardwalk was approximately ten feet wide with railings that are 54 inches tall on either side. The boardwalk is part of the Upper Yahara River Trail, a complex over three miles long which goes through the Village. Campbell filed a petition for an inverse condemnation proceeding, seeking compensation from the Village for its construction of the boardwalk. After a bench trial, the circuit court found that the boardwalk created a barrier across Campbell's property that effectively excluded her from using the thirty-foot strip of her property subject to the easement. However, the circuit court also determined that the terms of the easement were very broad, and that the Village's design and construction of the boardwalk were reasonably necessary to fulfill the purpose of the easement. Consequently, the circuit court concluded that the Village was acting within its rights pursuant to the terms of the easement in constructing the boardwalk and no taking had occurred. Campbell appealed.
  - Holding(s): The appellate court affirmed, holding that there was no taking as long as the Village was acting within the scope of its rights as the easement holder. Furthermore, because of the brief but broad terms of the easement, and because the easement traversed a steep slope abutting the river, the appellate court concluded that the Village reasonably interpreted the easement to allow a boardwalk, so as to allow for a smooth, level path for pedestrians and cyclists in all seasons. And even though the appellate court agreed that the boardwalk effectively excluded Campbell from parts of her property, it held that the Village's right to construct the boardwalk took precedent under the common law of easements.
  - Analysis and Notes: This case is a useful, although non-precedential, example of expansive rights of trail easement holders. The court also noted that even if Campbell had not had actual notice of the easement prior to her purchase, the same analysis would have applied. Despite the favorable outcome for the Village, in order to avoid lawsuits drafters of trail easement should clearly spell out if and what kinds of recreational structures are permitted.

- City of Sidney v. Spring Creek Corp., 2017-Ohio-8785 (Ohio App. Ct. Dec. 4, 2017)
  - State: Ohio
  - Procedural Status: Case concluded.
  - Date: 2017
  - Keywords: Definition of conservation easement; eminent domain; enabling statute; mineral rights; municipal conservation easement; private fee land; public conservation easement; public policy; rescission; termination; water supply.
  - Summary of Facts and Issues: For decades, an underground aquifer located in Washington Township had served as the sole source of drinking water for the approximately 700 residents of the Township. Around 2007, the nearby City of Sidney launched attempts to purchase two parcels of land in the Township comprising 237 acres. These parcels sat atop the aquifer, and the City sought to acquire them as a source of drinking water for its own residents. Thus commenced an intergovernmental struggle over this water resource. In 2009, the City unsuccessfully negotiated to purchase the parcels from the owner, Spring Creek Corporation, which operated a sand and gravel quarrying operation on the land. After these negotiations failed, the Township acquired a purported "conservation easement" over the parcels in 2013. The easement allowed the landowner to continue its quarrying operations, so long as the aquifer was not disturbed. The quarrying activities entailed the complete destruction of the vegetation and other natural features on the surface of the property. It was uncontested that the Township's motivation in acquiring the easement was to prevent the City from taking the property through eminent domain. In 2015, the City countered with an eminent domain proceeding to acquire the parcels. As part of that suit, the City claimed that the easement did not meet the definition of the "conservation easement" under Ohio's enabling statute. The City also contended that the easement violated public policy, in particular a provision of the Ohio Constitution that prohibited a municipality from holding groundwater in trust. The trial court agreed with the City on this latter point, and invalidated the easement on these grounds. The Township and Spring Creek appealed.
  - Holding(s): The appellate court affirmed, but on alternate grounds, holding that the easement was invalid because it did not meet the definition of a conservation easement under Ohio's enabling statute. The statute defined a conservation easement as having a purpose of "retaining land predominantly in its natural, scenic, open or wooded condition." But the easement at issue allowed the complete leveling and removal of the surface of the protected property, so long as the subsurface aquifer was not disturbed.
  - Analysis and Notes: Given the loose terms of the easement at issue, this case does not appear to be an instance where genuine conservation protections were lost as a result of the court decision. Rather, the decision demonstrates that parties cannot designate any kind of land use restriction a conservation easement, and that the rights extinguished must meet some basic threshold of protecting the surface of the property. The purported conservation easement was used as a shield by the Township against eminent domain, because although the City had the right to take the private property of Spring Creek, it did not have the right to condemn the Township's interest in the easement. Thus, the City's strategy was to invalidate

that easement, which then paved the way for its taking action against Spring Creek. That said, it's not clear why an easement's failure to meet the statutory definition of a conservation easement would result in its automatic nullification. Although the appellate court was not clear on this point, it still seemed to be using the trial court's framework that the easement was against public policy.

- In re Vermont Gas Systems, Inc., 2017 VT 83 (Vt. 2017)
  - State: Vermont
  - Procedural Status: Case concluded.
  - Date: 2017
  - Keywords: Conversion; eminent domain; prior public use doctrine; public fee land; restrictive covenant; state fee land; subsurface; utility easement.
  - Summary of Facts and Issues: In 2012, Vermont Gas Systems, Inc. (VGS) petitioned the Vermont Public Services Board (the Board) for initial approval of a 41-mile subsurface natural gas pipeline expansion. VGS's proposed route included a segment that went through Geprags Park (the Park) in the Town of Hinesburg, an 85-acre parcel that was donated to the Town in 1991 by the will of Dora Geprags. The Park contained a barn, a sledding hill, and a network of walking trails. The deed from Geprags' estate contained a restrictive covenant that the Park be used "only as a public park or school for recreational or educational purposes." The Board approved VGS' request in 2013, determining that the project would not impose undue negative consequences on any of the affected regions and identifying several benefits that would flow from the project, including lower energy costs and a decrease in greenhouse gas emissions. In 2015, VGS filed a petition with the Board to condemn a 1,987-foot long, 50-foot wide easement through the Park, which was the last segment requiring eminent domain approval along the entire route. This route would parallel an already existing 150-foot-wide power line easement running through the Park. Residents of the Town successfully intervened in the proceeding, and pressed three main arguments: (1) the prior public use doctrine barred the condemnation; (2) any immateriality exception to the prior public use doctrine would not apply because the easement would materially interfere with the use of the Park; and (3) the condemnation was not necessary as required by state eminent domain law because VGS did not show that the alternative routes were infeasible, more costly, or would result in greater impacts to natural resources. The Board sided with VGS on each of these points, and approved the easement subject to certain conditions intended to protect the ecological and recreational integrity of the Park. First and foremost, VGS was required to use horizontal directional drilling (HDD) so that the underground pipeline would be installed from outside the boundaries of the Park and the surface of the Park would not be disturbed. HDD methods also would be used for maintenance of the pipeline "to the extent feasible," and more intrusive measures could only be taken in the unlikely event of an emergency or infeasibility. The only above-ground structures would be a series of three-foot high and three-inch wide pipeline markers. The Town could establish new structures, trails and roads above the pipeline, but only upon the written consent

of VGS. The Town also obtained these conditions in writing before agreeing to the condemnation and accepting an award of $250,000. The intervenors appealed.
    - Holding(s): In a matter of first impression in Vermont, the Supreme Court held that the prior public use doctrine does not apply when the proposed second use of land does not materially interfere with the prior use. Furthermore, the Supreme Court rejected the argument that public park land deserves special protection from a materiality analysis. Next, the Supreme Court held that the Board has a reasonable basis for determining that the easement's impact on the Park was immaterial, based on the fleeting nature of the pipeline intrusions, and the remote likelihood of more substantial intrusions. Finally, the Supreme Court held that the Board conducted a sufficiently rigorous analysis of alternate routes, and reasonably determined that the route through the Park was necessary. The four alternate routes considered by VGS were inferior due to increased length, disturbance of mature forest and wetlands, and uneven terrain. Moreover, the restrictive covenant in the deed from the donor's estate did not limit the State's eminent domain authority.
    - Analysis and Notes: One dissenting justice found that the pipeline easement did constitute a material impairment of the Park's, especially because of VGS' control over the surface above the pipeline. The dissent also emphasized the importance of the restrictive covenant and the donor's intent to restrict the Park to educational and recreational uses.

- Tennessee Gas Pipeline Co., LLC v. Commonwealth of Massachusetts, No. 16-0083 (Super. Ct. Mass. Berkshire Cnty. May 9, 2016)
    - State: Massachusetts
    - Procedural Status: Case concluded.
    - Date: 2016
    - Keywords: Conversion; eminent domain; preemption; National Environmental Policy Act; public fee land; state fee land; utility easement.
    - Summary of Facts and Issues: Tennessee Gas Pipeline Company, LLC (TGP) was pursuing plans to construct an interstate natural gas pipeline through a 2.3-mile stretch of conservation land in the Otis State Forest, owned by the Massachusetts Department of Conservation and Recreation (DCR). TGP had received approval for the pipeline from the Federal Energy Regulatory Commission (FERC) pursuant to the federal Natural Gas Act (NGA). Under Article 97 of the Massachusetts Constitution, no state agency or municipality can transfer any interest in conservation land for a non-conservation purpose unless it is authorized by a supermajority vote of the Massachusetts Legislature. A bill to authorize the pipeline easement across the state forest had been introduced in the legislature, but had not reached any vote. Meanwhile, another state agency found that alternative routes avoiding the state forest would have a greater environmental impact than the proposed route. FERC also conducted an environmental impact report pursuant to the National Environmental Policy Act, which found that impacts to the state forest would be minor. Having apparently failed in its negotiations with the state to get approval for the pipeline, TGP filed an eminent domain suit to condemn temporary and permanent easements for the pipeline,

claiming that the NGA preempted any state laws, including Article 97. In response, the Commonwealth asserted that Article 97 was not preempted by the NGA because it was a "unique constitutional provision" that concerned the structure of Massachusetts state government. The Commonwealth further argued that any constitutional provision "that promotes conservation and environmental welfare" was exempt from preemption.

- Holding(s): The court held that the NGA did preempt Article 97, as the breadth of the statute and accompanying regulations, when combined with extensive safety regulations applicable to pipeline construction, compelled the conclusion that Congress annexed the field of interstate gas pipeline regulation, including environmental standards. The court cited extensive federal common law to support this finding.
- Analysis and Notes: This is the latest of several court decisions that interpret the scope of Article 97. The Massachusetts Audubon Society played a central role in preserving the state forest a decade ago, and had filed a friend-of-the-court brief trying to keep the pipeline away from the land. Meanwhile, a couple weeks before this court decision was issued, Kinder Morgan (the parent company of TGP) announced its suspension of a proposal to route a much longer natural gas pipeline across most of northern Massachusetts, after heavy local opposition.

- Crain v. Hardin Cnty. Water Dist. No. 2, No. 2015-CA-000-499-MR, 2016 Ky. App. Unpub. LEXIS 416 (Ct. App. Ky. June 17, 2016) (UNPUBLISHED)
  - State: Kentucky
  - Procedural Status: Case concluded.
  - Date: 2016
  - Keywords: Agricultural conservation easement; eminent domain; prior public use doctrine; public conservation easement; state conservation easement.
  - Summary of Facts and Issues: 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.
  - Holding(s): 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.

- Analysis and Notes: The question of whether a publicly held conservation easement establishes grounds for the application of the prior public use doctrine is an interesting one that will likely arise in other jurisdictions. The opinion here is unpublished and establishes no precedent in Kentucky or elsewhere. It seems likely that the question would have been a tougher call for the court if the Kentucky Department of Agriculture or the USDA had asserted the application of the doctrine, rather than acceding to the sewer line taking. Another factor influencing a court's decision would be if the easement guaranteed public recreational access, which was not the case here.

- Cnty. of Santa Barbara v. Double H Properties, LLC, No. B264223, 2016 Cal. App. Unpub. LEXIS 1869 (Cal. App. 2nd Dist. Div. 6 March 15, 2016) (UNPUBLISHED)
  - State: California
  - Procedural Status: Case concluded.
  - Date: 2016
  - Keywords: County conservation easement; damages; ecosystem services; eminent domain; evidence; highest and best use; mitigation; public conservation easement; utility easement; valuation; wildlife habitat.
  - Summary of Facts and Issues: In 2011, the County of Santa Barbara purchased a conservation easement on 16 acres of a 160-acre recreational ranch. The purpose of the easement was to establish wetlands habitat for the endangered California Tiger Salamander, as mitigation for a development project elsewhere. But the property was subsequently foreclosed upon by a mortgagee and the easement was extinguished. So in 2013 the County exercised its power of eminent domain to acquire another easement over the same protected property. The County's appraiser determined a fair market value of $42,000, with no value for severance damages because the easement was not deemed to interfere with the recreational use of the larger ranch property. Kioren Moss, the landowner's appraiser, found a fair market value of $43,000, but with an additional $133,000 in severance damages. Moss also offered an alternative theory of damages based on the hypothetical value of marketable mitigation credits, which arrived at a valuation of $217,000. The County filed a motion in limine to exclude evidence of this alternative valuation method as too speculative because the property had not been registered to qualify for such credits, and the trial court granted the motion.
  - Holding(s): The appellate court affirmed the granting of the motion in limine, finding no abuse of discretion by the trial court. The appellate court also agreed with the trial court's holding that the existence of the salamander habitat prior to the eminent domain action was not enough evidence to establish habitat value as the highest and best use of the property.
  - Analysis and Notes: This case should not be misread as standing for the general notion that ecosystem services or mitigation credits cannot be the basis of valuing conservation easements. Rather, in this case, the County successfully argued that there was indeed a market for mitigation credits, but that the landowner had not taken any steps to register the protected property for that market. Thus, the alternative valuation method was based on the "extraordinary assumption" that it

already qualified for such credits. Ultimately, a jury awarded damages of $88,000, including severance damages.

- Town of Silverthorne v. Lutz, 2016 COA 17, 370 P.3d 368 (Ct. App. Colo. Feb. 11, 2016)
  - State: Colorado
  - Procedural Status: Case concluded.
  - Date: 2016
  - Keywords: Eminent domain; evidence; municipal conservation easement; public conservation easement; trail easement.
  - Summary of Facts and Issues: The Town of Silverthorne undertook to construct the Blue River Trail (Trail), a network of trails for non-motorized recreation along the Blue River. The Town sought to purchase land and easement rights for the Trail, but landowner Matthew Lutz rejected all offers. The Town then exercised its right of eminent domain to condemn a trail easement, which the trial court upheld. In addition, the Town received project funds from the Great Outdoors Colorado (GOCO) fund. GOCO's authorizing constitutional amendment provides that "[n]o moneys received by any state agency pursuant to this article shall be used to acquire real property by condemnation through the power of eminent domain." At trial, Lutz sought to introduce this issue as evidence of the Town's lack of eminent domain authority. The Town filed a motion in limine to bar this evidence, which the trial court granted based upon Colorado case law holding that evidence on project funds sourcing is inadmissible in a condemnation proceeding. At trial and on appeal, Lutz claimed that the GOCO provision prohibiting acquisition through eminent domain extended to any project planning, engineering and surveying. In other words, the Town's use of GOCO funds to plan the entire trail project rendered the Town ineligible to exercise its eminent domain powers to condemn any land for the project. The Town and GOCO, as an amicus curiae, countered that the GOCO provision was to be much more narrowly construed so as to prevent only the use of GOCO funds as just compensation for condemned property.
  - Holding: The appellate court affirmed, holding that a project's funding source is inadmissible in a condemnation proceeding. The court further held that the GOCO provision was to be construed narrowly so as to prohibit using GOCO funds to pay just compensation for condemned property, but had no relevance to a project's planning or construction costs.
  - Analysis and Notes: Several state conservation easement enabling statutes and conservation funding programs include anti-condemnation provisions similar to the GOCO amendment, so this opinion could have applicability beyond Colorado.

- United States v. 1.57 Acres of Land, No. 12cv3055-LAB (S.D. Cal. Sept. 8, 2015); (S.D. Cal. Jan. 11, 2016)
  - State: California
  - Procedural Status: Case concluded. Settled.
  - Date: 2015

- Keywords: County conservation easement; eminent domain; force majeure; public conservation easement; valuation; wildlife habitat.
- Summary of Facts and Issues: In 2012, the United States filed an action to condemn approximately 1.57 acres of land for the purpose of securing the United States/Mexico border. The condemned area affected a trail easement held by the County of San Diego and the parties spent two years working to preserve the trail. Unbeknownst to the County, the condemned property was also part of a 90-acre conservation easement that had been granted to the County earlier in 2012 as mitigation for development of a salvage yard. The United States used about 0.43 acres of the condemned property to build a vehicle turnaround. The County alleged that the turnaround will destroy burrowing owl habitat, but the United States contested that claim. The County did not challenge the condemnation, but disagreed with the United States on how to value the 0.43 acres. (The fee owner disclaimed any interest in compensation.) The United States claimed that the conservation easement had zero value because all value had been extinguished by the easement. The United States further claimed that the County's "public benefit" interest in the easement was non-compensable because it was not an "economic" value. The United States filed a motion seeking to exclude any evidence of "non-economic" value, as well as any evidence of the cost of substitute conservation land, taking the position that only the traditional market value must be determined. The County agreed that market value should be used, but claimed that the conservation easement had significant market value as the highest and best use of the property. Furthermore, the County pointed to its obligations as a party to a Multiple Species Conservation Program agreement (MSCP) with the United States Fish and Wildlife Service and the California Department of Fish and Game. The County contended that the MSPC required it to own and maintain a specified quantity of habitat acreage, such as the conservation easement, and that as a result of the condemnation it would have to replace the lost conservation habitat. But the MSPC included a force majeure clause stating that actions of a federal agency can excuse nonperformance by the County.
- Holding: The court granted the motion to exclude any evidence of non-economic value or the cost of substituting the conservation land. On the first issue, the court noted that the County had not demonstrated any intent to claim a non-economic value, but nevertheless prohibited the County from doing so in the remaining proceedings. At the same time, the Court posited in dicta that "the fact that the fee owner was able to obtain economically valuable development rights in exchange for the conservation easement suggests that the conservation easement may have nontrivial economic value." On the second issue, the Court found that the force majeure clause excused the County from obligations under the MSPC and therefore its substitution costs could not be considered in determining just compensation.
- Analysis and Notes: The question of how to value a conservation easement in a takings context is of great significance to the land conservation community, and so this case bears watching. What is particularly concerning is the federal government's attempt to declare that the conservation easement has zero value.

As the County pointed out in its brief, this conclusion would have a terrible policy impact for it would incentivize the condemnation of conservation easement properties. Thus, the Court's statement in dicta, quoted above, is encouraging. However, the specific issues resolved on this motion are rather tangential, because the County had not sought to value the easement based on anything other than its market value. Furthermore, the decision did not resolve the ultimate question of how much the County must be compensated for the taking. As the Court pointed out, the facts about the quality of the owl habitat are still at issue. The case now proceeds to the discovery phase.

- March 2016 Update: The County and the United States settled the matter in January 2016, with the United States agreeing to compensate the County $20,000 for the taking. This is a propitious outcome for discouraging future conservation easement condemnation attempts based on a zero value theory.

- City of San Diego v. Caryon Properties LLC, No. D065915, 2015 WL 5097136 (Cal. App. 4th Dist., Div. 1 Aug. 31, 2015)(Unpublished)
  - State: California
  - Procedural Status: Case concluded.
  - Date: 2015
  - Keywords: County conservation easement; eminent domain; flowage easement; public conservation easement; valuation; wildlife habitat.
  - Summary of Facts and Issues: The City of San Diego exercised eminent domain along a parcel to widen a road. A portion of the parcel was subject to a narrow linear open space easement and an abutting flowage easement, both presumably held by the City. The flowage easement provided for the natural flowage of waters and prohibited structures, surface alterations, and vegetative plantings. Caryon Properties, LLC owned the subject parcel and challenged the City's eminent domain valuation. At issue was whether it was reasonably likely that the parcel could be rezoned from agricultural and open space to light industrial.
  - Holding: The trial court and the appellate court both held that the flowage easement had similar purposes and impacts as an open space easement and thus the probability of rezoning to light industrial was not likely.
  - Analysis and Notes: Ironically, the City was arguing for a robust interpretation of the flowage easement not in order to protect the parcel, but rather to set a lower valuation for its exercise of eminent domain. This case and United States v. 1.57 Acres of Land, discussed immediately above, are both examples of condemning authorities are arguing for a low or zero valuation to conserved land, and one hopes that a trend is not developing. Also of concern is the fact that the City condemned its own interest in the open space easement and the flowage easement, with no apparent discussion of the environmental consequences thereof.

- Reading Area Water Authority v. Schuylkill River Greenway Ass'n, 100 A.3d 572 (Pa.)
  - State: Pennsylvania
  - Procedural Status: Case concluded.
  - Date: 2014

- Keywords: Commercial uses; eminent domain; private fee land; scope of easement.
- Summary of Facts and Issues: The Schuylkill River Greenway Association (SRGA), a nonprofit corporation, owned a strip of land along the west bank of the Schuylkill River in Bern Township. SRGA and the Township intended to build a public recreational trail on the property as a segment of the larger Schuylkill River Trail. Situated immediately to the west of the SRGA property was a 58–acre tract owned by Fortune Development, L.P. (Developer). Developer sought to construct a 219–unit residential subdivision on this tract, and requested a 50-foot underground water main and sewer line easement across SRGA's property. The Reading Area Water Authority (RAWA), a municipal authority created by the City of Reading, supported Developer's planned development and tried to purchase an easement across the SRGA property. After negotiations with SRGA failed, in 2009 RAWA and the City authorized the use of eminent domain powers to condemn an easement across the SRGA property. The easement was appraised at $3,500. SRGA and the Township objected in court, claiming that the taking violated Pennsylvania's Property Rights Protection Act (PRPA) because it was being accomplished solely for the benefit of private enterprise. At an evidentiary hearing, the Township's manager testified that the easement would interfere with the proposed trail in several ways. For example, swales, pipes, fencing, a headwall, riprap and other surface improvements would need to be created and maintained. Also, odors from the sewage discharge operations would likely persist along parts of the trail. The trial court ruled for SRGA, finding that the sole purpose of the easement was to assist the private commercial developer. The trial court also held that the scope of the easement exceeded that which was necessary to serve any public purpose because approximately half of the 50-foot width of the easement would be used to accommodate Developer's privately owned sewer facilities. An intermediate appellate court reversed, finding that RAWA did have the statutory authority to take easements for water main and sewer lines. The intermediate appellate court also held that providing water and sewer services to citizens in RAWA's service area was a public purpose. SRGA and the Township appealed to the Pennsylvania Supreme Court, limiting its appeal just to the sewer line portion of the easement and not the water main portion.
- Holding: The Pennsylvania Supreme Court held for SRGA and the Township, finding that the sewer line taking violated the PRPA because its purpose was to benefit Developer. Key facts for the court were that Developer would not only finance the project, but would acquire exclusive use of the sewer easement to enable it to build a private residential development.
- Analysis and Notes: This case is a relatively rare example of a conservation organization successfully defending against a condemnation action. However, it was only a partial victory, as SRGA ultimately did not contest the water main easement, only the sewer easement. Pennsylvania's PRPA was enacted in the wake of the United States Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469 (2005), which supported a broad interpretation of "public use" in an eminent domain context. Like Pennsylvania, many other states enacted

similar limits on the use of eminent domain to support private rather than public uses.

- Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586 (2013)
  - State: Florida
  - Procedural Status: Case concluded.
  - Date: 2013
  - Keywords: Eminent domain; exaction; mitigation; public conservation easement; wetlands.
  - Summary of Facts and Issues: In 1972, Coy Koontz purchased a 15-acre parcel near Orlando. In 1972 and 1984, respectively, Florida enacted statutes that regulate land use actions affecting water bodies and wetlands. Consistent with these statutes, the St. Johns River Water Management District (District) requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere. In 1994, Koontz decided to develop a 3.7-acre northern section of his property, and applied to the District for the appropriate permits. To mitigate the environmental effects of his proposal, Koontz offered to grant a conservation easement protecting the remaining 11 acres of the parcel. The District considered the 11-acre conservation easement to be inadequate, and informed Koontz that it would grant a permit only if he either (1) reduced the size of his development to 1 acre and grant a conservation easement on the remaining 13.9 acres, or (2) stuck with the 3.7-acre development and 11-acre conservation easement, but also hire contractors to enhance 50 acres of District-owned wetlands several miles away, or an equivalent off-site mitigation project. Ultimately, the District denied the permit. Believing the District's demands to be excessive, Koontz filed suit in state court based on a state law that provides money damages for agency action that is an "unreasonable exercise" of eminent domain authority. The trial court found the District's actions unlawful under the United States Supreme Court's decisions in Nollan v. California Coastal Comm'n, 483 U. S. 825 (1987), and Dolan v. City of Tigard, 512 U. S. 374 (1994), which require a "nexus" and a "rough proportionality" between the government's mitigation or exaction demands and the effects of the proposed land use. The intermediate appellate court affirmed, but the State Supreme Court reversed on two grounds. First, it held that Koontz's claim failed because, unlike in Nollan or Dolan, the District denied the application. Second, the majority drew a distinction between a demand for an interest in real property (as in Nollan and Dolan) and a demand for money (i.e., paying the contractors).
  - Holding: In a 5-4 decision, the Supreme Court held that the "nexus" and "rough proportionality" requirements set forth in Nollan and Dolan apply even where the government denies a land use application, and even where the government exacts money instead of a real property interest. Justice Alito reasoned that it would be too easy to evade Nollan and Dolan simply by styling an exaction in the form of a conditional denial rather than a conditional approval, or by offering a choice of a real property interest or its equivalent cash value. The Court found irrelevant the fact that a government could simply reject the permit application outright, rather

than try to work out a mitigation arrangement that might violate the Nollan and Dolan requirements.
    - Analysis and Notes: This is a very important decision that will limit the ability of governments to negotiate mitigation deals with land use applicants. As one observer noted, the ruling "creates a perverse incentive for municipal governments to reject applications from developers rather than attempt to negotiate project designs that might advance both public and private goals — and it makes it hard for communities to get property owners to pay to mitigate any environmental damage they may cause." See http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?_r=1&. Although this case deals with the exaction of a conservation easement, the holding is not particular to land conservation.

- Sierra Club Iowa Chapter v. Iowa Dept. of Transp., 832 N.W.2d 636 (Iowa 2013)
    - State: Iowa
    - Procedural Status: Case concluded.
    - Date: 2013
    - Keywords: Eminent domain; exhaustion of remedies; public fee land; ripeness.
    - Summary of Facts and Issues: Rock Island State Preserve and the Rock Island County Preserve are two public preserves in Linn County. Both preserves include a rare specimen of native Iowa sand prairie. Moreover, the preserves host habitat for native species of plants and animals, some of which are endangered or threatened. Iowa Department of Transportation (IDOT) proposed to locate a highway extension adjacent to the State Preserve and through the County Preserve. The Sierra Club Iowa Chapter (SC) and two of its members filed an action to challenge IDOT's decision, alleging that IDOT had not complied with two environmental statutes that provide certain protections for public parks and preserves from highway construction and eminent domain. The trial court dismissed the action, finding that SC had not exhausted its administrative remedies by first seeking a declaratory order from IDOT. SC appealed, the intermediate appellate court affirmed, and SC then appealed to the Iowa Supreme Court.
    - Holding: The Iowa Supreme Court affirmed, holding that SC was required to seek a declaratory order from IDOT before proceeding with a lawsuit. The court also ruled that because IDOT had selected the final route of the highway and had allocated funds for the project, the matter was ripe for judicial review.
    - Analysis and Notes: It is not clear from the decision whether SC still can go back and seek the declaratory order from IDOT, or whether it is time-barred from doing so.

- Center for Natural Lands Management v. United States, No. 11-645L, United States Court of Federal Claims (Fed. Cl.)
    - State: California
    - Procedural Status: Case Concluded. Voluntary dismissal with prejudice
    - Date: 2012

- Keywords: Attorney's fees; charitable trust; eminent domain; just compensation; private conservation easement.
- Summary of Facts and Issues: The Center for Natural Lands Management (CNLM) holds a conservation easement over 419 acres of habitat in Sutter County, California for the perpetual protection of the Giant Gartersnake, a federally listed species, and other conservation values. In defense of that easement, CNLM filed a complaint alleging that the United States of America (United States), acting through the Western Area Power Administration (WAPA), an agency of the U.S. Department of Energy (DOE), took a property interest in 15.39 acres by recording a conflicting easement for a transmission line without paying just compensation to CNLM, as required by the Fifth Amendment of the United States Constitution. CNLM argued that conservation easements are donor-restricted charitable assets under California law held in trust for the benefit of the public, and as such CNLM, as holder, had a duty to the public to protect and preserve the associated conservation values of the protected property. The United States denied that its actions constituted a taking and further denied that CNLM was entitled to just compensation or any other relief.
- Holding: At the conclusion of settlement negotiations, the United States paid jointly to CNLM and Westervelt Ecological Services (WES), the fee title holder and grantor of the conservation easement, $50,000 in consideration for the transmission line easement property interest over their respective real properties (easement and fee), paid CNLM $28,000 for attorney's fees, and paid CNLM $5,500 for litigation expenses. In addition, DOE/WAPA advised CNLM that "...we will continue to explore ways to improve on past practices as part of our ongoing effort to address interest holders early in the property acquisition process, consistent with Department of Justice title standards [*Department of Justice Title Standards 2001" A guide for the preparation of title evidence in land acquisition by the United States of America*]." CNLM and WES entered into a non-disclosure agreement relating to the allocation of the real property recovery between conservation easement and fee.
- Analysis and Notes: Because it was settled, the case has no official precedential value. However, it does provide a framework for contesting conservation easement takings, and practical example of a conservation easement holder standing up for its rights in an eminent domain context. The settlement agreement provided that it was not an admission of any legal or monetary liability by the United States nor an admission by CNLM regarding any legal or factual matter relating to its claims. While the United States did not admit that a conservation easement is a real property interest the taking of which requires compensation, conservation easement holders are routinely compensated in a taking context. In fact, this author is not aware of any situation in which a conservation easement holder sought but did not receive any compensation for a taking of the underlying fee interest. For more examples of how conservation easement holders have responded to eminent domain matters, see *When Eminent Domain Comes Knocking*, Robert H. Levin, Exchange, The Journal for Land Conservation, Spring 2001. Also see Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation, Nancy J. McLaughlin, 41 U.C.

Davis L. Rev. 1897 (2008). CNLM was represented by students and advisors of the Environmental Law Clinic at Columbia University School of Law.

- Sterling v. California Coastal Commission, No. CV 482448 (Super. Ct. Cnty. Of San Mateo June 18, 2010)([Second Revised Proposed] Statement of Decision); (Super. Ct. Cnty. Of San Mateo July 22, 2011)(Decision and Order)
  - State: California
  - Procedural Status: Cases concluded.
  - Date: 2011
  - Keywords: Affirmative obligation to farm; agricultural conservation easement; deed restriction; eminent domain; exaction; grazing; nexus; zoning.
  - Summary of Facts and Issues: Dan and Denise Sterling purchased a 143-acre property in San Mateo County in 1997. The land is zoned for agriculture, and small pockets of flat land near a creek, amounting to 10 acres in total, were designated as prime agricultural soil. Recent owners, including the Sterlings, have leased upland areas of the property (about one third of its total) to nearby ranchers for grazing cattle. This arrangement is not for profit, but merely a mutually beneficial agreement by which the cattle owners get pasture, while the owner receives grazing that reduces fire hazards on the property. In 1999, the Sterlings applied to the County to subdivide their land into two parcels, one large and one small, and to build a 6,500-square-foot home on the larger proposed parcel while reserving the smaller parcel for later residential use. In 2005, the Planning Commission denied the project, based primarily on objections to the subdivision. The Sterlings then abandoned their planned subdivision and simply sought approval of one home. They proposed the home on a flat area south of, and set back from, the creek. This area was and is not used for agriculture. As part of their application, the Sterlings submitted an agricultural management plan, stating that they desired to continue voluntarily grazing 10 head of cattle on about 113 acres of the property, through a lease arrangement with a nearby rancher. The County unanimously approved this revised plan, finding it was consistent with the Local Coastal Program. Although approval was conditional, the County did not require the Sterlings to dedicate any kind of agricultural easement. Two of the County commissioners appealed the decision to the California Coastal Commission (CCC). After two years had gone by without CCC action, during which time the Sterlings continued to live in a mobile home on the property, the Sterlings threatened to file suit to compel a hearing. In 2009, the CCC voted to approve the Sterlings' proposed home, subject to approximately 11 new conditions, and 32 conditions previously required by the County. One of the new conditions recommended by CCC staff was that the Sterlings dedicate to the public an "affirmative" agricultural easement on all of the property lying outside a 10,000-square-foot home building area. The Sterlings filed suit, claiming that the agricultural easement would require the Sterlings to maintain the property in active agricultural use. They also argued that the agricultural easement condition was an unconstitutional taking in violation of Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 14I 512 U.S. 374 (1994).

    - December 2012 Update: After the court's April 2010 ruling, the CCC staff and the Sterlings negotiated, and a compromise plan went before the CCC. This compromise plan would allow the 10,000-square foot residential building area and a second subdivided residential building area, while the remainder of the property would be protected by a perpetual open space deed restriction. The CCC approved most of the plan but rejected the second subdivided residential site. The Sterlings filed a second suit.
  - Holding: First, the court held that the easement condition fails the Nollan "nexus" test because the area on which the home was to be built was not in active agricultural use, thus there was not an essential connection between the harm caused by the home and the purpose behind the easement. Second, the court held that the easement condition fails the Dolan "rough proportionality" test, as the requirement of permanent active agricultural use to mitigate a loss of potential agricultural land is not proportional. Furthermore, a permanent easement on 142 acres is out of proportion to the home's footprint on less than one acre.
    - December 2012 Update: In a July 2011 decision, the court ruled that the open space deed restriction could be an exaction, even if no conveyance to another entity occurs, and therefore the Nollan and Dolan jurisprudence applies. Similar to its April 2010 decision, the court then ruled that the deed restriction failed the Nollan and Dolan tests.
  - Analysis and Notes: Easements that require affirmative uses of any kind, including agriculture, are unusual in any context, but especially where required by a zoning authority. The Pacific Legal Foundation, a property rights organization, represented the Sterlings in this action.

- Collings v. Planning Board of Stow, 79 Mass. App. Ct. 447, 947 N.E.2d 78 (Mass. App. Ct. 2011)
  - State: Massachusetts
  - Procedural Status: Case concluded.
  - Date: 2011
  - Keywords: Eminent domain; exaction; mitigation; nexus; public access; recreation; subdivision; zoning.
  - Summary of Facts and Issues: Robert Collings sought to subdivide a 55-acre parcel in the Town of Stow into five residential lots. The subdivision application called for conveying 5.5 acres of open space to the proposed homeowners association, with limited public access. In exchange for a waiver from a cul-de-sac requirement, the Planning Board required Collings to offer the open space areas to the Town Conservation Commission or to a land trust, and to allow for more extensive public access. Collings filed suit against the Planning Board, claiming that the exaction violated a statute that prohibits, as a condition of subdivision approval, dedication of subdivision land to the public use or conveyance to a town for any public purpose without just compensation. The Land Court held for the Planning Board, concluding that the exaction did not violate the statute because the landowner had received just compensation in the form of the cul-de-sac requirement waiver.

- Holding: The appellate court reversed, holding that the requirement to offer the land to the conservation commission and a land trust was a violation of the statute, and that the waiver itself was not just compensation. Moreover, the court found no connection between the safety issues underlying the cul-de-sac provision and the granting of public access exacted by the Planning Board.
- Analysis and Notes: This case is somewhat similar to Building Industry Ass'n of Central California v. Cnty. of Stanislaus, below, in which a conservation easement enabling statute forbids the condemnation of a conservation easement in certain contexts. And the court's analysis also invoked a version of the nexus test from Nollan v. California Coastal Commission, 483 U.S. 825 (1987), in the United States Supreme Court held that an exaction was required to have a qualitative relation to the harm sought to be addressed by the exaction.

- Building Industry Assn of Central California v. Cnty. of Stanislaus, 190 Cal. App. 4th 582 (Cal. App. 2010)
  - State: California
  - Procedural Status: Case concluded.
  - Date: 2010
  - Keywords: Agricultural conservation easement; burden of proof; definition of conservation easement; enabling statute; exaction; liberal construction provision; mitigation; public benefit; public policy; public purpose; purpose clause; zoning.
  - Summary of Facts and Issues: In 2007, Stanislaus County (County) adopted a farmland mitigation program. The program required a 1:1 replacement ratio for conversions of agricultural land to residential uses. The program further required that the chief tool to be used for replacement would be perpetual agricultural conservation easements granted to the County. For projects entailing the loss of 20 or more acres of farmland, the applicant landowner could either grant a conservation easement on his own property or arrange for a conservation easement to be granted by a willing seller on another property. For projects below the 20-acre threshold, the County could approve payment of an in-lieu mitigation fee. California's conservation easement enabling statute permits governmental entities to hold easements that are "voluntarily conveyed" and further provides that "No local governmental entity may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement pursuant to this chapter." Cal. Civil Code §815.3(b). The local chapter of the Building Industry Association (BIA) filed suit against the County, asserting a variety of due process, equal protection and other grounds by which the mitigation programs were invalid. With respect to land conservation issues, there were two principal claims. First, the BIA argued that the mitigation program violated the conservation easement enabling statute's bar against conditioning a land use approval on the granting of an easement. Second, it contended that the 1:1 replacement ratio for lost agricultural land did not bear a reasonable relationship to the harms caused by such losses. In August 2009 the Superior Court of Stanislaus County ruled that the County's mitigation program was invalid because it violated the conservation easement enabling statute. The Court further held that the County failed to provide sufficient evidence to demonstrate that the easement mitigation program

met the "reasonable relationship" standard. Ironically, the court seemed to suggest that the easement mitigation program was not reasonable insofar as it could not be fully effective because, under the 1:1 replacement ratio, the program would at best preserve half of all remaining farmland. The County appealed.

- Holding: The Appellate Court reversed and held for the County. First, it held that the burden of proof on a facial challenge to the County's land use determination lay with the BIA, not the County. Next, it held that the 1:1 replacement ratio did bear a reasonable relationship to the adverse impacts of residential development of farmland, even though the loss of farmland would not be completely stemmed. Finally, the court held that although the conservation easements under the County's mitigation program were indeed "conservation easements" under the enabling statute's definition, the mitigation program was not prohibited by § 815.3(b) because the program did not require the applicant herself to grant the easement, as the applicant could arrange for a voluntary easement conveyance by a third party landowner.
- Analysis and Notes: The Appellate Court's holding with respect to the narrow interpretation of § 815.3(b) is notable because it relies on another provision of the enabling statute stating that the statute should be "liberally construed" to effectuate the public policy of land conservation. Easement enabling statutes in at least two other states, Pennsylvania and West Virginia, include similar liberal construction language. On a side note, the City of Stockton, California, enacted a very similar mitigation program that was challenged by a different chapter of the Building Industry Association. But the trial court in that case upheld the program. See Building Industry Assn of the Delta v. City of Stockton, No. CV032651 (Sup. Ct. Cnty. of San Joaquin March 5 2009)(Statement of Decision). An earlier case, San Mateo County Coastal Landowners Assn v. County of San Mateo, 38 Cal.App.4th 523 (Cal. App. 1995), also held that a mitigation program requiring conservation easements did not run afoul of § 815.3(b) of the conservation easement enabling statute, but for different reasons.

- In the Matter of Girard v. Town of East Hampton, 63 A.D.3d 835 (N.Y. App. Div. 2009)
  - State: New York
  - Procedural Status: Case concluded.
  - Date: 2009
  - Keywords: Arbitrary and capricious; exaction; municipal conservation easement; public conservation easement; zoning.
  - Summary of Facts and Issues: The facts are not set forth in detail in the opinion. Some background facts can be gleaned from a newspaper article at this link: http://www.easthamptonstar.com/dnn/Home/News/TownLosesLawsuit/tabid/9233/Default.aspx. Apparently, Girard applied to the Town of East Hampton (Town) Zoning Board of Appeals (ZBA) for a permit to construct a new house. A natural resources permit was required because of sensitive beach vegetation. In May 2006, the ZBA granted the permit, but on the condition that the applicants grant the Town a scenic and conservation easement. Girard filed suit. The trial court, finding the exacted easement to be insufficiently related to the house construction,

ordered the Town to issue the permit without the easement condition. The Town appealed.
    - Holding: The appellate court affirmed in a very brief opinion, holding that the Town's requirement of a conservation easement was arbitrary and capricious.
    - Analysis and Notes: It is difficult to determine what to make of this case, given the lack of facts and analysis by the appellate court. Compare with Smith v. Town of Mendon, 4 N.Y.3d 1 (N.Y. 2004)(below).

- Brace v. United States, 72 Fed. Cl. 337 (Fed. Cl. 2006)
    - State: Pennsylvania
    - Procedural Status: Case concluded.
    - Date: 2006
    - Keywords: Definition of conservation easement; eminent domain.
    - Summary of Facts and Issues: In 1990, the United States filed an enforcement action against Robert Brace for violating section 404 of the Clean Water Act. In 1994, after the Third Circuit Court of Appeals ruled for the United States, the parties entered a Consent Decree settling the case. The Consent Decree mandated wetland restoration activity and permanently prohibited Brace from placing fill material on a 30-acre wetlands portion of his property, unless in compliance with the Clean Water Act. Brace complied with all aspects of the Consent Decree, but in 1998, he filed an inverse condemnation action, claiming that the Consent Decree constituted a taking of his property. The bulk of the issues raised by the parties concerned basic takings doctrine as interpreted by a long line of Supreme Court jurisprudence. However, Brace also made the argument that the Consent Decree constituted a conservation easement and therefore was a physical taking.
    - Holding: The court held that the Consent Decree was not a conservation easement.
    - Analysis and Notes: This case is not the first instance in which a party has tried to achieve a desired result by claiming the existence of a de facto or constructive conservation easement. Usually these attempts fail. See Acco Unlimited Corp. v. City of Johnston, 611 N.W.2d 506, 2000 Iowa Sup. LEXIS 105 (Iowa 2000); Dodd v. Hood River County, 855 P.2d 608 (Or. 1993); c.f. City of Austin v. Teague, 570 S.W. 2d. 389 (Tex. 1978)(holding that the denial of permit was the taking of a scenic easement). And it won't be the last. As in Acco, the court here wasted little time in dismissing this argument, pointing to Pennsylvania common law and the Restatement (Third) of Property, Servitudes, which focus on the parties' intent in determining whether an easement has been established. The court also looked to out-of-state common law finding that agreements that merely recognize the preexisting rights of the parties do not constitute easements.

- Austin Family Limited Partnership and Piedmont Land Conservancy v. City of High Point, 630 S.E.2d 37 (N.C., 2006)
    - State: North Carolina
    - Procedural Status: Case concluded.
    - Date: 2006

- Keywords: Abandonment; eminent domain; private conservation easement; utility easement.
- Summary of Facts and Issues: Piedmont Land Conservancy (Conservancy) held a conservation easement on land owned by the Austin Family Limited Partnership (Austin). In 1963, Austin's predecessor-in-interest conveyed an underground sewer line easement to the City and was compensated nearly $1,000. In 2003, the City rerouted and upgraded the sewer line, requiring the condemnation of a new easement. Meanwhile, the City abandoned the old easement, leaving the old sewer pipes underground. Austin and the Conservancy brought suit to either force the removal of the old sewer pipes or to require just compensation on the grounds of inverse condemnation.
- Holding: The trial court and the appellate court held that the sewer easement holder was not required to remove the underground sewer pipes, and that the abandonment of the pipes did not constitute a taking, since the original sewer easement was granted in perpetuity.
- Analysis and Notes: Although this case concerns traditional real estate law and does not refer to the Conservancy's conservation easement, it is worthwhile for land trusts to be aware of this outcome when negotiating utility easements. In order to minimize the damage to conserved land, land trusts should insist that the easement include a requirement that the utility infrastructure be removed in the event that the easement is ever terminated or abandoned.

- Mount Laurel Twp. v. Mipro Homes, 379 N.J. Super. 358 (N.J. Super. Ct. App. Div. 2005)
  - State: New Jersey
  - Procedural Status: Case concluded.
  - Date: 2005
  - Keywords: Eminent domain; open space; public access; public purpose.
  - Summary of Facts and Issues: In 1998, the voters of Mount Laurel Township overwhelmingly approved a referendum for a property tax increase to raise funds for acquiring open space. At the same time, county and state voters approved referenda authorizing additional expenditures for open space acquisition. Following approval of these referenda, the Township crafted a list of properties that would be appropriate for open space purposes. The initial list did not include a 16-acre parcel that had been proposed for a low- and moderate-income assisted living facility. But when the property changed hands and a new developer, Mipro Homes, received approval to build high-end single-family homes, the Township added the property to the acquisitions list. In 2002, following the approval of another property tax increase for open space acquisition purposes, the Township sought to purchase the parcel from Mipro. During this same period, Mipro had obtained final subdivision approval from the Planning Board and began site work on the property. Shortly thereafter, the Township filed a declaration of taking. Mipro filed suit, claiming that the purpose of the taking was to stop residential development and therefore was not a public purpose. The trial court held for Mipro, ruling that acquisition to stop residential development is not a public purpose.

- Holding: The appellate court reversed, holding that a municipality has statutory authority to condemn property for open space, even when the property will not be put to any active recreational use. The court further held that a municipality's acquisition for open space of properties on which residential development is planned constitutes a proper use of the eminent domain power.
- Analysis and Notes: The court did note in passing that it might have ruled differently if the development that would be precluded by the condemnation had been for low-income housing or some other compelling public purpose.

- Smith v. Town of Mendon, 4 N.Y.3d 1 (N.Y. 2004)
  - State: New York
  - Procedural Status: Case concluded.
  - Date: 2004
  - Keywords: Eminent domain; municipal conservation easement; public conservation easement.
  - Summary of Facts and Issues: The Smiths owned a 10-acre parcel with frontage on a creek. Part of the property was within a floodplain and was regulated by a variety of local land use restrictions. In 2001, the Smiths applied for Town approval of a single-family home on the non-restricted portion of the parcel. The Planning Board issued an approval, subject to a conservation easement on the restricted area. The easement would incorporate virtually the same restrictions as the already existing land use restrictions. Therefore, the conservation easement did not eliminate substantial development rights, as the town ordinances already prohibited such rights. In addition, the easement did not extinguish the Smiths' right to exclude others from the property, except the Town for enforcement purposes. The Smiths opposed the conservation easement, and filed suit, claiming that the easement was an unconstitutional taking.
  - Holding: New York's high court held that the conservation easement was not an "exaction" and, by extension, not a taking, because it did not eliminate the owners' right to exclude others from the property.
  - Analysis and Notes: Exactions are analyzed under the much stricter Nollan and Dolan United States Supreme Court jurisprudence and are therefore much more likely to be treated as takings. This case is the most notable of its kind to consider the question of whether a conservation easement required as a condition of development approval is a taking, and is likely to be quite influential given the nationwide prestige of the New York Court of Appeals. See also Grogan v. Zoning Board of Appeals of the Town of East Hampton, 221 A.D.2d 441 (N.Y. App. Div. 1995)(Below). For a similar and much earlier case in Rhode Island, see Kent v. Mosher, 1987 R.I. Super. LEXIS 129 (R.I. Super. Ct., 1987).

- Johnston v. Sonoma County Agricultural Preservation and Open Space District, 123 Cal. Rptr. 2d 226 (Cal. App. 2002)
  - State: California
  - Procedural Status: Case concluded.
  - Date: 2002

- Keywords: Eminent domain; forever wild; municipal conservation easement; private fee land; public conservation easement.
- Summary of Facts and Issues: The Sonoma County Agricultural Preservation and Open Space District was established in 1990 pursuant to a state statute to acquire interests in land for the protection of open space. In 1994, the District acquired a forever wild conservation easement over a 1,400-acre National Audubon Society preserve. In 1998, the City of Santa Rosa proposed an underground water pipeline across a portion of the protected property, and threatened condemnation. After three years of negotiations, the District, with Audubon's consent, eventually agreed to grant a utility easement across the conservation easement property. In turn the City agreed to substantial mitigation measures, including conservation easements on 1,400 acres of City land and a $1.3 million payment to Audubon. Because of these mitigation measures, and because it's likely that a court would have ruled for the City in any lawsuit challenging the condemnation, Audubon and the District agreed to the utility easement. The pipeline project was approved, and the city did not have to initiate formal condemnation proceedings. A County landowner was dissatisfied with the outcome, and filed suit, claiming that the grant of the pipeline easement violated a provision of the District's enabling statute that requires either legislative or voter approval for the transfer of any interest in District-protected lands.
- Holding: The appellate court, affirming the trial court, held that statute requiring legislative or voter approval for the transfer of any interest in conservation land did not apply when the transfer was made under a bona fide threat of condemnation. The court concluded that the utility easement conveyance was clearly involuntary, in lieu and under the credible threat of condemnation, therefore the statute requiring legislative or voter approval did not apply.
- Analysis and Notes: The opinion discusses the factual background at length, and provides a good example of land conservation organizations making lemonade out of condemnation lemons. For more information and background, see *When Eminent Domain Comes Knocking*, Robert H. Levin, Exchange, The Journal for Land Conservation, Spring 2001.

- Acco Unlimited Corp. v. City of Johnston, 611 N.W.2d 506 (Iowa 2000)
  - State: Iowa
  - Procedural Status: Case concluded.
  - Date: 2000
  - Keywords: Definition of conservation easement; eminent domain; enabling statute.
  - Summary of Facts and Issues: Plaintiff owned property in a floodplain. After a series of floods, the City condemned the land for purposes of flood control. Plaintiff contended that the taking was in violation of the Iowa conservation easement enabling statute, which includes a provision prohibiting eminent domain of conservation easements.
  - Holding: The taking of land for flood control purposes is not akin to the taking of a conservation easement.

- Analysis and Notes: With little fanfare, the Court dismissed Plaintiff's "constructive conservation easement" claim. Any other result would have been unusual.

- Grogan v. Zoning Board of Appeals of the Town of East Hampton, 221 A.D.2d 441 (N.Y. App. Div. 1995)
  - State: New York
  - Procedural Status: Case concluded.
  - Date: 1995
  - Keywords: Eminent domain; public conservation easement.
  - Summary of Facts and Issues: In 1993, Edward Grogan (Grogan) sought to build an addition onto his home. As a condition of approval, the Town required Grogan to grant a conservation easement on a portion of his land. The easement did not grant public access on the property. Grogan filed suit, claiming that the easement was an unconstitutional taking without just compensation. The trial court held for the Town, finding no taking.
  - Holding: The appellate court affirmed, citing the Supreme Court's takings jurisprudence in Dolan v. City of Tigard, 512 US 687 (1994), and finding a rough proportionality between the easement and the projected environmental impacts of Grogan's expanded home.
  - Analysis and Notes: For a later case by the New York Court of Appeals, see Smith v. Town of Mendon, 4 N.Y.3d 1 (N.Y. 2004)(Above).

- Forest Preserve District of Cook County v. Mount Greenwood Bank Land Trust 5 -- 0899, 219 Ill. App. 3d 524; 579 N.E.2d 1066 (Ill. App. Ct. 1 Dist. 1991)
  - State: Illinois
  - Procedural Status: Case concluded.
  - Date: 1991
  - Keywords: Eminent domain; preliminary injunction; public fee land; standing; temporary restraining order.
  - Summary of Facts and Issues: The Forest Preserve District of Cook County (District) was a public agency that had eminent domain authority to acquire land for park and conservation purposes. The District sought to condemn a 14-acre former railroad right of way in the Beverly neighborhood of the City of Chicago, which property was adjacent to an already existing 200-acre forest preserve. But in 1990, the City issued a building permit to private landowners for a 59-unit residential subdivision. In February 1991 the District sent a letter to the landowner asking to negotiate a purchase price. A second letter asked the landowners to cease construction activities on the property, which had already begun. When these letters failed to elicit any response, the District filed suit. The trial court granted a temporary restraining order, barring the landowner from further construction activities, but later it denied a preliminary injunction. The District appealed the denial of the preliminary injunction.
  - Holding: The appellate court reversed, holding that the District was entitled to a preliminary injunction. In particular, the court noted that "Destruction of the flora, fauna and scenic beauty would be irreparable, and indeed, final."

- Analysis and Notes: This case addresses the interesting question of whether a condemning authority can prevent destruction of the natural resources of a property prior to completing the taking if the purpose of the taking is to preserve those natural resources. Although the result here was pro-conservation, two years later another Illinois appellate court reached the opposite conclusion in Forest Preserve District of Du Page County v. West Suburban Bank, 219 Ill. App. 3d 524 (Ill. App. Ct. 2 Dist. 1993). In that case, the court found that a preliminary injunction was an unconstitutional taking and that if the District had wanted to make sure the property's natural resources were protected it should have used a statutorily authorized "quick-taking" process. Finally, do not be confused by the name of the defendant in this case, because in Illinois the term "land trust" is often used to refer to a private property-holding trust, not a nonprofit land conservation organization.

- Town of Libertyville v. Bank of Waukegan, 152 Ill.App.3d 1066 (Ill. App. Ct. 2 Dist. 1987)
  - State: Illinois
  - Procedural Status: Case concluded.
  - Date: 1987
  - Keywords: Agriculture; eminent domain; municipal conservation easement; public conservation easement.
  - Summary of Facts and Issues: In 1986, the Town of Libertyville sought to take by eminent domain a conservation easement on a 46-acre parcel of farmland, pursuant to the Illinois Township Open Space Act (the Act). The Act allowed eminent domain for conservation purposes, but exempted any property that was used for farming purposes. The landowner filed suit to challenge the taking, citing the exemption. The Town argued that the exemption applied only to takings of fee land, and because the specific property right taken, i.e., the right to develop the property in the future, was not used for farming purposes, the statutory exemption did not apply.
  - Holding: The trial court ruled that the Act's exemption for farmed properties applied to the fee and any lesser interest in the subject property. The appellate court affirmed, noting the general principle that eminent domain statutes are to be strictly construed to protect the rights of property owners. The appellate court found that the plain and ordinary meaning of the Act operated to exempt farmland from all kinds of takings, not just fee simple takings.
  - Analysis and Notes: On appeal, the Trust for Public Land and the Land Trust Alliance (then known as the Land Trust Exchange) filed amicus briefs on behalf of the Town.

- Texas Eastern Transmission Corp. v. Wildlife Preserves, 225 A.2d 130 (N.J. 1966), 230 A.2d 505 (N.J. 1967)
  - State: New Jersey
  - Procedural Status: Case concluded.
  - Date: 1966

- Keywords: Eminent domain; prior public use doctrine; public purpose; private fee land.
- Summary of Facts and Issues: Plaintiff sought to condemn a 50-foot right of way across the Troy Meadows Wildlife Preserve, an area of over 1400 acres owned by defendant Wildlife Preserves, a private 501(c)(3) organization. The proposed right of way was to be used for installation of an underground gas transmission pipeline. Defendant alleged that the lands were devoted to a prior public use, *i.e.* conservation and the preservation of wildlife, and in the circumstances not subject to condemnation for plaintiff's purpose. Defendant further claimed that an alternate route is easily available and that plaintiff's choice of a route across the preserve was arbitrary and capricious. The trial court and intermediate appellate court ruled for plaintiff on all claims.
- Holding: In its 1966 opinion, the New Jersey Supreme Court reversed in part, holding that, even though the prior public use doctrine is inapplicable due to defendant's status as a private nonprofit corporation, defendant's devotion of the property to conservation purposes heightens the condemnor's obligation to show that the condemnation was not arbitrary. The court remanded to the trial court for a trial on the abritrariness issue. In its 1967 opinion, the New Jersey Supreme Court held that the plaintiff's choice of route was not arbitrary.
- Analysis and Notes: The 1966 opinion is notable because it affords private conservation land limited protection from the eminent domain power. The court noted the "special and unique status" of private conservation land and holds that conservation landowners are worthy of greater protection "than that of an ordinary owner who puts his land to conventional use."

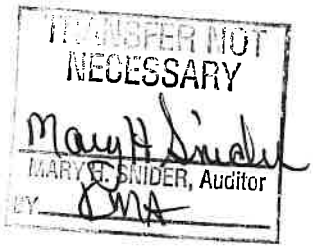
- Kamrowski v. State Highway Comm'n, 142 N.W.2d 793 (Wis. 1966)
  - State: Wisconsin
  - Procedural Status: Case concluded.
  - Date: 1966
  - Keywords: Eminent domain; public purpose; scenic easement.
  - Summary of Facts and Issues: In 1939 and again in 1961, the Wisconsin legislature enacted statutes authorizing the acquisition of scenic easements by gift, purchase, or eminent domain. Shortly after the 1961 statute was passed, the State Highway Commission condemned a 350-foot-wide scenic easement from plaintiff landowners. Plaintiffs filed suit, contending that that a scenic easement was not a public use because it does not permit the public nor any public agency to enter and occupy the lands in person.
  - Holding: The Wisconsin high court held that physical occupancy is not an essential element of a public use, and that enjoyment of scenic beauty is a public purpose.
  - Analysis and Notes: None.

(9) FRAUD, UNDUE INFLUENCE, AND CONTRACT-BASED CASES

294930

Ohio Department of Agriculture

Deed of Agricultural Easement Donation



August 21, 2003

THIS DEED OF AGRICULTURAL EASEMENT (HEREINAFTER REFERRED TO AS THE "EASEMENT") DATED AS OF November 5, 2003 IS MADE AND ENTERED INTO BY AND BETWEEN ARNO RENNER, TRUSTEE, 13260 INDUSTRIAL PARKWAY, MARYSVILLE, OHIO 43040 (HEREINAFTER REFERRED TO AS THE "GRANTOR") AND THE DIRECTOR, OHIO DEPARTMENT OF AGRICULTURE, 8995 EAST MAIN STREET, REYNOLDSBURG, OHIO, 43068, (HEREINAFTER REFERRED TO AS THE "GRANTEE"). THIS IS AN AGREEMENT FOR THE DONATION OF AN AGRICULTURAL EASEMENT TO THE DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE. The following provisions apply to this Easement:

A. PROTECTED PROPERTY

WHEREAS, THE GRANTOR IS THE OWNER IN FEE SIMPLE OF APPROXIMATELY 231.25 ACRES OF AGRICULTURAL PROPERTY LOCATED AT 13260 INDUSTRIAL PARKWAY, MARYSVILLE, OHIO IN UNION COUNTY (HEREINAFTER REFERRED TO AS THE "PROTECTED PROPERTY") MORE FULLY DESCRIBED ON EXHIBIT A ATTACHED HERETO. THE GRANTOR HAS FULL AUTHORITY TO DONATE THIS EASEMENT AND HAS A GOOD AND INDEFEASIBLE FEE SIMPLE TITLE TO THE LAND DESCRIBED IN EXHIBIT A FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES THAT ARE NOT CONDUCIVE TO AGRICULTURE.

B. AGRICULTURAL VALUE AND USE

IN PARTICULAR, THE PROTECTED PROPERTY CONSISTS OF LAND DEVOTED EXCLUSIVELY TO AGRICULTURAL USE AS DEFINED BY SECTION 5713.30 OF THE OHIO REVISED CODE AND THAT IS VALUED FOR REAL PROPERTY TAXATION AT ITS CURRENT VALUE FOR AGRICULTURAL USES UNDER SECTION 5713.31 OF THE OHIO REVISED CODE OR THAT CONSTITUTES A HOMESTEAD. THE GRANTOR HAS AN INTEREST IN PRESERVING THE PROTECTED PROPERTY FOR AGRICULTURAL USE.

C. AGRICULTURAL PRACTICES

THE GRANTOR, THE GRANTOR'S HEIRS, SUCCESSORS, AND ASSIGNS, SHALL CONDUCT ALL FARMING OPERATIONS USING BEST MANAGEMENT PRACTICES, AS APPROVED BY THE U.S. DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICE, THE SOIL AND WATER CONSERVATION DISTRICT, OR BY ANOTHER QUALIFIED CONSERVATION PROFESSIONAL APPROVED BY THE GRANTEE.

D. QUALIFIED ORGANIZATION

THE GRANTEE IS A DIVISION OF THE STATE OF OHIO AND IS A QUALIFIED ORGANIZATION UNDER SECTION 170 OF THE INTERNAL REVENUE CODE AS AMENDED FROM TIME TO TIME AND UNDER THE REGULATIONS PROMULGATED THEREUNDER TO RECEIVE CONSERVATION EASEMENTS. FURTHER, THE GRANTEE IS AUTHORIZED PURSUANT TO SECTION 901.21 OF THE OHIO REVISED CODE TO HOLD AGRICULTURAL EASEMENTS UNDER THE LAWS OF THE STATE OF OHIO FOR THE PUBLIC PURPOSE OF RETAINING THE PROTECTED PROPERTY PREDOMINANTLY IN AGRICULTURE.

E. STATE AGRICULTURAL CONSERVATION POLICY

THE UNITED STATES DEPARTMENT OF AGRICULTURE'S 1997 CENSUS OF AGRICULTURE FOUND THAT FROM 1950 TO 1997 OHIO HAS LOST 1/3 OF ITS TOTAL AGRICULTURAL LANDS. THE STATE OF OHIO HAS A CLEARLY DELINEATED CONSERVATION POLICY TO PRESERVE AND PROMOTE AGRICULTURE AND AGRICULTURAL LAND FOR A SIGNIFICANT PUBLIC BENEFIT. THE OHIO DEPARTMENT OF AGRICULTURE IS CHARGED WITH THE RESPONSIBILITY OF PROTECTING AND PROMOTING AGRICULTURE, INCLUDING THE PRESERVATION OF OHIO'S FARMLAND BY ACCEPTING AGRICULTURAL EASEMENTS IN ACCORDANCE WITH SECTION 901.21(B) OF THE OHIO REVISED CODE. BY GRANTING AND ACCEPTING AN AGRICULTURAL EASEMENT OVER THE PROTECTED PROPERTY THE GRANTOR AND GRANTEE ARE FURTHERING THE STATE OF OHIO'S CONSERVATION POLICY TO PRESERVE AND PROTECT VIABLE AGRICULTURAL LAND.

THE GRANTOR INTENDS THAT THIS EASEMENT WILL CONFINE THE USE OF PROTECTED PROPERTY, IN PERPETUITY, TO ACTIVITIES THAT ARE CONSISTENT WITH THE PURPOSES OF THE EASEMENT. OHIO'S POLICY TO PRESERVE AND PROMOTE AGRICULTURE AND AGRICULTURAL LAND IS FURTHER REFLECTED IN THE ENACTMENT OF THE PREVIOUSLY MENTIONED SECTION 901.21 AND SECTION 901.22 OF THE OHIO REVISED CODE WHICH ALLOWS, INTER ALIA, THE DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE TO ESTABLISH A PROCEDURE FOR AWARDING MATCHING GRANTS FOR THE PURCHASE OF AGRICULTURAL EASEMENTS AND PROVIDES THAT THE DIRECTOR SHALL MONITOR OHIO'S AGRICULTURAL EASEMENT PROGRAM TO EVALUATE ITS EFFECTIVENESS AND EFFICIENCY AS A FARMLAND PRESERVATION TOOL. ADDITIONALLY, THIS POLICY IS REFLECTED IN SECTION 901.54 OF THE OHIO REVISED CODE WHICH CREATES THE OFFICE OF FARMLAND PRESERVATION WITHIN THE OHIO DEPARTMENT OF AGRICULTURE TO ACTIVELY PRESERVE FARMLAND AND ENCOURAGE AND ASSIST OTHERS

IN DOING SO. THE GRANT OF THIS AGRICULTURAL EASEMENT IS EXCLUSIVELY FOR THE "CONSERVATION PURPOSE" AS THAT TERM IS DESCRIBED IN SECTION 170(H)(4)(A)(III) OF THE INTERNAL REVENUE CODE,

WHICH ENCOURAGES THE PRESERVATION OF OPEN SPACE, INCLUDING FARMLAND AND FOREST LAND. OHIO'S AGRICULTURAL CONSERVATION POLICY IS CONSISTENT WITH A FEDERAL FARMLAND PRESERVATION POLICY AS REFLECTED IN THE FOLLOWING PARAGRAPH.

F. FEDERAL FARMLAND PROTECTION ACT

THE PURPOSE OF THIS ACT, P.L. 97-98, 7 U.S.C. SECTION 42-01, ET SEQ., IS "TO MINIMIZE THE EXTENT TO WHICH FEDERAL PROGRAMS AND POLICIES CONTRIBUTE TO THE UNNECESSARY AND IRREVERSIBLE CONVERSION OF FARMLAND TO NONAGRICULTURAL USES, AND TO ASSURE THAT FEDERAL PROGRAMS ARE ADMINISTERED IN A MANNER THAT, TO THE EXTENT PRACTICABLE, WILL BE COMPATIBLE WITH STATE, UNIT OF LOCAL GOVERNMENT AND PRIVATE PROGRAMS AND POLICIES TO PROTECT FARMLAND." THE GRANT AND ACCEPTANCE OF THIS AGRICULTURAL EASEMENT IS ALSO PURSUANT TO THE CLEARLY DELINEATED FEDERAL CONSERVATION POLICY TO PRESERVE AGRICULTURAL LAND AS EVIDENCED BY THIS ACT.

DONATION OF AGRICULTURAL EASEMENT

NOW, THEREFORE IN CONSIDERATION OF THE MUTUAL PROMISES, CONDITIONS, RESTRICTIONS AND OBLIGATIONS CONTAINED HEREIN PURSUANT TO THE LAWS OF THE STATE OF OHIO, GRANTOR GRANTS WITH GENERAL WARRANTY COVENANTS TO THE GRANTEE A PERPETUAL AGRICULTURAL EASEMENT AS DEFINED IN SECTION 5301.67(C) OF THE OHIO REVISED CODE, ON THE PROTECTED PROPERTY. THE GRANTEE HAS THE AUTHORITY TO ACCEPT AGRICULTURAL EASEMENTS PURSUANT TO SECTION 901.21(B) OF THE OHIO REVISED CODE. THE EASEMENT IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

1. STATEMENT OF PURPOSE

IT IS THE PURPOSE OF THIS EASEMENT TO ASSURE THAT THE PROTECTED PROPERTY WILL BE RETAINED PREDOMINANTLY IN AGRICULTURAL USE BY PRESERVING AND PROTECTING ITS AGRICULTURAL SOILS AND VIABILITY THROUGH A PERPETUAL RESTRICTION ON THE USE OF THE PROTECTED PROPERTY.

OR509 PG371

2. PRESENT CONDITION REPORT

THE GRANTOR AND GRANTEE AGREE THAT THE NATURAL CHARACTERISTICS, THE PHYSICAL CONDITIONS, THE PHYSICAL STRUCTURES, AND THE AGRICULTURAL USE OF THE PROTECTED PROPERTY AT THE TIME OF THIS PURCHASE ARE DOCUMENTED IN A PRESENT CONDITION REPORT (HEREINAFTER REFERRED TO AS THE "REPORT") PREPARED BY THE GRANTEE AND SIGNED AND ACKNOWLEDGED BY THE GRANTOR AND A REPRESENTATIVE OF THE GRANTEE ESTABLISHING THE CONDITION OF THE PROTECTED PROPERTY AT THE TIME OF THIS DONATION, INCLUDING PHOTOGRAPHS, MAPS AND OTHER DOCUMENTS, AS SET FORTH IN EXHIBIT B.

3. PROHIBITED USES/RESTRICTIONS

ANY ACTIVITY ON OR USE OF THE PROTECTED PROPERTY INCONSISTENT WITH THE PURPOSES OF THIS EASEMENT IS PROHIBITED. THE FOLLOWING ACTIVITIES ARE EXPRESSLY PROHIBITED, EXCEPT AS PROVIDED IN PARAGRAPH 4 BELOW:

3.1 INDUSTRIAL OR COMMERCIAL ACTIVITY - THERE SHALL BE NO INDUSTRIAL OR COMMERCIAL ACTIVITY UNDERTAKEN OR ALLOWED ON THE PROTECTED PROPERTY, EXCEPT AS PROVIDED IN PARAGRAPH 4 BELOW. NO RIGHT OF PASSAGE SHALL BE GRANTED OR RETAINED ACROSS OR UPON THE PROTECTED PROPERTY IF THAT RIGHT OF PASSAGE IS USED IN CONJUNCTION WITH SUCH PROHIBITED ACTIVITIES.

3.2 STRUCTURES - THERE SHALL BE NO NEW STRUCTURES OR PLACING OF ANY DWELLING, BUILDING, ATHLETIC OR RECREATIONAL STRUCTURE, PUBLIC LANDING STRIP, HELICOPTER PAD, FENCE OR SIGN (OTHER THAN THOSE SIGNS PERMITTED, REQUIRED OR ALLOWED BY THE GRANTEE FOR APPROPRIATE MANAGEMENT, PREVENTION OF HUNTING OR TRESPASS, ETC.), ASPHALT, CONCRETE PAVEMENT, BILLBOARD OR OTHER ADVERTISING DISPLAY, ANTENNA, UTILITY POLE, TELECOMMUNICATION TOWER, TOWER, CONDUIT LINE, OR ANY OTHER TEMPORARY OR PERMANENT STRUCTURE OR FACILITY ON THE PROTECTED PROPERTY, EXCEPT AS PROVIDED IN PARAGRAPH 4 BELOW.

3.3 AGRICULTURAL SUBDIVISION - THE LEGAL SUBDIVISION OF THE PROTECTED PROPERTY, RECORDING OF A SUBDIVISION PLAN, PARTITION, OR ANY OTHER DIVISION OF THE PROTECTED PROPERTY INTO TWO OR MORE PARCELS, IS PROHIBITED, EXCEPT A SUBDIVISION OF THE PROTECTED PROPERTY IS PERMITTED ONLY WITH THE ADVANCE WRITTEN PERMISSION OF THE GRANTEE, WHO AGREES THAT EACH

BK509 PG372

SPEARATED PARCEL CAN STAND ALONE AS VIABLE AGRICULTURAL LAND. THIS PROHIBITION APPLIES REGARDLESS OF HOW MANY SEPARATELY DESCRIBED PARCELS ARE CONTAINED IN THE LEGAL DESCRIPTION ATTACHED AS EXHIBIT A. THE FARMSTEAD AREA, WHICH INCLUDES THE RESIDENTIAL DWELLING AND AGRICULTURAL BUILDINGS AS SHOWN ON THE REPORT, SHALL NOT BE SUBDIVIDED AND SHALL REMAIN A PART OF THE PROTECTED PROPERTY.

3.4 MINING - UNDER NO CIRCUMSTANCES SHALL SURFACE MINING BE PERMITTED ON THE PROTECTED PROPERTY, EXCEPT THAT THE GRANTOR MAY REMOVE SAND AND GRAVEL FOR NORMAL FARM USE ON THE PROTECTED PROPERTY. GRANTOR MAY UNDERTAKE SUBSURFACE EXPLORATION, DEVELOPMENT AND EXTRACTION OF OIL, GAS, COAL, OR OTHER MINERALS. UPON COMPLETION OF THE SUBSURFACE OIL, GAS, COAL, OR OTHER MINERAL ACTIVITIES, THE GRANTOR SHALL PROMPTLY RESTORE ANY SURFACE PORTION OF THE PROTECTED PROPERTY AFFECTED THEREBY AS NEARLY AS POSSIBLE TO ITS CONDITION EXISTING PRIOR TO COMMENCEMENT OF THESE SUBSURFACE MINING ACTIVITIES.

3.5 TOPOGRAPHY - THERE SHALL BE NO DITCHING; DRAINING; DIKING; FILLING; EXCAVATING; REMOVAL OF TOPSOIL, SAND, GRAVEL, ROCK, OR OTHER MATERIALS; OR ANY CHANGE IN THE TOPOGRAPHY OF THE LAND IN ANY MANNER, UNLESS IN ACCORDANCE WITH THE FARM CONSERVATION PLAN REFERENCED IN PARAGRAPH C ABOVE.

3.6 WATER - GRANTOR SHALL NOT TRANSFER, ENCUMBER, LEASE, SELL, OR OTHERWISE SEPARATE SUCH WATER RIGHTS FROM TITLE TO THE PROTECTED PROPERTY ITSELF.

3.7 DUMPING - THERE SHALL BE NO NEW DUMPING OF TRASH, NONCOMPOSTABLE GARBAGE, HAZARDOUS OR TOXIC SUBSTANCES OR OTHER UNSIGHTLY OR OFFENSIVE MATERIAL, EXCEPT AS REASONABLY REQUIRED FOR THE USE OF THE PROTECTED PROPERTY IN ACCORDANCE WITH APPLICABLE LOCAL, STATE AND FEDERAL LAWS AND REGULATIONS.

3.8 ROADS - THERE SHALL BE NO BUILDING OF NEW ROADS, PARKING LOTS, OR OTHER PAVED SURFACES, OR THE WIDENING OF EXISTING SUCH SURFACES, EXCEPT ON THE FARMSTEAD AREA, STATE OR LOCAL HIGHWAY RIGHTS-OF-WAY (I.E., 50 FEET FROM THE CENTER OF INDUSTRIAL PARKWAY AND 30 FEET

FROM THE CENTER OF ADELSBERGER ROAD), AND THOSE IMPROVEMENTS PERMITTED UNDER PARAGRAPH 4.11 BELOW.

3.9 FOREST MANAGEMENT – THERE SHALL BE NO CUTTING OR HARVESTING OF TIMBER OR LIVE TREES. CUTTING OF DISEASED TREES OR CUTTING OF DEAD TREES FOR FIREWOOD IS PERMITTED.

4. GRANTOR'S RESERVED RIGHTS

THE GRANTOR RESERVES FOR THE GRANTOR'S SELF, HEIRS, SUCCESSORS AND ASSIGNS, ALL RIGHTS AND PRIVILEGES OF OWNERSHIP OF THE PROTECTED PROPERTY TO USE THE PROTECTED PROPERTY FOR ALL PURPOSES THAT ARE NOT INCONSISTENT WITH THE PURPOSE OF THIS EASEMENT AND NOT EXPRESSLY PROHIBITED BY THIS EASEMENT. THE FOLLOWING RIGHTS ARE EXPRESSLY RESERVED BY THE GRANTOR:

4.1 CONVEYANCE - GRANTOR MAY SELL, FORM A TWO OWNER PARTNERSHIP, GIVE, MORTGAGE, LEASE OR OTHERWISE CONVEY THE PROTECTED PROPERTY, PROVIDED THAT SUCH CONVEYANCE IS SUBJECT TO THIS EASEMENT AND WRITTEN NOTICE IS PROVIDED TO THE GRANTEE IN ACCORDANCE WITH PARAGRAPH 18 BELOW.

4.2 RIGHT TO FARM - GRANTOR RETAINS THE RIGHT TO FARM, OR TO PERMIT OTHERS TO FARM, INDIVIDUALLY OR IN PARTNERSHIP, IN ACCORDANCE WITH APPLICABLE LOCAL, STATE AND FEDERAL LAWS AND REGULATIONS.

4.3 RIGHT TO PRIVACY - GRANTOR RETAINS THE RIGHT TO PRIVACY AND THE RIGHT TO EXCLUDE ANY MEMBER OF THE PUBLIC FROM TRESPASSING ON THE PROTECTED PROPERTY. NOTWITHSTANDING THIS PROVISION, GRANTEE SHALL HAVE THE RIGHT TO INSPECT THE PROTECTED PROPERTY AND ENFORCE THE PROVISIONS OF THIS EASEMENT IN ACCORDANCE WITH PARAGRAPH 7.3 BELOW.

4.4 RIGHT TO USE THE PROTECTED PROPERTY FOR CUSTOMARY RURAL ENTERPRISES - GRANTOR RETAINS THE RIGHT TO USE THE PROTECTED PROPERTY FOR OTHERWISE LAWFUL AND CUSTOMARY RURAL ENTERPRISES, SUCH AS, BUT NOT LIMITED TO, PROCESSING, PACKAGING AND MARKETING OF FARM

OR509 PG374

PRODUCTS; FARM MACHINERY REPAIR; ROADSIDE MARKET STANDS; AND RIDING STABLES SO LONG AS THESE USES DO NOT ADVERSELY AFFECT THE AGRICULTURAL VALUES OF THE PROTECTED PROPERTY.

4.5 FENCES - EXISTING FENCES MAY BE CLEARED, REPAIRED AND REPLACED, AND NEW FENCES MAY BE BUILT ON THE PROTECTED PROPERTY FOR PURPOSES OF TRESPASS AND REASONABLE AND CUSTOMARY MANAGEMENT OF LIVESTOCK AND WILDLIFE, WITHOUT ANY FURTHER PERMISSION OF THE GRANTEE.

4.6 PERSONAL RESIDENCE - NOTWITHSTANDING ANY OTHER PROVISION HEREIN, GRANTOR MAY MAINTAIN, REPAIR AND RESTORE THE EXISTING STRUCTURES ON THE PROTECTED PROPERTY, INCLUDING DRIVEWAYS, SEPTIC SYSTEMS, UTILITIES, UNDERGROUND PIPES AND WIRES OR OVERHEAD WIRES IN SUBSTANTIALLY THEIR SAME LOCATIONS. GRANTOR MAY IMPROVE THE PERMITTED RESIDENCES AND OTHER STRUCTURES. GRANTOR MAY ALSO REPLACE THE PERSONAL RESIDENCES WITH A NEW RESIDENCE ON THE CURRENT "FARMSTEAD AREA" SHOWN ON THE REPORT. HOWEVER, WITH THE EXCEPTION OF PARAGRAPH 4.13 BELOW, UNDER NO CIRCUMSTANCES SHALL A NEW PERSONAL RESIDENCE BE PERMITTED OUTSIDE THE CURRENT "FARMSTEAD AREA" SHOWN ON THE REPORT WITHOUT THE ADVANCED WRITTEN PERMISSION OF THE GRANTEE.

4.7 AGRICULTURAL STRUCTURES AND IMPROVEMENTS - THE EXISTING AGRICULTURAL STRUCTURES AND IMPROVEMENTS MAY BE REPAIRED, ENLARGED AND REPLACED AT THEIR CURRENT LOCATIONS AS SHOWN ON THE REPORT, WITHOUT ANY FURTHER PERMISSION FROM THE GRANTEE. NEW BUILDINGS AND OTHER STRUCTURES AND IMPROVEMENTS TO BE USED PRIMARILY FOR AGRICULTURAL PURPOSES, INCLUDING THE PROCESSING OR SALE OF FARM PRODUCTS PREDOMINANTLY GROWN OR RAISED ON THE PROTECTED PROPERTY, BUT NOT INCLUDING ANY DWELLING OR FARM LABOR HOUSING, MAY BE BUILT ON THE PROTECTED PROPERTY WITHOUT ANY FURTHER PERMISSION OF THE GRANTEE.

4.8 EXISTING RECREATIONAL IMPROVEMENTS - ALL EXISTING RECREATIONAL IMPROVEMENTS MAY BE REPAIRED, REASONABLY ENLARGED OR REPLACED AT THEIR CURRENT LOCATIONS WITHOUT FURTHER PERMISSION OF THE GRANTEE.

OR509 PG375

4.9 NEW RECREATIONAL IMPROVEMENTS - NEW PERSONAL RECREATIONAL IMPROVEMENTS FOR THE GRANTOR'S PERSONAL USE, MAY BE BUILT WITHIN THE AREA IDENTIFIED AS THE "FARMSTEAD AREA" ON THE REPORT WITHOUT FURTHER PERMISSION OF THE GRANTEE. ANY ADDITIONAL NEW PERSONAL RECREATIONAL IMPROVEMENTS PROPOSED FOR LOCATIONS OUTSIDE THE AREA IDENTIFIED AS THE

"FARMSTEAD AREA" ON THE REPORT MAY BE BUILT ONLY WITH THE ADVANCED WRITTEN PERMISSION OF THE GRANTEE. HOWEVER, NO NEW COMMERCIAL RECREATIONAL IMPROVEMENTS ARE PERMITTED ANYWHERE ON THE PROTECTED PROPERTY.

4.10 UTILITY SERVICES AND SEPTIC SYSTEMS - INSTALLATION, MAINTENANCE, REPAIR, REPLACEMENT, REMOVAL AND RELOCATION OF ELECTRIC, GAS, GEOTHERMAL, WATER FACILITIES, SEWER LINES AND/OR OTHER PUBLIC OR PRIVATE UTILITIES, INCLUDING TELEPHONE OR OTHER COMMUNICATION SERVICES OVER OR UNDER THE PROTECTED PROPERTY FOR THE PURPOSE OF PROVIDING ELECTRICAL, GAS, WATER, SEWER, OR OTHER UTILITIES TO SERVE IMPROVEMENTS PERMITTED HEREIN, AND THE RIGHT TO GRANT EASEMENTS OVER AND UNDER THE PROTECTED PROPERTY FOR SUCH PURPOSES, IS PERMITTED WITHOUT FURTHER PERMISSION OF THE GRANTEE. MAINTENANCE, REPAIR OR IMPROVEMENT OF A SEPTIC SYSTEM(S) OR OTHER UNDERGROUND SANITARY SYSTEM WHICH EXISTS ON THE PROTECTED PROPERTY AT THE TIME OF THIS EASEMENT, OR THE CONSTRUCTION OF SEPTIC OR OTHER UNDERGROUND SANITARY SYSTEM FOR THE BENEFIT OF ANY OF THE PERMITTED IMPROVEMENTS IS PERMITTED WITHOUT FURTHER APPROVAL OF THE GRANTEE.

4.11 PAVING AND ROAD CONSTRUCTION - CONSTRUCTION OF NEW ROADS, PARKING LOTS, OR OTHER PAVED SURFACES, OR THE WIDENING OF EXISTING SUCH SURFACES, ARE PERMITTED OUTSIDE THE FARMSTEAD AREA CONSISTENT WITH THE AGRICULTURAL PURPOSES OF THIS EASEMENT WITH THE ADVANCE WRITTEN PERMISSION OF THE GRANTEE. THE GRANTEE SHALL NOT GIVE SUCH PERMISSION, UNLESS THE GRANTEE DETERMINES THAT THE PROPOSED PAVING OR COVERING OF THE SOIL, OR THE LOCATION OF ANY SUCH ROAD, WILL NOT SUBSTANTIALLY DIMINISH OR IMPAIR THE AGRICULTURAL VALUES OF THE PROTECTED PROPERTY.

OR509 PG376

4.12 WATER - GRANTOR SHALL RETAIN AND RESERVE THE RIGHT TO USE ANY APPURTENANT WATER RIGHTS NECESSARY AND SUFFICIENT TO MAINTAIN THE AGRICULTURAL PRODUCTIVITY OF THE PROTECTED PROPERTY.

4.13 ADDITIONAL RESIDENCE - GRANTOR RESERVES THE RIGHT TO BUILD ONE SINGLE FAMILY RESIDENCE ON AN APPROXIMATE FOUR ACRE TRACT BORDERING THE WOODS AT THE EASTERN BOUNDARY OF THE PROPERTY WHERE THE POND IS LOCATED.

ALTHOUGH THE GRANTOR NEED NOT OBTAIN APPROVAL OF THE GRANTEE IN ORDER TO EXERCISE ANY RESERVED RIGHTS IN PARAGRAPH 4, UNLESS OTHERWISE STATED HEREIN, THE GRANTOR HEREBY AGREES TO NOTIFY THE GRANTEE IN WRITING BEFORE EXERCISING ANY RESERVED RIGHT WHICH MAY HAVE AN ADVERSE IMPACT ON THE CONSERVATION OF THE AGRICULTURAL VALUES ASSOCIATED WITH THE PROTECTED PROPERTY.

5. ONGOING RESPONSIBILITIES OF GRANTOR AND GRANTEE

OTHER THAN AS SPECIFIED HEREIN, THIS EASEMENT IS NOT INTENDED TO IMPOSE ANY LEGAL OR OTHER RESPONSIBILITY ON THE GRANTEE, OR IN ANY WAY TO AFFECT ANY EXISTING OBLIGATION OF THE GRANTOR AS OWNER OF THE PROTECTED PROPERTY. AMONG OTHER THINGS, THIS SHALL APPLY TO:

(A) TAXES - THE GRANTOR SHALL CONTINUE TO BE SOLELY RESPONSIBLE FOR PAYMENT OF ALL TAXES AND ASSESSMENTS LEVIED AGAINST THE PROTECTED PROPERTY. IF THE GRANTEE IS EVER REQUIRED TO PAY ANY TAXES OR ASSESSMENTS ON ITS INTEREST IN THE PROTECTED PROPERTY, THE GRANTOR WILL REIMBURSE THE GRANTEE FOR THE SAME.

(B) UPKEEP AND MAINTENANCE - THE GRANTOR SHALL CONTINUE TO BE SOLELY RESPONSIBLE FOR THE UPKEEP AND MAINTENANCE OF THE PROTECTED PROPERTY, TO THE EXTENT IT MAY BE REQUIRED BY LOCAL, STATE AND FEDERAL LAWS AND REGULATIONS. THE GRANTEE SHALL HAVE NO OBLIGATION FOR THE UPKEEP AND MAINTENANCE OF THE PROTECTED PROPERTY.

(C) LIABILITY AND INDEMNIFICATION - THE GRANTOR AGREES TO INDEMNIFY, DEFEND AND HOLD THE GRANTEE HARMLESS FOR ANY AND ALL CLAIMS OR LIABILITY, INCLUDING, BUT NOT LIMITED TO, REASONABLE ATTORNEY FEES ARISING FROM PERSONAL INJURY, ACCIDENTS, NEGLIGENCE, ENVIRONMENTAL CONTAMINATION, OR DAMAGE RELATING TO THE PROTECTED PROPERTY OR ANY CLAIM THEREOF, UNLESS DUE TO THE GROSS NEGLIGENCE OF GRANTEE OR ITS AGENTS, IN WHICH CASE LIABILITY SHALL BE APPORTIONED ACCORDINGLY.

OR 509 PG 377

6. CURRENT AGRICULTURAL USE VALUATION

THE PROTECTED PROPERTY IS, AS OF THE DATE OF EXECUTION OF THIS DEED, VALUED AT ITS AGRICULTURAL USE FOR PURPOSES OF REAL PROPERTY TAXATION, UNDER SECTION 5713.31 OF THE OHIO REVISED CODE. FURTHERMORE, THE GRANTOR SHALL NOT FAIL TO ANNUALLY FILE A RENEWAL APPLICATION UNDER SECTION 5713.31 OF THE OHIO REVISED CODE.

7. GRANTEE'S ENFORCEMENT RIGHTS AND REMEDIES

IN ORDER TO ENFORCE THE TERMS OF THIS EASEMENT, THE GRANTEE SHALL HAVE THE FOLLOWING RIGHTS AND REMEDIES:

7.1 REMEDIES - THE GRANTEE SHALL HAVE THE RIGHT TO ENFORCE BY PROCEEDINGS AT LAW OR IN EQUITY THE PROVISIONS OF THIS EASEMENT INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO REQUIRE THE RESTORATION OF THE PROTECTED PROPERTY TO ITS CONDITION AT THE DATE OF THE GRANT OF THIS EASEMENT, SUBJECT TO THE RESERVED RIGHTS OF THE GRANTOR SET FORTH HEREIN. THE GRANTEE, OR ITS SUCCESSORS OR ASSIGNS, SHALL NOT WAIVE OR FORFEIT THE RIGHT TO TAKE ACTION AS MAY BE NECESSARY TO ENSURE COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS EASEMENT BY ANY PRIOR FAILURE TO ACT. NOTHING HEREIN SHALL BE CONSTRUED TO ENTITLE THE GRANTEE TO INSTITUTE ANY ENFORCEMENT PROCEEDING AGAINST THE GRANTOR FOR ANY CHANGES TO THE PROTECTED PROPERTY DUE TO CAUSES BEYOND THE GRANTOR'S CONTROL, SUCH AS CHANGES CAUSED BY FIRE, FLOOD, STORM, INFESTATIONS, NATURAL DETERIORATION, THE ACTS OF THIRD PARTIES LEGALLY AUTHORIZED TO ACT BY RECORDED DOCUMENT OR OTHER LEGALLY ESTABLISHED RIGHTS OR THE UNAUTHORIZED WRONGFUL ACTS OF THIRD PERSONS; PROVIDED, HOWEVER, THAT THE GRANTOR SHALL NOTIFY GRANTEE OF ANY OCCURRENCE WHICH WOULD ADVERSELY AFFECT OR INTERFERE WITH THE AGRICULTURAL PURPOSES OF THE EASEMENT, WHETHER CAUSED BY THE ACTS OR OMISSIONS OF THE GRANTOR OR THIRD PARTIES, OR BY NATURAL OCCURRENCES.

7.2 ENFORCEMENT COSTS - ALL REASONABLE COSTS INCURRED BY THE GRANTEE IN ENFORCING THE TERMS OF THIS EASEMENT AGAINST GRANTOR, INCLUDING WITHOUT LIMITATION, COSTS AND EXPENSES OF SUIT AND REASONABLE ATTORNEYS' FEES, AND ANY COSTS OF RESTORATION NECESSITATED BY GRANTOR'S VIOLATION OF THE TERMS OF THIS EASEMENT SHALL BE BORNE BY THE GRANTOR. HOWEVER, IT IS UNDERSTOOD BY

THE PARTIES THAT IF THE GRANTOR ULTIMATELY PREVAILS IN A JUDICIAL ENFORCEMENT ACTION, THE GRANTEE SHALL PAY ALL REASONABLE COSTS.

7.3 RIGHT OF ENTRY - THE GRANTEE OR ITS AGENTS, INCLUDING THE UNION COUNTY SOIL AND WATER CONSERVATION DISTRICT (SWCD) SHALL HAVE THE RIGHT TO ENTER THE PROTECTED PROPERTY, IN A REASONABLE MANNER AND AT REASONABLE TIMES, BUT ALWAYS UPON PRIOR REASONABLE NOTICE TO THE GRANTOR, FOR THE PURPOSES OF:

(A) INSPECTION OF THE PROTECTED PROPERTY TO DETERMINE IF THE GRANTOR, OR GRANTOR'S HEIRS SUCCESSORS OR ASSIGNS, IS COMPLYING WITH THE PROVISIONS OF THIS EASEMENT;

(B) OBTAINING EVIDENCE FOR THE PURPOSE OF SEEKING JUDICIAL ENFORCEMENT OF THIS EASEMENT.

8. MONITORING - NOTWITHSTANDING ANY OTHER PROVISIONS IN THIS DEED, THE GRANTEE OR THE GRANTEE'S DESIGNEE SHALL CONDUCT AT LEAST AN ANNUAL MONITORING VISIT OF THE PROTECTED PROPERTY VERIFYING THAT THE GRANTOR IS IN COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS DEED. THE UNION COUNTY SWCD IS APPOINTED AS THE GRANTEE'S DESIGNEE FOR THIS PURPOSE. THE GRANTOR INTENDS TO ENFORCE ANY VIOLATIONS OF THIS DEED, INCLUDING, IF NECESSARY, COMMENCING ENFORCEMENT ACTION IN A COURT OF COMPETENT JURISDICTION LOCATED IN FRANKLIN COUNTY, OHIO.

9. PROMOTION

WITH THE PERMISSION OF THE GRANTOR, THE GRANTEE MAY POST A SIGN(S) WHICH STATES THAT THE PROTECTED PROPERTY IS PRESERVED BY AN AGRICULTURAL EASEMENT.

10. PERPETUAL BURDEN

THIS EASEMENT SHALL RUN WITH AND BURDEN THE PROTECTED PROPERTY IN PERPETUITY AND SHALL BIND THE GRANTOR AND THE GRANTEE, THEIR HEIRS, SUCCESSORS AND ASSIGNS.

11. ASSIGNMENT

THIS EASEMENT IS IN GROSS AND MAY BE ASSIGNED OR TRANSFERRED BY THE GRANTEE. THE GRANTEE AGREES

OR509 PG379

THAT, IF IT TRANSFERS OR ASSIGNS ITS INTEREST IN THIS EASEMENT THAT HAS BEEN ACQUIRED PURSUANT TO SECTION 901.21(B) OF THE OHIO REVISED CODE,

(A) THE ORGANIZATION OR ENTITY RECEIVING THIS INTEREST WILL BE A QUALIFIED ORGANIZATION AS THAT TERM IS DEFINED IS SECTION 170(H)(3) OF THE INTERNAL REVENUE CODE , AS THAT SECTION MAY BE AMENDED FROM TIME TO TIME, AND IN THE REGULATIONS PROMULGATED THEREUNDER AND WHICH IS ORGANIZED AND OPERATED PRIMARILY FOR ONE OF THE CONSERVATIN PURPOSES SPECIFIED IN SECTION 170(H)(4)(A) OF THE INTERNAL REVENUE CODE, AS THAT SECTION MAY BE AMENDED FROM TIME TO TIME, AND IN THE REGULATIONS PROMULGATED THEREUNDER;

(B) IF THE GRANTEE, OR ITS ASSIGNEE, EVER CEASES TO EXIST OR NO LONGER QUALIFIES UNDER SECTION 170(h) OF THE U.S. INTERNAL REVENUE CODE, OR APPLICABLE STATE LAW, A COURT WITH JURISDICTION SHALL ORDER THE TRANSFER OF THIS EASEMENT TO ANOTHER QUALIFIED ORGANIZATION THAT AGREES TO ASSUME THE RESPONSIBILITY IMPOSED BY THIS EASEMENT.

(C) THE TRANSFEREE OR ASSIGNEE WILL BE REQUIRED TO CARRY OUT IN PERPETUITY THE AGRICULTURAL PURPOSES WHICH THIS EASEMENT WAS ORIGINALLY INTENDED TO ADVANCE.

12. TRANSFER OF PROTECTED PROPERTY

UNLESS THIS EASEMENT IS EXTINGUISHED, AS SET FORTH IN PARAGRAPH 13 BELOW, THE GRANTOR AGREES THAT THE TERMS, CONDITIONS, RESTRICTIONS AND PURPOSES OF THIS EASEMENT WILL EITHER BE REFERENCED OR INSERTED BY THE GRANTOR IN ANY SUBSEQUENT DEED OR OTHER LEGAL INSTRUMENT BY WHICH THE GRANTOR SELF-DIVESTS OF ANY INTEREST IN ALL OR PART OF THE PROTECTED PROPERTY. THE GRANTOR AGREES TO NOTIFY THE GRANTEE, ITS SUCCESSORS AND ASSIGNS, OF ANY SUCH CONVEYANCE IN WRITING, AND TO INCLUDE A COPY OF THE SUBSEQUENT DEED OR OTHER LEGAL INSTRUMENT WITH AFOREMENTIONED REFERENCES, BY CERTIFIED MAIL WITHIN FIFTEEN (15) DAYS AFTER CLOSING.

13. EXTINGUISHMENT OF EASEMENT

SHOULD THE DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE, AT THE REQUEST OF THE GRANTOR, DETERMINE THAT CONDITIONS SURROUNDING THE PROTECTED PROPERTY HAVE CHANGED SO MUCH THAT IT BECOMES IMPOSSIBLE OR IMPRACTICAL TO FULFILL THE AGRICULTURAL PURPOSE OF THIS EASEMENT, THEN THE GRANTEE MAY EXTINGUISH OR MODIFY THIS EASEMENT, OR, EXTINGUISHMENT OF THE EASEMENT MAY OCCUR IN WHOLE OR IN PART BY JUDICIAL PROCEEDING UNDER APPLICABLE LOCAL, STATE OR FEDERAL LAWS. IF THIS EASEMENT IS EXTINGUISHED IN WHOLE OR IN PART BY THE GRANTEE OR BY JUDICIAL PROCEEDING, THEN

UPON THE SALE, EXCHANGE OR INVOLUNTARY CONVERSION OF THE PROTECTED PROPERTY, THE GRANTOR SHALL REMIT TO THE GRANTEE, AT CLOSING, 50% OF THE TOTAL FAIR MARKET VALUE OF THAT PART OF THE PROTECTED PROPERTY WHICH IS CONVERTED, EXCLUDING THE VALUE OF ALL BUILDINGS AND IMPROVEMENTS THEREON. UNLESS ESTABLISHED BY A COURT OF LAW IN CONNECTION WITH A JUDICIAL PROCEEDING (E.G., A CONDEMNATION ACTION) THE TOTAL FAIR MARKET VALUE OF THE PORTION OF THE PROTECTED PROPERTY WHICH IS CONVERTED SHALL BE DETERMINED BY AN APPRAISAL CONDUCTED BY A STATE CERTIFIED GENERAL REAL ESTATE APPRAISER SELECTED AND PAID FOR BY THE GRANTOR. THE APPRAISAL SHALL BE DONE IN ACCORDANCE WITH A METHODOLOGY ACCEPTABLE UNDER THE MOST RECENT EDITION OF THE *UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE,* OR ITS EQUIVALENT. THE GRANTEE SHALL DEPOSIT THE PROCEEDS RECEIVED DUE TO THE EXTINGUISHMENT OF THE EASEMENT INTO THE AGRICULTURAL EASEMENT PURCHASE FUND, AS REQUIRED BY SECTION 901.21 (E) OF THE REVISED CODE.

NOTHING SET FORTH HEREIN SHALL IMPAIR, IMPEDE OR EFFECT THE DETERMINATION OF THE FAIR MARKET VALUATION OF THE PROTECTED PROPERTY AT ITS "HIGHEST AND BEST USE" SHOULD AN EXTINGUISHMENT OCCUR, REGARDLESS OF WHETHER BY AGREEMENT, CONDEMNATION, OR OTHER JUDICIAL PROCEEDING. IN OTHER WORDS, THE PROTECTED PROPERTY IS NOT TO BE VALUED FOR AGRICULTURAL PURPOSES, UNLESS THAT IS ITS HIGHEST AND BEST USE AT THE TIME OF SUCH VALUATION.

14. IMMEDIATE PROPERTY RIGHT

THE GRANTOR AGREES THAT THIS DONATION OF A PERPETUAL EASEMENT GIVES RISE TO A PROPERTY RIGHT, IMMEDIATELY INVESTED IN THE GRANTEE, WHICH IS EQUAL TO 50% OF THE TOTAL FAIR MARKET VALUE OF THE PROTECTED PROPERTY, EXCLUDING THE VALUE OF ALL BUILDINGS AND IMPROVEMENTS. SHOULD THIS EASEMENT EVER BE EXTINGUISHED, RECOUPMENT SHALL OCCUR IN ACCORDANCE WITH PARAGRAPH 13 ABOVE.

15. HAZARDOUS WASTE

THE GRANTOR WARRANTS THAT THE GRANTOR HAS NO ACTUAL KNOWLEDGE OF A RELEASE OF A HAZARDOUS SUBSTANCE OR TOXIC WASTE ON THE PROTECTED PROPERTY AS SUCH SUBSTANCES OR WASTES ARE DEFINED BY APPLICABLE LOCAL, STATE AND FEDERAL LAWS AND REGULATIONS, AND HEREBY PROMISES TO INDEMNIFY AND DEFEND THE GRANTEE AGAINST, AND HOLD THE GRANTEE HARMLESS FROM, ANY AND ALL LOSS, COST, CLAIM, LIABILITY OR EXPENSE (INCLUDING REASONABLE ATTORNEYS' FEES) ARISING FROM OR WITH RESPECT

TO ANY RELEASE OF HAZARDOUS SUBSTANCE OR TOXIC WASTE OR VIOLATION OF ANY ENVIRONMENTAL LAWS AND REGULATIONS.

16. AMENDMENT OF EASEMENT

GRANTEE MAY AMEND THIS EASEMENT ONLY WITH THE WRITTEN CONSENT OF THE GRANTOR. ANY SUCH AMENDMENT SHALL BE CONSISTENT WITH THE "STATEMENT OF PURPOSE" OF THIS EASEMENT AND WITH THE GRANTEE'S EASEMENT AMENDMENT POLICIES, AND SHALL COMPLY WITH SECTION 170(h) OF THE U.S. INTERNAL REVENUE CODE OR ANY REGULATIONS PROMULGATED IN ACCORDANCE WITH THAT SECTION. ANY SUCH AMENDMENT SHALL ALSO BE CONSISTENT WITH SECTION 5301.67 et. seq., OF THE OHIO REVISED CODE OR ANY REGULATIONS PROMULGATED PURSUANT TO THOSE LAWS. ANY SUCH AMENDMENT SHALL BE DULY RECORDED.

17. RE-RECORDING

THE GRANTEE IS AUTHORIZED TO RECORD OR FILE ANY NOTICES OR INSTRUMENTS APPROPRIATE TO ASSURING THE PERPETUAL ENFORCEABILITY OF THIS EASEMENT; FOR SUCH PURPOSE, THE GRANTOR APPOINTS THE GRANTEE AS GRANTOR'S ATTORNEY-IN-FACT TO EXECUTE, ACKNOWLEDGE AND DELIVER ANY NECESSARY INSTRUMENT ON THE GRANTOR'S BEHALF. WITHOUT LIMITING THE FOREGOING, THE GRANTOR AGREES TO EXECUTE ANY SUCH INSTRUMENTS UPON REQUEST.

18. DEFINITIONS

THE TERMS "GRANTOR" AND "GRANTEE" AS USED HEREIN SHALL BE DEEMED TO INCLUDE, RESPECTIVELY, THE GRANTOR, THE GRANTOR'S HEIRS, SUCCESSORS AND ASSIGNS, AND THE GRANTEE, ITS SUCCESSORS AND ASSIGNS.

19. NOTICES

ANY NOTICES REQUIRED BY THIS EASEMENT SHALL BE SENT BY REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE GRANTEE AT THE FOLLOWING ADDRESS OR SUCH ADDRESSES AS MAY BE HEREAFTER SPECIFIED IN WRITING: OHIO DEPARTMENT OF AGRICULTURE, OFFICE OF FARMLAND PRESERVATION, 8995 EAST MAIN STREET, REYNOLDSBURG, OHIO 43068.

20. SEVERABILITY

IF ANY PROVISION OF THIS EASEMENT OR THE APPLICATION THEREOF TO ANY PERSON OR CIRCUMSTANCE IS FOUND TO BE INVALID, THE REMAINDER OF THE PROVISIONS OF THIS EASEMENT AND THE APPLICATION OF SUCH PROVISIONS TO PERSONS OR CIRCUMSTANCES OTHER THAN THOSE AS TO WHICH IT IS FOUND TO BE INVALID SHALL NOT BE AFFECTED THEREBY.

21. ENTIRE AGREEMENT

THIS INSTRUMENT SETS FORTH THE ENTIRE AGREEMENT OF THE PARTIES WITH RESPECT TO THE EASEMENT AND SUPERSEDES ALL PRIOR DISCUSSION, NEGOTIATIONS, UNDERSTANDINGS, OR AGREEMENTS RELATING TO THE EASEMENT, ALL OF WHICH ARE MERGED HEREIN. ORIGINALS AND SUPPORTING DOCUMENTATION ARE ON FILE IN THE OHIO DEPARTMENT OF AGRICULTURE, WITH A COPY AVAILABLE ON FILE WITH THE COUNTY OF RECORD.

22. MODIFICATIONS

THIS EASEMENT MAY NOT BE CHANGED, MODIFIED OR DISCHARGED EXCEPT BY A WRITING SIGNED BY THE DULY AUTHORIZED REPRESENTATIVES OF BOTH THE GRANTOR AND THE GRANTEE.

23. GOVERNING LAW

THIS EASEMENT SHALL BE GOVERNED BY AND INTERPRETED UNDER THE LAWS OF THE STATE OF OHIO. ANY ACTION OR PROCEEDING ARISING OUT OF THE TERMS OF THIS EASEMENT AGREEMENT SHALL BE BROUGHT IN A COURT OF COMPETENT JURISDICTION LOCATED IN FRANKLIN COUNTY, OHIO.

24. TERMINATION OF RIGHTS AND OBLIGATIONS

A PARTY'S RIGHTS AND OBLIGATIONS UNDER THIS EASEMENT TERMINATE UPON TRANSFER OF THE PARTY'S INTEREST IN THE EASEMENT OR PROTECTED PROPERTY, EXCEPT THE LIABILITY FOR ACTS OR OMISSIONS PRIOR TO TRANSFER SHALL SURVIVE TRANSFER.

TO HAVE AND TO HOLD THE ABOVE-DESCRIBED AGRICULTURAL EASEMENT TO THE USE, BENEFIT, AND BEHALF OF THE GRANTEE, GRANTEE'S SUCCESSORS AND ASSIGNS FOREVER. IN WITNESS WHEREOF, THE GRANTOR HAS EXECUTED THIS AGRICULTURAL EASEMENT THIS 29th DAY OF October 2003.

OR 509 PG 383

Voluntary Donation by Grantor

The Grantor

Signature: Arno Renner, TRUSTEE

Arno Renner

TRUSTEE OF ARNO L. RENNER TRUST

DATED 4-24-97

Acknowledgement

State of Ohio)

County of UNION)ss.:

The foregoing instrument was acknowledged before me this 29TH day of OCTOBER 2003 by Arno Renner, who acknowledges that he did sign the foregoing instrument, and that the same is his free act and deed.

Notary Public

My Commission Expires

NOTARIAL SEAL STATE OF OHIO

DENNIS A. SCHULZE, Attorney at Law
Notary Public - State of Ohio
My Commission has no expiration

CONSENT OF AGENT

THE UNION COUNTY SOIL AND WATER CONSERVATION DISTRICT HEREBY ACCEPTS ITS APPOINTMENT AS AGENT FOR THE OHIO DEPARTMENT OF AGRICULTURE PURSUANT TO THE TERMS OF THIS EASEMENT.

UNION COUNTY SOIL AND WATER CONSERVATION DISTRICT

SIGNATURE: Terri A Gravatt

PRINT NAME: Terri A. Gravatt

TITLE: District Administrator

OR509 PG384

Acceptance by Grantee

The Grantee:

Fred L Dailey

Fred L. Dailey, Director
Ohio Department of Agriculture

Acknowledgement

State of Ohio)
County of Licking)ss.:

THE FOREGOING INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS 5th DAY OF November, 2003 BY FRED L. DAILEY, THE DIRECTOR OF THE DEPARTMENT OF AGRICULTURE, ACTING FOR AND ON BEHALF OF THE STATE OF OHIO, WHO ACKNOWLEDGED THAT HE EXECUTED THE SAME FOR AND ON BEHALF OF THAT DEPARTMENT AND THE STATE OF OHIO AND THAT HE DID SO ON HIS, THE DEPARTMENT'S AND THE STATE OF OHIO'S OWN FREE ACT AND DEED.

Connie L Ellis

Notary Public

My Commission Expires:

NOTARIAL SEAL
STATE OF OHIO

CONNIE L. ELLIS
Notary Public, State of Ohio
My Commission Expires 2-16-2005

TO INCLUDE THESE ATTACHED EXHIBITS: EXHIBIT A (LEGAL DESCRIPTION OF PROPERTY)
EXHIBIT B (PRESENT CONDITION REPORT)

AFTER RECORDING, PLEASE RETURN TO: OHIO DEPARTMENT OF AGRICULTURE, OFP, 8995 EAST MAIN STREET, REYNOLDSBURG, OHIO 43068

OR 509 PG 385

Exhibit A

BETHEL L. TEMPLE
RECORDER, UNION CO., OHIO
2003 DEC 5 AM 11:08 156 00

Real estate situated in the County of Union in the State of Ohio and in the Township of Millcreek and bounded and described as follows:
Being part of Survey No. 3349, and further described as follows:
Beginning in Marysville and California Pike, corner to lands conveyed by Charles Rausch and by heirs of John Rausch, deceased, January 24th, 1907; thence with the center of said pike 119 50/100 poles to an iron pin corner to George Renner; thence with said Renner's line N. 83 degrees 45' E. 244 poles to Survey line stone; thence with said survey line S. 7 degrees 45' E. 87 poles to a stone in said Survey line corner to said Charles Rausch land; thence with line of said land S. 83 degrees 45' W. 164 60/100 poles to a stone at beginning.
Containing 110 25/100 acres.

LEGAL DESCRIPTIONS

PARCEL 1:

Situated in the County of Union, State of Ohio and the Township of Mill Creek, part of Survey No. 3349 and bounded and described as follows:

Beginning at a stake in the center of the Columbus and Marysville Road at the northwest corner of the lands of Albert Rausch, thence with the center of the said Road N. 52-3/4 degrees W. 10 poles to a stake at the southwest corner of the lands of Amelia Boerger, and in the center of said Road; thence with said line N. 81-3/4 degrees E. 313.50 poles to the survey line and the west line of the lands of John and Bessie Opphile. Thence with said line S. 9-1/2 degrees E. 70 poles to a stake, corner to the lands of Albert Rausch; thence with said line S. 80-1/2 degrees E. 231.50 poles to the place of beginning, CONTAINING ONE HUNDRED TWENTY ONE ACRES, (121) MORE OR LESS.

Excepting therefrom: Being a triangle of land out of the Grantor's northeasterly property corner. Beginning at a point in the Grantor's northeasterly property corner, said point being 144.71 feet right of Station 864 plus 82.27 in the centerline of the aforementioned survey; thence south 07 degrees, 20' 58" East along the Grantor's easterly property line a distance of 90.86 feet to a point; thence North 53 degrees 17' 23" West along a new easterly limited access right of way line for said highway a distance of 134.44 feet to a point in the Grantor's northerly property line: thence North 84 degrees 12' 51" East along said northerly property line, distance of 96.65 feet to the place of beginning. This described parcel containes 0.10 ACRES MORE OR LESS.

CONTAINING IN ALL 120.90 ACRES MORE OR LESS
Prior Deed Reference: Volume 224, Page 413 and Volume 246, Page 26

PARCEL 2:

Situated in the Count of Union, in the State of Ohio, and in the Township of Millcreek and bounded and described as follows:
Being part of Survey No. 3349, and further described as follows:
Beginning in Marysville and California Pike, corner to lands conveyed by Charles Rausch and by heirs of John Rausch, deceased, January 24th, 1907; thence with the center of said pike 119 50/100 poles to an iron pin corner to George Renner; thence with said Renner's line N. 83 deg. 45' E. 244 poles to Survey line stone; thence with said survey line S. 7 deg. 45' E. 87 poles to a stone in said Survey line corner to said Charles Rausch land; thence with line of said land S. 83 deg. 45' W. 164 60/100 poles to a stone at beginning.

OR 509 PG 386

EXHIBIT B: PRESENT CONDITION REPORT

Deed of Agricultural Easement between

Mr. Arno Renner

and

Fred L. Dailey, Director
Ohio Department of Agriculture

The undersigned are parties to an agricultural easement granted by Mr. Renner, Grantor, which has been accepted by Fred L. Dailey, Director, Ohio Department of Agriculture, Grantee. This easement has been recorded in the Union County Records.

Attached herewith is a report detailing the condition of the property described in the easement, as it existed on the date the easement was granted. The report contains a narrative description together with maps and photographs. The parties accept this report as an accurate depiction of the present condition of the property and acknowledge that the original report shall be permanently maintained in the custody of the Ohio Department of Agriculture.

Signed the 21st day of January, 2004.

Grantor:

Arno Renner

Arno Renner

Grantee:

Fred L. Dailey, Director
Ohio Department of Agriculture

Ohio Department of Agriculture
Office of Farmland Preservation
Donation of Agricultural Easement

Renner Farms

Home Address: Arno Renner
13260 Industrial Parkway
Marysville, OH, 43040
937-642-3975

Farm Address: Same

Introduction

The purpose of this Present Condition Report is to describe the physical features and current land uses of the farm owned by Mr. Arno Renner on which an agricultural easement in perpetuity will be conveyed to the Director of the Ohio Department of Agriculture. This report and photo documentation are based on a site visit of the farm on August 7, 2002 by Joe Daubenmire of the Ohio Department of Agriculture, and updated by a drive-by review on August 30, 2003.

Directions to the Farm

This Union County farm is located approximately 15 miles north of the intersection of I-270 and US 33 in south central Mill Creek Township, a few miles south of the City of Marysville, near the Headquarters of Scott Lawn Inc. From US 33 north, just past the rest area, exit and turn left at Scott Lawn Road. Proceed about one mile, then turn south on Industrial Parkway. Travel about 1.5 miles. The farm sits back on the left off of Adelsberger Road which is a chip and seal one lane, dead end road owned and maintained by the township.

Title Search

A title search on the farm was conducted by the office of Mr. Dennis Schultz, Esq. There were no issues of concern identified.

Ownership History of the Farm

Mr. Renner indicates that the farm has been in his family since his grandfather bought the property. Mr. Renner, who is 84 years old, grew up on the farm and has worked continuously on the land first with his parents and then taking over ownership and operation himself. Today he is the sole owner, stating that he has a will and a solid

farm transition plan in place. Mr. Renner's intention in donating this agricultural easement is to avoid a tax sale of his estate and to insure that the land will be available for agriculture for future generations.

Description of Property

This two parcel property, known as Renner Farms, consist of approximately 231 systematically tiled acres with two separate dwellings and associated outbuildings. The property is divided longitudinally by the aforementioned Adelsberger Road. City sewer and water are located directly across the main road, Industrial Parkway. A stream crosses at the back of both parcels and usually runs year round. A nicely developed, well stocked one acre pond with blue spruce, three acres of mixed hardwoods and a managed wildlife habitat is located to the north of the western most parcel (Parcel A), which is 120 acres in size. This pond site adjoins the roadside rest area belonging to US 33. A portion of the land for the roadside rest was purchased from Mr. Renner at the time it was constructed.

The farmstead of Parcel A consists of a solidly built 1870's two story brick home in very good repair. This home is Mr. Renner's dwelling. Three large aluminum grain bins, one of which is less than a year old, are situated on the farmstead, as well as a barn, a pole barn, a grainery, and an older garage that is used for storage. About a dozen fruit trees are on the farmstead. All of Parcel A, with the exception of 17 acres of managed woodland, is planted out in no-till or minimum-till corn. The last timber harvest occurred 11 years ago and no additional timber harvesting will be permitted.

Parcel B consists of approximately 111 acres, planted in no-till soy beans. A pre-civil war era barn and two story brick home (currently rented) make up the homestead along with an old grainery (to be torn down) and a large dog kennel.

There is no livestock on the farm. There are no third party interests associated with ownership. Mineral rights have been retained by Mr. Renner.

Environmental Issues

During the August 7, 2002 site visit, Mr. Renner stated that there are no dumps, trash accumulations, or environmental problems that he is aware of. Also, during a walking tour of the farm, Joe Daubenmire observed no environmental problems.

Conservation Plan

A conservation plan is on file with the Union County Soil and Water Conservation District office. A soil map is attached.

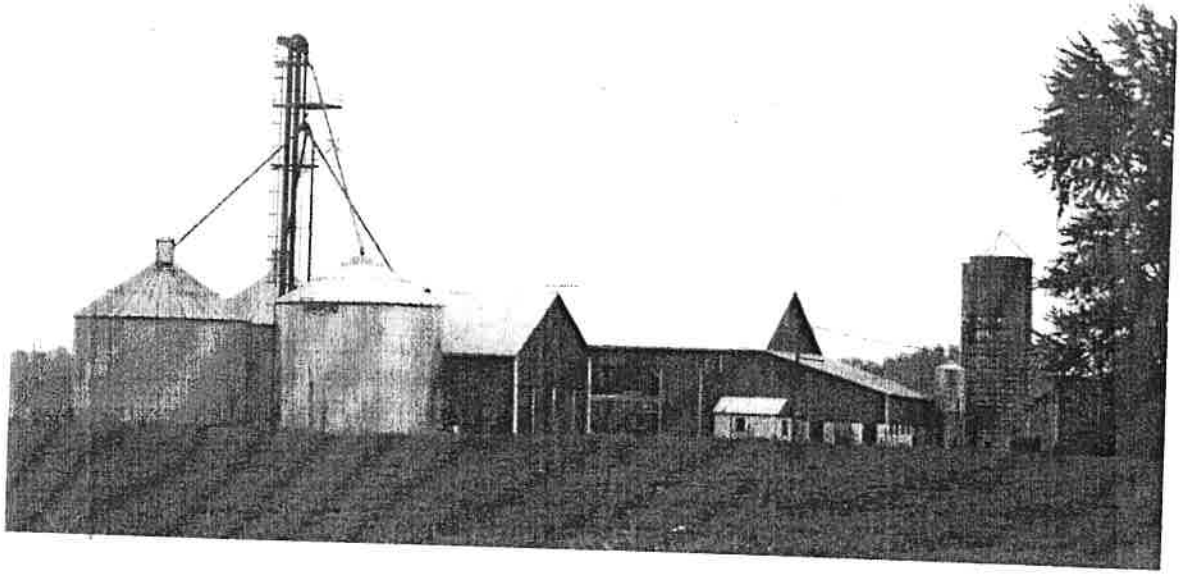
The attached maps and photographs are provided to document the foregoing text. Original photographs are on file at the Ohio Department of Agriculture.

Exhibit B

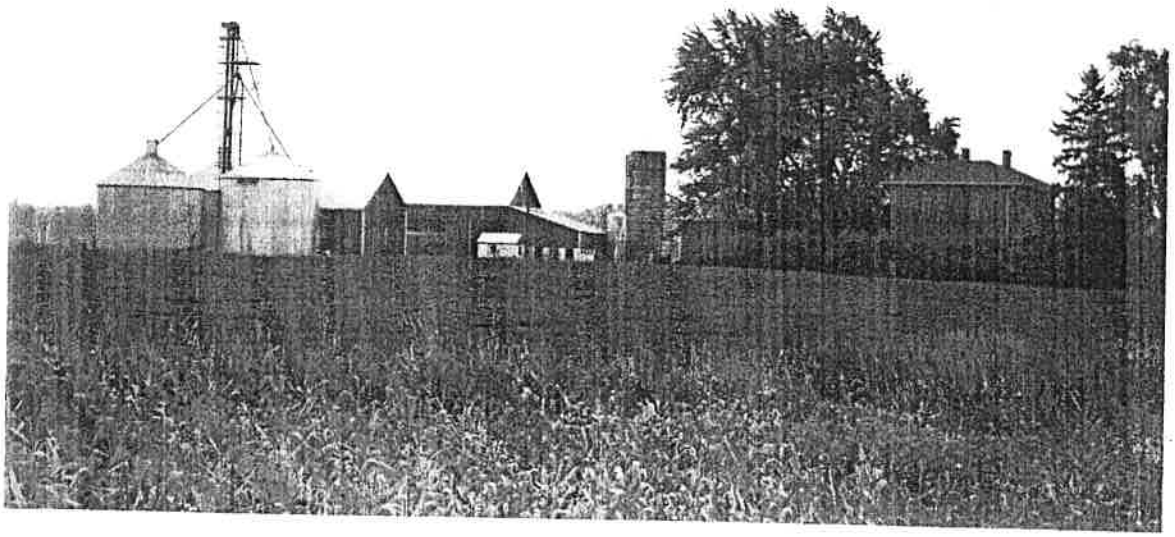
PHOTO DESCRIPTION **Renner Farm**

1., 2. Farmstead #1.
3. From farmstead looking toward Industrial Parkway.
4. From farmstead looking north toward Marysville.
5. From farmstead looking north west toward the Rt. 33 rest area.
6. Behind barn on farmstead #1 looking toward pond.
7. By farmhouse #1 looking at farmstead #2.
8. Wind powered aerator at pond building site.
9. At the pond site, looking toward Industrial Parkway.
10. Near pond looking west toward farmstead.
11. Looking east along Adelsberger Road between the two farms.
12. Farm #1 southern border frontage on Industrial Parkway from Adelsberger Road looking southwest.
13. Southwestern boundary of farm #1 from Industrial Parkway looking toward the roadside rest on US 33 with farm #1 in background.
14. Farm #2 southern border frontage on Industrial Parkway from Adelsberger Road looking southeast.
15. Eastern border of farm #1 from Adelsberger Road looking north.
16. Eastern border of farm #2 from Adelsberger Road looking south.
17. Southern border of Farm #2 looking east from Industrial Parkway
18. Looking from farmstead #2 down the lane leading to Industrial Parkway.
19. Looking at farm #1 from farm #2.
20. Old crib and storage shed slated to be razed on farm #2.
21. Looking south from front yard of farm #2.
22. Front view of home on farmstead #2.
23. Looking east toward woods bordering Rt. 33 from farmstead #2.

1



2





3



4

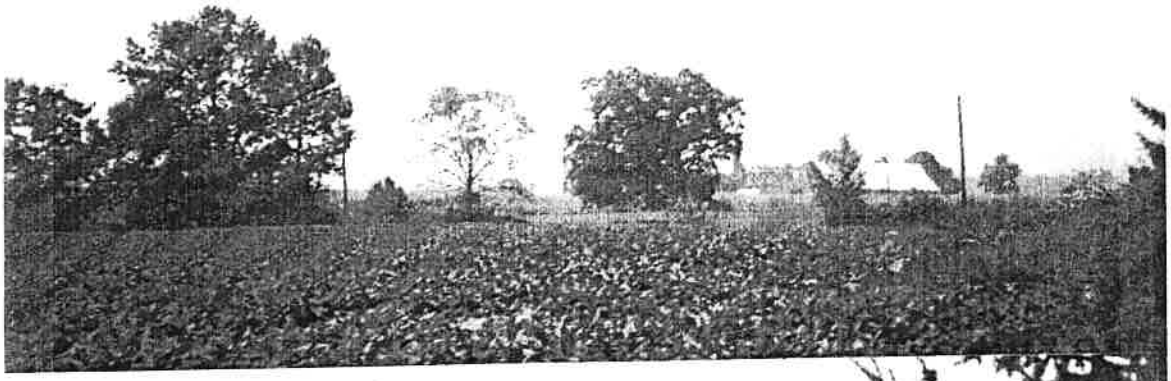


5

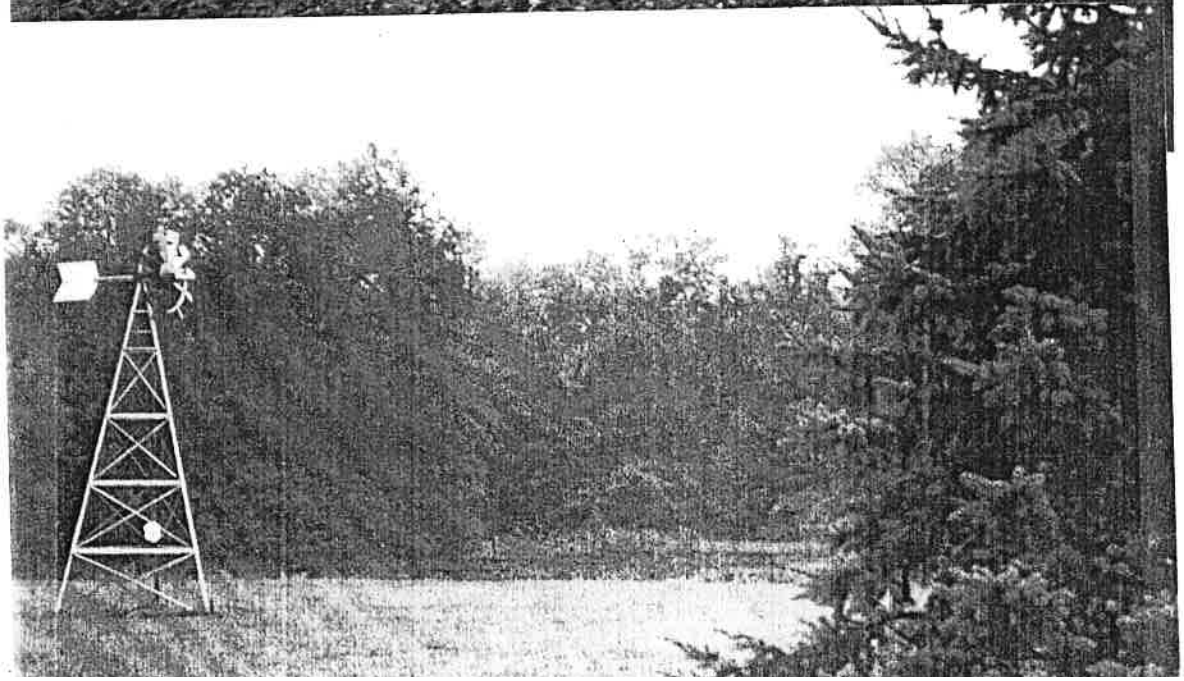
6



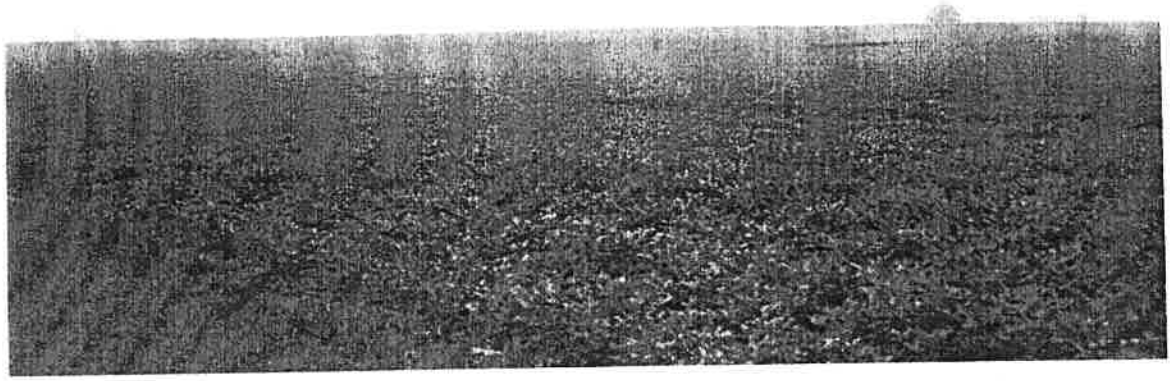
7



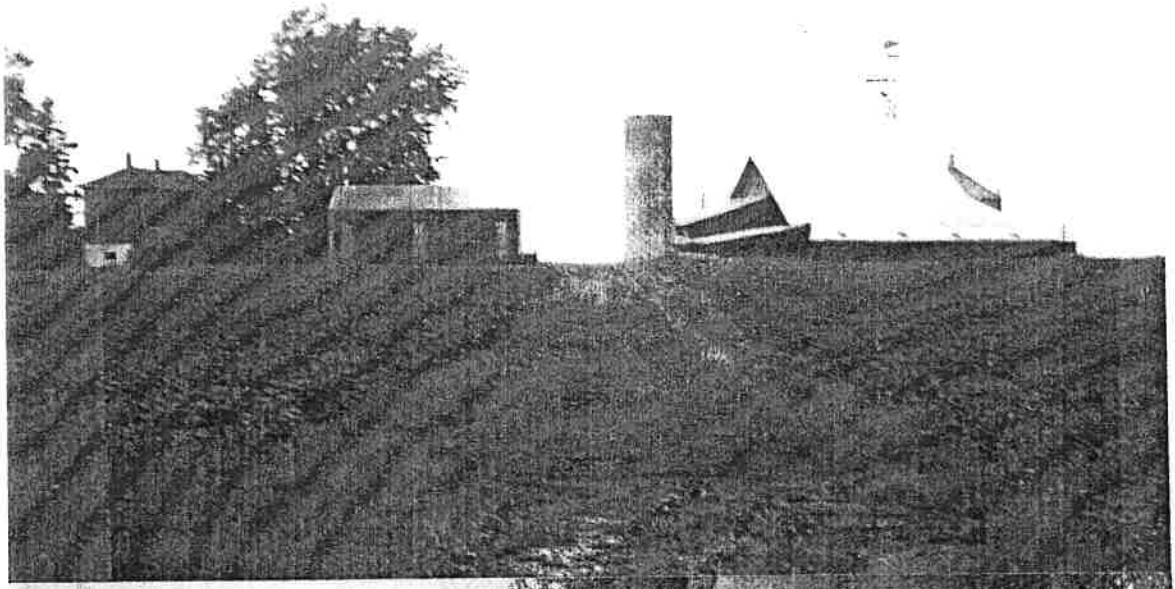
8



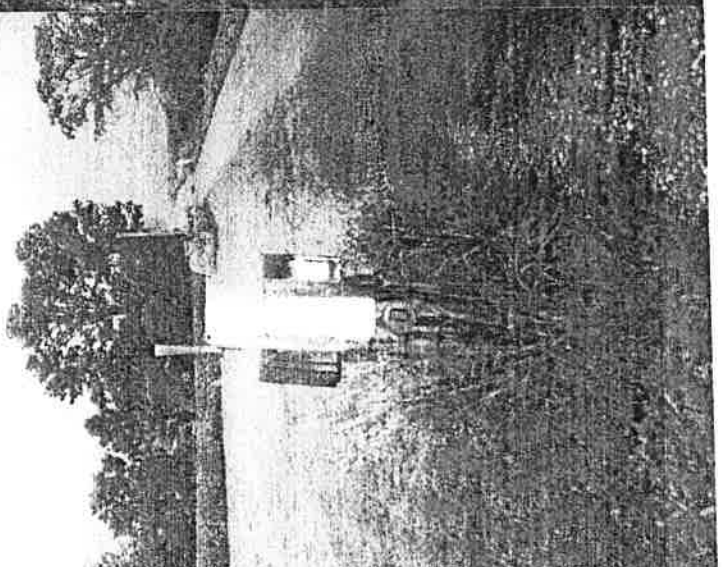
9



10



11



12



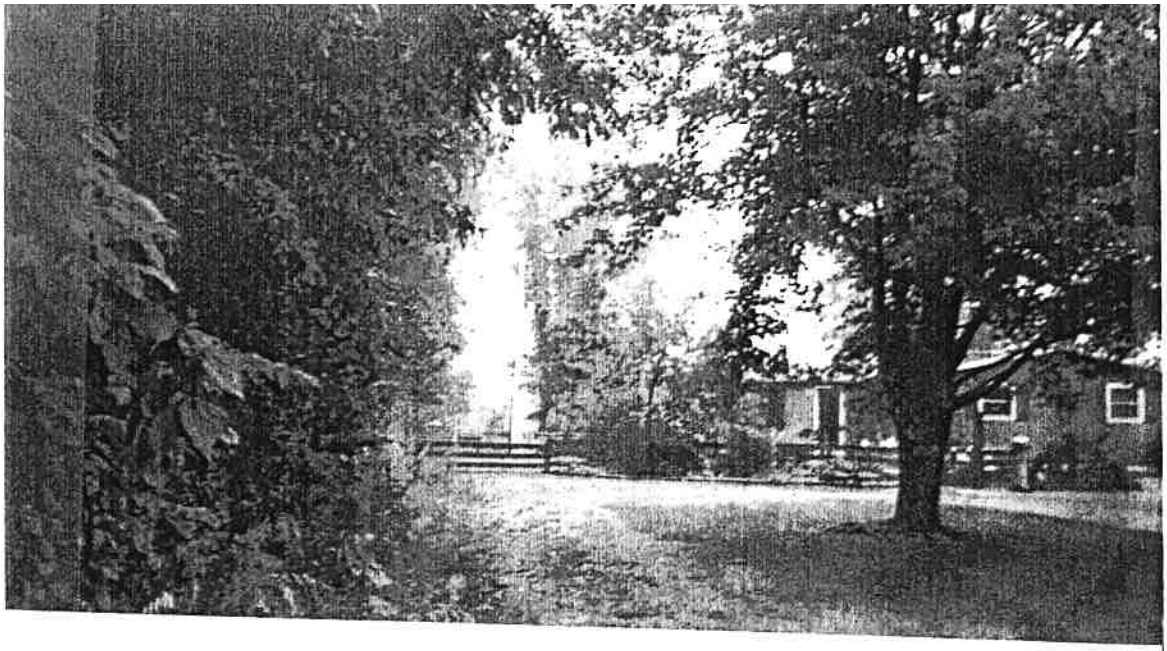
13



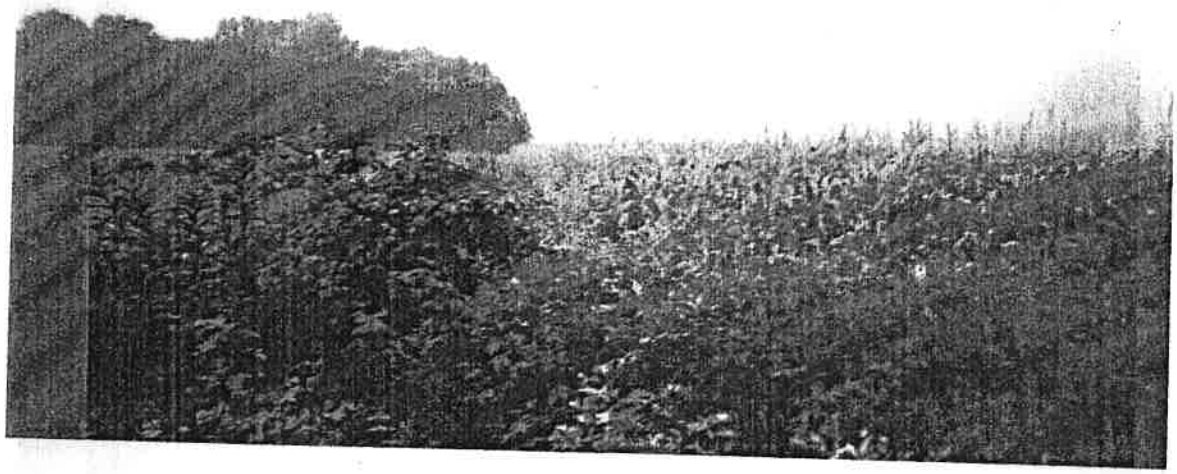
14



15



16



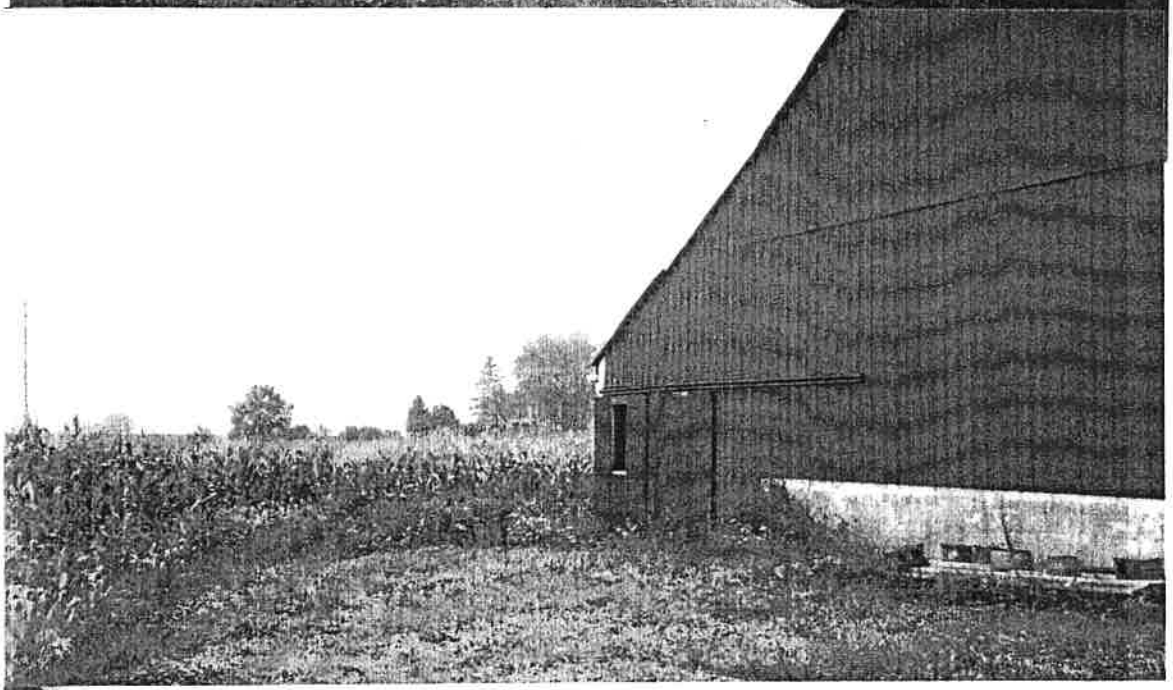
17



18



19



20



21



22



23



Mapping Appraisal & Planning System

Union County | Property Information Guide | County Auditor

Mary H. Snider
Union County Auditor

Steve A. Stolte
Union County Engineer

County Engineer



Layers:

- [x] Roads
- [x] Parcels (search)
- [x] Cities
- [ ] Townships

(Note: Some layers are not visible at all scales.)

Background:

Aerial Photo (2000)

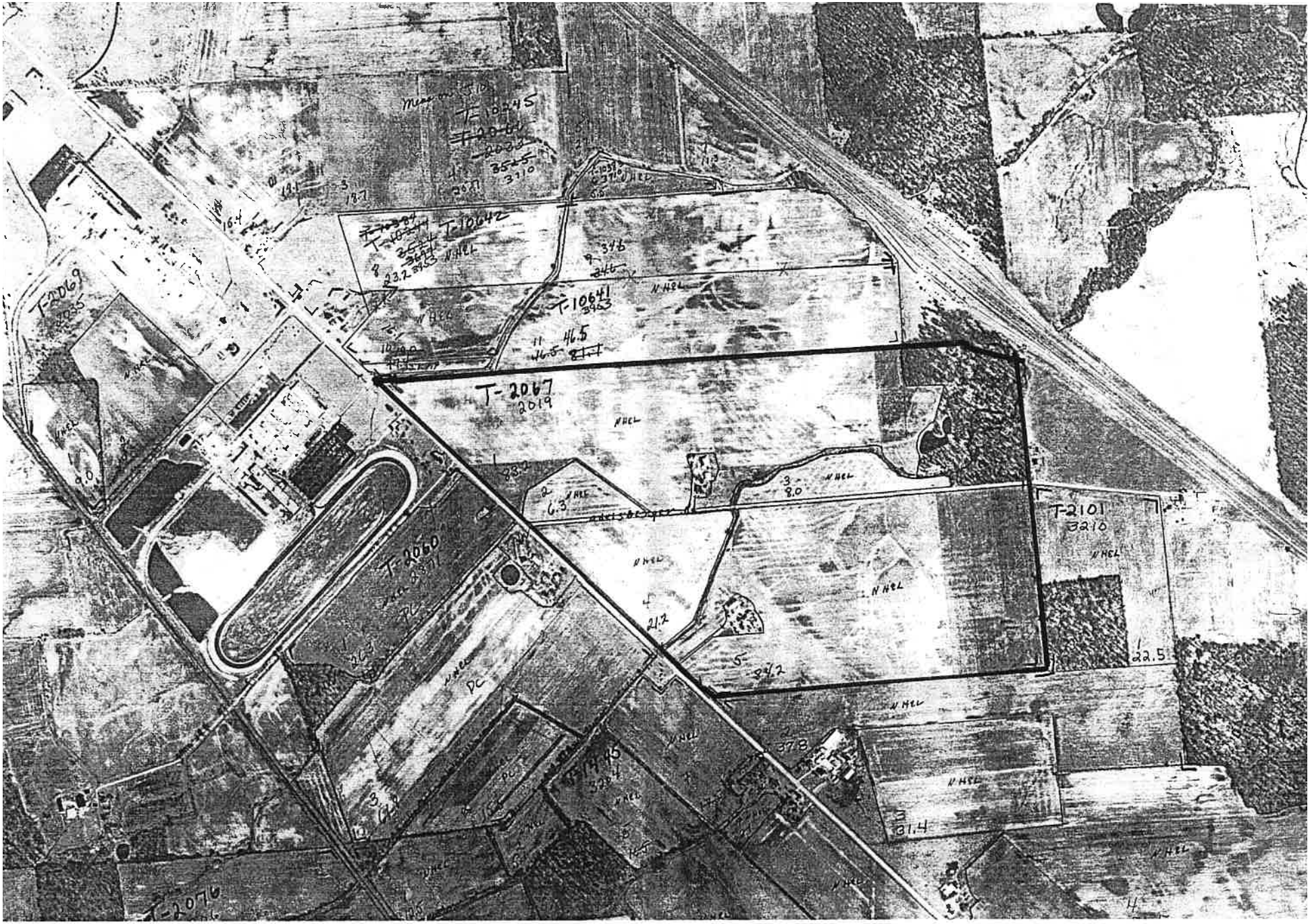
Redraw

Click map to:

- (•) Zoom in 4x
- ( ) Zoom out 2x
- ( ) Move to point
- ( ) Select Parcel

Restart

The information on this page was prepared to assist in the appraisal of real property for tax purposes. Map features and related data may not reflect most recent changes. Union County assumes no legal responsibility or liability for the information contained on this page. Users noting errors or omissions are encouraged to contact the Union County Auditor (937-645-3003) or the Union County Engineer (937-645-3018), or send e-mail to maps@co.union.oh.us.


T-10245
T-10642
T-10641
T-2067
2019
T-2069
T-2060
T-2101
3210
T-2076
N HEL
PC
22.5
31.4
37.8
21.2
6.3
8.0
46.5
23.2
16.4
18.7

SOIL AND CAPABILITY MAP

UNION Soil Conservation District and _____ cooperating.

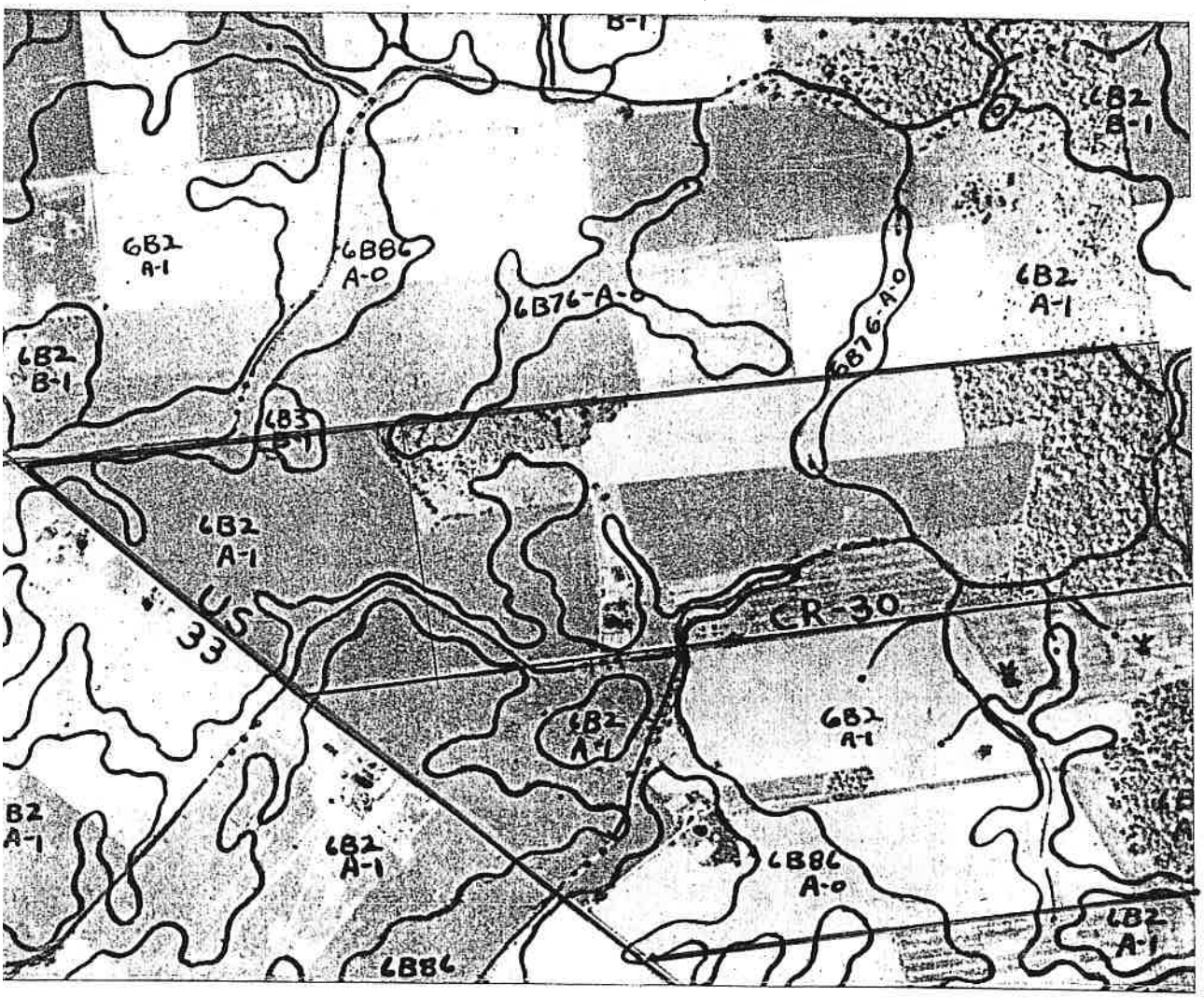
Owner ARNO RENNER Operator _____

County UNION State OHIO Photo Nos. BVN-3G-182

Date prepared _____ Approx. Scale 8"= 1 Mile _____

PREPARED BY U. S. DEPARTMENT OF AGRICULTURE, SOIL CONSERVATION SERVICE

N



CONSERVATION PLAN MAP

UNION Soil Conservation District

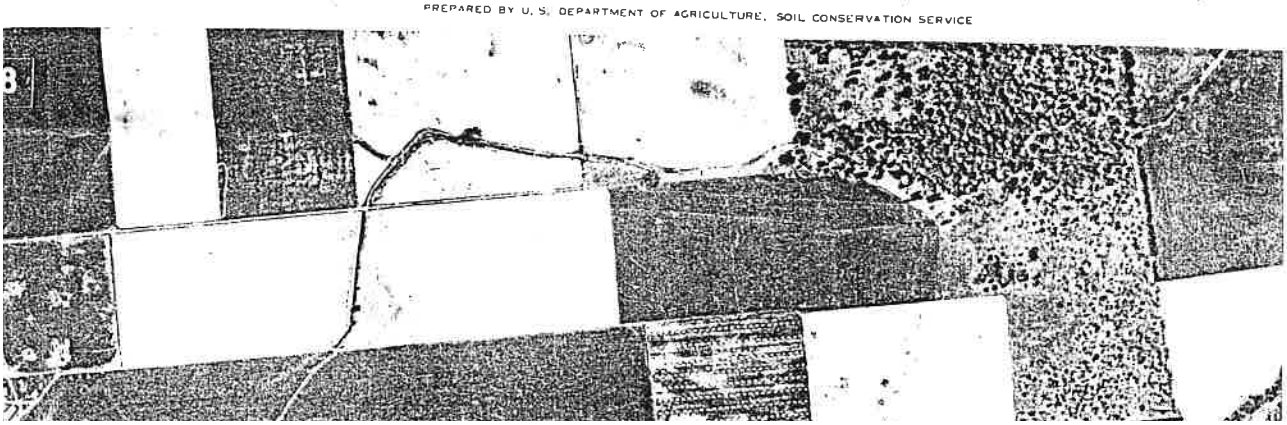
Owner ARNO RENNER Operator _____

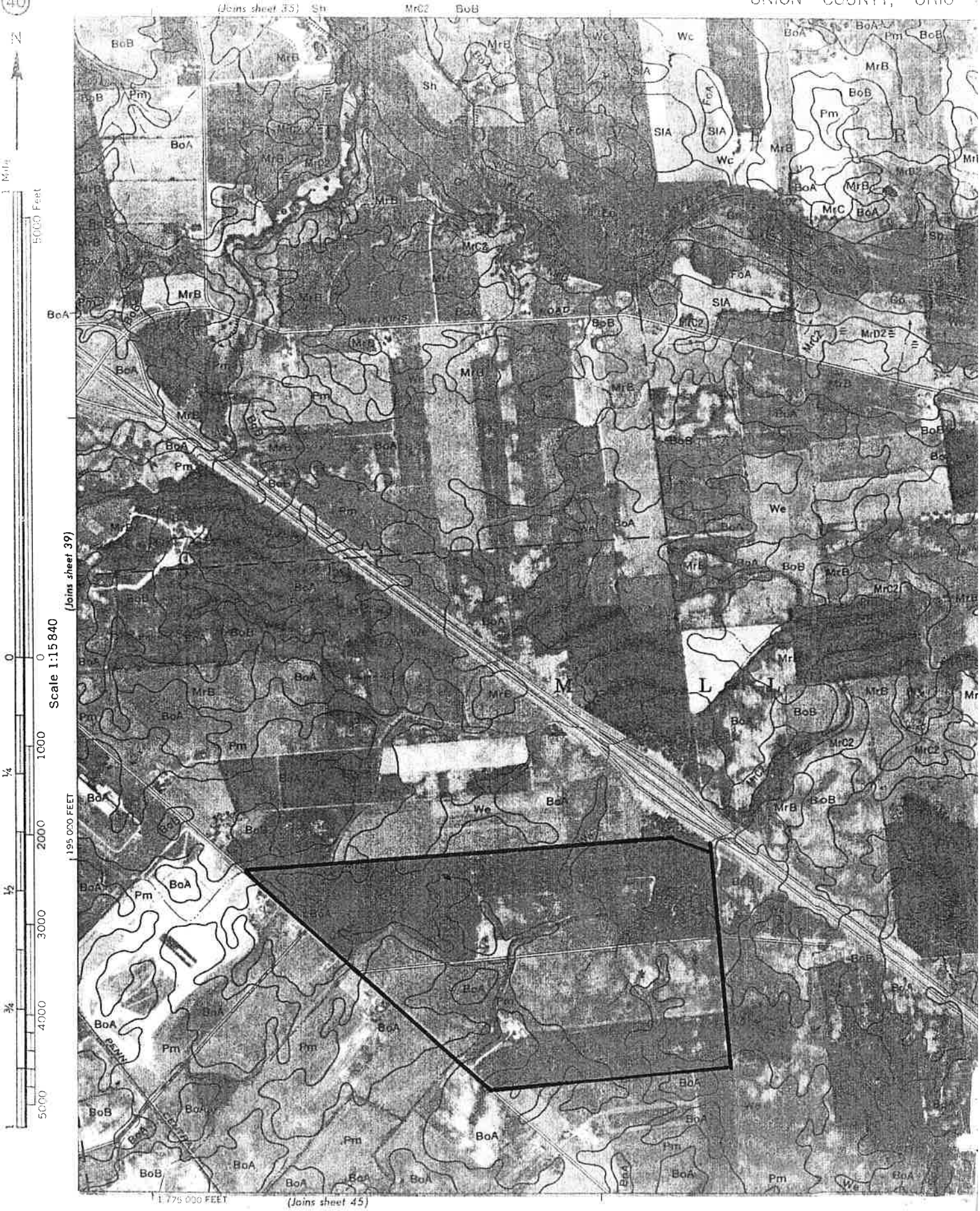
County UNION State OHIO Photo Nos. BVN-3G-182

Date prepared _____ Approx. Scale 8"=1 Mile _____

PREPARED BY U. S. DEPARTMENT OF AGRICULTURE, SOIL CONSERVATION SERVICE

N




(Joins sheet 35)
(Joins sheet 39)
(Joins sheet 45)
N
1 Mile
5000 Feet
Scale 1:15 840
0
1000
2000
3000
4000
5000
¼
½
¾
1
195 000 FEET
1 775 000 FEET
WATKINS ROAD
PENN CENTRAL
M L L
BoA
BoB
MrB
MrC2
MrC
MrD2
Pm
Sh
Wc
SlA
FoA
We

OHIO DEPARTMENT OF AGRICULTURE 325534

AMENDMENT TO DEED OF AGRICULTURAL EASEMENT

This Amendment, effective 21 Feb, 2006, revises the Deed of Agricultural Easement entered into on November 5, 2003, recorded in Union County, Official Record 509, Page 369, that was made and entered into by and between Arno Renner, Trustee, residing at 13260 Industrial Parkway, Marysville, Ohio 43040 (hereinafter referred to as the "**Grantor**") and the Director, Ohio Department of Agriculture, 8995 East Main Street, Reynoldsburg, Ohio, 43068, (hereinafter referred to as the "**Grantee**").

IT IS HEREBY MUTUALLY AGREED BY and BETWEEN the Grantor and the Grantee to amend the original Deed of Agricultural Easement:

SECTION 3.8

Replace Section 3.8 of the original Easement, in its entirety, with the following:

3.8 ROADS- THERE SHALL BE NO BUILDING OF NEW ROADS, PARKING LOTS, OR OTHER PAVED SURFACES, OR THE WIDENING OF EXISTING SUCH SURFACES, EXCEPT ON THE FARMSTEAD AREA, STATE OR LOCAL HIGHWAY RIGHTS-OF-WAY, AND THOSE IMPROVEMENTS PERMITTED UNDER PARAGRAPH 4.11 BELOW.

TRANSFER NOT NECESSARY
MARY H. SNYDER, Auditor
BY

OR 666 PG 354

ACCEPTANCE BY GRANTEE

OHIO DEPARTMENT OF AGRICULTURE

Fred L Dailey

FRED L. DAILEY, DIRECTOR
OHIO DEPARTMENT OF AGRICULTURE

ACKNOWLEDGEMENT

STATE OF OHIO
COUNTY OF Licking)SS.:

THE FOREGOING INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS 21st DAY OF February, 2006 BY FRED L. DAILEY, THE DIRECTOR OF THE DEPARTMENT OF AGRICULTURE, ACTING FOR AND ON BEHALF OF THE STATE OF OHIO, WHO ACKNOWLEDGED THAT HE EXECUTED THE SAME FOR AND ON BEHALF OF THAT DEPARTMENT AND THE STATE OF OHIO AND THAT HE DID SO ON HIS, THE DEPARTMENT'S AND THE STATE OF OHIO'S OWN FREE ACT AND DEED.

Connie L Ellis

NOTARY PUBLIC
My Commission Expires:

NOTARY PUBLIC STATE OF OHIO

Connie L. Ellis
Notary Public-State of Ohio
My Commission Expires
February 15, 2010

Prepared by Wright Law Off
Dublin, OH

ACCEPTANCE BY GRANTOR

SIGNATURE: Arno Renner

ARNO RENNER, TRUSTEE

STATE OF OHIO

COUNTY OF Union)SS.:

THE FOREGOING INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS 22nd DAY OF February 2006 BY ARNO RENNER, TRUSTEE, WHO ACKNOWLEDGES THAT HE DID SIGN THE FOREGOING INSTRUMENT, AND THAT THE SAME IS HIS FREE ACT AND DEED.

NOTARIAL SEAL STATE OF OHIO

Carol Pope Scheiderer

NOTARY PUBLIC

MY COMMISSION EXPIRES:

CAROL POPE SCHEIDERER
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES SEPTEMBER 9, 2007

TERESA L. MARKHAM
RECORDER, UNION CO., OHIO
2006 FEB 22 AM 10:50
4000

OR 666 PG 356

Laura A. Curliss Co., LPA
Laura A. Curliss
Attorney at Law

January 7, 2021

Sarah Huffman
Executive Director
Office of Farmland Preservation
Ohio Department of Agriculture
8995 E. Main Street
Reynoldsburg, Ohio 43068

RE: ODA Easement ID: AEDP-03-R01-D-0234SPA110 - Proposed Columbia Gas Industrial/Commercial Gas Pipeline Utility Easement on Protected Property

Dear Executive Director Huffman,

I am writing on behalf of landowners Don Bailey and Charles Renner (Farm #1) and Patrick and Whitney Bailey (Farm #2) in Union County, Ohio. Columbia Gas, Inc. has written to my clients suggesting that they will use eminent domain if they do not sign an industrial/commercial gas utility line easement. Columbia Gas is proceeding with a survey of my clients' land and also an appraisal.

As you know, both farms are protected by the above referenced AEDP easement, donated as the 2003 Arno Renner Trust Agricultural Easement, recorded as document 294930 in the Official Records of Union County, Ohio (the "Ag Easement"), held by the Ohio Department of Agriculture on a total of 231.25 acres (the "Protected Property"). The Protected Property is restricted ***exclusively*** to agricultural use. Arno Renner donated this Ag Easement to ODA as a restricted gift. Arno Renner took a federal tax deduction for this gift to the Ohio Department of Agriculture.

NOTICE: This letter is being written to provide NOTICE to the Ohio Department of Agriculture. Per the terms of the Ag Easement, the Grantors shall "***notify the Grantee in writing before exercising any reserved right which may have an adverse impact on the conservation of the agricultural values*** associated with the Protected Property."

The language of the Ag Easement governs the allowable uses of the Protected Property. This Ag Easement does not permit the installation of an industrial/commercial gas pipeline and related utility line easement. Please refer to the following sections of the Ag Easement. References are to paragraphs in the Ag Easement and are excerpted to highlight the relevant sections (with emphasis added):

[Recitals]

B. Agricultural Value and Use – land is ***exclusively devoted to agriculture. The Grantor has an interest in preserving the Protected Property for agricultural use.***

E. ….The Grantor and Grantee are furthering the State of Ohio's conservation polity to preserve and protect viable agricultural land.

The Grantor ***intends that this Easement will confine the use*** of the Protected Property, in perpetuity, to activities that are consistent with the purposes of the Easement....The Grant of this agricultural easement is ***exclusively for the "conservation purpose" as that term is described in Section 170(h)(4)(A)(III) of the Internal Revenue Code*****.....**

F. Federal Farmland Protection Act. .... The ***grant and acceptance*** of this agricultural easement is also pursuant to the clearly delineated federal conservation policy to preserve agricultural land as evidenced by this [P.L. 97-98, 7 U.S.C. 42-01 *et seq.*] Act.

"3. Prohibited Uses/Restrictions

Any activity on or use of the Protected Property inconsistent with the purposes of this Easement is prohibited. ***The following activities are expressly prohibited***, except as provided in Paragraph 4 below:

3.1 Industrial or Commercial Activity – There shall be ***no industrial or commercial activity undertaken or allowed on the Protected Property***, except as provided in Paragraph 4 below. ***No right of passage shall be granted or retained across or upon the Protected Property if that right of passage is used in conjunction with such prohibited activities.***

3.2 There shall be ***no new structures*** or placing of any dwelling, building, ... fence or sign (other than those signs permitted, required or allowed by the Grantee for appropriate management, prevention of hunting or trespass, etc.), asphalt, concrete pavement, ... ***utility pole, ... conduit line, or any other temporary or permanent structure or facility on the Protected Property***, except as provided in paragraph 4 below.

DONATION OF AGRICULTURAL EASEMENT

...The Easement is subject to the following terms and conditions:

1. Statement of Purpose

It is the purpose of this Easement to assure that the Protected Property will be retained predominantly in agricultural use by ***preserving and protecting its agricultural soils and viability through a perpetual restriction on the use of the Protected Property.***

3. Prohibited Uses/Restrictions

Any activity or use of the Protected Property ***inconsistent with the purposes of this Easement is prohibited.*** The following activities are ***expressly prohibited***, except as provided in paragraph 4 below (***emphasis added***):

3.1 Industrial or Commercial Activity – There shall be ***no industrial*** or commercial activity undertaken or allowed on the Protected Property, except as provided in paragraph 4 below. ***No right of passage shall be granted*** or

retained across or upon the Protected Property if that right of passage is used in conjunction with such prohibited activities.

3.2 Structures – There shall be ***no new structures*** or placing of any dwelling, building…fence or sign (other than those signs permitted, required or allowed by the Grantee for appropriate management, prevention of hunting or trespass, etc.), asphalt, concrete pavement, ….. ***utility*** pole…***conduit line, or any other temporary or permanent structure or facility*** on the Protected Property, except as provided in paragraph 4 below.

3.5 Topography – There shall be no ***ditching…filling; excavating; removal of topsoil…or other materials;*** or any change in the topography of the land in any manner, ***unless in accordance with the farm conservation plan*** referenced in paragraph C above.

3.8. Roads – There shall be ***no building of new roads***, parking lots, or other paved surfaces or widening of existing such surfaces, except on the Farmstead area, state or local highway rights-of-way (~~i.e. 50 feet from the center of Industrial Parkway and 30 feet from the center of Adelsberger Road~~)[1], and those improvements permitted under paragraph 4.11 below.

4. Grantor's Reserved Rights

The Grantor reserves for the Grantor's self, heirs, successors and assigns, all rights and privileges of ownership of the Protected Property to use the Protected Property for all purposes that are not inconsistent with the purpose of this Easement and not expressly prohibited by this Easement. ***The following rights are expressly reserved by the Grantor:***

4.1 Conveyance – Grantor may sell…or otherwise convey the Protected Property, ***provided that such conveyance is subject to this Easement and written notice is provided to the Grantee in accordance with paragraph 18 below.***

4.5 Fences – Existing fences….and new fences may be built on the Protected Property for purposes of trespass and reasonable and customary management of livestock and wildlife, without any further permission of the Grantee.

4.7 Agricultural Structures and Improvements – The existing agricultural structures and improvements may be repaired….. ***New buildings and other structures and improvements to be used primarily for agricultural purposes,*** including the processing or sale of farm products predominantly grown or raised on the Protected Property, but not including any dwelling or farm labor housing, ***may be built*** on the Protected Property without any further permission of the Grantee.

---

[1] Per amendment to the Ag Easement dated February 21, 2006, the language in parentheses was removed. Official Records of Union County, Ohio, Vol. 666, page 354.

4.10 Utility Services and Septic Systems – ***Installation, maintenance, repair***, replacement, removal and relocation **of** electric, **gas,** geothermal, water facilities, sewer lines and/***or other public or private utilities...over and under*** the Protected Property ***for the purpose of providing*** electrical, gas, water, sewer, or other ***utilities to serve improvements permitted herein, and the right to grant easements over and under the Protected Property for such purposes, is permitted*** without further permission of the Grantee.....

4.11 Paving and Road Construction – Construction of new roads, parking lots, or other paved surfaces, or the widening of existing such surfaces, are permitted outside the Farmstead Area ***consistent with the agricultural purposes*** of this Easement with ***advance written permission of the Grantee***. The Grantee shall not give such permission, ***unless the Grantee determines*** that the Proposed Paving or covering of soil, or the location of any such road, will not substantially diminish or impair the agricultural values of the Protected Property.

NOTICE – p. 9 - .... Grantor agrees to ***notify the Grantee in writing before exercising any reserved right which may have an adverse impact on the conservation of the agricultural values*** associated with the Protected Property.

Section 7 – Grantee's Enforcement Rights and Remedies. This section sets forth the Ohio Department of Agriculture's many rights and remedies in the event that the landowners violate the terms of the Ag Easement.

*****

My clients believe that granting this industrial/commercial gas pipeline easement will have adverse impacts on agriculture on their land. They are concerned that the State of Ohio could find that they have violated the terms of the Ag Easement if they cooperate or agree to allow this industrial/commercial gas line to be installed on their property. The local monitoring agent, Union Soil & Water Conservation District has stated as much in the attached Resolution.

The landowners believe that the Ag Easement does not permit them to convey an industrial/commercial gas line easement across the Protected Property for the following reasons:

1. The gift of the Ag Easement was a restricted gift exclusively for agricultural purposes;
2. The terms of the proposed CG Industrial Gas Easement ("CG gas utility easement") would limit the landowners from being able to use the land under easement for many activities defined as agriculture in O.R.C. 1.61 and 5713.30 – including silviculture, viticulture, apiaries, hops, fruit trees, specialty crops, fencing for pasturing livestock and deer exclusion;
3. The landowners' successor-in-interest took a federal tax deduction for the fair market value of the donation of the this "qualified conservation contribution" pursuant to I.R.C. IRC §§ 170(f)(3)(B)(iii) and (h);

4. A "qualified conservation contribution" is a conservation easement that is not subject to amendment to allow building sites or building envelopes not identified at the time of the easement donation and violates the "in perpetuity" requirement for a qualified conservation contribution (see the IRS Conservation Easements Audit Techniques Guide, revised 11.9.20);
5. The CG gas utility easement will be used for an industrial or commercial activity (3.1);[2]
6. The CG gas utility easement will permit a non-agricultural structure/improvement (4.7);
7. The high-pressure gas pipeline Columbia Gas intends to install cannot and will not serve the Protected Property (4.10);
8. The installation of the CG gas pipeline will require non-permissible excavation (3.2, 3.5);
9. Columbia Gas has to build two new access roads (3.8) for construction and continuing access;
10. Construction requires the removal of topsoil and will result in permanent damage to the 9.5acres of soils. The construction damage to the land will be extensive and is inconsistent with the conservation purpose of the easement (Recitals section);
11. The State of Ohio, Ohio Department of Agriculture, would be breaching the public trust by failing to protect this charitable gift if it allowed the landowners/Grantors to convey an industrial/commercial utility easement on the Protected Property;
12. The State of Ohio, Ohio Department of Agriculture, will endanger its standing as a "qualified conservation organization" for purposes of landowners substantiating for tax deduction purposes the donation of qualified conservation contributions if it approves/allows landowners to convey an industrial/commercial utility easement (see IRS Audit Guide) and to permit these prohibited activities, including a violation of the in perpetuity requirement for qualified conservation contributions. If the Ohio Department of Agriculture no longer qualifies as a "qualified conservation organization" under federal law, the Section 11B. of the Ag Easement states that "a court with jurisdiction shall order the transfer of this Easement to another qualified organization that agrees to assume the responsibility imposed by this Easement."

    At this point in time, it appears that the Ohio Department of Agriculture may not be willing to assume the responsibility imposed by this Ag Easement.

For the foregoing reasons, the landowners believe that it would be a violation of the law of real property, the state and federal laws governing charities and non-cash charitable gifts to permit this industrial/commercial gas pipeline.

The news of the ODA's failure to understand the terms of this Ag Easement (and dozens of similar easements it holds) has made statewide news in major agriculture media outlets (Ohio Farmer, Ohio Country Journal and Farm and Dairy). It has also been brought to the attention of the Governor's office by the Ohio Coalition of Land Trusts.

---

[2] Providing service to a new industry if the primary basis of need cited by Columbia Gas to the Ohio Power Siting Board.

While the Ohio Power Siting Board in August granted to Columbia Gas an Opinion, Order and Certificate to install this gas pipeline, this approval is **conditioned upon** their compliance with all other federal, state and local laws. An Ag Easement, enforceable under state law, is a legal instrument with terms directly contrary to the installation of this pipeline.

The 231 acres comprising the two farms protected by the Arno Renner Ag Easement has been the subject of legal examination in the past and found to be a legal barrier to commercial utility line installation. On August 13, 2008, then Attorney General Nancy Rogers issued an opinion concerning the Arno Renner Ag Easement and whether it permitted a commercial water line utility easement (not serving the farm). AG Rogers opined, in part, as follows:

> Your request discusses the possibility of locating the waterline in a 20 foot wide area parallel to the road, but beyond the existing right-of-way. You mention that this area might be acquired by Union County either as an easement or an expansion of the right-of-way for Industrial Parkway.
>
> ODA, in its discretion and mission to preserve farmland in Ohio, has established standard terms that appear in deeds of agricultural easements, including the Deed of easement for the Bailey farm. One term addresses the rights of farmland owner with respect to utility improvements and granting easements for such. This term allows the farmland owner to make utility improvements or grant easements for such only if the improvement ***solely serves the protected farmland*** and permitted structures thereon. In this instance, the proposed water line would not solely serve the Bailey property. Accordingly, the Baileys are prohibited from granting the proposed easement unless ODA gives its approval.
>
> At this time, ODA has determined that any water line must be located in the existing right-of-way and that placement outside of that area is counter to the preservation of the Bailey property as farmland.

(emphasis added)

In light of the 2008 Attorney General Opinion and their own reading of the terms of the easement, the landowners are understandably reluctant agree to allow any industrial/commercial utility line on the farm.

The landowners therefore **request an Opinion from Attorney General Yost** as to why the 2008 Attorney General Opinion is incorrect as to para. 4.10 of the Ag Easement, to determine the rights and responsibilities of the parties to this donated easement – ODA, the successor landowners, and the local monitoring agency, and explaining why the sections of the Ag Easement cited above do not also prevent the excavation or the land and installation of an industrial/commercial pipeline and roadways, and explaining why State of Ohio would not otherwise be breaching its duty as a charity and a qualified conservation organization under state and federal law by allowing such a use on the Protected Property.

CONSENT NOT TO SUE LETTER - Finally, before the landowners can even contemplate agreeing to such the CG gas pipeline utility easement, the landowners would ***require unequivocal assurance*** from the Ohio Department of Agriculture that it will not exercise its rights under Sections 7 and 8 of the Ag Easement, ***now or in future,*** including a guarantee from the Ohio Department of Agriculture and its local monitoring agent, Union County Soil & Water Conservation District, that it will not take enforcement action against the landowners or their successor owners for violating the terms of the Ag Easement by conveying the CG gas pipeline utility easement, indemnifying them and holding them harmless for any violation of the terms of the Ag Easement that is causally related to CG's use of the utility easement (including pollution or damage to the land or the inability of the landowners to use the Protected Property to pursue all legal agricultural uses in perpetuity) and paying for the landowners' attorney's fees and costs related to the indemnification. Such an indemnification would also require a release of the landowner's from paragraph 5C of the Ag Easement to effectuate the indemnity.

EXTINGUISHMENT? The Attorney General may find that only a judicial partial extinguishment of the Ag Easement would make this project possible. The use of the land proposed for the pipeline will violate *many* of the provisions of the Ag Easement. Extinguishment invokes paragraph 13 and a proceeds payment would be due to ODA because this was a donated easement with a related tax deduction. Some of the proceeds must come back to ODA to benefit the public through a future ag easement purchase.

****

In conclusion, my clients are open to have a conversation with ODA and its legal counsel at the Attorney General's office to discuss these issues.

Sincerely yours,

Laura A. Curliss
Attorney for Don Bailey, Charles Renner,
Patrick & Whitney Bailey, successor landowners
to the Arno Renner Trust Ag Easement Land
P.O. Box 421
Yellow Springs, OH 45387
513-600-7171
curlisslegal@gmail.com

Attachments:
2003 Arno Renner Trust Ag Easement & Amendment (AEDP-03-R01-D-0234SPA110)
2008 Attorney General Opinion
Res. 20-102 of the Union Soil & Water Conservation District

EXHIBIT B: PRESENT CONDITION REPORT

Deed of Agricultural Easement between

Mr. Arno Renner

and

Fred L. Dailey, Director
Ohio Department of Agriculture

The undersigned are parties to an agricultural easement granted by Mr. Renner, Grantor, which has been accepted by Fred L. Dailey, Director, Ohio Department of Agriculture, Grantee. This easement has been recorded in the Union County Records.

Attached herewith is a report detailing the condition of the property described in the easement, as it existed on the date the easement was granted. The report contains a narrative description together with maps and photographs. The parties accept this report as an accurate depiction of the present condition of the property and acknowledge that the original report shall be permanently maintained in the custody of the Ohio Department of Agriculture.

Signed the 21st day of January, 2004.

Grantor:

Arno Renner

Arno Renner

Grantee:

Fred L. Dailey, Director
Ohio Department of Agriculture

Ohio Department of Agriculture
Office of Farmland Preservation
Donation of Agricultural Easement

Renner Farms

Home Address: Arno Renner
13260 Industrial Parkway
Marysville, OH, 43040
937-642-3975

Farm Address: Same

Introduction

The purpose of this Present Condition Report is to describe the physical features and current land uses of the farm owned by Mr. Arno Renner on which an agricultural easement in perpetuity will be conveyed to the Director of the Ohio Department of Agriculture. This report and photo documentation are based on a site visit of the farm on August 7, 2002 by Joe Daubenmire of the Ohio Department of Agriculture, and updated by a drive-by review on August 30, 2003.

Directions to the Farm

This Union County farm is located approximately 15 miles north of the intersection of I-270 and US 33 in south central Mill Creek Township, a few miles south of the City of Marysville, near the Headquarters of Scott Lawn Inc. From US 33 north, just past the rest area, exit and turn left at Scott Lawn Road. Proceed about one mile, then turn south on Industrial Parkway. Travel about 1.5 miles. The farm sits back on the left off of Adelsberger Road which is a chip and seal one lane, dead end road owned and maintained by the township.

Title Search

A title search on the farm was conducted by the office of Mr. Dennis Schultz, Esq. There were no issues of concern identified.

Ownership History of the Farm

Mr. Renner indicates that the farm has been in his family since his grandfather bought the property. Mr. Renner, who is 84 years old, grew up on the farm and has worked continuously on the land first with his parents and then taking over ownership and operation himself. Today he is the sole owner, stating that he has a will and a solid

farm transition plan in place. Mr. Renner's intention in donating this agricultural easement is to avoid a tax sale of his estate and to insure that the land will be available for agriculture for future generations.

Description of Property

This two parcel property, known as Renner Farms, consist of approximately 231 systematically tiled acres with two separate dwellings and associated outbuildings. The property is divided longitudinally by the aforementioned Adelsberger Road. City sewer and water are located directly across the main road, Industrial Parkway. A stream crosses at the back of both parcels and usually runs year round. A nicely developed, well stocked one acre pond with blue spruce, three acres of mixed hardwoods and a managed wildlife habitat is located to the north of the western most parcel (Parcel A), which is 120 acres in size. This pond site adjoins the roadside rest area belonging to US 33. A portion of the land for the roadside rest was purchased from Mr. Renner at the time it was constructed.

The farmstead of Parcel A consists of a solidly built 1870's two story brick home in very good repair. This home is Mr. Renner's dwelling. Three large aluminum grain bins, one of which is less than a year old, are situated on the farmstead, as well as a barn, a pole barn, a grainery, and an older garage that is used for storage. About a dozen fruit trees are on the farmstead. All of Parcel A, with the exception of 17 acres of managed woodland, is planted out in no-till or minimum-till corn. The last timber harvest occurred 11 years ago and no additional timber harvesting will be permitted.

Parcel B consists of approximately 111 acres, planted in no-till soy beans. A pre-civil war era barn and two story brick home (currently rented) make up the homestead along with an old grainery (to be torn down) and a large dog kennel.

There is no livestock on the farm. There are no third party interests associated with ownership. Mineral rights have been retained by Mr. Renner.

Environmental Issues

During the August 7, 2002 site visit, Mr. Renner stated that there are no dumps, trash accumulations, or environmental problems that he is aware of. Also, during a walking tour of the farm, Joe Daubenmire observed no environmental problems.

Conservation Plan

A conservation plan is on file with the Union County Soil and Water Conservation District office. A soil map is attached.

The attached maps and photographs are provided to document the foregoing text. Original photographs are on file at the Ohio Department of Agriculture.

Exhibit B

PHOTO DESCRIPTION **Renner Farm**

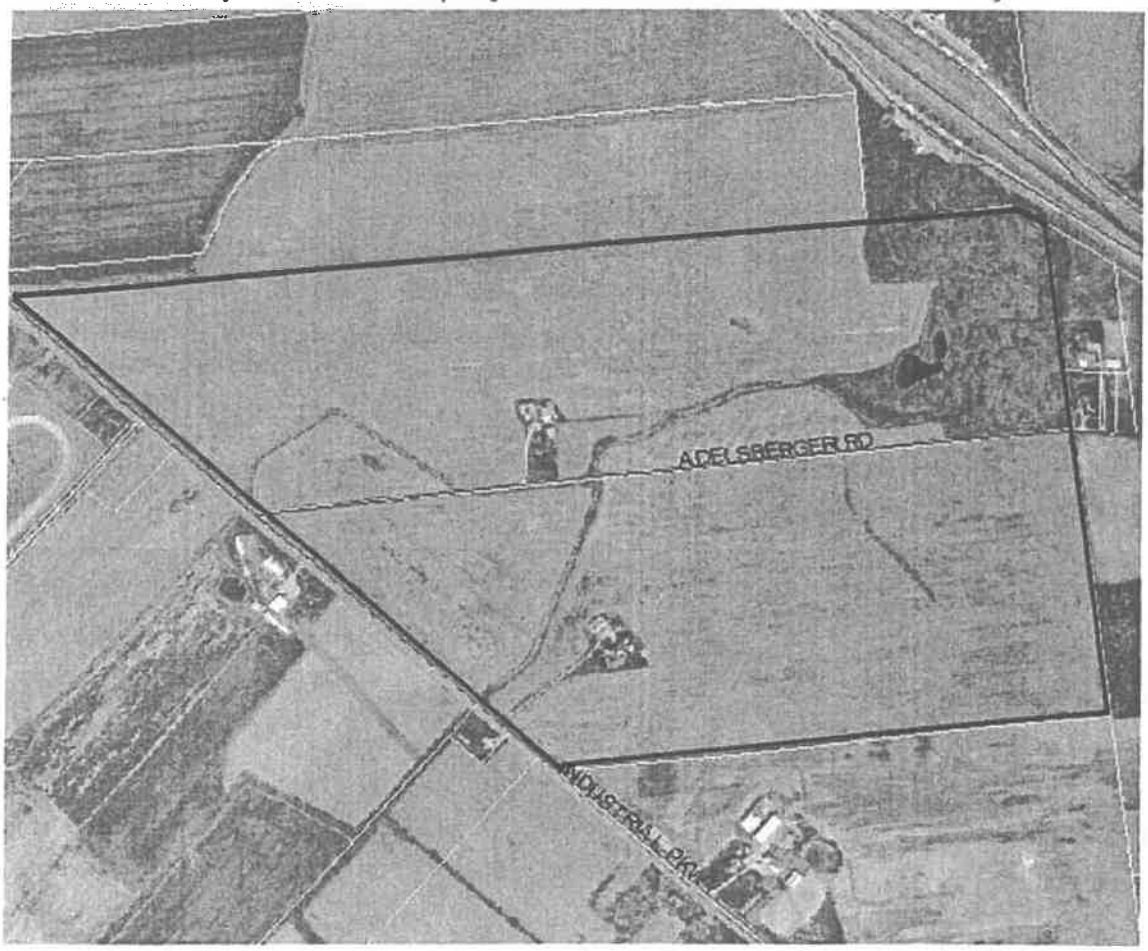
1., 2. Farmstead #1.
3. From farmstead looking toward Industrial Parkway.
4. From farmstead looking north toward Marysville.
5. From farmstead looking north west toward the Rt. 33 rest area.
6. Behind barn on farmstead #1 looking toward pond.
7. By farmhouse #1 looking at farmstead #2.
8. Wind powered aerator at pond building site.
9. At the pond site, looking toward Industrial Parkway.
10. Near pond looking west toward farmstead.
11. Looking east along Adelsberger Road between the two farms.
12. Farm #1 southern border frontage on Industrial Parkway from Adelsberger Road looking southwest.
13. Southwestern boundary of farm #1 from Industrial Parkway looking toward the roadside rest on US 33 with farm #1 in background.
14. Farm #2 southern border frontage on Industrial Parkway from Adelsberger Road looking southeast.
15. Eastern border of farm #1 from Adelsberger Road looking north.
16. Eastern border of farm #2 from Adelsberger Road looking south.
17. Southern border of Farm #2 looking east from Industrial Parkway
18. Looking from farmstead #2 down the lane leading to Industrial Parkway.
19. Looking at farm #1 from farm #2.
20. Old crib and storage shed slated to be razed on farm #2.
21. Looking south from front yard of farm #2.
22. Front view of home on farmstead #2.
23. Looking east toward woods bordering Rt. 33 from farmstead #2.

Mapping Appraisal & Planning System

Mary H. Snider
Union County Auditor

Steve A. Stolte
Union County Engineer

Union County | Property Information Guide | County Auditor | County Engineer



Layers:

- [x] Roads
- [x] Parcels (search)
- [x] Cities
- [ ] Townships

(Note: Some layers are not visible at all scales.)

Background:

Aerial Photo (2000)

Redraw

Click map to:

- (•) Zoom in 4x
- ( ) Zoom out 2x
- ( ) Move to point
- ( ) Select Parcel

Restart

The information on this page was prepared to assist in the appraisal of real property for tax purposes. Map features and related data may not reflect most recent changes. Union County assumes no legal responsibility or liability for the information contained on this page. Users noting errors or omissions are encouraged to contact the Union County Auditor (937-645-3003) or the Union County Engineer (937-645-3018), or send e-mail to maps@co.union.oh.us.

SOIL AND CAPABILITY MAP

UNION Soil Conservation District and cooperating.

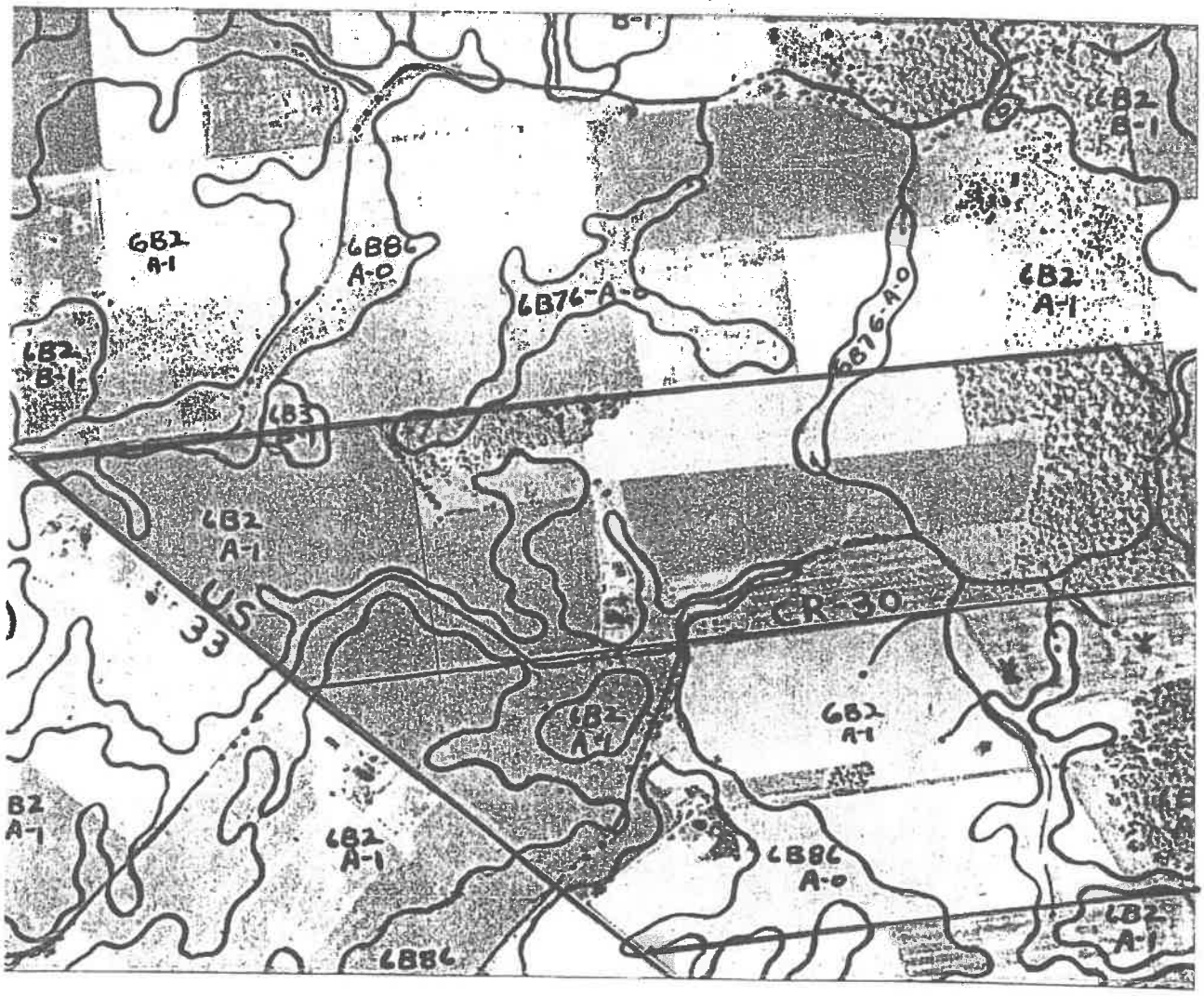
Owner ARNO RENNER Operator

County UNION State OHIO Photo Nos. BVN-3C-182

Date prepared Approx. Scale 8"= 1 Mile

PREPARED BY U. S. DEPARTMENT OF AGRICULTURE, SOIL CONSERVATION SERVICE

N



CONSERVATION PLAN MAP

UNION Soil Conservation District

Owner ARNO RENNER Operator

County UNION State OHIO Photo Nos. BVN-3C-182

Date prepared Approx. Scale 8"=1 Mile

PREPARED BY U. S. DEPARTMENT OF AGRICULTURE, SOIL CONSERVATION SERVICE

N



OHIO DEPARTMENT OF AGRICULTURE 325534

AMENDMENT TO DEED OF AGRICULTURAL EASEMENT

This Amendment, effective 21 Feb, 2006, revises the Deed of Agricultural Easement entered into on November 5, 2003, recorded in Union County, Official Record 509, Page 369, that was made and entered into by and between Arno Renner, Trustee, residing at 13260 Industrial Parkway, Marysville, Ohio 43040 (hereinafter referred to as the "**Grantor**") and the Director, Ohio Department of Agriculture, 8995 East Main Street, Reynoldsburg, Ohio, 43068, (hereinafter referred to as the "**Grantee**").

IT IS HEREBY MUTUALLY AGREED BY and BETWEEN the Grantor and the Grantee to amend the original Deed of Agricultural Easement:

SECTION 3.8

Replace Section 3.8 of the original Easement, in its entirety, with the following:

3.8 ROADS- THERE SHALL BE NO BUILDING OF NEW ROADS, PARKING LOTS, OR OTHER PAVED SURFACES, OR THE WIDENING OF EXISTING SUCH SURFACES, EXCEPT ON THE FARMSTEAD AREA, STATE OR LOCAL HIGHWAY RIGHTS-OF-WAY, AND THOSE IMPROVEMENTS PERMITTED UNDER PARAGRAPH 4.11 BELOW.



OR 666 PG 354

ACCEPTANCE BY GRANTEE

OHIO DEPARTMENT OF AGRICULTURE

Fred L Dailey

FRED L. DAILEY, DIRECTOR
OHIO DEPARTMENT OF AGRICULTURE

ACKNOWLEDGEMENT

STATE OF OHIO
COUNTY OF Licking)SS.:

THE FOREGOING INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS 21st DAY OF February, 2006 BY FRED L. DAILEY, THE DIRECTOR OF THE DEPARTMENT OF AGRICULTURE, ACTING FOR AND ON BEHALF OF THE STATE OF OHIO, WHO ACKNOWLEDGED THAT HE EXECUTED THE SAME FOR AND ON BEHALF OF THAT DEPARTMENT AND THE STATE OF OHIO AND THAT HE DID SO ON HIS, THE DEPARTMENT'S AND THE STATE OF OHIO'S OWN FREE ACT AND DEED.

Connie L Ellis

NOTARY PUBLIC
My Commission Expires:

NOTARY PUBLIC STATE OF OHIO

Connie L. Ellis
Notary Public-State of Ohio
My Commission Expires
February 15, 2010

Prepared by Wright Law Offs
Dublin, OH

OR 666 PG 355

ACCEPTANCE BY GRANTOR

SIGNATURE: Arno Renner

ARNO RENNER, TRUSTEE

STATE OF OHIO

COUNTY OF Union)SS.:

THE FOREGOING INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS 22nd DAY OF February 2006 BY ARNO RENNER, TRUSTEE, WHO ACKNOWLEDGES THAT HE DID SIGN THE FOREGOING INSTRUMENT, AND THAT THE SAME IS HIS FREE ACT AND DEED.



Carol Pope Scheiderer

NOTARY PUBLIC

MY COMMISSION EXPIRES:

CAROL POPE SCHEIDERER
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES SEPTEMBER 9, 2007

TERESA L. MARKHAM
RECORDER, UNION CO., OHIO
2006 FEB 22 AM 10:50
4000

OR 666 PG 356

Union Soil and Water Conservation District

18000 State Route 4, Suite B, Marysville, OH 43040 | Phone (937) 642-5871
www.co.union.oh.us/union-soil-water-conservation-district/

Whereas, the mission of Union County Soil and Water Conservation District (SWCD) is to "Promote, preserve, and enhance the wise use of our natural resources for the people of Union County by providing technical, financial and educational assistance."

Whereas, the Ohio Department of Agriculture Office of Farmland Preservation was created to partner with landowners, local government, soil and water conservation districts and land trusts to permanently preserve Ohio farms in agricultural production, strengthening Ohio's number one industry, food and agriculture.

Whereas, on November 5, 2003 the Ohio Department of Agriculture (ODA) accepted a donation from The Arno Renner Trust for an agricultural easement on 231.25 acres of prime farmland valued at over $3.5 million.

Whereas, the Union County SWCD represents the local expertise on all matters related to agricultural best management practices and technical aspects related to the conservation of soil and water resources.

Whereas, the ODA Office of Farmland Preservation entered into an agreement with the Union County SWCD to serve as the local agent entrusted to monitor the agricultural easement donated by the Arno Renner Trust.

Whereas, in 2004 The City of Marysville sought to acquire a permanent utility easement to install a sanitary sewer line across the preserved farmland of the Arno Renner Trust.

Whereas, at the urging of local interested parties, including the Union County SWCD Board of Supervisors, the ODA asserted the supremacy of the State's interest in preserving farmland when it issued a letter to the City of Marysville dated November 23, 2005 in which the ODA set a strong precedent on this matter. This letter clarified the legal terms of the agricultural easement and its prohibition against the installation of any utilities across the preserved farmland that do not directly service the farm. With the assistance of staff from the Union County SWCD, the City of Marysville was able to utilize a mutually beneficial alternative route that met the needs of the sewer project while minimizing adverse impact to the preserved farmland.

Whereas, on July 9, 2020 the Ohio Power Siting Board issued a Staff Report which recommended conditional approval of a proposed natural gas pipeline route planned by Columbia Gas which would require a utility easement across the preserved farmland donated by the Arno Renner Trust. This OPSB Staff Report stated the primary basis of need identified by Columbia Gas for this particular route was "in order to accommodate a new industrial customer." This proposed gas main by its very size and nature cannot provide any direct service to the preserved farm.

Whereas, the agricultural easement donated by the Arno Renner Trust includes language that explicitly prohibits the granting of any right of passage across the protected property if that passage is used in conjunction with industrial activities.

Whereas, on August 27, 2020 the OPSB passed a conditional Opinion, Order, and Certificate which identifies a condition of their approval that "prior to commencement of construction activities in the areas that require permits or authorizations by federal or state laws and regulations, the Applicant shall obtain and comply with such permits or authorizations."

Board of Supervisors

ANDY CLARRIDGE	STEVE ROBINSON	RICK WEIGAND	MATT STALEY	CHERYL TRIVISONNO
16862 Paver Barnes Road	21510 Wolford-Maskill Road	11700 Hopewell Road	27485 Storms Road	10477 Shields Road
Marysville, Ohio 43040	Marysville, OH 43040	Marysville, OH 43040	West Mansfield, OH 43358	Raymond, OH 43067

Whereas, the Union County SWCD Board of Supervisors supports a strong and vibrant local economy with ample access to natural gas resources through the US 33 Smart Corridor and beyond to accommodate both existing and prospective industrial and residential customers.

Whereas, the Union County SWCD Board of Supervisors supports a meaningful and enduring farmland preservation program. Therefore this body is concerned with the long-term viability of this program if easement language is not consistently interpreted or enforced, and preserved farmland is allowed to be used as a utility corridor to support industrial activities, in apparent contradiction to both the legal terms of the easement and the 2005 legal precedent set by ODA and fully supported by this body.

Therefore let it be resolved that the Union County SWCD Board of Supervisors requests that ODA thoroughly review the language in the agricultural easement donated by the Arno Renner Trust in 2003 and apply the same legal precedent expressed in ODA's letter dated November 23, 2005 to protect the integrity of the agricultural easement against intrusion of a utility route primarily intended to support unspecified private industrial activity and not directly servicing the farm. By so doing, ODA will strengthen and promote future farmland preservation efforts in Union County and across all of Ohio.

Let it also be resolved that the Union County SWCD Board of Supervisors strongly encourages ODA to thoughtfully reconsider any real or perceived consent granted to Columbia Gas to utilize any portion of the proposed gas main route that will impact farmland protected by agricultural easements. ODA should work with Columbia Gas to fully evaluate mutually beneficial alternative routes for this project that do not impact preserved farmland protected by agricultural easements.

Let it also be resolved that the Union County SWCD Board of Supervisors fully recognizes the long-term detriment to the public trust and confidence in the ODA Office of Farmland Preservation if support for protecting the agricultural easements is not consistently and energetically applied in accordance with legal precedent and the legal terms of the easement language.

Let is also be resolved that as the local monitoring agent for the agricultural easement donated by the Arno Renner Trust, the Union County SWCD Board of Supervisors hereby requests that ODA consult with and come to a formal agreement with this body prior to any issuance of the State's approval, as a required condition of the OPSB, for Columbia Gas to move forward with plans to obtain permanent utility easements on any preserved farmland protected by an agricultural easement.

Respectfully,

The Union County Soil and Water Conservation District Board of Supervisors

Nancy H. Rogers
Attorney General
State of Ohio

Business Counsel Section
30 E. Broad St.
Columbus, OH 43215-3400
Telephone: (614) 644-6342
Facsimile: (614) 644-6135
www.ag.state.oh.us

August 13, 2008

Chris Lanka, P.E.
Terrain Evolution
720 East Broad Street, Suite 203
Columbus, Ohio 43215

Dear Chris,

I am writing on behalf of the Ohio Department of Agriculture's Farmland Preservation Office (ODA) in response to your request regarding a proposed water transmission line along Industrial Parkway in Union County.

ODA holds an agricultural easement on the farmland property owned by Patrick and Whitney Bailey. I gather that the water line would encumber the Bailey property and ODA has indicated that the line must be located within the existing right-of-way for Industrial Parkway.

Your request discusses a possibility of locating the water line in a 20 foot wide area, parallel to the road, but beyond the existing right-of-way. You mention that this area might be acquired by Union County either as an easement or an expansion of the right-of-way for Industrial Parkway.

ODA, in its discretion and mission to preserve farmland in Ohio, has established standard terms that appear in the deeds for agricultural easements, including the deed of easement for the Bailey farm. One term addresses the rights of the farmland owner with respect to utility improvements and granting easements for such. This term allows the farmland owner to make utility improvements or grant easements for such only if the improvement solely serves the protected farmland and permitted structures thereon. In this instance, the proposed water line would not solely serve the Bailey property. Accordingly, the Baileys are prohibited from granting the proposed easement unless ODA gives approval.

At this time, ODA has determined that any water line must be located in the existing right-of-way and that placement outside of that area is counter to the preservation of the Bailey property as farmland.

If Union County wishes to acquire an easement or expand the right-of-way for Industrial Parkway, ODA will address that issue when it is actually presented by the Union County Engineer. Currently, an acquisition by Union County appears only to be hypothetical. It is not in ODA's interest to give direction or appear to make commitments to an independent political subdivision or private developer at a hypothetical stage. Accordingly, your company's

discussion with ODA seems premature and the matter would be better addressed to Union County.

Sincerely,

Joel P. O'Connell
Assistant Attorney General
Business Counsel Section

cc: Mark Forni, Director of Farmland Preservation

March 3, 2020

Governor Mike DeWine
77 South High St.
30th Floor
Columbus, OH 43215-6117

Dear Governor DeWine,

Since you have been a longstanding advocate for both farmers and farmland preservation in Ohio, I write to seek your assistance in protecting our historic family farm. I am a strong proponent of farmland preservation in Ohio, and my family has collectively donated agricultural easements on three different farms throughout Union County to the Ohio Department of Agriculture (ODA).

I've been entrusted to steward our historic family farm, which was initially preserved by my late Uncle, Arno Renner, in 2003. He chose to preserve the farm by donating an agricultural easement to ODA worth over $3 Million. My Uncle was deeply committed to seeing his property remain as productive farmland for generations to come and saw ODA as a credible partner which would uphold its commitment to help him protect his property, and ensure his farm would continue to thrive long after he died.

The first real test against his preserved farm, and of ODA's willingness to defend its easement program, arrived in 2005. The City of Marysville planned to install a 72-inch diameter sanitary sewer line through the middle of Arno's farm and threatened the use of eminent domain if Arno didn't agree to their terms. Arno had no desire to allow such a destructive pipeline through his property, despite the city's assertion that the land could be fully returned to its previous condition and productivity. ODA recognized its responsibility to defend the agricultural easement and the overall interests of his protected farm. They reached out to independent agencies and experts, who all agreed that the farmland would be irreparably damaged by this kind of intrusion, and could never be returned to what it once was. ODA established a strong precedent for the defense of all farmland preservation easements in a 11/23/2005 letter to the City of Marysville, which is enclosed. Based upon ODA's involvement, the city of Marysville eventually selected an alternative route for their project. The net result was that the city met its overall project objectives, the farmland preservation program's credibility was greatly bolstered throughout the state, and Uncle Arno was assured that ODA had his back. News headlines in agricultural media conveyed the message: when you enter into a perpetual preservation easement with ODA, the agency is serious about defending the easement. See the enclosed February 2006 cover article from *Ohio Farmer* magazine for a brief history of Arno's struggle to preserve his farm.

When Arno passed away in 2007, he entrusted me to continue his legacy of caring for our family's historic farm. I've done the very best I can to care for this farm in such a way as would make him proud. I share all of the above history to provide context for the reason for this letter. Just like the City of Marysville attempted years ago, Columbia Gas has threatened the use of eminent domain to force a utility line through our family's preserved farm. We immediately contacted ODA and informed them of Columbia Gas' intentions, and expected the Office of Farmland Preservation to support us in the same way they did Arno in 2005. Instead, we have learned that ODA appears to have accepted Columbia Gas' blanket assertion that the land will be returned to full agricultural productivity, and ODA appears to have

no plans to pursue the matter further. We have been left to hire our own attorney in an attempt to defend the ODA easement ourselves.

Unlike the strong support shown by the agency in 2005, ODA now appears quite disinterested in the hard work of defending our easement. Sadly, the agency doesn't appear to have or appreciate: 1) any sense of institutional knowledge or historical understanding of what our family and ODA have previously been through in working together to defend our protected property; and 2) any desire to engage on this issue in a meaningful way on behalf of our protected farm and encourage Columbia Gas to pursue alternative routes.

When I shared with a local elected leader how disappointed I was that ODA has expressed so little concern on this current issue with Columbia Gas, he told me that I should not expect nearly as much support from ODA as we had previously enjoyed. When pressed for an explanation, he informed me of Director Pelanda's direct personal connection with Columbia Gas. While the longstanding political clout of Columbia Gas at the Statehouse is no secret, I certainly hope that the Director's family connection is not in any way influencing, either directly or indirectly, the recent decisions made by ODA staff in this particular case.

Clearly, the easiest path for ODA is to simply do nothing and minimize involvement, and hope we simply allow Columbia Gas to force its pipeline through our preserved farm as quickly and quietly as possible. I find that approach unacceptable, and contrary to the overall purpose for which a landowner would ever willingly enter into a permanent agricultural easement with ODA in the first place.

As such, I respectfully ask you to encourage ODA to: 1.) re-consider the simplistic and rushed position on this issue; 2.) expend the genuine effort necessary to conduct a thorough technical review with relevant local stakeholders like the Union Soil and Water Conservation District on the impact of this pipeline; and 3.) ask Columbia Gas to demonstrate why alternate routes are not being thoroughly explored on nearby non-preserved lands with landowners who might be eager to work with them.

It always takes much more effort to do the right thing, and to do things right. Just as the City of Marysville eventually made meaningful concessions (once ODA expended the effort to step in), Columbia Gas can also be encouraged to adopt an alternate route to accomplish its goal which won't affect nearby farms permanently preserved by ODA. Please continue your strong support for Ohio agriculture and the preservation of the State's prime farmlands.

Very Respectfully,

Don M. Bailey, Trustee

Arno Renner Trust

10956 Rausch Rd.

Marysville OH 43040

Enclosures (2)

February 2006 cover article from *Ohio Farmer* magazine

11/23/2005 letter from ODA Director Fred Dailey

Cc: Senator Dave Burke

Representative Tracy Richardson

Anne Vogel, Policy Director, Office of Governor Mike DeWine

Dorothy Pelanda, Director of Agriculture (ODA)

Sarah Huffman, Executive Director of Farmland Preservation (ODA)

Union County Soil and Water Conservation District

Union County Commissioners

Union County Farm Bureau

Coalition of Ohio Land Trusts, c/o Western Reserve Land Conservancy

Tecumseh Land Trust c/o Krista Magaw

Ohio Department of Agriculture

OHIO PROUD®

Governor Bob Taft
Lieutenant Governor Bruce Johnson
Director Fred L. Dailey

Administrative Offices
8995 East Main Street • Reynoldsburg, Ohio 43068-3399
Phone: (614) 466-2732 • Fax: (614) 466-6124
ODA home page: www.ohioagriculture.gov/ • e-mail: agri@mail.agri.state.oh.us

November 23, 2005

Certified Mail 7099 3400 0008 7273 2856

The Honorable Thomas L. Kruse, Mayor
City Hall
125 East 6th Street
Marysville, Ohio 43040-1641

Dear Mayor Kruse:

Thank you for your letter of October 31st, pursuant to the Renner Agricultural Easement and Marysville Trunk Interceptor Project. Based upon your letter, I forwarded your responses to the Ohio Department of Natural Resources (ODNR) soil and water engineers for evaluation. I would like to provide you with a little background about the Ohio Department of Agriculture's (ODA's) involvement in this matter.

In 2003, Mr. Arno Renner generously donated an easement on his property to the people of Ohio through the Office of Farmland Preservation and the Ohio Department of Agriculture. We did not accept this easement until we received the unanimous support from the Millcreek Township Trustees and the Union County Commissioners. The agricultural easement was created by the state legislature to insure that productive farmland would be preserved for future generations by creating a legal prohibition against the use of the land for anything other than agricultural purposes. In Mr. Renner's case, he gave up a valuable private property right because he wanted the land that he and his ancestors have been farming for the past 160 years to be protected, in perpetuity, as productive farmland for his descendants and the citizens of the state.

You wrote to Mr. Renner's attorney, Robert Moore, of the Wright Law Company, that you believed Mr. Renner could grant the City an easement without ODA's approval. We respectfully disagree with this opinion. The deed for an agricultural easement is clear: the land may only be used for agricultural purposes and any water or sewer lines installed on the property are for improvements to the farm only, not for municipal water and sewer lines to run across the farm. I wanted, however, to explore whether it was possible to install the TIP line without affecting Mr. Renner's property over the long term. Therefore, I had my staff meet with your deputy mayor, Kathy House, and contractor, DLZ, to explore this possibility. Because the representatives from DLZ suggested that the effects of the construction could be mitigated, I had my staff contact soil and water experts with the Union County Soil and Water Conservation District as well as ODNR for their analysis and professional opinion.

On November 21st, I personally inspected Mr. Renner's farm including the proposed site of the TIP line. I then met with Mr. Renner and experts from Union County Soil and

Water and ODNR, as well as representatives from the Union County Farm Bureau and the Ohio Farm Bureau, and with Representative Core and Senator Mumper from the Ohio Legislature. All expressed their belief that the installation of the TIP line would cause irreparable harm to Mr. Renner's farm. In particular, soil scientists at ODNR, based in part on the information your contractor provided, determined that Mr. Renner's farm would, in all likelihood, suffer from drainage and compaction problems if the soil strata was disturbed and that this damage would have a long term negative effect upon the productivity of the impacted land. They also foresee the possibility of additional problems resulting from the need to gain access, at some future point in time, to the underground concrete manholes.

The people of Ohio have entrusted their grants of deeds of agricultural easements with ODA. As the Director of Agriculture, it is my duty to enforce the agricultural law of Ohio by protecting the rights of the people of Ohio. I do this in part by ensuring that property interests generously donated to Ohio, by citizens such as Mr. Renner, remains farmland for future generations to benefit from and enjoy. If an agricultural easement is threatened or violated, it is my duty to act to protect it. After reviewing all of the information provided to me, I must inform you that ODA plans to oppose any attempt to take an easement of this property by eminent domain. My recommendation is that the City of Marysville should consider other alternatives.

Thank you for consulting our Department on this matter. If you have any questions, please feel free to contact me at (614) 728-2143 or my Chief Legal Counsel, William A. Hopper, Jr. at (614) 728-6430.

Sincerely,

Fred L. Dailey
Director

cc: Arno Renner
Honorable Larry Mumper, Senator
Honorable Tony Core, Representative
Howard F. Wise, Assistant Director
William A. Hopper, Jr., ODA Chief Legal Counsel
Lori Payne, Associate Attorney General
David Hanselmann, Chief, Division of Soil and Water Conservation, ODNR
Keith Stimpert, Vice President, Government Affairs, Ohio Farm Bureau
Dan L. Erwin, President, Union County Farm Bureau Board of Trustees
Peggy Hall Kirk, Chair, Land Heritage Trust of Union County
Matt Staley, Chairman, Board of Supervisors, Union SWCD
Terri Gravatt, District Administrator, Union SWCD
John F. Gore, Jr., President, Marysville City Council

OHIO FARMER®

www.ohiofarmer.com Serving Ohio agriculture since 1848 February 2006



Outdoor cla
tests techn
page 6

Protect
applicati

What's ahead for the
economy? page 32

Fields in jeopard

Key Points

- Marysville wants Arno Renner to sell them a right-of-way to build a sewer line.
- Renner's land is in an easement, which prohibits him from granting the request.
- City officials are threatening to take the right-of-way by eminent domain.

By **GAIL C. KECK**

THESE days, the road along the southwest border of Arno Renner's farm is called Industrial Parkway and it hums with traffic from the nearby Goodyear plant, the Scotts Miracle-Gro Co. headquarters and a growing industrial park. Renner remembers back when it was just a dirt road the local farmers called Mud Pike because it was sometimes so muddy buggies could hardly get through.

The modern road name is an indication of the way Marysville city leaders view the area: Even though the land along Industrial Parkway south of town is some of the best farmland in the state, it is also some of the most desirable for nonfarm development.

"It seems like the people in Marysville think all the land between Marysville and Dublin is theirs and we don't matter anymore," says Renner.

Unbroken chain

Although he is now in his mid-80s and has turned the operation of his farm over to his nephew Don Bailey, Renner is determined to do all he can to preserve his own land as farm ground. "After it's been in the family 160 years, you hate to be the one who breaks the chain," he explains.

In 2003, Renner donated an agricultural easement on his 231 acres to the Ohio Department of Agriculture. By doing so, he gave up development rights, which were valued at $3 million. In return, the ODA accepted the responsibility for enforcing the easement, no matter who owns the land in the future.



FIGHTING EMINENT DOMAIN: Arno Renner (right) and his nephew Don Bailey, who farms the Renner land, foot-deep trench to install a sewer line would irreparably damage the productivity of their family's farm ground.

Already, the ODA's commitment to protecting the easement on the Renner farm has been tested. The city of Marysville has plans to install a pipeline across Renner's farm to connect the city's sewer system with a proposed treatment plant. ODA director Fred Dailey has promised to defend the easement in court if necessary.

The situation is frustrating for Renner, who says he's spending thousands to hire his own attorney to look after his interests in the case. "This is no way to spend a retirement, that's for sure," he says. Still, he remains committed to defending the agricultural easement program, sake of his own farm, other ag easements a

"We feel the whol down the drain if we time," he explains.

■ Turn to page 7 for



Ag easement undermined by eminent domain threat

By **GAIL C. KECK**

Key Points

- Easement pact gives ODA an interest in Arno Renner's land.
- ODA says city's right-of-way would irreparably damage land.
- If Marysville uses eminent domain, it could set a precedent.

THE threat of eminent domain against a Union County farm protected by an agricultural easement could test the integrity of Ohio's farmland preservation laws. Even if the Union County case is settled without a court battle, it has raised some concerns for other farmers who have ag easements and for those who are considering them.

The controversy in Union County focuses on two different interpretations of the easement farmer Arno Renner donated to the Ohio Department of Agriculture.

The city of Marysville wants a right-of-way to bury a sewer line up to 40 feet deep on Renner's farm; city officials contend that Renner still has the right to sell the city the right-of-way to bury the line without violating the agricultural easement. Since he refuses to sell a right-of-way to the city, the city has threatened to take it using eminent domain.

The ODA says Renner no longer has the right sell the city a sewer right-of-way, even if he wants to. Since the ODA is now in charge of protecting the land's development rights, the state would have to grant any right-of-way. However, the ODA won't do so, because the excavation for the sewer line would damage the agricultural value of the land.

Conservation plan rules

The city's interpretation of the easement is simply wrong, says Robert Moore, an attorney with Wright Law Co. who represents Arno Renner. "If you read the easement, it is well-written and very clear," he says.

The section of the easement that the city is using to support their position is meant to allow a landowner to install utilities for use on the farm, he explains. For instance, if a landowner built a grain bin or barn, the easement allows for excavation for electric lines or water lines to serve those buildings.

Instead, Moore says, the section of the easement that should apply to the city's proposal says: "There shall be no ditching, draining, diking, filling, excavating, removal of topsoil, sand, gravel, rock or other materials, or any change in the topography of the land in any manner unless in accordance with the farm conservation plan."

Digging a 40-foot-deep trench to bury a sewer line is not a part of Renner's conservation plan. In fact, says Moore, "this is exactly what the easement is designed to prevent."

While Moore is working with Renner to protect his interests in this case, he says the legal conflict is really between the ODA and the city. The question is whether the city, or any municipality, can use eminent domain to take land rights when the state of Ohio holds an easement on the land.

Precedent-setting case

If the question goes to court, the outcome would have implications far beyond one Union County farm, notes Brian Williams, Ohio state director for American Farmland Trust.

If the courts ruled that the city could impose eminent domain, superseding the ag easement held by the state, other easements might also be challenged, explains Williams. "And it could very well ripple across the country."

Although the ODA has dealt with other minor violations of ag easements, the Renner case could be the first major challenge for the program, says LeeAnne Mizer of the ODA.

"This is definitely a precedent-setting case," says Mizer. "We need to follow through with what we agreed to do."

As holder of the easement, the ODA has a duty to defend the easement and protect the agricultural use of the land, explains Mizer. Even if Renner wanted to sell the city a right-of-way to bury the sewer line, the ODA would have a duty to prevent that, she says.

Usually, when people think of developments that violate ag easements, they think of buildings; however, the sewer line also qualifies, Mizer says.

While Marysville has approached other landowners about routing the sewer line across their land, officials say the route across the Renner farm would be the least expensive. Some of the alternate routes might also cross farmland, but since the land is not protected by easements, landowners would not have that defense against eminent domain.

Although Marysville's proposed sewer plant could enhance economic development in the area, the recent moratorium on eminent domain proceedings for economic development projects does not apply to public utilities such as sewer systems.

Sewer is needed

Marysville has outlined an aggressive time line to complete construction of a new treatment plant and sewer system, with construction scheduled to start early this year. In fact the city must build additional treatment facilities to meet EPA clean-water mandates.

The mandate doesn't dictate the route the sewer line must take, stresses Don Bailey, a nephew of Renner who operates the farm. "Nobody's denying that they need a sewer plant, because they do, but there's lots of ways they can go other than through the only protected farmland here."

■ **Read what *Ohio Farmer* has to say about this on page 9.**

The facts on ag easements

WHETHER an easement is held by the Ohio Department of Agriculture, local government, land trust or Soil and Water Conservation District, the basic function is the same: The landowner sells or donates the right to develop the land for non-ag uses and the holder of the easement takes responsibility for monitoring the land to make sure it remains in ag use.

Before the ODA accepts the donation of an ag easement, it is required by law to consult local officials, including officials of any municipality located within a quarter of a mile. If any of the officials offer a valid objection, Fred Dailey, ODA director, can decide to refuse a donation or can accept it anyway. In Arno Renner's case, the township trustees and county commissioners unanimously approved the donation. Marysville is not within a quarter of a mile, so city officials did not have to be consulted.

Preservation group gets help

THE Ohio Center for Farmland Preservation Innovation at Ohio State University has received $400,000 of funds through the USDA appropriations bill. Sen. Mike DeWine sponsored the appropriation. Jill Clark will be interim director of the program until a permanent position is filled.

The primary mission of the center will be to help Ohio communities test and install innovative ways to protect farmland and communicate the results of those efforts to other communities, Clark says. The center will also be a clearinghouse of information on innovative approaches for farmland protection throughout the country.

Saving farmland against the odds

LIKE Arno Renner, Helen Trotter wants her farm to remain in agriculture despite the pressures of development all around.

Trotter's 90 acres were accepted by the Ohio Department of Agriculture for the state's Farmland Preservation Program last fall. The land is the first in Franklin County to be enrolled in the program.

Trotter's neighbors include Limited Brands and Reynoldsburg Schools, which is planning to build a new junior high school adjacent to the property. Land in the area is bringing $100,000 an acre.

"It is my belief that future generations of Ohioans will look back on your selfless gift as an example of your love of the land and your commitment to the future prosperity of Ohio's agricultural industry," ODA's Fred Dailey said in a letter to Trotter.

Trustees in Jefferson Township where the farm is located supported Dailey's decision to add the land to the state's 20,000-acre preservation program. However, Reynoldsburg mayor Bob McPherson was quoted as saying that the Trotter farm offers prime space for commercial and industrial use. He expressed relief that the tract was only 90 acres. "The impact will not be significant, though it is disappointing," he said.

Opinion & Mailbox

Renner land fight stirs the pot

Our Say

SOMETIMES a photo is worth a thousand words, and that's just about how much farmer Gary Carter had to say about the shot that ran last month with Fred Dailey, director of the Ohio Department of Agriculture, and Sen. John Glenn (page 9) at the Farmland Preservation Summit.

Carter called me to say he likes Glenn, but he thinks the Farmland Easement Program run by the ODA is a vehicle to "steal" land away from naïve farmers. With lots in his area bringing $65,000 an acre, Carter is convinced that the easement holders will soon find ways to turn the land into far more cash than the agricultural use will create.

I asked Carter if he was familiar with the case of Arno Renner featured on page 7. He was surprised to hear that Dailey had stood up to the city of Marysville in their bid to run a sewer line across the land; however, he was not convinced that future participants would be as dedicated to farmland preservation. If he is right, it would certainly be a concern. After all, the farmers who volunteer to participate in the program intend to have their land remain in agricultural use "in perpetuity."

Letter from director

Dailey made his position clear in a letter to Thomas Kruse, mayor of Marysville:

"The people of Ohio have entrusted their grants of deeds of agricultural easements with ODA. As the director of agriculture, it is my duty to enforce the agricultural law of Ohio by protecting the rights of the people of Ohio. I do this in part by ensuring that property interests generously donated to Ohio by citizens such as Mr. Renner remain farmland for future generations to benefit from and enjoy. If an agricultural easement is threatened or violated, it is my duty to act to protect it. After reviewing all of the information provided to me, I must inform you that ODA plans to oppose any attempt to take an easement of this property by eminent domain. My recommendation is that the city of Marysville should consider other alternatives.

"The legal instrument [easement] is pretty detailed," says Peggy Kirk Hall, OSU Extension director of agricultural and rural law. "To think the state could sell the land or abolish the easement is not very plausible."

It would take an agreement from both the state and landowner to break an easement that was donated directly to ODA. In cases of land held under the state Farmland Preservation Easement Program, there is also a third party such as a land trust involved, and they would have to agree to a dissolution also.

Furthermore, such action could create tax ramifications for a landowner who has benefited from the tax implications of an easement.

Perhaps of greater concern are agricultural easements that are established in areas that the community has already designated for other uses. Should the state have agreed to take an easement on the Renner land in the first place?

Marysville has a comprehensive regional plan that shows the Renner farm is in an area earmarked for commerce and industry. However, there was no zoning in place to back up the community's plan for the site. If such zoning were in place, maybe a legal argument could be made for not preserving the farm.

Ag base assured

"That raises issues of private property rights," Hall adds. Should the private citizen or the community decide how land should be used?

Renner knew he wanted his land to stay in agriculture and he acted to make sure it would be. The director stood by the easement and reports indicate that Marysville is exploring different solutions to its sewer problem. Still, the big question of planning how to use our farmland only gets tougher.

While some will say a farm in the middle of a growing community hinders progress, others will argue the land will always provide a base for ag activity. Farming ventures that today's entrepreneurs have not yet even considered may one day grow on Renner's land because it is destined for agriculture.



Tim White, editor
twhite@farmprogress.com

Survey says 'no' to eminent domain

AMERICANS remain strongly committed to protecting private property from the possibility of unjust seizure, according to the results of a nationwide survey released recently by the American Farm Bureau Federation. The poll shows, regardless of geographical, partisan and other demographic differences, Americans are unified nearly 2 to 1 against government use of eminent domain to take private property, except in limited circumstances such as when the public at large would clearly benefit from a new road, electric utility or similar project.

Likewise, 83% of Americans oppose the use of eminent domain to further private development initiatives.

Seizure for private development was the issue at the heart of the Kelo v. New London, Conn., case decided by the U.S. Supreme Court last year. That case made national headlines when the high court ruled that property could be taken from one landowner to advance the economic development efforts of another private entity. In the survey, when respondents were asked about the Kelo ruling, 95% expressed disapproval; of those respondents, 87% said they disagreed strongly with the ruling.

Farming, in particular, received solid support when respondents were asked to prioritize entities that should be off-limits to eminent domain proceedings. Likewise, 12% of those surveyed said family farmers should be exempt from eminent domain laws, compared with 9% who support exempting private businesses and 8% who support exempting all landowners.

The telephone survey of 1,076 adults was conducted by Zogby International. The nationwide survey, conducted Oct. 29 through Nov. 2, 2005, contains a margin of error of +/- 3 points. The survey is one component of the grassroots "Stop Taking Our Property" (STOP) campaign initiated by the American Farm Bureau Federation following the Kelo ruling.

Your Say

Appreciate SWCD annual report

Thank you for the good, timely articles in the last issue of *Ohio Farmer*. You publish a real good, informative magazine. This latest one (January) probably had more information than any one in the past year. Keep it coming.

As a member of the board of the Montgomery Soil and Water Conservation District for the past 40 years, I've worked to benefit farmers. I appreciate your cooperation in that effort and was very pleased to see the annual report from the Ohio Department of Natural Resources Division of Soil and Water as a supplement to the January issue. It highlights much of the good work that the soil and water districts are doing around our state.

Fred Glander
Germantown

Small farms succeed

As always, I enjoyed the recent issue of *Ohio Farmer*. I was especially interested in the prototype wind turbine and the fact it is being scaled for individual houses, dwellings and businesses. That makes sense. Why build all these wind farms if you can get the job done on a personal basis?

There is also an article about E-85. While there are stations to buy E-85 all the way out in Iowa, there don't seem to be any here in Ohio.

People need to know how far behind Ohio is in this. We rank behind Michigan and Indiana and others and some of the blame falls on our illustrious governor who doesn't seem to recognize the value of our largest industry.

Why not scale biodiesel production to the farm level? It just doesn't work in a co-op. Each individual farmer could pay an assessment of oilseed processing and do it for less than the cost of a new corn planter. You can use the fuel all the time and don't use your corn planter every day of the year.

As for woodstoves, I don't know why every farmer doesn't heat their home and their shop with corn. My sister heats her whole house with corn for $600 a year.

I was glad to see the articles on grass-finishing cattle. It seems to me the pendulum is swinging to more small farms. There are people who make a nice living on 25 acres. I'd like to see more stories about them. Face it: There are so many opportunities in farming. It just bugs me when so many are ignored because they just aren't big enough.

I enjoy the magazine. Just wish more individual farmers would advertise in your marketplace for equipment.

Dave Pollard
Mantua

Slow-food investigation

What fun, being on the cover of your *Ohio Farmer* magazine with our bed and breakfast and vacation cottages ("Slow food success," November 2005). Who'da thought others would want to read about what we're doing down here on the farm. Now, as Paul Harvey would say, "for the rest of the story."

That article in your magazine brought the Ohio Department of Agriculture knocking on our door. They were quite polite, (didn't call or let us know they were coming, though — said they were "in the neighborhood"), but there was no question that they were here in an official capacity. Their business cards said "Enforcement Division."

Uh, oh! Turns out, the ODA reads the *Ohio Farmer*, too, and they were very concerned about what we have been serving to the guests at our table and whether we had "crossed the line."

They had a list of questions about information gleaned from the *Ohio Farmer* story. I'm thinking, somebody doesn't have enough to do. Specifically, they wanted to know about the cheese and where the milk came from and about the smoked sausage and where I do the cooking. They repeatedly said, "We're not here to shut you down. We just want to make sure that you are in compliance."

My thought about the time and money and manpower that the Ohio Department of Agriculture invested in tracking us down and scrutinizing our little project is: Maybe our taxpayers' dollars could be better spent addressing real issues of concern.

With BSE concerns and the looming nightmare of bird flu, just to name a few, maybe hunting down those shifty old farmwives with their nefarious schemes to serve their unsuspecting guests their homemade treats might not be the best prioritizing of our tax dollars. And, I told them so.

The reality is: In the state of Ohio, a small bed and breakfast like ours is exempt from purchasing a food-service license. Our guests pay for their lodgings and simply have breakfast with our family. To our surprise, these agents from the ODA indicated that they didn't know this.

There were several other things about Cottage Food Production Operation regulations that these agents didn't know. They asked us how we knew these things and could we tell them where they could find this information — and better yet, could we send this information to them! We said we would, but we have re-thought that idea.

We think we will let them do their own homework, especially since most of the information is on their own ODA Web site.

Nicki Blackstone
Lewisville

IN THE COMMON PLEAS COURT OF UNION COUNTY, OHIO

DON BAILEY, JR., SUCCESSOR TRUSTEE OF THE ARNO RENNER TRUST DATED APRIL 24, 1997
10596 Rausch Road
Marysville, Ohio 43040

Case No. 21CV0099

Judge

COURT OF COMMON PLEAS
UNION COUNTY, OHIO
2021 JUL 12 PM 2:23
Dominic N Sullivan
CLERK

And

CHARLES PETER RENNER
19777 Twp. Rd. 74
Forest OH 45843

And

PATRICK E. BAILEY
WHITNEY BAILEY
12860 Industrial Parkway
Marysville, Ohio 43040,
Plaintiffs,

v.

COLUMBIA GAS OF OHIO, INC.
C/O Statutory Agent
Corporation Service Company
50 West Broad Street, Ste. 1330
Columbus, Ohio 43215,
Defendant.

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

BACKGROUND

1. Plaintiffs, Don Bailey, Jr., successor trustee of the Arno Renner Trust dated April 24, 1997 and Charles Peter Renner, are owners of farmland located at 13260 Adelsberger Road, Marysville, Ohio, Parcel No. 25-0008013.0000.

2. Plaintiffs, Patrick Bailey and Whitney Bailey, are owners of farmland located at 12860 Industrial Parkway, Marysville, Ohio 43040, Parcel No. 25-0008014.0000. Don Bailey, Jr., Charles Peter Renner, Patrick Bailey and Whitney Bailey shall be referred to herein collectively as the "Plaintiffs." The property of the Plaintiffs shall be referred to herein collectively as the "Protected Property." Copies of the legal descriptions of the Plaintiffs' farmland are attached as Exhibit A.

3. The Plaintiffs are the successors-in-interest to Arno Renner and the Arno Renner Trust.

4. Defendant, Columbia Gas of Ohio, Inc., a NiSource Company ("Columbia Gas"), is an Ohio for-profit corporation.

5. The Protected Property is encumbered and protected pursuant to the terms of an Ohio Department of Agriculture Deed of Agricultural Easement, Grantor Arno Renner, Trustee / Grantee, Director of the Ohio Department of Agriculture, dated November 5, 2003, recorded as document 29430 in the Official Records of Union, County, Ohio, as amended February 21, 2006, recorded as document 325534 (the "Ag Easement"). Copies of the Ag Easement and the 2006 amendment are attached as Exhibits B and C. Photos that are attached to the Present Condition Report exhibit to the Ag Easement are not attached to this Complaint.

6. Union Soil and Water Conservation District ("USWCD"), is an independent subdivision of the State of Ohio and receives funding from the federal, state and local governments. USWCD is the local agent for the Ohio Department of Agriculture ("ODA") and, as such, has monitoring responsibility for the Ag Easement and also documents and reports to ODA any violations of the terms of the Ag Easement, whether those violations are by the landowners or third parties.

7. O.R.C. §§ 5301.67 - .70 is the authorizing legislation for the creation and enforcement of conservation and agricultural easements. Per O.R.C. § 5301.67(B) and (C), agricultural easements are for land devoted "exclusively" to agriculture (including homestead areas).

8. The Ag Easement was donated to the ODA through its Agricultural Easement Donation Program. ODA, therefore, has accepted a gift and holds that gift per the restrictions in the Ag Easement and has a duty to enforce its terms. The value of the donation of an agricultural easement such as the Ag Easement is eligible for a federal tax deduction. On the ODA website for the Agricultural Easement Donation Program, ODA states that:

> ODA partners with a local entity to monitor the easement, which includes an annual visit to the farm. A local partner may include a township, land trust or soil and water conservation district. ODA is committed to enforcing all agricultural easements that it holds to protect the integrity of the easement and to comply with IRS requirements related to landowners who receive federal tax benefits for donating an agricultural easement. If ODA staff find a violation, they will work with the landowner and local partner to resolve the situation. If that attempt fails, the state will take legal action to enforce the easement.

9. Per the Ag Easement, Paragraph B, Agricultural Value and Use, "...The Protected Property consists of land devoted exclusively to agricultural use...the Grantor has an interest in preserving the Protected Property for agricultural use."

10. Per the Ag Easement Paragraph E, it is intended to be a tax deductible easement meeting all of the requirements of federal law (including protection of soils from excavation or non-agricultural uses), to wit: "...The state of Ohio has a clearly delineated conservation policy to preserve and promote agriculture and agricultural land for significant public benefit. The Ohio Department of Agriculture is charged with the responsibility of protecting and promoting agriculture, including the preservation of Ohio's farmland by accepting agricultural easements in

accordance with Section 901.21(B) of the Ohio Revised Code. By granting and accepting an agricultural easement over the Protected Property the Grantor and Grantee are furthering the State of Ohio's conservation policy to preserve and protect viable agricultural land...The grant of this agricultural easement is exclusively for the "conservation purpose" as that term is described in Section 170(H)(4)(A)(iii) of the Internal Revenue Code."

11. Section 170(h) of the Internal Revenue Code sets forth the requirements for landowners to take a tax deduction for a charitable donation of a "Qualified Conservation Contribution," such as an agricultural easement that meets the requirements of applicable federal law.

12. Per the Ag Easement Paragraph F, Federal Farmland Preservation Act, "...The grant and acceptance of this agricultural easement is also pursuant to the clearly delineated federal conservation policy to preserve agricultural land as evidenced by this [P.L. 97-98, 7 U.S.C. 42-01 *et seq.*] Act.

13. Per the Ag Easement Paragraph 1, Statement of Purpose, "It is the purpose of this Easement to assure that the Protected Property will be retained predominantly in agricultural use by preserving and protecting its agricultural soils and viability through a perpetual restriction on the use of the Protected Property." This is a general purpose statement and is not in derogation of the more specific restrictive provisions in the Ag Easement.

14. Per the Ag Easement Paragraph 3, Prohibited Uses/Restrictions:

> Any activity on or use of the Protected Property inconsistent with the purposes of this agricultural easement is prohibited. The following activities are expressly prohibited, except as provided in Paragraph 4 below:
>
> 3.1 Industrial or Commercial Activity - There shall be no industrial or commercial activity taken or allowed on the Protected Property, except as provided in Paragraph 4 below. No right of

passage shall be granted or retained across or upon the Protected Property if that right of passage is used in conjunction with such prohibited activities.

3.2 Structures – There shall be no new structures or placing of any dwelling, building...fence or sign (other than those signs permitted, required or allowed by the Grantee for appropriate management, prevention of hunting or trespass, etc.), asphalt, concrete pavement...utility pole...conduit line, or any other temporary or permanent structure of faculty on the Protected Property, except as provided in Paragraph 4 below.

3.5 Topography – There shall be no ditching...filling; excavating; removal of topsoil...or other materials; or any change in the topography of the land in any manner, unless in accordance with the farm preservation plan referenced in paragraph C above.

3.8 Roads (As amended by February 21, 2006 Amendment to Deed of Agricultural Easement, attached as Exhibit C) – There shall be no building of new roads, parking lots, or other paved surfaces or widening of existing such surfaces, except on the Farmstead area, state or local highway rights-of-way, and those improvements permitted under paragraph 4.11 below.

15. Per the Ag Easement Paragraph 4, Grantor's Reserved Rights:

The Grantor reserves for the Grantor's self, heirs, successors and assigns, all rights and privileges of ownership of the Protected Property to use the Protected Property for all purposes that are not inconsistent with the purpose of this Easement and not expressly prohibited by this Easement. The following rights are expressly reserved by the Grantor:

4.1 Conveyance – Grantor may sell...or otherwise convey the Protected Property, provided that such conveyance is subject to this Easement and written notice is provided to the Grantee in accordance with paragraph 18 below.

4.5 Fences – Existing fences...and new fences may be built on the Protected Property for purposes of trespass and reasonable and customary management of livestock and wildlife, without any further permission of the Grantee.

4.7 Agricultural Structures and Improvements – The existing agricultural structures and improvements may be repaired...New buildings and other structures and improvements to be used

primarily for agricultural purposes, including the processing or sale of farm products predominantly grown or raised on the Protected Property, but not including any dwelling or farm labor housing, may be built on the Protected Property without any further permission of the Grantee.

4.10 Utility Services and Septic Systems – Installation, maintenance, repair, replacement, removal and relocation of electric, gas, geothermal, water facilities, sewer lines and/or other public or private utilities…over and under the Protected Property for the purpose of providing electrical, gas, water, sewer, or other utilities to serve improvements permitted herein, and the right to grant easements over and under the Protected Property for such purposes, is permitted without further permission of the Grantee…

4.11 Paving and Road Construction – Construction of new roads, parking lots or other paved surfaces, or the widening of existing such surfaces, are permitted outside the Farmstead Area consistent with the agricultural purposes of this Easement with advance written permission of the Grantee. The Grantee shall not give such permission, unless the Grantee determines that the Proposed Paving or covering of soil, or the location of any such road, will not substantially diminish or impair the agricultural values of the Protected Property.

16. Per the Ag Easement Paragraph 22, Modifications, "This Easement may not be changed, modified or discharged except by a writing signed by the duly authorized representatives of both the Grantor and the Grantee."

JURISDICTION AND VENUE

17. Plaintiffs restate all the allegations set forth in Paragraphs 1 through 16 of this Complaint.

18. This Court has subject matter and personal jurisdiction in this case.

19. Venue is proper in this Court.

FIRST CLAIM
PRELIMINARY AND PERMANENT INJUNCTION

20. Plaintiffs restate all the allegations set forth in Paragraphs 1 through 19 of this Complaint.

21. By letter dated June 14, 2021, Defendant, Columbia Gas, notified the Plaintiffs that it intends to acquire easements for the installation of natural gas pipeline infrastructure (the "Gas Pipeline") on the Protected Property. Copies of the "Notice of Intent to Acquire" letters are attached as Exhibit D. Copies of the proposed Gas Pipeline Easements are attached as Exhibit E.

22. The installation of the Gas Pipeline on the Protected Property is contrary to the purpose of the Agricultural Easement as stated in Ag Easement Paragraph B.

23. The installation of the Gas Pipeline on the Protected Property violates Ag Easement Paragraph 3.1 because the Gas Pipeline will be used to supply an off-farm industrial customer.

24. The installation of the Gas Pipeline on the Protected Property violates Ag Easement Paragraph 3.2 because the Gas Pipeline is a temporary or permanent structure or facility. Paragraph 3.2 specifically prohibits the installation of any "conduit line."

25. The installation of the Gas Pipeline on the Protected Property violates Ag Easement Paragraph 3.5 because it will require non-permissible excavation.

26. The installation of the Gas Pipeline on the Protected Property violates Ag Easement Paragraph 3.8 because it will require the building of two new access roads for construction and continuing access.

27. The terms of the Gas Pipeline Easements violate Ag Easement Paragraph 4.5 by prohibiting the Plaintiffs from constructing permitted fences.

28. The terms of the Gas Pipeline Easements violate Ag Easement Paragraph 4.7 by prohibiting the Plaintiffs from constructing permitted agricultural structures and improvements.

29. The terms of the Gas Pipeline Easements violate Ag Easement Paragraph 4.10 by prohibiting the installation, maintenance, replacement, removal and relocation of permitted public or private utilities for the purpose of providing utility service to the Protected Property.

30. The terms of the Gas Pipeline Easements violate Ag Easement Paragraph 4.11 by prohibiting the construction of new roads, parking lots, or other paved surfaces, or the widening of existing such surfaces consistent with the agricultural purposes of the Ag Easement.

31. The terms of the Gas Pipeline Easements will prevent the Plaintiffs from being able to use the Protected Property for many activities defined as agriculture in §§ 1.61 and 5713, including silviculture, viticulture, apiaries, hops, fruit trees, specialty crops, livestock feeding facilities, fencing for pasture and deer exclusion.

32. Installation of the Gas Pipeline will require the removal of topsoil and will result in permanent damage to the Protected Property's soils. This action is inconsistent with the conservation purpose of the Ag Easement and inconsistent with federal law determining allowable activities for an I.R.C. 170(h) qualified agricultural easement.

33. On August 13, 2008, Ohio Attorney General Nancy H. Rogers issued an opinion letter on the propriety of locating a water line on the Protected Property (the "AG Opinion"). A copy of the AG Opinion is attached as Exhibit F.

The AG Opinion states:

> ODA [Ohio Department of Agriculture], in its discretion and mission to preserve farmland in Ohio, has established standard terms that appear in the deeds for agricultural easements, including the deed of easement for the Bailey Farm [Ag Easement]. One term addresses the rights of the farmland owner with respect to utility improvements and granting easements for such. This term allows the farmland owner to make utility easements or grant easement for such only if the improvement solely serves the protected farmland and permitted structures thereon. In this instance, the proposed water line would not solely serve the Bailey

property. Accordingly, the Baileys are prohibited from granting the proposed easement unless ODA gives approval.

At this time, ODA has determined that any water line must be located in the existing right-of-way and that placement outside of that area is counter to the preservation of the Bailey property as farmland.

34. Per Ag Easement Paragraphs 7.3 and 8, the USWCD has the duty to monitor and report violations of the Ag Easement.

35. The USWCD issued a resolution on the Gas Pipeline on September 14, 2020. A copy of the resolution is attached as Exhibit G. The resolution states:

> Whereas, on November 3, 2003, the ODA Office of Farmland Preservation accepted a donation from The Arno Renner Trust for an agricultural easement on 231.25 acres of prime farmland valued at over $3.5 million.
>
> ***
>
> Whereas, the ODA Office of Farmland Preservation entered into an agreement with the Union County SWCD to serve as the local agent entrusted to monitor the agricultural easement donated by the Arno Renner Trust.
>
> Whereas, at the urging of local interested parties, including the Union County SWCD Board of Supervisors, the ODA asserted the supremacy of the State's interest in preserving farmland when it issued a letter to the City of Marysville dated November 23, 2005 in which the ODA set a strong precedent on this matter. This letter clarified the legal terms of the agricultural easement and its prohibitions against the installation of any utilities across preserved farmland that do not directly service the farm. With the assistance of staff from Union County SWCD, the City of Marysville was able to utilize a mutually beneficial alternative route that met the needs of the sewer project while minimizing adverse impact on the preserved farm.
>
> Whereas, on July 9, 2020, the Ohio Power Siting Board issued a Staff Report which recommended conditional approval of a proposed natural gas pipeline route planned by Columbia Gas which would require a utility easement across preserved farmland donated by the Arno Renner Trust. This OPSB Staff Report stated

the primary basis of need identified by Columbia Gas for this particular route was "in order to accommodate a new industrial customer." The proposed gas main by its very size and nature cannot provide any direct service to the preserved farm.

Whereas, the agricultural easement donated by the Arno Renner Trust includes language that explicitly prohibits the granting of any right of passage across protected property if that passage is used in conjunction with industrial activities.

Whereas, on August 27, 2020, the OPSB passed a conditional Opinion, Order, and Certificate which identifies a condition of their approval that "prior to commencement of construction activities in the areas that require permits or authorizations by federal or state laws and regulations, the Applicant shall obtain and comply with such permits and authorizations.

***

Therefore let it be resolved that the Union County SWCD Board of Supervisors strongly encourages ODA to thoroughly review the language in the agricultural easement donated by the Arno Renner Trust in 2003 and apply the same legal precedent expressed in ODA's letter dated November 23, 2005 to protect the integrity of the agricultural easement against intrusion of a utility route primarily intended to support unspecified private industrial activity and not directly servicing the farm. By so doing, ODA will strengthen and promote future farmland preservation efforts in Union County and across all of Ohio.

Let it also be resolved that the Union County SWCD Board of Supervisors strongly encourages ODA to thoughtfully reconsider any real or perceived consent granted to Columbia Gas to utilize any portion of the proposed gas main route that will impact farmland protected by agricultural easements. ODA should work with Columbia Gas to fully evaluate mutually beneficial alternative routes for this project that do not impact preserved farmland protected by agricultural easements.

36. The installation of the Gas Pipeline violates the Plaintiffs' property rights and is a violation of the law.

37. The installation of the Gas Pipeline with the potential for leaks creates a significant environmental risk.

38. The Plaintiffs have shown a substantial likelihood that they will prevail on the merits of this action.

39. The Plaintiffs will suffer irreparable harm if an injunction is not granted.

40. The issuance of an injunction will not harm third parties.

41. The public interest will be served by the issuance of an injunction.

42. The Plaintiffs have no plain and adequate remedy in the course of ordinary law.

SECOND CLAIM
DECLARATORY JUDGMENT

43. Plaintiffs restate all the allegations set forth in Paragraphs 1 through 42 of this Complaint.

44. A real controversy exists between the Plaintiffs and the Defendant which is justiciable in character.

45. Speedy relief is necessary for the preservation of Plaintiffs' rights which may otherwise be impaired or lost.

46. Plaintiffs are entitled to a declaration from the Court that the Ag Easement prohibits the Defendant from installing the Gas Pipeline on the Protected Property.

47. Plaintiffs are entitled to a declaration from the Court that Ohio and Federal law prohibit the installation of the Gas Pipeline on the Protected Property.

48. Plaintiffs are entitled to a declaration from the Court that public policy and the law require that the terms of the Ag Easement be strictly construed to benefit the preservation of the Protected Property as farmland.

WHEREFORE, the Plaintiffs demand judgment as follows:

A. For preliminary and permanent injunctions prohibiting the Defendant from commencing or continuing eminent domain proceedings against the Protected Property;

B. For preliminary and permanent injunctions prohibiting the installation of the Gas Pipeline on the Protected Property;

C. For a declaration that the Ag Easement prohibits the Defendant from installing the Gas Pipeline on the Protected Property;

D. For a declaration that Ohio and Federal law prohibit the installation of the Gas Pipeline on the Protected Property;

E. For a declaration that public policy and the law require that the terms of the Ag Easement be strictly construed to benefit the preservation of farmland.

F. For costs;

G. For reasonable attorney fees;

H. For statutory damages; and

I. For all relief that the Court deems equitable.

Respectfully submitted,

PLANK LAW FIRM, LPA

David Watkins (0059242)
Kevin Dunn (0088333)
411 E. Town Street, Flr 2
Columbus, Ohio 43215
614/947-8600
614/228-1790 (Facsimile)
dw@planklaw.com
Attorneys for Plaintiffs

COURT OF COMMON PLEAS
UNION COUNTY, OHIO
2021 JUL 12 PM 2:19
Dominic Sullivan
CLERK

IN THE COMMON PLEAS COURT OF UNION COUNTY, OHIO

STATE EX REL.
DON BAILEY, JR., SUCCESSOR TRUSTEE
OF THE ARNO RENNER TRUST DATED
APRIL 24, 1997
10596 Rausch Road
Marysville, Ohio 43040

21CV0098

And

CHARLES PETER RENNER
19777 Township Road 74
Forest, Ohio 45843

And

PATRICK E. BAILEY
WHITNEY BAILEY
12860 Industrial Parkway
Marysville, Ohio 43040,
Relators

v.

DOROTHY PELANDA, DIRECTOR
OHIO DEPARTMENT OF AGRICULTURE
8995 East Main Street
Reynoldsburg, Ohio 43068

And

BOARD OF SUPERVISORS
UNION SOIL AND WATER CONSERVATION DISTRICT
18000 OH-4, Suite B
Marysville, Ohio 43040
Respondents.

Copy to:

DAVE YOST
Attorney General of the State of Ohio

30 East Broad Street, 14th Floor
Columbus, Ohio 43215

PETITION FOR WRIT OF MANDAMUS

1. Relators, Don Bailey, Jr., successor trustee of the Arno Renner Trust dated April 24, 1997 and Charles Peter Renner, are owners of farmland located at 13260 Adelsberger Road, Marysville, Ohio, Parcel No. 25-0008013.0000.

2. Relators, Patrick Bailey and Whitney Bailey, are owners of farmland located at 12860 Industrial Parkway, Marysville, Ohio 43040, Parcel No. 25-0008014.0000. Don Bailey, Jr., Charles Peter Renner, Patrick Bailey and Whitney Bailey shall be referred to herein collectively as the "Relators." The property of the Relators shall be referred to herein collectively as the "Protected Property." Copies of the legal descriptions of the Relators' farmland are attached as Exhibit A.

3. The Relators are the successors-in-interest to Arno Renner and the Arno Renner Trust.

4. Respondent, Dorothy Pelanda, is the duly appointed Director of the Ohio Department of Agriculture ("ODA"). Dorothy Pelanda will be referred to herein as the "Director."

5. Upon information and belief, the Director's spouse was until recently a registered lobbyist for Columbia Gas of Ohio, Inc., a NiSource Company ("Columbia Gas").

6. The Protected Property is encumbered and protected pursuant to the terms of an Ohio Department of Agriculture Deed of Agricultural Easement, Grantor Arno Renner, Trustee / Grantee, Director of the Ohio Department of Agriculture, dated November 5, 2003, recorded as document 29430 in the Official Records of Union, County, Ohio, as amended February 21, 2006, recorded as document 325534 (the "Ag Easement"). Copies of the Ag Easement and the 2006

amendment are attached as Exhibits B and C. Photos that are attached to the Present Condition Report exhibit to the Ag Easement are not attached to this Petition.

7. Respondent, Union Soil and Water Conservation District ("USWCD"), is an independent subdivision of the State of Ohio and receives funding from the federal, state and local governments. USWCD is the local agent for the ODA and, as such, has monitoring responsibility for the Ag Easement and also documents and reports to ODA any violations of the terms of the Ag Easement, whether those violations are by the landowners or third parties.

8. O.R.C. §§ 5301.67 - .70 is the authorizing legislation for the creation and enforcement of conservation and agricultural easements. Per O.R.C. § 5301.67(B) and (C), agricultural easements are for land devoted "exclusively" to agriculture (including homestead areas).

9. The Ag Easement was donated to the ODA through its Agricultural Easement Donation Program. ODA, therefore, has accepted a gift and holds that gift per the restrictions in the Ag Easement and has a duty to enforce its terms. The value of the donation of an agricultural easement such as the Ag Easement is eligible for a federal tax deduction. On the ODA website for the Agricultural Easement Donation Program, ODA states that:

> ODA partners with a local entity to monitor the easement, which includes an annual visit to the farm. A local partner may include a township, land trust or soil and water conservation district. ODA is committed to enforcing all agricultural easements that it holds to protect the integrity of the easement and to comply with IRS requirements related to landowners who receive federal tax benefits for donating an agricultural easement. If ODA staff find a violation, they will work with the landowner and local partner to resolve the situation. If that attempt fails, the state will take legal action to enforce the easement.

10. Per the Ag Easement, Paragraph B, Agricultural Value and Use, "...The Protected Property consists of land devoted exclusively to agricultural use...the Grantor has an interest in preserving the Protected Property for agricultural use."

11. Per the Ag Easement Paragraph E, it is intended to be a tax deductible easement meeting all of the requirements of federal law (including protection of soils from excavation or non-agricultural uses), to wit: "...The state of Ohio has a clearly delineated conservation policy to preserve and promote agriculture and agricultural land for significant public benefit. The Ohio Department of Agriculture is charged with the responsibility of protecting and promoting agriculture, including the preservation of Ohio's farmland by accepting agricultural easements in accordance with Section 901.21(B) of the Ohio Revised Code. By granting and accepting an agricultural easement over the Protected Property the Grantor and Grantee are furthering the State of Ohio's conservation policy to preserve and protect viable agricultural land...The grant of this agricultural easement is exclusively for the "conservation purpose" as that term is described in Section 170(H)(4)(A)(iii) of the Internal Revenue Code."

12. Section 170(h) of the Internal Revenue Code sets forth the requirements for landowners to take a tax deduction for a charitable donation of a "Qualified Conservation Contribution," such as an agricultural easement that meets the requirements of applicable federal law.

13. Per the Ag Easement Paragraph F, Federal Farmland Preservation Act, "...The grant and acceptance of this agricultural easement is also pursuant to the clearly delineated federal conservation policy to preserve agricultural land as evidenced by this [P.L. 97-98, 7 U.S.C. 42-01 *et seq.*] Act.

14. Per the Ag Easement Paragraph 1, Statement of Purpose, "It is the purpose of this Easement to assure that the Protected Property will be retained predominantly in agricultural use by preserving and protecting its agricultural soils and viability through a perpetual restriction on the use of the Protected Property." This is a general purpose statement and is not in derogation of the more specific restrictive provisions in the Ag Easement.

15. Per the Ag Easement Paragraph 3, Prohibited Uses/Restrictions:

> Any activity on or use of the Protected Property inconsistent with the purposes of this agricultural easement is prohibited. The following activities are expressly prohibited, except as provided in Paragraph 4 below:
>
> 3.1 Industrial or Commercial Activity - There shall be no industrial or commercial activity taken or allowed on the Protected Property, except as provided in Paragraph 4 below. No right of passage shall be granted or retained across or upon the Protected Property if that right of passage is used in conjunction with such prohibited activities.
>
> 3.2 Structures – There shall be no new structures or placing of any dwelling, building…fence or sign (other than those signs permitted, required or allowed by the Grantee for appropriate management, prevention of hunting or trespass, etc.), asphalt, concrete pavement…utility pole…conduit line, or any other temporary or permanent structure of faculty on the Protected Property, except as provided in Paragraph 4 below.
>
> 3.5 Topography – There shall be no ditching…filling; excavating; removal of topsoil…or other materials; or any change in the topography of the land in any manner, unless in accordance with the farm preservation plan referenced in paragraph C above.
>
> 3.8 Roads (As amended by February 21, 2006 Amendment to Deed of Agricultural Easement, attached as Exhibit C) – There shall be no building of new roads, parking lots, or other paved surfaces or widening of existing such surfaces, except on the Farmstead area, state or local highway rights-of-way, and those improvements permitted under paragraph 4.11 below.

16. Per the Ag Easement Paragraph 4, Grantor's Reserved Rights:

The Grantor reserves for the Grantor's self, heirs, successors and assigns, all rights and privileges of ownership of the Protected Property to use the Protected Property for all purposes that are not inconsistent with the purpose of this Easement and not expressly prohibited by this Easement. The following rights are expressly reserved by the Grantor:

4.1 Conveyance – Grantor may sell...or otherwise convey the Protected Property, provided that such conveyance is subject to this Easement and written notice is provided to the Grantee in accordance with paragraph 18 below.

4.5 Fences – Existing fences...and new fences may be built on the Protected Property for purposes of trespass and reasonable and customary management of livestock and wildlife, without any further permission of the Grantee.

4.7 Agricultural Structures and Improvements – The existing agricultural structures and improvements may be repaired...New buildings and other structures and improvements to be used primarily for agricultural purposes, including the processing or sale of farm products predominantly grown or raised on the Protected Property, but not including any dwelling or farm labor housing, may be built on the Protected Property without any further permission of the Grantee.

4.10 Utility Services and Septic Systems – Installation, maintenance, repair, replacement, removal and relocation of electric, gas, geothermal, water facilities, sewer lines and/or other public or private utilities...over and under the Protected Property for the purpose of providing electrical, gas, water, sewer, or other utilities to serve improvements permitted herein, and the right to grant easements over and under the Protected Property for such purposes, is permitted without further permission of the Grantee...

4.11 Paving and Road Construction – Construction of new roads, parking lots or other paved surfaces, or the widening of existing such surfaces, are permitted outside the Farmstead Area consistent with the agricultural purposes of this Easement with advance written permission of the Grantee. The Grantee shall not give such permission, unless the Grantee determines that the Proposed Paving or covering of soil, or the location of any such road, will not substantially diminish or impair the agricultural values of the Protected Property.

17. Per the Ag Easement Paragraph 22, Modifications, "This Easement may not be changed, modified or discharged except by a writing signed by the duly authorized representatives of both the Grantor and the Grantee."

18. This Court has subject matter and personal jurisdiction in this case.

19. Venue is proper in this Court.

20. By letter dated June 14, 2021, Columbia Gas notified the Relators that it intends to acquire easements for the installation of natural gas pipeline infrastructure (the "Gas Pipeline") on the Protected Property. Copies of the "Notice of Intent to Acquire" letters are attached as Exhibit D. Copies of the proposed Gas Pipeline Easements are attached as Exhibit E.

21. The installation of the Gas Pipeline on the Protected Property is contrary to the purpose of the Agricultural Easement as stated in Ag Easement Paragraph B.

22. The installation of the Gas Pipeline on the Protected Property violates Ag Easement Paragraph 3.1 because the Gas Pipeline will be used to supply an off-farm industrial customer.

23. The installation of the Gas Pipeline on the Protected Property violates Ag Easement Paragraph 3.2 because the Gas Pipeline is a temporary or permanent structure or facility. Paragraph 3.2 specifically prohibits the installation of any "conduit line."

24. The installation of the Gas Pipeline on the Protected Property violates Ag Easement Paragraph 3.5 because it will require non-permissible excavation.

25. The installation of the Gas Pipeline on the Protected Property violates Ag Easement Paragraph 3.8 because it will require the building of two new access roads for construction and continuing access.

26. The terms of the Gas Pipeline Easements violate Ag Easement Paragraph 4.5 by prohibiting the Relators from constructing permitted fences.

27. The terms of the Gas Pipeline Easements violate Ag Easement Paragraph 4.7 by prohibiting the Relators from constructing permitted agricultural structures and improvements.

28. The terms of the Gas Pipeline Easements violate Ag Easement Paragraph 4.10 by prohibiting the installation, maintenance, replacement, removal and relocation of permitted public or private utilities for the purpose of providing utility service to the Protected Property.

29. The terms of the Gas Pipeline Easements violate Ag Easement Paragraph 4.11 by prohibiting the construction of new roads, parking lots, or other paved surfaces, or the widening of existing such surfaces consistent with the agricultural purposes of the Ag Easement.

30. The terms of the Gas Pipeline Easements will prevent the Relators from being able to use the Protected Property for many activities defined as agriculture in §§ 1.61 and 5713, including silviculture, viticulture, apiaries, hops, fruit trees, specialty crops, livestock feeding facilities, fencing for pasture and deer exclusion.

31. Installation of the Gas Pipeline will require the removal of topsoil and will result in permanent damage to the Protected Property's soils. This action is inconsistent with the conservation purpose of the Ag Easement and inconsistent with federal law determining allowable activities for an I.R.C. 170(h) qualified agricultural easement.

32. On August 13, 2008, Ohio Attorney General Nancy H. Rogers issued an opinion letter on the propriety of locating a water line on the Protected Property (the "AG Opinion"). A copy of the AG Opinion is attached as Exhibit F.

The AG Opinion states:

> ODA [Ohio Department of Agriculture], in its discretion and mission to preserve farmland in Ohio, has established standard

> terms that appear in the deeds for agricultural easements, including the deed of easement for the Bailey Farm [Ag Easement]. One term addresses the rights of the farmland owner with respect to utility improvements and granting easements for such. This term allows the farmland owner to make utility easements or grant easement for such only if the improvement solely serves the protected farmland and permitted structures thereon. In this instance, the proposed water line would not solely serve the Bailey property. Accordingly, the Baileys are prohibited from granting the proposed easement unless ODA gives approval.
>
> At this time, ODA has determined that any water line must be located in the existing right-of-way and that placement outside of that area is counter to the preservation of the Bailey property as farmland.

33. Per Ag Easement Paragraphs 7.3 and 8, the USWCD has the duty to monitor and report violations of the Ag Easement.

34. The USWCD issued a resolution on the Gas Pipeline on September 14, 2020. A copy of the resolution is attached as Exhibit G. The resolution states:

> Whereas, on November 3, 2003, the ODA Office of Farmland Preservation accepted a donation from The Arno Renner Trust for an agricultural easement on 231.25 acres of prime farmland valued at over $3.5 million.
>
> ***
>
> Whereas, the ODA Office of Farmland Preservation entered into an agreement with the Union County SWCD to serve as the local agent entrusted to monitor the agricultural easement donated by the Arno Renner Trust.
>
> Whereas, at the urging of local interested parties, including the Union County SWCD Board of Supervisors, the ODA asserted the supremacy of the State's interest in preserving farmland when it issued a letter to the City of Marysville dated November 23, 2005 in which the ODA set a strong precedent on this matter. This letter clarified the legal terms of the agricultural easement and its prohibitions against the installation of any utilities across preserved farmland that do not directly service the farm. With the assistance of staff from Union County SWCD, the City of Marysville was able to utilize a mutually beneficial alternative route that met the

needs of the sewer project while minimizing adverse impact on the preserved farm.

Whereas, on July 9, 2020, the Ohio Power Siting Board issued a Staff Report which recommended conditional approval of a proposed natural gas pipeline route planned by Columbia Gas which would require a utility easement across preserved farmland donated by the Arno Renner Trust. This OPSB Staff Report stated the primary basis of need identified by Columbia Gas for this particular route was "in order to accommodate a new industrial customer." The proposed gas main by its very size and nature cannot provide any direct service to the preserved farm.

Whereas, the agricultural easement donated by the Arno Renner Trust includes language that explicitly prohibits the granting of any right of passage across protected property if that passage is used in conjunction with industrial activities.

Whereas, on August 27, 2020, the OPSB passed a conditional Opinion, Order, and Certificate which identifies a condition of their approval that "prior to commencement of construction activities in the areas that require permits or authorizations by federal or state laws and regulations, the Applicant shall obtain and comply with such permits and authorizations.

***

Therefore let it be resolved that the Union County SWCD Board of Supervisors strongly encourages ODA to thoroughly review the language in the agricultural easement donated by the Arno Renner Trust in 2003 and apply the same legal precedent expressed in ODA's letter dated November 23, 2005 to protect the integrity of the agricultural easement against intrusion of a utility route primarily intended to support unspecified private industrial activity and not directly servicing the farm. By so doing, ODA will strengthen and promote future farmland preservation efforts in Union County and across all of Ohio.

Let it also be resolved that the Union County SWCD Board of Supervisors strongly encourages ODA to thoughtfully reconsider any real or perceived consent granted to Columbia Gas to utilize any portion of the proposed gas main route that will impact farmland protected by agricultural easements. ODA should work with Columbia Gas to fully evaluate mutually beneficial alternative routes for this project that do not impact preserved farmland protected by agricultural easements.

35. By letter dated July 1, 2021, counsel for Relators sent a letter to Sarah Huffman, Executive Director of the Office of Farmland Preservation for the Ohio Department of Agriculture, with copies to the Director, Ohio Governor Mike DeWine and Ohio Attorney General Dave Yost, requesting the Ohio Department of Agriculture " to send a cease and desist letter to NiSource/Columbia Gas stating that it is not authorizing the landowners [Relators] to grant non-farm commercial utility line easements and is not authorizing NiSource or Columbia Gas to install this proposed pipeline because this would violate the terms of the Ag Easement." A copy of the July 1, 2021 letter is attached as Exhibit I.

36. By letter dated July 7, 2021, Sarah Huffman responded to Relators' counsels' letter stating in full "I am in receipt of your letter dated July 1, 2021. The Ohio Department of Agriculture will not be taking the action requested." A copy of the July 7, 2021 letter is attached as Exhibit I

37. The relators have a clear legal right to the relief they are requesting.

38. The Director has a clear legal duty to promote the preservation of Ohio farm land, which is a public policy of the State of Ohio.

39. The Director has a clear legal duty to enforce the terms of the Ag Easement.

40. The Director has a clear legal duty to oppose the grant of easements over the Protected Property in favor of Columbia Gas.

41. The Director has a clear legal duty to defend the Ag Easement before the Ohio Power Siting Board.

42. The Board of Supervisors of the USWCD has a clear duty to support the enforcement of the terms of the Ag Easement.

43. The relators have no plain and adequate remedy in the course of ordinary law and have requested by letters to ODA that ODA voluntarily enforce the terms of the Ag Easement as prior administrations have done.

WHEREFORE, Relators demand that the Court issue a Writ of Mandamus ordering the Director to perform her legal duty by:

A. Enforcing the terms of the Ag Easement;

B. Sending a cease and desist letter to Columbia Gas stating that the Ohio Department of Agriculture is not authorizing the Relators to grant non-farm commercial utility line easements and is not authorizing Columbia Gas to install the Gas Pipeline because such installation would violate the terms of the Ag Easement;.

C. Opposing any eminent domain action brought by Columbia Gas against the Protected Property;

D. Informing the Ohio Power Siting Board that with regard to the Protected Property that Columbia Gas has not obtained the permits or authorizations needed to install the Gas Pipeline on the Protected Property, including written specific authorization from the Ohio Department of Agriculture.

Relators demand that the Court issue a Writ of Mandamus ordering the Board of Supervisors of the USWCD to perform its legal duty by:

E. Supporting the enforcement of the terms of the Ag Easement.

F. Additionally, Relators demand an award of costs, reasonable attorney fees, recovery of damages in accordance with O.R.C. Sec. 2731.11, and all other relief the Court deems equitable.

Respectfully submitted,

PLANK LAW FIRM, LPA

By: _____

David Watkins (0059242)
Kevin Dunn (0088333)
411 E. Town Street, Flr 2
Columbus, Ohio 43215
614/947-8600
614/228-1790 (Facsimile)
dw@planklaw.com
Attorneys for Relators

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT

COLUMBIA GAS OF OHIO, INC. Appellant/Cross-Appellee,	)	Case No. 14-22-0013
vs.	)	Regular Calendar
PATRICK E. BAILEY, JR., *et al.,* Appellee/Cross-Appellant.	)	On Appeal from Decision of the Court of Common Pleas of Union County, Ohio Case No. 2021 CV 0112
and	)	
	)	Case No. 14-22-0014
COLUMBIA GAS OF OHIO, INC. Appellant/Cross-Appellee,	)	Regular Calendar
vs.	)	On appeal from Decision of the Court of Common Pleas of Union County, Ohio Case No. 2021 CV 0113
DON BAILEY, JR., *et al.,* Appellees/Cross-Appellant	)	

BRIEF OF *AMICI CURIAE* THE OHIO FARM BUREAU FEDERATION, UNION COUNTY FARM BUREAU, AND THE COALITION OF OHIO LAND TRUSTS IN SUPPORT OF APPELLEES'/CROSS-APPELLANT'S DON BAILEY, JR *ET AL*

Chad A. Endsley (0080648)
(Counsel of Record)
Leah F. Curtis (0086257)
Amy Milam (0082375)
Ohio Farm Bureau Federation, Inc
280 N. High Street
Columbus, OH 43215
Phone: (614) 246-8256
Fax: (614) 246-8656
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
Counsel for Amici Curiae, Ohio Farm Bureau Federation, Inc. and Union County Farm Bureau

Chris Walker (0040696)
Van Kley & Walker, LLC
109 North Main Street
Suite 500
Dayton, OH 45402
Telephone: (937) 226-9000
Fax: (937) 226-9002
cwalker@vankleywalker.com
Counsel for Amicus Ohio Coalition of Land Trusts

Adam C. Smith (0087720)
Richard W. Cline (0068560)
McDonald Hopkins LLC
600 Superior Avenue, East, Suite 2100
Cleveland, OH 44114-2653
Phone: 216.348.5400
Fax: 216.348.5474
Email: acsmith@mcdonaldhopkins.com
rcline@mcdonaldhopkins.com
Counsel for Petitioner/Appellant/Cross-Appellee Columbia Gas of Ohio Inc.

David Watkins
Kevin Dunn
411 E. Town Street, Fl 2
Columbus, OH 43215
Phone: 614.947.8600
Fax: 614.228.1790
Email: dw@planklaw.com
Counsel for Respondents/Appellee/Cross-Appellant Don Bailey, Jr., Successor Trustee of the Arno Renner Trust Dated April 24, 1997 and Charles Renner

Lydia Arko Zigler
Shelli R. Brock
Assistant Attorneys General
Ohio Attorney General's Office
Executive Agencies Section
30 E. Broad Street, 26th Floor
Columbus, OH 43215
Phone: 614.466.2980
Fax: 614.728.9470
Email: Lydia.zigler@OhioAGO.gov
Shelli.Brock@OhioAGO.gov
Counsel for Respondent Ohio Department of Agriculture

Table of Contents

Table of Contents iii

Table of Authorities v

I. STATEMENT OF THE CASE AND FACTS 1

II. STATEMENT OF INTEREST 1

III. LAW AND ARGUMENT 5

A. While the legislature may grant the power of eminent domain, it is the courts' duty alone to ensure the law is properly applied within the constraints of Ohio's Constitution 5

1. Statutes regulating eminent domain must be reviewed with heightened scrutiny. 5

2. Transfers of property to public utilities, while lawful, are transfers to private entities that require review favorable to the landowner. 5

3. The judiciary is empowered to determine the interpretation of Ohio laws in accordance with the constraints of the Ohio Constitution. 6

4. Necessity must be given its narrowest meaning to honor the Ohio Constitution's protection of private property rights. 7

B. In order to apply the presumptions in R.C. 163.09, an agency must have reviewed and approved the appropriation documents, and not merely the project or its general location. ... 8

1. The lower court's decision appropriately found the irrebutable presumption did not apply because the OPSB did not approve the appropriation. 8

C. Private economic development is not a lawful nor appropriate use of eminent domain. 10

1. The Court made clear in *Norwood* that private economic development is not a valid use of the eminent domain power 10

2. Landowners are often threatened with eminent domain for projects that may not meet the public use requirement, yet evade review. 11

D. Farmland preservation easements must be interpreted to the benefit of preserving irreplaceable farmland. 12

1. The clear language of the farmland preservation easement at issue prohibits the placement of a commercial or industrial gas line, particularly when that line will not serve the structures or improvements on the farm itself. 12

2. When in dispute, a holder of the easement cannot provide the legal interpretation of the property rights at issue in the case. 14

3. The Ohio Power Siting Board cannot make a legal conclusion as to the application of the agricultural easement to the project 15

E. Farmland preservation easements held by the state are a prior public use and cannot be disturbed by condemnation. 16

F. CONCLUSION 18

APPENDIX 20

CERTIFICATE OF SERVICE 21

Table of Authorities

Cases

Blue Ash v. Cincinnati, 173 Ohio St. 345, 351, 182 N.E.2d 557 (1962) 16

Buckingham v. Smith, 10 Ohio 288, 297 (1840) 11

City of Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 ..... passim

Cooper v. Williams, 5 Ohio 391, 392 (1832) 8

Corder v. Ohio Edison Co., 162 Ohio St. 3d 639, 2020-Ohio-5220, 166 N.E.3d 1180 ..... 10, 14, 16

Covington & C. Bridge Co. v. Magruder, 63 Ohio St. 455, 473 (1900) 8

Henry v. Columbus Depot Co., 135 Ohio St. 311, 316 (1939) 7

Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed. 2d 439 9

Kinder Morgan Utopia, LLC v. PDB Farms of Wood County, LLC et al, 6th Dist. Wood No. 2016WD0051, Final Decision and Judgment Entry (Apr. 12, 2017) 11

Knick v. Twp of Scott, PA, 588 U.S. __, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019) 1

Siltstone Resources, L.L.C. v. Ohio Pub. Works. Comm., Slip Opinion No. 2022-Ohio-483 ..... 3, 14

Sunoco Pipeline, L.P. v. Carol A. Teter, et al., Case No. 2016-1486, 9/13/2017 Case Announcements #2, 2017-Ohio-7567 11

Statutes

R.C. 163.09 ..... 8, 10

R.C. 5301.67 16

R.C. 901.21 14

Other Authorities

American Farmland Trust, *2040 Future Scenarios: Ohio*, (2022) https://storage.googleapis.com/csp-fut2040.appspot.com/state-reports/FUT2040_OH.pdf

(accessed July 11, 2022) 3

Brief amicus curiae of Ohio Farm Bureau Federation (June 4, 2018) available at https://www.supremecourt.gov/DocketPDF/17/17-647/49121/20180604161651568_36343%20pdf%20Shuey.pdf (accessed June 21, 2022) 2

Brooker, Jena, *Pipelines keep robbing the land long after the bulldozers leave,* (Jan. 7, 2022) Grist, https://grist.org/energy/new-research-shows-sustained-damage-to-agricultural-land-near-pipelines/ (accessed July 11, 2022) 18

Culman et al., *Does Pipeline Installation have a Lasting Effect on Crop Yields?* (2021) C.O.R.N. Newsletter, https://agcrops.osu.edu/newsletter/corn-newsletter/24-2021/does-pipeline-installation-have-lasting-effect-crop-yields (accessed July 11, 2022) 17

Keck, Gail, *Union County court rejects pipeline eminent domain,* (May 2, 2022), Farm and Dairy, https://www.farmanddairy.com/news/union-co-court-rejects-pipeline-eminent-domain/716041.html (accessed June 13, 2022) 15

Legislative Task Force to Study Eminent Domain, "Final Report of the Task Force to Study Eminent Domain", (2006), 7, *available at* https://ccao.org/wp-content/uploads/Eminent%20Domain%20Task%20Force%20Report.pdf (accessed June 21, 2022) 9

Ohio Department of Agriculture, *Welcome to the Farmland Preservation Office,* https://agri.ohio.gov/programs/farmland-preservation-office (accessed July 11, 2022) 3

I. STATEMENT OF THE CASE AND FACTS

The Ohio Farm Bureau Federation, Union County Farm Bureau (collectively "Farm Bureau") and the Coalition of Ohio Land Trusts ("COLT") accepts and incorporates herein the statement of the case and the statement of the facts as presented by Respondents-Appellees/Cross-Appellants, Bailey *et al.*

II. STATEMENT OF INTEREST

The Ohio Farm Bureau Federation (OFBF) is Ohio's largest general farm organization, with a core purpose of working together for Ohio's farmers and a mission of creating a partnership between farmers and consumers. Ohio Farm Bureau is a federation of 86 county farm bureau organizations, representing all 88 counties in Ohio. Union County Farm Bureau is one of those county farm bureaus, representing the members in that county.

Farm Bureau members own and rent land throughout the state and use it to produce virtually every kind of agricultural commodity found in this area of the country. The Farm Bureau is strongly committed to protecting private property rights preserved by the Ohio and U.S. Constitutions, as it has done for more than 100 years. OFBF participated as a member of the historic Eminent Domain Task Force in the early 2000's to lend its expertise and the experience of Farm Bureau members to the legislative reform process. While much is left to be desired in Ohio law to uphold the tenets of Ohio's constitutional private property right protections and this Court's lodestar holding in *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, we strive to see these rights protected at the local, state and federal level. *Knick v. Twp of Scott, PA*, 588 U.S. __, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019), *see also* Brief amicus curiae of Ohio Farm Bureau Federation (June 4, 2018) available at https://www.supremecourt.gov/DocketPDF/17/17-

647/49121/20180604161651568_36343%20pdf%20Shuey.pdf (accessed June 21, 2022).

The landowners involved in this case are Farm Bureau members in Union County whose land lies directly in the intended path of the gas line in question. Across the state, Farm Bureau members are being asked to give up property, either willingly or through eminent domain, for various proposed utility infrastructure projects. Eminent domain could impact any landowner, but when it comes to large scale projects, the fact is that it is often rural landowners (many of whom are Farm Bureau members) who are disproportionally burdened. Due to the lower density of people and buildings, the wide-open expanses of productive, fertile farmland are far too often and by too many seen only as "vacant land" or "empty land" and as the obvious choice for new infrastructure placement. Instead, this land should be viewed as an incredibly vital ecosystem producing food, fuel, and fiber, benefiting the environment, and creating jobs and economic activity for the community and state.

Ohio Farm Bureau's member developed policy is staunch in its opposition to the use of the eminent domain power generally, and particularly where it impacts farmland. Where property acquisition is necessary for utility infrastructure, OFBF policy supports that developers should obtain voluntary easements from willing landowners and use existing corridors to prevent further impacts to private land. OFBF policy also staunchly opposes broader interpretation of existing right-of-way easements to allow expanded access without the proper additional compensation to the landowner.

Farmland preservation is also of utmost importance to our members, as we continue to see the march of development across this state – turning valuable, prime farmland into homes, buildings and other uses that make it nearly impossible to return to fertile ground. "Between 1950 and 2000, Ohio lost more than 6.9 million acres of farmland, representing nearly one-third of

Ohio's agricultural land." Ohio Department of Agriculture, *Welcome to the Farmland Preservation Office,* https://agri.ohio.gov/programs/farmland-preservation-office (accessed July 11, 2022). The American Farmland Trust estimates based on recent trends, Ohio will pave over more than 500,000 acres of farmland by 2040. American Farmland Trust, *2040 Future Scenarios: Ohio,* (2022) https://storage.googleapis.com/csp-fut2040.appspot.com/state-reports/FUT2040_OH.pdf (accessed July 11, 2022). The threat of conversion to Ohio's farmland is real and consequential.

While OFBF supports the rights of private property owners to make their own choices about their land, we also encourage a balance be struck between development and the preservation of valuable farmland resources. The Agricultural Easement Donation and Purchase programs are one way to achieve that balance, by allowing landowners to make permanent preservation decisions about their property. However, if those easements hold no protection when the condemnor comes knocking, landowners and farmers will not be willing to take part in these programs. The promise of these programs to preserve farmland has to be meaningful in order for Ohio's farmland owners to donate or sell—often at a bargain—agricultural easements to the Ohio Department of Agriculture (ODA) and Ohio's land trusts. Confidence must be instilled in grantors that their purpose for donating or selling these easements will be "observed and preserved with integrity over time." *Siltstone Resources, L.L.C. v. Ohio Pub. Works. Comm.*, Slip Opinion No. 2022-Ohio-483, ¶30.

Farm Bureau is extensively engaged on the topic of eminent domain. OFBF frequently hosts or presents at meetings providing information about the power of appropriation, the general uses, and the process that occurs when the property is taken for the government or a private company's use. Unfortunately, many regular Ohioans without an army of lawyers at their disposal

do not know the ins and outs of eminent domain law, or the extent to which the U.S. and Ohio Constitutions grant them protection of their private property rights. OFBF takes incredibly seriously its role in informing landowners about their legal rights, particularly related to their private property. With the potential for members to be affected by the outcome of this case statewide, Farm Bureau provides a unique viewpoint of the issues pertinent to this case. The policy positions which underpin OFBF's viewpoint are not made in a profit-driven boardroom. Rather, these positions are chosen by everyday Ohio citizens, looking for solutions to the very real problems they face, looking for ways to address the issues of their neighbors, their communities, and the state of Ohio. They are farmers and landowners who wish to continue providing food, fiber and fuel to their friends and neighbors, and support the economy of this state and country.

The Coalition of Ohio Land Trusts (COLT) is a 33-member organization, who has represented non-profit land trusts and soil and water conservation districts throughout the state for more than twenty years. COLT's mission is to strengthen Ohio's conservation community through training, advocacy, connection, and support. COLT's members work with landowners to permanently preserve Ohio's natural areas and farmlands, primarily through donated and purchased conservation easements, including agricultural easements. As such, COLT members regularly work with ODA, and are co-holders along with ODA, of hundreds of easements obtained through the Agricultural Easement Purchase and Donation programs. Many members of COLT are enrolled as certified local sponsors for the Agricultural Easement Purchase and Donation programs. COLT is committed to the permanent protection of conserved property, and to ensuring that proper judicial review is conducted when a conserved property is threatened with eminent domain. The preservation of agricultural land is essential to the future of our state because of its countless public benefits including access to local food, jobs and economic growth, carbon

sequestration, and more.

As set forth more fully below, this Court should uphold the decision of the Union County Court of Common Pleas regarding the necessity of this taking and reverse the lower court's ruling that an agricultural easement does not preclude the use of eminent domain on preserved property.

III. LAW AND ARGUMENT

A. While the legislature may grant the power of eminent domain, it is the courts' duty alone to ensure the law is properly applied within the constraints of Ohio's Constitution

1. Statutes regulating eminent domain must be reviewed with heightened scrutiny.

The Ohio Supreme Court has clearly ruled that heightened scrutiny must be applied in reviewing any statutes which regulate the use of eminent domain powers. *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at syllabus ¶ 3. As eminent domain is a constitutional power, and private property receives significant constitutional protection, it is imperative that the highest scrutiny is applied in interpreting any statutes which may grant such a power.

2. Transfers of property to public utilities, while lawful, are transfers to private entities that require review favorable to the landowner.

As the legislature has some ability to transfer its eminent domain power for use by a private entity, the use of heightened review is even more important. "In cases where the eminent domain power is transferred, it must be ensured that the grant of authority is strictly construed and that any doubt over the propriety of the taking is resolved in favor of the property owner." *Norwood*, 2006-Ohio-3799 at ¶ 71. The *Norwood* case is the guiding precedent on eminent domain case in this state, and every question around eminent domain must consider the important holdings of that case in order to ensure they comply with the law, precedent and the Ohio Constitution. As the attempted

appropriation in this case is predicated upon the transfer of eminent domain power to a private entity, the eminent domain statutes at issue in this case must be reviewed with heightened scrutiny and any doubts as to the taking resolved to the benefit of the landowner. *Id.*

While it is clear these private entities wish to represent themselves as being on the same level as the government when acting as a condemnor, the fact is they are private companies. When the government acts as a condemnor, it is at least accountable to its citizens through various mechanisms, and in particular, through the election of the very officials who can write the laws and/or approve the appropriation of property for use in developing projects. The government and its supporting agencies hold supreme the mission of serving the citizens of Ohio as a whole, and when that public trust is violated, the citizens can respond accordingly at the ballot box. No such accountability exists where eminent domain powers are transferred to private corporations. While takings or projects may be "good for business," that does not necessarily mean they will always be for the "public good." Because the taking power is being transferred to and exercised by a private company, the lower court properly reviewed the taking with appropriate heightened scrutiny.

3. The judiciary is empowered to determine the interpretation of Ohio laws in accordance with the constraints of the Ohio Constitution.

Not only must the plain text of statutes be scrutinized for constitutional muster in the hypothetical, but they must also be scrutinized as they are applied to real-life takings and all the facts and circumstances surrounding them. While the court's role is a limited one, it is a "critical one that requires vigilance in reviewing state actions for the necessary restraint, including review to ensure that the state takes no more than that necessary to promote the public use." *Norwood*,

2006-Ohio-3799, ¶ 69. And while the legislature may confer the power of eminent domain upon other parties generally, it is the court's role to ensure that exercise of power is not beyond the scope of authority. *See id.* at ¶ 70. In reviewing an appropriation, the court must act in deference to legislative pronouncements but also act independent of them. *Id.* The Ohio Supreme Court recognized judicial oversight was even more imperative when the taking involves a transfer of property to a private entity, such as Columbia Gas. *Id.* at ¶ 72.

Ohio law has permitted some exercise of the powers of eminent domain in order to appropriate property rights that will be transferred to a private entity, but such law does not and should not insulate transfers from judicial review for a qualifying public use and necessity. It is imperative that courts use their review power to ensure takings by appropriation are necessary and for the public good.

In addition to the courts' critical role in determining whether a taking is for the public good, the courts also must ensure the condemning authority "takes no more than that necessary to promote the public use." *Norwood*, 2006-Ohio-3799, ¶ 69. The Supreme Court of Ohio's ruling in *Norwood* confirmed that judicial review of the necessity component of a taking is a crucial aspect of takings jurisprudence. *Id.* The necessity that allows for the exercise of eminent domain is just that and nothing broader, and no more property shall be taken than the public use requires. *See Henry v. Columbus Depot Co.*, 135 Ohio St. 311, 316, 20 N.E.2d 921 (1939).

4. Necessity must be given its narrowest meaning to honor the Ohio Constitution's protection of private property rights.

Construing the law in favor of the landowner requires that "necessity" be given its narrowest and most limited meaning for the purpose of advancing the public good. Interpreting "necessity" to mean "reasonably convenient" or "useful" is a flagrant violation of the fundamental

rights of property owners and contrary to *Norwood* and historical case law which hold that appropriations must be limited to what is necessary and nothing more. *See Norwood*, 2006-Ohio-3799, at ¶ 69, *see also Cooper v. Williams*, 5 Ohio 391, 392 (1832) (appropriating agency may take only that "which is necessary" and may not take a "surplus" of rights); *Covington & C. Bridge Co. v. Magruder*, 63 Ohio St. 455, 473 (1900) ("Inasmuch as property cannot constitutionally be taken by eminent domain except for the public use, it follows that no more property shall be taken than the public use requires."). Courts must ensure that condemnors are held to the appropriate standard of only taking what is necessary for the public good, and not one right nor one inch more.

B. In order to apply the presumptions in R.C. 163.09, an agency must have reviewed and approved the appropriation documents, and not merely the project or its general location.

1. The lower court's decision appropriately found the irrebutable presumption did not apply because the OPSB did not approve the appropriation.

The lower court was correct in not applying the presumptions within R.C. 163.09(B), because, simply, those presumptions did not apply. The Ohio Power Siting Board did not review "appropriations" in this case, but has only issued a certificate of public convenience and necessity to a pipeline project put forth by Columbia Gas. No documents of appropriation, "taking possession of" land, were put before the Board, and only the judiciary can determine the threshold issues of public need and necessity. *Norwood*, 2006-Ohio-3799 at ¶ 69. While Columbia Gas asserts that maps were attached to their applications at the Ohio Power Siting Board, maps are not easements and do not detail nor describe the property rights at issue in this case.

The legislature has attempted to create an irrebuttable presumption when a state or federal regulatory authority "approves" an appropriation. R.C. 163.09(B)(1)(c). It is doubtful whether the approval of any permit to build can be equated to an actual "approval" of appropriation,

particularly considering that the threshold questions of need and necessity can only be answered by the judiciary. *Norwood v*, 2006-Ohio-3799, at ¶ 70; *see also* Legislative Task Force to Study Eminent Domain, "Final Report of the Task Force to Study Eminent Domain", (2006), 7, *available at* https://ccao.org/wp-content/uploads/Eminent%20Domain%20Task%20Force%20Report.pdf (accessed June 21, 2022) (stating "**Majority Task Force Recommendation:** The Task Force recommends that the issue of necessity for the taking should be decided by a judge." No minority opinion was provided.).

The Ohio Supreme Court has held that the question of necessity is squarely within the province of the judiciary, and cannot be usurped by legislative acts without upsetting the vital balance and separation of powers. *See Norwood*, 2006-Ohio-3799, at ¶ 67; *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S. Ct. 360, 74 L.Ed. 950. Public use cannot be established by legislative act alone, lest the public use requirement be reduced to "hortatory fluff." *See Kelo v. City of New London*, 545 U.S. 469, 497, 125 S.Ct. 2655, 162 L.Ed. 2d 439 (O'Connor, J. dissenting). It is solidified, through statute and precedent, that it is the judiciary's critical role to "ensure that the state takes no more than necessary to promote the public use." *Norwood*, 2006-Ohio-3799 at ¶ 69. Indeed, the Ohio Supreme Court has found that it cannot and will not abdicate its "traditional role as guardian of constitutional rights and limits" and that questions such as public use and necessity are "constitutional question[s] squarely within the Court's authority." *Id.* While not squarely before the Court in *Norwood*, the Court's opinion expressed concern regarding any presumption in favor of the condemnor. *Norwood*, 2006-Ohio-3799, at ¶ 136 fn16. The case at hand shows exactly how this concern has come to fruition.

The irrebuttable presumption should not be applied in this case, because applying it unconstitutionally eliminates the court's required review of takings. A landowner not only

deserves to have a judicial review of necessity, but is required to have such judicial review by the Ohio Constitution, statutory law, and the holding of *Norwood.* 2006-Ohio-3799.

However, it is not necessary to address this constitutional question, as the language of the statute itself removes the need for such review. The relevant language in R.C. 163.09(B)(1)(c) provides that the irrebuttable presumption applies only when a regulatory authority approves "an appropriation by a public utility." No regulatory authority approved the appropriation in this case. Although the Ohio Power Siting Board provided a conditional approval for the general project, it did not approve any appropriation of property. While Columbia Gas cites that the Board did review maps showing where easements would be located, that is not an "approval" of any taking of property. *See Corder v. Ohio Edison Co.*, 162 Ohio St. 3d 639, 2020-Ohio-5220, 166 N.E.3d 1180. ("However, the PUCO is not a court of general jurisdiction, and it may not adjudicate claims involving competing property rights, including those asserted by or against a public utility." at ¶2).

C. Private economic development is not a lawful nor appropriate use of eminent domain.

1. The Court made clear in *Norwood* that private economic development is not a valid use of the eminent domain power

In this court's formative opinion in *Norwood v. Horney*, it was made clear that the transfer of land from Party A to Party B, for the reason of increasing the commercial gain of Party B, is not a valid public use for the purposes of eminent domain law. 2006-Ohio-3799, at ¶ 43. While the transfer to a private entity is not immediately suspect, that does not insulate the transfer from appropriate judicial review for a qualifying public use. Instead, the judicial branch serves the role of highest importance to ensure that the legislature has not abused its power by permitting the state to take private property from one individual simply to give it to another for private gain. *See id.* at ¶ 72. "A primordial purpose of the public-use clause is to prevent the legislature from permitting

the state to take private property from one individual simply to give it to another. Such a law would be a flagrant abuse of legislative power [...] and to give deference to it would be a wholesale abdication of judicial review." *Id.* (citations omitted).

Columbia Gas asserts, multiple times, that the pipeline at issue is "needed to increase the economic development and natural gas service reliability in the greater-Marysville area and Union County." Appellant's Br. at 4. However, the economic development of an area is not a valid use of the eminent domain power. A common benefit to all people alike is what allows for and justifies a seizure of private property. *Norwood*, 2006-Ohio-3799, at ¶ 43 (*citing Buckingham v. Smith*, 10 Ohio 288, 297 (1840)). The proliferation of business is not a public use, and the downstream economic benefits that might be created cannot be used to support eminent domain.

2. Landowners are often threatened with eminent domain for projects that may not meet the public use requirement, yet evade review.

Through the years, OFBF members have been confronted numerous times with threats of eminent domain for utility projects that solely or primarily serve private business interests. *See generally Sunoco Pipeline, L.P. v. Carol A. Teter, et al., Case No. 2016-1486, 9/13/2017 Case Announcements #2,* 2017-Ohio-7567; *Kinder Morgan Utopia, LLC v. PDB Farms of Wood County, LLC et al*, 6th Dist. Wood No. 2016WD0051, Final Decision and Judgment Entry (Apr. 12, 2017). These landowners are approached with offers to purchase easements, and when they refuse, are threatened with court action through eminent domain. However, it has been OFBF's experience that if landowners have the resources to stand up to these threats, the infrastructure is suddenly able to be moved or negotiations become quickly fruitful, the cases dismissed, and the issue evades judicial review of the all-important public use requirement.

What Farm Bureau members know, and continue to advocate against, is that the much-celebrated protections of *Norwood* can often ring hollow. Many takings are in reality transfers

from a private landowner to another private business for the benefit of a third private business. The lamentations of disruption to economic development are merely pulling back the curtain on what is often the true use of eminent domain when it comes to the appropriation of utility easements across this state: furthering private development.

The bare admission of the use of eminent domain for the inappropriate purpose of economic development is further indication that the lower court's ruling regarding the necessity of this taking was correct and should be upheld.

D. Farmland preservation easements must be interpreted to the benefit of preserving irreplaceable farmland.

1. The clear language of the farmland preservation easement at issue prohibits the placement of a commercial or industrial gas line, particularly when that line will not serve the structures or improvements on the farm itself.

The lower court erred in not giving effect to the plain language of the farmland preservation easement at issue in this case. The easement's terms clearly prohibit the placement of the utility line in question. Easement term 3.1 clearly states "there shall be no" commercial or industrial activity on the property, including a prohibition on any right of passage for use in conjunction with such prohibited activities. Easement term 3.2 prohibits structures, including any "utility pole...conduit line, or other temporary or permanent structure or facility on the Protected Property..." Easement term 3.3 provides that "[t]here shall be no ditching, draining, diking, filling, excavating, removal of topsoil, sand, gravel, rock or other materials or any change in the topography of the land..." Easement term 3.8, under a 2006 amendment, added a prohibition against the building of any new roads. Term 4.7 allows only for structures that are used for agriculture. Easement term 4.10 contemplates only the placement of utility lines to the benefit of

the improvements otherwise approved by the easement. And finally, the Grantor has reserved the "right to farm" in easement term 4.2, which allows for the grantor to retain the ability to farm in accordance with local, state, and federal laws and regulation – a right that would be severely burdened by the lower court's ruling. Respondent-Appellee/Cross Appellant's Trial Exhibit H.

A 12" high pressure commercial gas utility line cannot be classified as anything other than "commercial or industrial" activity. The easement clearly states that it is prohibited, and no passage through the land shall be permitted. This case does not involve the placement of a utility line by the grantor to service permitted structures or improvements on the property. It will not serve the landowner's home or buildings or barns. Under the terms of the easement, commercial utility lines such as the one sought by Columbia Gas are prohibited.

Failing to enforce the terms of the easement obliterates its protections and declares open season on land that was intended to be protected from development in perpetuity. Such a violation of the easement is counter to the clear purpose stated in the easement, of "furthering the State of Ohio's conservation policy to preserve and protect viable agricultural land." Respondent-Appellee/Cross Appellant's Trial Exhibit H at 2. In this particular case, the landowners themselves donated the development rights to the state in order to ensure their land would be protected from development and remain a vital farmland resource to their community. In other situations, the state, a county, or a land trust will purchase the development rights from a landowner in order to protect an area from development. Obliterating the protections guaranteed in the terms of the preservation easement would be a waste of taxpayer dollars for many agricultural easements around the state, and possibly a violation of the charitable trust for this specific donated easement.

As recently observed by the Ohio Supreme Court in *Siltstone Resources v. Ohio Pub. Works Comm.*, Slip Opinion No. 2022-Ohio-483, the charitable trust and charitable gift laws of

the state and the United States are impacted when violations of donated (or partially donated) restrictive covenants or conservation easements occur. The majority opinion noted that particularly in the charitable gift context, restrictions on use must be implemented to preserve the integrity of the gift. *Id.* at ¶29. The Court cited there are distinct exceptions to the rule against restraints on alienation in cases of charitable or public purposes, and specifically that transferring property for conservation purposes generally involves perpetuity under state and federal law, including under federal tax law. *Id.* Violation of easement terms of donated agricultural easements is contrary to their tax deductibility the express provisions of the easement at issue in this case, and R.C. 901.21(B); and when occurring after the easement is in place, are a violation of the charitable trust placed in the State of Ohio

2. When in dispute, a holder of the easement cannot provide the legal interpretation of the property rights at issue in the case.

The court erred in relying solely on the testimony of ODA employee Sarah Huffman in this case, in determining that the easement does not preclude the placement of a utility line across protected farmland. Agency employees are not judges, they are not triers of facts, and they cannot hold the authority to determine property rights when in dispute. *See generally Corder*, 162 Ohio St. 3d 639, 2020-Ohio-5220, 166 N.E.3d 1180. The determination of property rights is within the jurisdiction of the courts, and not the executive agencies. In a boundary dispute between private property owners, one of the property owners cannot opine as to the property line's location and have their word deemed as the law. Instead, the court reviews surveys, deeds, recorded instruments, and takes evidence to ultimately conclude where a boundary line is located. So, here, the court should have reviewed the easement as well as evidence and course of conduct regarding this and other agricultural easement-encumbered properties prior to determine the legal standing

of the farmland preservation easement.

Despite the conclusions of Sarah Huffman, past administrations have come to the opposite conclusion and found that the placement of utility lines outside of existing right of ways would violate the farmland preservation easement's terms. It is well documented that this property has been threatened at least twice with the idea of placing utility infrastructure, and both times those suggestions were rebuffed by the administration. Keck, Gail, *Union County court rejects pipeline eminent domain,* (May 2, 2022), Farm and Dairy, https://www.farmanddairy.com/news/union-co-court-rejects-pipeline-eminent-domain/716041.html (accessed June 13, 2022). Former Director of Agriculture Fred Dailey, who oversaw the activities of the Department longer than any individual (including the farmland preservation easement programs), testified as to the importance of agriculture, the public benefits bestowed by farmland, and the intended protection of ag easements against these types of encroachments. Feb. 22, 2022 Hearing, Transcript Pt. I at p. 106-155. This further demonstrates the need to avoid relying upon the opinions of individuals working for agencies for a finite period of time to interpret legal documents that will serve a property interest in perpetuity. The evidence as presented by the Bailey family clearly supports the interpretation that the agricultural easement does not allow for the placement of industrial or commercial gas lines across or through the protected property.

3. The Ohio Power Siting Board cannot make a legal conclusion as to the application of the agricultural easement to the project

Columbia Gas also asserts that the Ohio Power Siting Board found that the agricultural easement did not preclude installation over or under the property. Appellant/Cross-Appellees Brief at 6. However, the staff of the Ohio Power Siting Board, nor the board itself has the jurisdiction nor authority to determine property rights. The scope of an easement, and the rights it confers, are

to be determined by courts holding such jurisdiction. The Ohio Power Siting Board (and its staff) do not have that power, particularly considering the holding in *Corder v. Ohio Edison*. 2020-Ohio-5220 at ¶2. The OPSB's conclusion as to the application of the easement can hold no weight as to the determination of the easement rights and their applicability.

E. Farmland preservation easements held by the state are a prior public use and cannot be disturbed by condemnation.

At issue in this case is a piece of land, of which the development rights were donated to the state of Ohio to effectuate the state's interest and policy in preserving prime farmland. *See* Respondent-Appellee/Cross Appellant's Trial Exhibit H at 2. Farmland preservation easements (also referred to as agricultural easements) are a right or interest in land "held for the public purpose of retaining the use of land" in agriculture. R.C. 5301.67(C). The prior public use doctrine holds as a general rule that a condemnor which seeks to appropriate property already devoted to a public use can be enjoined if the proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction. *Blue Ash v. Cincinnati*, 173 Ohio St. 345, 351, 182 N.E.2d 557 (1962). The lower court failed to appropriately recognize that the proposed taking by Columbia Gas would destroy and severely inhibit the prior public use of the agricultural easement in question in this case.

The presence of a high-pressure commercial gas pipeline severely limits the agricultural use of a property, as was evidenced by testimony presented by the Baileys' and their witnesses in the lower court. The placement of a high-pressure gas pipeline means that current and any future landowners are inhibited from using the approximately 13 acres of property overlying the pipeline for many uses. The "right to farm" protected by the terms of the agricultural easement is severely curtailed. It also hinders the use of land immediately surrounding the pipeline, for obvious safety

purposes. These limitations mean that the agricultural purpose of the land will be burdened and frustrated by the presence of the proposed pipeline to an extent that ruins the public purpose of preserving farmland "exclusively" for agricultural use.

The state has clearly demonstrated its policy in preserving farmland, and the importance of agriculture in the state of Ohio, as evidenced by the testimony of former Ohio Director of Agriculture Fred Dailey's testimony at the lower court. Feb. 22, 2022 Hearing, Transcript Pt. I at p. 106-155. Former Director Dailey testified as to the vast array of crops grown in Ohio and the foundation those farms give to the larger food, processing and manufacturing industries of Ohio, and ultimately the public benefits provided by farmland. *Id.*

The case at hand must be controlled by legal principles, rather than the practical effects that the proposed pipeline will have on the economic development of the area. *See Blue Ash* at 352. What is pertinent is the effect the pipeline will have for the purpose of agricultural use – the required public use of the property under the previously established state-held agricultural easement. Research conducted in Ohio shows that yields for field crops are substantially decreased after the installation of a pipeline, including up to nearly 25% for corn yields. Culman et al., *Does Pipeline Installation have a Lasting Effect on Crop Yields?* (2021) C.O.R.N. Newsletter, https://agcrops.osu.edu/newsletter/corn-newsletter/24-2021/does-pipeline-installation-have-lasting-effect-crop-yields (accessed July 11, 2022). These are not one-year disruptions but lasting long-term effects. Soils within pipeline right of ways have more rock fragments, lower soil moisture, and have higher resistance to penetration indicating lasting soil compaction. *Id.* Agronomists have also found changes in available water and nutrients within soil after the construction of pipelines. Brooker, Jena, *Pipelines keep robbing the land long after the bulldozers leave,* (Jan. 7, 2022) Grist, https://grist.org/energy/new-research-shows-sustained-damage-to-

agricultural-land-near-pipelines/ (accessed July 11, 2022). Simply put, the common assurance that the land will be returned to normal after pipeline construction is false. And these studies are only investigating the use of the land for field crops; they do not consider the vast array of other agricultural crops and products that one may choose to grow or produce on their property. Pipeline easements would likely not allow for the growth of orchards for fruit crops, nor large stand trees for timber crops or Christmas tree production. Livestock production will also be prohibited, or at the least severely limited, because of the inability to build fencing and appropriate livestock structures like barns or shelters. The agricultural production and management of the protected property will forever be altered and inhibited—not by agronomic, environmental, or market factors —but by the presence of an incompatible commercial and industrial use. The purpose of the agricultural easement is clearly stated to keep the land permanently available for future agricultural uses, and those permissible future uses greatly dwindle with a pipeline easement burdening the property. The lower court should have found that the easement prohibited the placement of the pipeline, as farmland preservation is a prior public use that would be destroyed by the presence of a commercial and industrial pipeline.

F. CONCLUSION

The organizations represented herein continue to advocate at all levels of government to ensure that Ohio citizens are protected from the abuse and overreach that can be rife within eminent domain situations. The protection of Ohio farmland – both through appropriate eminent domain review and the enforcement of agricultural easements – is integral to the continuation of Ohio's iconic agriculture and food industry. We ask this court to affirm the necessity ruling of the lower court and reverse the lower court's ruling as to the agricultural easement's protection of the farmland as a prior public use not subject to eminent domain.

Respectfully Submitted,

Chad A. Endsley (0080648)
(Counsel of Record)
Leah F. Curtis (0086257)
Amy M. Milam (0082375)
Ohio Farm Bureau Federation, Inc.
280 N. High St., 6th Floor, P.O. Box 182383
Columbus, Ohio 43218-2383
Telephone: (614) 246-8258
Fax: (614) 246-8658
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
Counsel for Ohio Farm Bureau Federation, Inc. and Union County Farm Bureau

Chris Walker (0040696)
Van Kley & Walker, LLC
109 North Main Street.
Suite 500
Dayton, OH 45402
Telephone: (937) 226-9000
Fax: (937) 226-9002
cwalker@vankleywalker.com
Counsel for the Ohio Coalition of Land Trusts

APPENDIX

Kinder Morgan Utopia, LLC v. PDB Farms of Wood County, LLC et al, 6th Dist. Wood No. 2016WD0051, Final Decision and Judgment Entry (Apr. 12, 2017) A-1

R.C. 5301.67 ..... A-2

CERTIFICATE OF SERVICE

I certify that, on July 18, 2022, a copy of this Brief was served by regular U.S. mail or electronic mail upon the following counsel of record:

Adam C. Smith (0087720)
Richard W. Cline (0068560)
McDonald Hopkins LLC
600 Superior Avenue, East, Suite 2100
Cleveland, OH 44114-2653
Phone: 216.348.5400
Fax: 216.348.5474
Email: acsmith@mcdonaldhopkins.com
rcline@mcdonaldhopkins.com
Counsel for Petitioner/Appellant/Cross-Appellee
Columbia Gas of Ohio Inc.

David Watkins
Kevin Dunn
411 E. Town Street, Fl 2
Columbus, OH 43215
Phone: 614.947.8600
Fax: 614.228.1790
Email: dw@planklaw.com
Counsel for Respondents/Appellee/Cross-Appellant
Don Bailey, Jr., Successor Trustee of the Arno Renner
Trust Dated April 24, 1997 and Charles Renner

Lydia Arko Zigler
Shelli R. Brock
Assistant Attorneys General
Ohio Attorney General's Office
Executive Agencies Section
30 E. Broad Street, 26th Floor
Columbus, OH 43215
Phone: 614.466.2980
Fax: 614.728.9470
Email: Lydia.zigler@OhioAGO.gov
Shelli.Brock@OhioAGO.gov
Counsel for Respondent Ohio Department of Agriculture



Chad A. Endsley (0080648)

A-1

FILED
WOOD COUNTY, OHIO

2017 APR 12 PM 3:39

SIXTH DISTRICT
COURT OF APPEALS
CINDY A. HOFNER, CLERK

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Kinder Morgan Utopia, LLC

Appellant

v.

PDB Farms of Wood County, LLC, et al.

Appellees

Court of Appeals No. WD-16-051

Trial Court No. 2016CV0220

DECISION AND JUDGMENT

Decided: APR 12 2017

* * * * *

This matter is before the court on appellant's motion to dismiss this appeal.

Upon due consideration, appellant's motion is found well-taken and granted, and this appeal is dismissed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mary J. Boyle, J.

Eileen A. Gallagher, J.

Larry A. Jones, Sr., J.
CONCUR.

JUDGE

JUDGE

JUDGE

JOURNALIZED
COURT OF APPEALS
APR 12 2017

A-2

AUTHENTICATED,
OHIO LEGISLATIVE SERVICE
COMMISSION
DOCUMENT #249547

Ohio Revised Code

Section 5301.67 Conservation, agricultural easement definitions.

Effective: July 26, 2001
Legislation: House Bill 3 - 124th General Assembly

As used in sections 5301.67 to 5301.70 of the Revised Code:

(A) "Conservation easement" means an incorporeal right or interest in land that is held for the public purpose of retaining land, water, or wetland areas predominantly in their natural, scenic, open, or wooded condition, including, without limitation, the use of land in agriculture when consistent with and in furtherance of the purpose of retaining those areas in such a condition, or retaining their use predominantly as suitable habitat for fish, plants, or wildlife; that imposes any limitations on the use or development of the areas that are appropriate at the time of creation of the conservation easement to achieve one or more of those purposes; and that includes appropriate provisions for the holder to enter the property subject to the easement at reasonable times to ensure compliance with its provisions.

(B) "Agriculture" means those activities occurring on land devoted exclusively to agricultural use, as defined in section 5713.30 of the Revised Code, or on land that constitutes a homestead.

(C) "Agricultural easement" means an incorporeal right or interest in land that is held for the public purpose of retaining the use of land predominantly in agriculture; that imposes any limitations on the use or development of the land that are appropriate at the time of creation of the easement to achieve that purpose; that is in the form of articles of dedication, easement, covenant, restriction, or condition; and that includes appropriate provisions for the holder to enter the property subject to the easement at reasonable times to ensure compliance with its provisions.

(D) "Homestead" means the portion of a farm on which is located a dwelling house, yard, or outbuildings such as a barn or garage.

IN THE COURT OF COMMON PLEAS, UNION COUNTY, OHIO

Columbia Gas of Ohio,

Petitioner,

vs.

Patrick Bailey et al.

Respondent.

AND

Columbia Gas of Ohio,

Petitioner,

vs.

Don Bailey Jr.
Successor Trustee of the
Arno Renner Trust,

Respondent.

Case No. 21-CV-0112

Case No. 21-CV-0113

Judge Mark S. O'Connor
(by assignment)

Dominic A Sullivan
CLERK
2022 APR 26 PM 3:02
UNION COUNTY, OHIO

JUDGMENT ENTRY ON NECESSITY HEARING

These cases come before the Court upon a Necessity hearing pursuant to §163.09 of the Revised Code. Evidence was taken on three separate days; November 12, 2021; February 22, 2022; and February 25, 2022. Both

parties filed post hearing briefs and proposed Finds of Facts and Conclusions of Law.

Two other Necessity hearings have been held and ruled upon the 4.78mile Marysville Connector Pipeline Project. The first hearing consolidated three cases. *Columbia Gas v. Williams* (2021-CV- 0111) *Paul L. Jacquemin* (2021-CV-0114) and *Schrader 10944* (21-CV-0115) (Decision, Finding of Fact and Conclusions of Law) Filed January 3, 2022, The second hearing was *Columbia Gas v. Phelps Preferred Investments LLC* (21-cv-0137) which decision was filed February 8, 2022. Counsel on a third case (*Columbia Gas v. Denise Phillips* (21-CV-0136) have advised the Court that the case is settled. The two cases where the Court ruled in favor of the respondents are being appealed to the 3rd District Court of Appeals.

In its prior decisions, this Court relied upon the Supreme Court's decision in *City of Norwood v. Horney*, 110 Ohio St 3d 353, 2006-Ohio-3795 and the 4th District case of *Ohio Power Co. v. Burns*, 2021 Ohio 2715. While the Supreme Court initially denied jurisdiction in *Ohio Power v. Burns*, 2021 Ohio-4289, subsequently it accepted jurisdiction upon reconsideration (2-15-22 2022 Ohio 397). This Court relied upon the Supreme Court's decision in *Norwood* at ¶ 69:

> There can be no doubt that our role -- though limited -- is a critical one that requires vigilance in reviewing state actions for the necessary

> restraint, including review to ensure that the state takes no more than that necessary to promote the public use, *Buckingham,* 10 Ohio at 296-297, and that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose.

Given the particular fact of this case where the 25foot easement was labeled "temporary" before the Siting Board and transformed itself to "perpetual" before this Court, this Court is of the opinion that the Siting Board did not do its job. This Court finds it was "bad faith" to represent one thing to the Siting Board and then ask this Court to approve something greater. The Court finds Respondent's specific denial as alleged at Paragraph 18 of Respondents' answer filed October 1, 2021 is with merit.

Since this Court's decisions in the two prior referenced "Necessity" hearing are now before the Court of Appeals, the Court will address Respondent's other argument under section 163.09 (B) (1) that there is no right to make the appropriation.

The OPSP Staff Report of Investigation (Petitioner's Exhibit 8) stated at page 3 that the agricultural easement did not preclude this project. The Siting Board's Opinion reiterated that Opinion. Petitioner's Exhibit 9 at paragraph 34. Respondent's H is the agricultural easement in question.

FINDINGS OF FACTS

1.) Columbia Gas is a public utility subject to regulation by the State.

2.) Columbia Gas seeks to build a pipeline known as the Marysville Connector Pipeline Project.

3.) This project would benefit the community of Marysville and surrounding areas with an increase in available natural gas.

4.) Columbia Gas took the necessary steps to seek approval of this project from the Ohio Power Siting Board.

5.) The OPSB approved the project and a 75 foot wide easement over Respondents' properties, but failed to examine the proposed easement.

6.) Respondents Renner Trust created an agricultural easement by conveyance to the Ohio Department of Agriculture (Respondents'H). The current administrators of the Ohio Department of Agriculture have taken the position that the pipeline project does not violate the terms of the respondents' agricultural easement. Affidavit of Sarah Huffman, Executive Director of the Office of Farmland Preservation. TR. Exhibit 7 and February 25, 2022 Hearing at 6:5-9, 9-10-10:30"

CONCLUSIONS OF LAW

1.) The burden is upon the Petitioner to prove that the appropriation is taking no more than is necessary to promote the public. Norwood v. Horney, 110 Ohio St 3d 353, 2006-Ohio-3799.

2.) The Ohio Power Siting Board in failing to examine the applicable easement documents itself, failed to determine if the appropriation was taking only that which was necessary. Ohio Power Co. v. Burns, (4th Dist) 2021-Ohio-2714; 176 NE 3d 778.

3.) Court shall apply heightened scrutiny when reviewing statutes that regulate the use of eminent-domain powers.
Norwood v. Horney, 110 Ohio St 3d 353, 2006-Ohio-3799
Syllabus paragraph 3.

4.) Respondents urge the Court to supplant the current position of the Department of Agriculture and find that the Renner easement prevents this eminent domain action. This is contrary to the terms of that easement and contrary to the State's historic right to exercise the right of eminent domain. Fifth Amendment U.S. Constitution; Ohio Constitution Article 1 Section 19.

Accordingly, the Court finds the Respondents' assertions that there is no right to make this appropriation is without merit.

It is therefore Ordered that the Petitions herein be and are dismissed. The parties are encouraged to engage in further mediations. Respondents shall submit their claims for attorney fees within 45 days. Thereafter, a hearing will be assigned upon the call of the Court.

IT IS SO ORDERED.

JUDGE MARK S. O'CONNOR
(by assignment)

Mark S. O'Connor
By Assignment

Copies to:
Counsel of record

[Cite as *Columbia Gas v. Bailey*, 2023-Ohio-1245.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
UNION COUNTY

COLUMBIA GAS OF OHIO, INC.,

PETITIONER-APPELLANT/ CROSS-APPELLEE, **CASE NO. 14-22-13**

v.

PATRICK E. BAILEY, ET AL., **O P I N I O N**

RESPONDENTS-APPELLEES/ CROSS-APPELLANTS.

COLUMBIA GAS OF OHIO, INC.,

PETITIONER-APPELLANT/ CROSS-APPELLEE, **CASE NO. 14-22-14**

v.

DON BAILEY, JR., SUCCESSOR TRUSTEE OF THE ARNO RENNER TRUST DATED APRIL 24, 1997, ET AL., **O P I N I O N**

RESPONDENTS-APPELLEES/ CROSS-APPELLANTS.

Appeals from Union County Common Pleas Court
Trial Court Nos. 21-CV-0112 and 21-CV-0113

Judgments Affirmed in Part, Reversed in Part and Cause Remanded

Date of Decision: April 17, 2023

APPEARANCES:

Adam C. Smith **for Appellant/Petitioner Columbia Gas of Ohio, Inc.**

David Watkins **for Appellees/Cross-Appellants/Respondents**

Ryan P. Sherman **for Amici Curiae, Ohio Power Company and AEP Ohio Transmission Co., Inc.**

ZIMMERMAN, J.

{¶1} Petitioner-appellant/cross-appellee, Columbia Gas of Ohio, Inc. ("Columbia Gas"), appeals the April 26, 2022 judgment of the Union County Court of Common Pleas denying its petitions for the appropriation of easement rights. Respondents-appellees/cross-appellants, Don Bailey, Jr., Successor Trustee of the Arno Renner Trust dated April 24, 1997 ("Don"), Charles Peter Renner ("Renner"), Patrick E. Bailey ("Patrick"), and Whitney Bailey ("Whitney") (collectively, "respondents"), appeal the trial court's determination that an agricultural easement does not prevent Columbia Gas's petitions. For the reasons that follow, affirm in part and reverse in part.

{¶2} Much like our previous and similar case, this case involves a dispute involving Columbia Gas over the necessity of easement rights it sought through eminent domain for the construction, operation, and maintenance of a natural-gas pipeline. *See Columbia Gas of Ohio, Inc. v. Phelps Preferred Investments, LLC*, 3d

Dist. Union No. 14-22-07, 2022-Ohio-2540. However, the main issues in this case is whether Columbia Gas is entitled to a necessity presumption under R.C. 163.09(B)(1) *and* whether respondents' agricultural easement precludes an appropriation of easement rights.

Background

{¶3} The Arno Renner farm originally comprised 231.25 acres of farmland in Marysville, Ohio (the "protected property"). However, the protected property is encumbered by an agricultural easement (as defined under R.C. 5301.67(C)) granted in favor of the Ohio Department of Agriculture ("ODA"). The easement was filed on August 21, 2003, recorded in Volume 509 of the Official Records at Page 369, in the Union County, Ohio Recorder's Office. Later, the protected property was devised and divided. As a result, Don and Renner became the successive owners of 121 acres of the protected property, while and Patrick and Whitney became the successive owners of 110.25 acres of the protected property.

{¶4} Before filing its verified petitions in the trial court, Columbia Gas—a public utility—filed a letter-of-notification application under R.C. 4906.06 with the Ohio Power Siting Board ("OPSB") on December 20, 2019. Importantly, Columbia Gas sought approval from the OPSB under R.C. 4906.03(F)(3) since it intended to construct a new natural-gas pipeline which would be greater than one-mile length but not greater than five miles in length. Specifically, Columbia Gas sought the

OPSB's approval to construct a natural-gas pipeline that is approximately 4.78 miles in length, consisting of a 12-inch diameter "coated steel pipe with a wall thickness of 0.375 inches," and "a Maximum Allowable Operating Pressure ("MAOP") of 190 pounds per square inch gauge * * * ." (Petitioner's Ex. 1).

{¶5} In its application, Columbia Gas generally represented to the OPSB that it had "not obtained any easements along the right-of-way" under the section of its application discussing the "list of properties for which the applicant ha[d] obtained easements * * * necessary to construct and operate the facility and a list of the additional properties for which such agreements have not been obtained." (*Id.*). Nevertheless, Columbia Gas indicated that it was "working to obtain easements from the individuals and entities" identified in the appendix and that it would "not begin construction until all easements [were] secured." (*Id.*). Significantly, Columbia Gas's application did not include any further information regarding the specific easements it sought from the landowners in that section or in the corresponding appendix.

{¶6} However, in the general information portion of the application, Columbia Gas informed the OPSB that "[t]he majority of the 12-inch natural gas main will be constructed within permanent private pipeline easements * * * as depicted in the construction plans in Appendix B." (*Id.*). Further, Columbia Gas indicated to the OPSB that "the proposed pipeline route will only include a 75-foot

wide (50-foot permanent easement and 25-foot temporary easement) construction footprint" in the section of its application discussing the impact to wetlands. (*Id.*).

{¶7} In its July 9, 2020 staff report of investigation, the OPSB documented that the pipeline project "crosses a parcel protected by an agricultural easement with the [ODA]." (Doc. No. 1, Ex. 3). However, the report reflects the findings that "[t]he easement held by ODA states that it does not preclude installation over or under the protected property for the purpose of providing gas" and that "[f]arming activities would be able to resume within the pipeline easement following completion of construction." (*Id.*).

{¶8} Ultimately, on August 27, 2020, the OPSB concluded that Columbia Gas's letter-of-notification application satisfied the requirements enumerated under R.C. 4906.10. Notably, the OPSB concluded that "Columbia [Gas] has demonstrated the basis of need for the Project" since "the Marysville area requires additional demand for natural gas and that the proposed Project, especially when connected to Columbia's Columbus Northern Loop system, will provide an additional supply of natural gas." (Case No. 21CV0112, Doc. No. 1, Ex. 17); (Case No. 21CV0113, Doc. No. 1, Ex. 17).

{¶9} Furthermore, the OPSB concluded (based on the findings contained within its staff report of investigation) that "[l]and use throughout the Project area consists primarily of agricultural uses" and that "[t]he Project also crosses an

agricultural easement held by the [ODA]; however, the easement does not preclude installation over or under the property for purposes of providing gas. Farming activities can resume within the Project easement following completion of construction." (*Id.*); (*Id.*).

{¶10} As a result, the OPSB (conditionally) issued a certificate under R.C. Chapter 4906 to Columbia Gas. Following the conditional approval of its certificate, Columbia Gas sought to appropriate the necessary easement rights from the respondents.

{¶11} However, when negotiations with the respondents failed, Columbia Gas, filed a verified petition for the appropriation of easement rights in real property on July 22, 2021 in the Union County Court of Common Pleas against Patrick, Whitney, and the ODA (in case number 21CV0112) and a petition against Don, Renner, and the ODA (in case number 21CV0113).

{¶12} In its petitions, Columbia Gas attached the specific easements rights that it sought from the respondents in relation to its pipeline project. In particular, the easements granted Columbia Gas a "permanent-easement area" "located within the limits of a fifty foot (50') wide easement * * * as shown on Exhibit B attached * * * and made part" of the easement. (Case No. 21CV0112, Doc. No. 1, Ex. 18); (Case No. 21CV0113, Doc. No. 1, Ex. 18). Similarly, the easements granted Columbia Gas a "temporary-easement area"

> to temporarily use an additional twenty-five feet (25') of space adjoining said Permanent Easement Area * * * , as shown on Exhibit B, only for the purpose of enabling [Columbia Gas] to initially construct the pipeline and to later alter, replace, and repair said pipeline and to conduct all activities incident [to], including restoration or clean-up activities.

(*Id.*); (*Id.*). Significantly, Exhibit B depicts a "gas pipeline easement to [Columbia Gas]" and a "25' *perpetual* temporary easement." (Emphasis added.) (*Id.*); (*Id.*).

{¶13} The ODA filed its answers to Columbia Gas's petitions on September 27, 2021. Patrick and Whitney filed their answer to Columbia Gas's petition on October 1, 2021. Don and Renner filed their answer to Columbia Gas's petition on October 5, 2021.

{¶14} On October 22, 2021, the respondents filed motions for a hearing under R.C. 163.09. Because the ODA did "not interpret the proposed utility easement as violating the existing agricultural easement," it filed a motion on November 10, 2021 requesting to be excused from the appropriation-necessity hearing. (Case No. 21CV0112, Doc. No. 31); (Case No. 21CV0113, Doc. No. 31). As evidence in support of its motion, the ODA submitted the affidavit of Sarah Huffman ("Huffman"), the executive director of the Office of Farmland Preservation for the ODA. In the affidavit, Huffman averred that "[a]ccording to Provision 7.1 of the Agricultural Easement," the ODA "has the sole and exclusive discretion to enforce the terms of the Agricultural Easement." (*Id.*); (*Id.*). Based on that determination, Huffman further averred that the

> ODA has determined in its sole and exclusive discretion that the utility easement as proposed by Columbia Gas does not violate the terms of the Agricultural Easement. This is based on correspondence from Melissa Thompson [("Thompson")], Director of Regulatory Policy at Columbia Gas, dated February 24, 2020 * * * . Further, the proposed utility easements attached to the Petitions are consistent with this correspondence.

(*Id.*); (*Id.*). Patrick and Whitney as well as Don and Renner filed memoranda in opposition to the ODA's motion, respectively, on November 15, 2021. However, the trial court granted the ODA's motion that same day.

{¶15} On November 12, 2021, Columbia Gas filed a motion in both cases to strike "the affirmative defenses raised by" the respondents, arguing they are improper necessity challenges. The respondents filed memoranda in opposition to Columbia Gas's motion to strike on November 16, 18, 23, and 24, 2021. On November 30, 2021, Columbia Gas filed its replies to the respondents' memoranda in opposition to its motions to strike.

{¶16} The trial court held necessity hearings on November 17, 2021 and February 22 and 25, 2022, at which Columbia Gas presented the testimony of four witnesses: Thompson; Matthew Opfer ("Opfer"), the manager of major projects for NiSource; Huffman; and Tiffany Fritchley ("Fritchley"), a natural resources permitting coordinator for Columbia Gas and NiSource.

{¶17} In response, the respondents presented the testimony of five witnesses: Ryan Conklin ("Conklin"), an attorney retained to represent the respondents in

negotiations with Columbia Gas regarding the easement rights sought by Columbia Gas; Patrick; Fred Dailey ("Dailey"), Director of the ODA from 1991-2007; Patrick Hornschemeier ("Hornschemeier"), an expert in conservation easements; and Mark Wilson ("Wilson"), an expert agronomist.

{¶18} On November 17, 2021, Thompson identified Columbia Gas's letter-of-notification application (filed with the OPSB) and testified that it reflects that

> the proposed need of the project is to increase economic development and service reliability near Marysville in Union County and the project will, also, provide natural gas service to new industry and residential development near the project alignment and provide existing customers an increased capacity for reliable natural gas service.

(Nov. 17, 2021 Tr. at 34).

{¶19} Thompson explained Columbia Gas's approach to acquiring the easement rights needed for the project from the respondents. According to Thompson, Columbia Gas is generally "seeking the right to construct, operate and maintain the pipeline." (*Id.* at 55-56). She also testified that the specific easement terms include "the right to lay a pipeline subservice on the premise" and "[t]he right to operate and maintain without restriction limitation, repair and replace a pipeline without interruption to service together with necessary valves and other necessary appurtenances." (*Id.* at 56). Furthermore, Thompson testified that Exhibit B to Columbia Gas's letter-of-notification application depicts the permanent and temporary easements.

{¶20} Moreover, Thompson testified that the specific easement rights that Columbia Gas sought from the respondents in relation to its pipeline project "provide for a permanent 50 foot wide easement and a 25 foot temporary easement * * * ." (*Id.* at 58). Thompson acknowledged the categorization of the "temporary perpetual easement" and described such easement as "necessary when Columbia [Gas] is doing its initial construction of the pipeline, as well as any future repairs or maintenance on the pipeline that require that kind of extra space for its equipment." (*Id.*). She further described that Columbia Gas "does not plan to utilize or permanently encumber that 25 foot easement, * * * every day[, u]nlike a permanent easement where Columbia [Gas] is laying a pipeline it will be permanently encumbering that easement area." (*Id.*). In sum, she clarified that the temporary easement is "characterized as perpetual" because it grants Columbia Gas "the ability * * * to utilize it when it needs it for various specific activities" as described in the easement. (*Id.* at 59).

{¶21} On cross-examination, Thompson acknowledged that the easements do not place restrictions on the size of the pipeline that may be installed or as to the type of material that may be transmitted through the pipeline. Moreover, Thompson agreed that the temporary easements do not include any temporal limitation. Further, Thompson testified that the purpose of the temporary easement is the initial

construction and the maintenance of the pipeline, which is also the basis of the permanent easement.

{¶22} Opfer testified that, in his role for NiSource, he is responsible for ensuring the execution of the pipeline project at issue in this case. As relevant here, he testified that the permanent and temporary easements are necessary because that is the area required "to safely and efficiently construct the pipeline and then properly maintain and operate it moving forward." (*Id.* at 81). He further described (using technical detail) why such easements are necessary for the construction and maintenance of the pipeline.

{¶23} On February 22, 2022, Dailey testified regarding the importance of preserving farmland in Ohio for the public benefit and highlighted that "agriculture is the largest industry in Ohio." (Feb. 22, 2022, Vol. I, Tr. at 106). Importantly, Dailey identified Union, County as situated in "the most productive ground on this earth." (*Id.*). Further, he provided the trial court with an overview of his work as the former director of the ODA in establishing the ODA's Office of Farmland Preservation from which Ohio's agricultural-easement program evolved.

{¶24} Critically, Dailey identified Respondents' Exhibit N as the ODA's Office of Farmland Preservation, Ohio Agricultural Easement Donation Program Guidelines that he helped codify in 2006. Dailey testified that the guidelines restrict that

> [t]here cannot be any third party interest in the land that are not conducive to agriculture as determined by the Director of ODA. Examples of such interest would be surface mining leases, water, sewer, utility lines or roads and highways outside of existing right-of-ways or other development activities that would damage the topsoil or subsoil of the farm.

(*Id.* at 112). Dailey testified that the current version of the guidelines contains the same restriction. (*See* Respondents' Ex. O). According to Dailey, the installation of Columbia Gas's pipeline project does not comply with the ODA's guidelines.

{¶25} Regarding the agricultural easement at issue in this case, Dailey testified that he acknowledged the agricultural deed as the grantee in his capacity as the director of the ODA. Relevantly, the agricultural easement provides that the "protected property" "consists of land devoted exclusively to agricultural use as defined by [R.C. 5713.30] and that it is valued for real property taxation at its current value for agricultural uses under [R.C. 5713.31] or that it constitutes a homestead" and that the grantor "has an interest in preserving the property for agricultural use." (Respondents' Ex. H). Further, the agricultural easement critically imparts that the grantee—the ODA—"is authorized [under R.C. 901.21] to hold agricultural easements * * * for the *public purpose* of retaining the Protected Property predominantly in agriculture." (Emphasis added.) (*Id.*).

{¶26} Moreover, paragraph E of the agricultural easement describes Ohio's agricultural-conservation policy (which is consistent with the Federal Farmland Protection Act) and provides that "Ohio has a clearly delineated conservation policy

to preserve and promote agriculture and agricultural land for a significant public benefit" and that the ODA "is charged with the responsibility of protecting and promoting agriculture, including the preservation of Ohio's farmland by accepting agricultural easements [under R.C. 901.21(B)]." (*Id.*).

{¶27} Importantly, the agricultural easement's statement of purpose reflects that "[i]t is the purpose of this Easement to assure that the Protected Property will be retained predominantly in agricultural use by preserving and protecting its agricultural soils and viability through a perpetual restriction on the use of the Protected Property." (*Id.*). The agricultural easement also lists "prohibited uses/restrictions" as including "any activity on or use of the Protected Property inconsistent with the purposes of this easement is prohibited" and that

> [t]he following activities are expressly prohibited, except as provided in Paragraph 4 below:
>
> 3.1 Industrial or Commercial Activity – There shall be no industrial or commercial activity undertaken or allowed on the Protected Property, except as provided in Paragraph 4 below. No right of passage shall be granted or retained across or upon the Protected Property if that right of passage is used in conjunction with such prohibited activities.
>
> 3.2 Structures – There shall be no new structures or placing of any * * * fence or sign (other than those signs permitted, required or allowed by the Grantee for appropriate management, prevention of hunting or trespass, etc.), asphalt, concrete pavement, * * * utility pole, * * * conduit line, or any other temporary or permanent structure or facility on the Protected Property, except as provided in Paragraph 4 below.
>
> * * *

> 3.5 Topography – There shall be no ditching; draining; diking; filling; excavating; removal of topsoil, sand, gravel, rock, or other materials; or any change in the topography of the land in any manner, unless in accordance with the farm conservation plan referenced in Paragraph C above.
>
> * * *
>
> 3.8 Roads – There shall be no building of new roads, parking lots, or other paved surfaces, or the widening of existing such surfaces, except on the Farmstead Area, state or local highway rights-of-way * * * , and those improvements permitted under Paragraph 4.11 below.

(Emphasis sic.) (*Id.*).

{¶28} Paragraph 4 addresses the rights reserved for the grantor. As relevant here, Paragraph 4.10 highlights "utility services" and provides that the

> "[i]nstallation, maintenance, repair, replacement, removal and relocation of electric, gas, geothermal, water facilities, sewer lines and/or other public or private utilities * * * over or under the Protected Property for the purpose of providing electrical, gas, water, sewer, or other utilities to serve improvements permitted herein, and the right to grant easements over and under the Protected Property for such purposes, is permitted *without* permission of the Grantee.

(Emphasis added.) (*Id.*). Further, Paragraph 4.11 discusses "paving and road construction" and provides, in its relevant part, that "[c]onstruction of new roads, parking lots, or other paved surfaces, or the widening of such surfaces, are permitted outside the Farmstead Area consistent with the agricultural purposes of this Easement with the advance written permission of the Grantee" but that "[t]he Grantee shall not give such permission, unless the Grantee determines that the

proposed paving or covering of the soil, or the location of any such road, will not substantially diminish the agricultural values of the Protected Property." (*Id.*).

{¶29} Paragraph 7 of the agricultural easement discusses the grantee's enforcement rights and remedies. It provides, in its relevant part, that "the Grantee shall have the following rights and remedies" "[i]n order to enforce the terms of this Easement." (*Id.*).

> 7.1 Remedies – The Grantee shall have the right to enforce by proceedings at law or in equity the provisions of this Easement including, but not limited to, the right to require the restoration of the Protected Property to its condition at the date of the grant of this Easement, subject to the reserved rights of the Grantor set forth herein.

(Emphasis sic.) (*Id.*). Importantly, that paragraph also commands that "[t]he Grantee, or its successors or assigns, *shall not waive or forfeit the right* to take action as may be necessary to ensure compliance with the terms and conditions of this Easement by any prior failures to act." (Emphasis added.) (*Id.*). It continues by requiring "the Grantor [to] notify Grantee of any occurrence which would adversely affect or interfere with the agricultural purposes of the Easement, whether caused by the acts or omissions of the Grantor or *third parties*, or by natural occurrences." (Emphasis added.) (*Id.*).

{¶30} To extinguish the agricultural easement, paragraph 13 provides, in its relevant part, that,

> [s]hould the Director of the [ODA], at the request of the *Grantor*, determine that conditions surrounding the Protected Property have

> changed so much that it becomes impossible or impractical to fulfill the agricultural purpose of this Easement, then the Grantee may extinguish or modify this Easement, or, extinguishment of the easement may occur in whole or in party by judicial proceeding under applicable local, state, or federal laws.

(Emphasis added.) (*Id.*). Similarly, Paragraph 16 requires that the grantee obtain the "*written consent of the Grantor*" to amend the easement. (Emphasis added.) (*Id.*). That paragraph further *requires* any "such amendment [to be] consistent with the 'Statement of Purpose' of this Easement"; "with the Grantee's Easement amendment policies," "with Section 170(h) of the U.S. Internal Revenue Code or any regulations promulgated in accordance with that section"; and to "be consistent with Section 5301.67 et. seq., of the Ohio Revised Code or any regulations promulgated pursuant to those laws." (*Id.*). Finally, paragraph 22 of the agricultural easement provides that it "may not be changed, modified or discharged except by a writing signed by the duly authorized representatives of *both* the Grantor and the Grantee." (Emphasis added.) (*Id.*).

{¶31} Based on the language contained in the agricultural easement, Dailey testified that the installation of the pipeline would not be consistent with preserving and protecting the viability of the protected property's soils. Dailey also testified that the installation of the pipeline would be inconsistent with Paragraphs 3.1 (restricting industrial or commercial activity); 3.2 (restricting the construction of new structures); and 3.5 (restricting disturbing the topography) of the agricultural

easement. By way of historical example, Dailey testified that the City of Marysville approached the ODA in 2005 (when he was the director of the agency) regarding installing a sanitary-sewer line on the protected property and that the project was denied as being "inconsistent with the easement." (Feb. 22, 2022 Tr., Vol. I, at 120). (*See also* Respondents' Ex. I).

{¶32} Moreover, Dailey testified that Huffman's affidavit averring "that the utility easement * * * does not violate the terms of the Agricultural Easement" "looks incestuous" because Huffman's determination—as opposed to consulting an outside, independent source—relies on Columbia Gas's conclusion that its project is consistent with a predominantly agricultural purpose. (Feb. 22, 2022 Tr., Vol. I, at 118). Significantly, Dailey testified that Columbia Gas's intended use of the property will not be predominately agricultural because there will be "changes to the topsoil and substrata" and because it will alter the agricultural "use of this ground." (*Id.* at 119). Notably, Dailey testified that Columbia Gas's proposed use for the protected property will destroy the current public benefit provided by the agricultural easement.

{¶33} On cross-examination, Dailey testified that the ODA's easement-donation-program guidelines permit extinguishment of an agricultural easement through eminent domain. However, Dailey clarified that the guidelines state that

"the procedure for extinguishment on account of changed conditions always begins with a request from the landowner to the Director of ODA." (*Id.* at 134).

{¶34} Wilson testified, based on his specific experience with the construction and installation of pipelines in the ground on agricultural land, that the protected property's designation as prime farmland "would be forever lost" as a result of Columbia Gas's pipeline project. (Feb. 22, 2022, Tr., Vol. II, at 179). He explained that prime farmland is defined by the Department of Agriculture as "the land that can provide the greatest crop return with the least amount of inputs" and "as the most productive land [because] it has unique properties that insure [sic] a stable food supply." (*Id.* at 165). Furthermore, Wilson testified that "[p]rime farmland insures [sic] a public good" because "[i]t insures [sic] that we have a food supply that keeps up with the growing population * * * ." (*Id.* at 166).

{¶35} Critically, Wilson testified that he studied the soil contained on the protected property—namely, in the area of the easement rights sought by Columbia Gas—and testified that it reflects the types of soils which qualify as "prime farmland" because "[t]hey are highly productive soils" and "are desirable to be farmed and they are valuable from that standpoint." (*Id.* at 172). (*See also* Respondents' Ex. W). In other words, Wilson testified that the open-ditch excavation of Columbia Gas's pipeline project will disturb the soil structure and composition of the protected property.

{¶36} Specifically, he testified that "[t]he process of excavating soil * * * would use a very large excavator and in doing so, you disturb and damage the entire soil profile by pulling it out and placing it in a pile" and "in that process, you would have mixing of * * * horizons." (Feb. 22, 2022, Tr., Vol. II, at 174). Importantly, Wilson testified that, "even after every precaution is taken by Columbia Gas" there would be some mixing of the soil horizons" as a result of construction of the pipeline.

{¶37} Wilson described a soil horizon as "a distinct arrangement of soil in layers," which "are parallel to the soil surface and contain unique properties." (*Id.* at 172). For illustration purposes, he analogized that

> a good way to think of soil horizons is like a cake. On the top of the cake, [is] the A horizon or the top horizon. That's the best soil. The best stuff for producing crops.
>
> Following the next layer in the cake, you would have the B horizon. The B horizon is known as the subsoil. The subsoil does support crop growth and it is important. However, it's not as vital to crop productivity as the topsoil. * * *
>
> Then the bottom of the cake is known as the C horizon. * * * The C horizon is referred to as the substratum [or] the parent material. * * * It's the material that is breaking down, resulting in soil * * * .

(*Id.* at 172-173).

{¶38} Similarly, Wilson testified that the pipeline project will compress the soil through a process known as compaction. He described that compaction "eliminate[s] an ability of the soil to exchange air and have water infiltrate and

percolate through the * * * soil profile" and that "compaction is detrimental." (*Id.* at 175). Likewise, Wilson described the dynamic and inherent properties of soil. As relevant here, he testified that "[t]hose dynamic properties, once they are changed, it is possible over a long period of time to make adjustments and change those," but that "[t]he inherent properties, once those are changed," they "are irreversible." (*Id.* at 178-179).

{¶39} Moreover, Wilson testified that he reviewed Columbia Gas's Agricultural Impact Mitigation Plan. (*See* Petitioner's Ex. 33). Critically, Wilson testified that "[m]itigation means to make less severe," "it does not mean to eliminate." (Feb. 22, 2022, Tr., Vol. II, at 183). Based on his review of the plan, Wilson testified that "much of the language refers to, if it's convenient, if it's possible, [Columbia Gas] will do such a thing." (*Id.* at 184). He further highlighted some of the troubling procedures. In sum, he testified that the document "falls far short of the specifics needed" and that "there's a lot of room for improvement." (*Id.* at 185).

{¶40} On cross-examination, Wilson testified that, even if the protected property is no longer considered prime farmland, it still could be used for crop production after the installation of the pipeline.

{¶41} Because the petitioners objected to the presentation of Hornschemeier's testimony under Evid.R. 702, the respondents proffered that

Hornschemeier would have testified to "the significance of" "Section D of the Ag Easement related to Section 170 of the IRS Code." (*Id.* at 212). Specifically, Hornschemeier would have applied his knowledge and experience to offer the trial court his opinion on the significance of the intersection of the federal tax code and the requirement that the protected property remain "exclusively for the 'conservation purpose' as the term is described in Section 170(H)(4)(A)(III) of the Internal Revenue Code." (Respondents' Ex. H).

{¶42} Likewise, the respondents proffered that Hornschemeier would have testified that the agricultural easement does not permit construction of the pipeline and would have testified that Huffman's assessment is incorrect. Importantly, the respondents proffered that Hornschemeier would have testified that "the preservation of farmland is a public benefit" and that "the installation of the gas pipeline on the protected property would alter or destroy the public benefit provided by the Ag Easement." (Feb. 22, 2022 Tr., Vol. II, at 214).

{¶43} On February 25, 2022, Huffman testified that she is responsible for overseeing management of the ODA's agricultural-easement program, including entering and enforcing such easements. Pertinently, Huffman testified that the Revised Code distinguishes between an agricultural easement and a conservation easement. She indicated that, under the statute, the ODA is permitted to hold only agricultural easements. Regarding her position with the ODA, Huffman testified

that the ODA has adopted a position of "non-interference" with utility installation through farmland, similar to the pipeline project at issue in this case. (Feb. 25, 2022 Tr. at 17-18).

{¶44} Huffman identified that the purpose of the agricultural easement at issue in this case is "to assure that the protected property shall be retained predominately in agricultural use by preserving and protecting its agricultural soils and viability." (*Id.* at 10). According to Huffman, the term "predominately in agricultural" means that the protected property "has to be primarily an agricultural use. It can't be converted acres and that can't be converted alternative uses that aren't agriculture" and that such provision applies to the entire property. (*Id.*).

{¶45} Moreover, Huffman testified that the section of the agricultural easement describing prohibited uses of the property applies only to the landowner—that is, not the ODA—and prohibits only such uses that are "inconsistent with maintaining the property in predominantly agricultural use." (*Id.* at 11). According to Huffman, the landowners do not have the power to enforce the agricultural easement at issue in this case.

{¶46} Huffman further testified that she received correspondence from the respondents requesting that the ODA enforce the agricultural easement at issue in this case. In response, Huffman contacted Columbia Gas requesting an evaluation of its project. Huffman testified that she received a response from Thompson

indicating that Columbia Gas's intended use of the protected property is consistent with the ODA's purpose of preserving "Ohio land to remain predominately agricultural." (Petitioner's Ex. 28). As a result, Huffman testified that, after reviewing Columbia Gas's proposal and Thompson's correspondence, the ODA did "not believe the pipeline violates the purpose of the easement nor the terms." (Feb. 25, 2022 Tr. at 24). (*See also* Petitioner's Ex. 30). Huffman further testified that she offered "experts from [ODA's] soil and water * * * to review the easement * * * and insure [sic] that there were acceptable standards that would return the property to use" "if the [OPSB] were to approve the project." (Feb. 25, 2022 Tr. at 25).

{¶47} On cross-examination, Huffman testified that she did not review Columbia Gas's proposed easements (as attached to its petitions) when she issued her opinion that its project does not violate the purpose of the agricultural easement at issue in this case. Further, Huffman testified that "[t]he protected property cannot be retained predominately in agriculture if its soils are not preserved and protected." (*Id.* at 55).

{¶48} Moreover, Huffman testified that the ODA's role on the OPSB is "to represent agricultural interests and ag impact of projects" but that it recused itself from participating in the OPSB's decision in this case.[1] (Feb. 25, 2022 Tr. at 67).

[1] The director of the ODA is a voting member of the OPSB. In this case, Dorothy Pelanda ("Pelanda"), the (former) director of the ODA designated Huffman to serve as her representative on the OPSB. However, the ODA recused itself from participating in matters relating to Columbia Gas's pipeline project.

Nevertheless, Huffman testified that the OPSB *incorrectly* concluded in its certificate (and staff report of investigation) that the agricultural easement "does not preclude installation over or under the property to provide gas * * * ." (*Id.* at 61).

{¶49} Furthermore, Huffman testified regarding the denial of the 2005 sanitary-sewer project. She identified Petitioner's Exhibit 22 as a June 10, 2005 letter from the Union Soil and Water Conservation District expressing "conflicts" between the project and the agricultural easement. (*Id.* at 62). Huffman agreed that such concerns also apply to Columbia Gas's project. Likewise, Huffman identified Petitioner's Exhibit 23 as a September 28, 2005 letter from the Ohio Department of Natural Resources expressing concerns that the sanitary-soil project will destroy the soil structure, lead to compaction, and provoke surface and subsurface drainage issues on the protected property. Notably, the letter directs the reader to the Agricultural Mitigation Procedures promulgated by the Ohio Federation of Soil and Water Conservation Districts and suggests that such minimization techniques be followed. (*See* Respondents' Ex. AE). Huffman testified that she is not aware if Columbia Gas is following such mitigation procedures in this case.

{¶50} Fritchley testified that Columbia Gas's pipeline will be installed through open-trench cutting. According to Fritchley, Columbia Gas is required to comply with a Storm Water Prevention Plan ("SWPP") through the Ohio Environmental Protection Agency ("Ohio EPA"). A SWPP through the Ohio EPA

discusses soil-segregation techniques; soil-compaction and decompaction techniques; soil-restoration techniques; soil-erosion prevention; and crop restoration. Fritchley testified that the Ohio EPA issued Columbia Gas a general permit for its pipeline project, including approval of its SWPP. Fritchley identified Columbia Gas's Agricultural Impact Mitigation Plan for the pipeline project and discussed its contents. (*See* Petitioner's Ex. 33).

{¶51} On cross-examination, Fritchley testified that even though the mitigation plan states that it "it is intended to become a part of the * * * easement agreement," it was *not* made part of either easement in this case. (*Id.*). Further, Fritchley testified that she is not an agronomist (or a soils expert).

{¶52} After the necessity hearings, the trial court permitted the parties to submit briefs and proposed findings of fact and conclusions of law, which the parties submitted. On April 26, 2022, the trial court denied Columbia Gas's petitions for the appropriation of the respondents' easement rights. (Case No. 21CV0112, Doc. No. 63); (Case No. 21CV0113, Doc. No. 58). Further, the trial court determined that the agricultural easement does not prevent Columbia Gas's petitions.

{¶53} Columbia Gas filed its notices of appeal on May 18, 2022 in both cases. The respondents filed notices of cross-appeal on May 20, 2022. This court consolidated the cases for purposes of appeal. Columbia Gas raises six assignments of error, and the respondents raise two assignments of for our review. For ease of

our discussion, we will begin by discussing Columbia Gas's first, second, third, fourth, and sixth assignments of error, along with the respondents' first assignment of error. Then, we will discuss Columbia Gas's fifth assignment of error and respondents' second assignment of error together.

Columbia Gas's Assignment of Error No. I

The Trial Court erred in holding a hearing (the "Hearing") pursuant to R.C. 163.09(B) because Appellees/Respondents Don Bailey, Jr., Successor Trustee of the Arno Renner Trust dated April 24, 1997 ("Bailey, Jr."), Charles Peter Renner ("Renner"), Patrick Bailey ("P. Bailey"), and Whitney Bailey ("W. Bailey") (collectively, "Appellees") failed to assert specific denials under R.C. 163.08 and instead asserted Affirmative Defenses which cannot trigger a necessity challenge under R.C. 163.09(B)(1).

Columbia Gas's Assignment of Error No. II

The Trial Court erred in finding in the Judgment Entry on Necessity Hearing (the "Judgment Entry") that Appellant/Petitioner Columbia Gas of Ohio, Inc. ("Columbia Gas") is not entitled to an irrebuttable presumption of necessity pursuant to R.C. 163.09(B)(1)(c), despite the Ohio Power Sitting Board ("OPSB") approving Columbia Gas' Letter of Notification Application ("Application" or "OPSB Application") for the Marysville Connector Pipeline Project (the "Project"), which contained the easement terms Columbia Gas seeks to appropriate.

Columbia Gas's Assignment of Error No. III

The Trial Court erred in failing to find in the Judgment Entry that Columbia Gas is entitled to a rebuttable presumption of necessity pursuant to R.C. 163.09(B)(1)(b), despite Columbia Gas presenting evidence of necessity of the appropriation, despite considerable deference afforded to an appropriating public utility, and despite Appellees' failure to overcome Columbia Gas' presumption of necessity of the appropriation.

Columbia Gas's Assignment of Error No. IV

The Trial Court erred in finding in favor of Appellees in the Judgment Entry on Appellees' Affirmative Defense set forth in Paragraph 18 of Appellees' Answers that the OPSB did not approve the particular easements that Columbia Gas seeks to acquire and that the OPSB did not find that the easements were necessary.

Columbia Gas's Assignment of Error No. VI

The Trial Court erred by dismissing Columbia Gas' Petition in the Judgment Entry and by failing to hold a compensation hearing pursuant to R.C. 163.09(B)(2), regardless of how the Trial Court ruled on Appellees' Affirmative Defenses.

Respondents' Assignment of Error No. I

The Trial Court erred by ruling that the Appellant/Cross Appellee/Petitioner had a right to appropriate the property of the Appellees/Cross Appellants/Respondents.

{¶54} In its assignments of error, Columbia Gas argues that the trial court erred by denying its verified petitions for the appropriation of easement rights in real property. In particular, under its first assignment of error, Columbia Gas argues that the trial court erred by setting the matters for a necessity hearing because the respondents "failed to assert a single specific denial pursuant to R.C. 163.08." (Appellant's/Cross-Appellee's Brief at 8).

{¶55} Under its second and third assignments of error, Columbia Gas contends that it is entitled to the irrebuttable presumption under R.C. 163.09(B)(1)(c) or the rebuttable presumption under 163.09(B)(1)(b). Similarly, it

argues under its fourth assignment of error that the trial court failed to review the specific easement rights that Columbia Gas sought from the respondents. Finally, under its sixth assignment of error, Columbia Gas argues that this court should the remand the cases to the trial court for compensation hearings under R.C. 163.09(B)(2).

{¶56} The respondents, in their first assignment of error, argue that the trial court should have applied Ohio's prior public use doctrine to conclude that the specific easement rights sought by Columbia Gas in these cases are not authorized as a result of the agricultural easement.

Standard of Review

{¶57} "The scrutiny by the courts in appropriation cases is limited in scope," but "requires vigilance in reviewing state actions for the necessary restraint, including review to ensure that the state takes no more than that necessary to promote the public use, and that the state proceeds fairly and effectuates takings without bad faith, pretext, discrimination, or improper purpose." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶ 69-70. *See also State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, 5th Dist. Licking No. 2019 CA 00039, 2020-Ohio-276, ¶ 35 ("The question of necessity is subjected on appeal to a 'limited standard of review.'"), quoting *Willoughby Hills v. Andolsek*, 11th Dist. Lake No. 2001-L-173, 2003-Ohio-323, ¶ 92.

{¶58} Because municipalities "enjoy broad discretion in determining whether a proposed taking serves the public," a trial court's review of a *municipality's* appropriation decision consists of whether "the legislature's exercise of power is not beyond the scope of its authority, and that the power is not abused by irregular or oppressive use, or use[d] in bad faith." *Norwood* at ¶ 70. *See also Ohio Power Co. v. Burns*, ___ Ohio St.3d ___, 2022-Ohio-4713, ¶ 32; *United States v. Carmack*, 329 U.S. 230, 243, 67 S.Ct. 252 (1946) (applying an ultra-vires as well as an arbitrary, capricious, and bad-faith standard of review to takings challenges). Generally, an abuse of discretion suggests the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). *See also Bd. of Commrs. Mill Creek Park Metro. Dist. v. Less*, 7th Dist. Mahoning No. 20MA0074, 2022-Ohio-1289, ¶ 19 (applying the abuse-of-discretion standard to an R.C. Chapter 163 appropriation case).

{¶59} "However, 'when the authority is delegated to another,'" it is the duty of the trial court to "'ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the *property owner*.'" (Emphasis added.) *Less* at ¶ 16, quoting *Norwood* at ¶ 70.

{¶60} When a trial court's decision regarding a petition for appropriation rights brought under R.C. Chapter 163 is "'supported by some competent, credible evidence going to all the essential elements of the case[, it] will not be reversed by

a reviewing court as being against the manifest weight of the evidence.'" *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984), quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. *See also Ohio Power* at ¶ 35 (applying the civil-manifest-weight standard of review to a petition for appropriation rights brought under R.C. Chapter 163); *Willoughby Hills*, 2003-Ohio-323, at ¶ 91. In other words, "a trial court's findings of fact will be upheld when they are supported by some competent and credible evidence." *Ohio Power* at ¶ 35. *See also Dublin v. Beatley*, 5th Dist. Delaware No. 18 CAE 01 0007, 2018-Ohio-3354, ¶ 15 (reviewing a trial court's appropriations-rights decision against the competent-credible-evidence standard in an appropriations rights case brought under R.C. Chapter 163).

Analysis

{¶61} "The property rights of an individual are fundamental rights, and 'the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.'" *Ohio Power* at ¶ 22, quoting *Norwood* at ¶ 38. However, "[l]ike the individual's right to property, the state's great power to seize private property predates modern constitutional principles." *Norwood* at ¶ 39. Indeed, "[a]t the time the Constitution was adopted, * * * [t]he founders recognized the necessity of the takings power and expressly incorporated it into the Fifth Amendment to the United States Constitution." *Id.* Nevertheless, even "though its existence is undeniable and its powers are sweepingly broad, the power is *not* unlimited." (Emphasis added.) *Id.*

{¶62} R.C. Chapter 163 governs the appropriation of private property for public use in Ohio. Importantly, the Revised Code directs that "[n]o agency shall appropriate real property except as necessary and for a public use" and that "[i]n any appropriation, the taking agency shall show by a preponderance of the evidence that the taking is necessary and for a public use."[2] R.C. 163.021(A). *See also Ohio*

[2] Under R.C. Chapter 163, an agency "means any public agency or private agency." R.C. 163.01(C). *See also* R.C. 163.01(G) (defining public utility as including "an agency holding a certificate of public convenience and necessity granted by the federal energy regulatory commission). A private agency is "any corporation, firm, partnership, voluntary association, joint-stock association, or company that is not a public agency and that is authorized by law to appropriate property in the courts of this state." R.C. 163.01(B).

Power at ¶ 22 (noting that "[t]he state, however, may seize private property when it is necessary for public use."), citing *Norwood* at ¶ 39, 41. "This provision enforces our state constitution's requirement * * * ." *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, ___ Ohio St.3d ___, 2022-Ohio-4345, ¶ 41. *See* Ohio Constitution, Article I, Section 19.

{¶63} Importantly, the Supreme Court of Ohio stresses that "the term 'appropriation' means the appropriation of the specific property sought to be appropriated by the agency; it does not mean the *project* or the *taking in general*, given the restrictions on an agency's right to appropriate." (Emphasis added.) *Ohio Power* at ¶ 24. Consequently,

> R.C. 163.09(B)(1) comes into play only when (1) the agency has filed a petition under R.C. 163.05 against a landowner to appropriate a "parcel or contiguous parcels in a single common ownership, or interest or right therein," and (2) the landowner has filed an answer in response to that petition denying the "necessity for the appropriation" under R.C. 163.08.

Id., citing R.C. 163.09(B)(1). If in play, R.C. 163.09(B)(1) requires the trial court to set a hearing to address the appropriation. *See id.* at ¶ 25 (noting that the trial "court must resolve the agency's right to make the appropriation and the necessity of the appropriation"), citing R.C. 163.08.

Columbia Gas's Appeal

{¶64} In this case, Columbia Gas filed its petitions under R.C. 163.05 against the respondents and the respondents filed their answers in response to those petitions

denying the necessity for the appropriations under R.C. 163.08. Nevertheless, Columbia Gas argues under its first assignment of error that the trial court erred by setting the matter for a hearing because the respondents "failed to assert a single specific denial pursuant to R.C. 163.08." (Appellant's/Cross-Appellee's Brief at 8). Instead, Columbia Gas contends that the respondents asserted affirmative defenses under Civ.R. 8(C), which "are not specific denials under R.C. 163.08, * * * and cannot trigger a R.C. 163.09(B) hearing." (Emphasis sic.). (*Id.*). Therefore, Columbia Gas asserts that the trial court should have resolved "any issue that could have been raised through a specific denial by [the respondents] in favor of Columbia Gas." (*Id.*).

{¶65} Columbia Gas's argument is without merit. R.C. 163.08 provides, in its relevant part that

> [s]uch answer * * * shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein * * * .

{¶66} Here, the respondents' answers reflect general and specific denials of each material allegation not admitted. Even though the respondents included a section of specific denials titled "affirmative defenses," under which they listed the specific reasons Columbia Gas's appropriations are not necessary, such

characterization is not fatal to their answers. Indeed, a review of the respondents' denials reflects that they are "sufficiently specific and factually supported to have required a necessity hearing." *Ohio River Pipe Line, LLC v. Gutheil*, 144 Ohio App.3d 694, 698 (4th Dist.2001). Thus, Columbia Gas's first assignment of error is overruled.

{¶67} Pivoting to the underlying considerations of R.C. Chapter 163, even though "economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution." *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, at paragraph one of the syllabus. Nevertheless, the Revised Code defines "public use." "R.C. 163.01(H)(1) first defines 'public use' by negation"—that is, the Revised Code defines that "a '[p]ublic use' does not include any taking that is for conveyance to a private commercial enterprise, for economic development, or solely for the purpose of increasing public revenue, unless the property is conveyed or leased to" "[a] public utility, municipal power agency, or common carrier." *Ohio History Connection*, ___ Ohio St.3d ___, 2022-Ohio-4345, at ¶ 43; R.C. 163.01(H)(1)(a). The parties do not dispute that Columbia Gas is a public utility. Consequently, there is some competent, credible evidence in the record that the appropriations in this case satisfy

the public-use element. *See, e.g.*, *Sunoco Pipeline L.P. v. Teter*, 7th Dist. Harrison No. 16 HA 0002, 2016-Ohio-7073, ¶ 81.

{¶68} Turning to the necessity element, an agency "must show by a preponderance of the evidence that the taking of the property is necessary, unless one of three circumstances in division (a), (b), or (c) [of R.C. 163.09(B)(1)] has occurred." *Ohio Power*, ___ Ohio St.3d ___, 2022-Ohio-4713, at ¶ 20. "'The "necessity" required in the exercise of the power of eminent domain does not require a showing of absolute necessity, but includes "that which is reasonably convenient or useful to the public."'" *Ohio Power Co. v. Duff*, 12th Dist. Madison No. CA2020-01-004, 2020-Ohio-4628, ¶ 32, quoting *Ferencz v. Toledo*, 6th Dist. Lucas No. L-87-379, 1988 WL 139615, *3 (Dec. 30, 1988), quoting *Giesy v. Cincinnati, Wilmington, and Zanesville RR. Co.*, 4 Ohio St. 308, 327 (1854). "Necessity includes present needs as well as future needs." *Erie-Ottawa-Sandusky Regional Airport Auth. v. Orris*, 6th Dist. Ottawa No. 90-OT-039, 1991 WL 254227, *4 (Sept. 13, 1991).

{¶69} Under R.C. 163.09(B)(1)(a), an agency "is entitled to a rebuttable presumption of necessity if the [governing board of the agency] declared by resolution 'the necessity for the appropriation.'" *Id.*, quoting R.C. 163.09(B)(1)(a). "Under division (b), [an agency] is entitled to a rebuttable presumption of necessity if it presented 'evidence of the necessity for the appropriation.'" *Id.*, quoting R.C.

163.09(B)(1)(b). Finally, "under division (c), [an agency] is entitled to an irrebuttable presumption of necessity if a state or federal regulatory authority, such as the [OPSB], approved 'of [the] appropriation.'" *Id.*, quoting R.C. 163.09(B)(1)(c). "Thus, to be entitled to any of the presumptions, the relevant entities must determine the necessity of the appropriation." *Id.*

{¶70} Finally, if the trial court determines that the appropriation is not necessary or not for a public use, the court shall award the respondent the full amount of attorney's fees, costs, and expenses. *Id.* at ¶ 26, citing R.C. 163.041.

{¶71} In its second assignment of error, Columbia Gas contends that it is entitled to the irrebuttable presumption of necessity under R.C. 163.09(B)(1)(c) because the OPSB approved its pipeline project. Columbia Gas's argument is unfounded. Indeed, the Supreme Court of Ohio recently determined that an agency is entitled to the irrebutable presumption of necessity under R.C. 163.09(B)(1)(c) if a state or federal regulatory authority, such as the OPSB, approves "appropriation of the individual property, or the interest or right therein, that is sought to be taken by the agency, *not* the project in its entirety." (Emphasis added.) *Id.* at ¶ 28 (holding "that the term 'appropriation' as used in R.C. 163.09(B)(1) means the appropriation of the individual property, or the interest or right therein, that is sought to be taken by the agency, not the project in its entirety").

{¶72} In this case, the trial court concluded that the OPSB "failed to determine if the appropriation was taking only that which was necessary" because it did not "examine the applicable easement documents itself [sic] * * * ." (Case No. 21CV0112, Doc. No. 63); (Case No. 21CV0113, Doc. No. 58). Specifically, the trial court found that "[t]he OPSB approved the project and a 75 foot wide easement over Respondents' properties, but failed to examine the proposed easement." (*Id.*); (*Id.*).

{¶73} We conclude that some competent, credible evidence supports the trial court's determination that Columbia Gas is *not* entitled to the irrebuttable presumption of necessity under R.C. 163.09(B)(1)(c). That is, the record reflects that the OPSB approved Columbia Gas's project as it is *generally* described in its letter-of-notification application. Specifically, under the project-description section, the OPSB illustrated that Columbia Gas sought "certification to build a 4.78-mile long, 12-inch diameter natural gas pipeline, with a maximum allowable operating pressure of 190 pounds per square inch gauge, in Union County." (Case No. 21CV0112, Doc. No. 1, Ex. 17); (Case No. 21CV0113, Doc. No. 1, Ex. 17). The OPSB further illustrated that "[p]ipeline construction will occur within a 75-foot easement, 25-foot of which is temporary, with the remainder being permanent." (*Id.*); (*Id.*). In other words, the record reflects that the OPSB did not approve "the

specific property being appropriated by the agency." (Emphasis added.) *Ohio Power* at ¶ 23. *See also id.* at ¶ 29.

{¶74} Nonetheless, Columbia Gas argues that "[e]ven if approval of the Project, alone, does not trigger the irrebuttable presumption under R.C. 163.09(B)(1)(c) * * * , the OPSB approved the terms of the easement that Columbia Gas seeks to acquire when it approved the *rights* contained in the easements." (Emphasis sic.) (Appellant's/Cross-Appellee's Brief at 14-15). Stated another way, Columbia Gas contends that the documentation concerning the easements that it sought from the landowners contained in its letter-of-notification application (and as reviewed by the OPSB) is sufficient to trigger the irrebuttable presumption under R.C. 163.09(B)(1)(c). We disagree. The Supreme Court of Ohio unequivocally determined that a state or federal regulatory authority, such as the OPSB, *must* approve the *individual* appropriations to trigger the irrebuttable presumption under R.C. 163.09(B)(1)(c). *Ohio Power* at ¶ 31.

{¶75} Importantly, the Supreme Court stressed that "because it may be inconvenient or tedious for [an agency] to obtain the required resolutions or approvals for *each* appropriation to be entitled to a presumption under R.C. 163.09(B)(1)(a) or (c) does not mean that such an interpretation is unreasonable or absurd." (Emphasis added.) *Id.* Consequently, we conclude that, since the OPSB did not review and approve the individual appropriations at issue in this case—i.e.,

the specific proposed easement terms—Columbia Gas is not entitled to the irrebuttable presumption under R.C. 163.09(B)(1)(c). *Id.* at ¶ 2, 31. Accordingly, Columbia Gas's second assignment of error is overruled.

{¶76} Alternatively, Columbia Gas argues under its third assignment of error that it is entitled to the rebuttable presumption under R.C. 163.09(B)(1)(b) since it provided evidence of the necessity for the appropriations. *Accord id.* at ¶ 2, 32. That is, Columbia Gas argues that the trial court should have resolved this case in its favor after determining that "'[t]his project would benefit the community of Marysville and surrounding areas with an increase in available natural gas.'" (Appellant's/Cross-Appellee's Brief at 17, quoting Case No. 21CV0112, Doc. No. 63 and Case No. 21CV0113, Doc. No. 58).

{¶77} In particular, Columbia Gas posits that it presented evidence of the necessity for the appropriations through the OPSB's issuance of the certificate in which the OPSB "found that 'the public interest, convenience, and necessity are served' through construction, operation, and maintenance of the pipeline." (Appellant's/Cross-Appellee's Brief at 17, quoting Petitioner's Ex. 9). Columbia Gas further contends that it presented evidence of the necessity for the appropriations through Opfer's testimony "that a 75'corridor—a 50' permanent easement and a 25' temporary construction easement—is reasonably convenient and useful to the public." (*Id.* at 17-18, citing Nov. 17, 2021 Tr. at 80). Therefore,

Columbia Gas argues that there is some competent, credible evidence in the record supporting that it satisfied its burden to prove that the easement terms were necessary under R.C. 163.09(B)(1)(b). And, to bolster its argument, Columbia Gas advocates that the respondents did not produce any evidence to balance or counter balance that presumption of necessity.

{¶78} "The General Assembly requires an agency to set forth in its verified petition the 'parcel or contiguous parcels in a single common ownership, or interest or right therein,' that it seeks to appropriate." *Ohio Power* at ¶ 34, quoting R.C. 163.05. *See also Ayersville Water & Sewer Dist. v. Geiger*, 3d Dist. Defiance No. 4-11-19, 2012-Ohio-2689, ¶ 69 (discussing that "R.C. 163.05 provides the requirements an agency must meet to commence an appropriation action"). "Thus, the agency must demonstrate the necessity of that appropriation—the need to take the property, or interest or right therein, set forth in its verified petition." *Ohio Power* at ¶ 34. Consequently, in a case in which "the easement terms include various rights that" an agency seeks to take from landowners, "each easement term that is challenged must be reviewed by the trial court." *Id.*

{¶79} Here, even though the trial court determined that the "project would benefit the community of Marysville and surrounding areas with an increase in available natural gas," the trial court nevertheless concluded that "it was 'bad faith' to represent one thing to the [OPSB] and then ask [the trial] Court to approve

something greater" since "the 25foot easement was labeled 'temporary' before the [OPSB] and transformed itself to 'perpetual' before [the trial] Court * * * ." (Case No. 21CV0112, Doc. No. 63); (Case No. 21CV0113, Doc. No. 58). Importantly, the "rebuttable presumption [under R.C. 163.09(B)(1)(b)] gives rise only to a prima facie showing of necessity," it does not shift the ultimate burden of proof from the agency "to the landowners but, rather, it impose[s] on the landowners '"the burden of going forward with evidence to rebut or meet the presumption.'" *Ohio Power* at ¶ 32, quoting *Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843, ¶ 24, quoting Evid.R. 301. The presumption disappears if the landowners produce "evidence that balances or counterbalances the presumption," "and the case must be resolved on the evidence presented under the original burden of proof." *Id.*

{¶80} Nevertheless, this case may be resolved on evidence that Columbia Gas acted in bad faith, abused its discretion, or acted with improper purpose to satisfy its burden of proof. *See id. See also Springfield v. Gross*, 164 Ohio App.3d 1, 2005-Ohio-5527, ¶ 12 (2d Dist.) ("'[W]here the appropriating agency has passed a resolution of necessity for the appropriation, the resolution is prima facie evidence of such necessity in the absence of proof showing fraud, bad faith, or abuse of discretion by the agency.'"), quoting *Mentor v. Osborne*, 143 Ohio App.3d 439, 446 (11th Dist.2001). Here, there is some competent, credible evidence supporting the trial court's determination that Columbia Gas acted in bad faith to satisfy its burden

of proving that the taking is necessary. That is, there is some competent, credible evidence in the record supporting the trial court's assessment that since "the 25foot easement was labeled 'temporary' before the [OPSB] and transformed itself to 'perpetual' before this Court," amounted to "bad faith." (Case No. 21CV0112, Doc. No. 63); (Case No. 21CV0113, Doc. No. 58).

{¶81} In the context of appropriations, the Ohio Supreme Court recently defined "bad faith" to mean "'[d]ishonesty of belief, purpose, or motive.'" *Ohio History Connection*, ___ Ohio St.3d ___, 2022-Ohio-4345, at ¶ 31, quoting *Black's Law Dictionary* 171 (11th Ed.2019). When considering whether a party acted in bad faith, the court suggested that we consider whether that party "acted reasonably under the circumstances in addition to considering whether it acted honestly." *Id.* at ¶ 32.

{¶82} Here, our review of the record reflects that Columbia Gas did not act with full honesty. Specifically, the record reflects that the OPSB (conditionally) issued a certificate under R.C. Chapter 4906 to Columbia Gas after reviewing Columbia Gas's letter-of-notification application. The certificate (conditionally) authorized Columbia Gas to construct, operate, and maintain a 4.78-mile long, 12-inch diameter natural gas pipeline, with a maximum allowable operating pressure of 190 pounds per square inch gauge.

{¶83} Under the project description, the OPSB unequivocally stated that the "[p]ipeline construction will occur within a 75-foot easement, 25-feet of which is *temporary*, with the remainder being permanent." (Emphasis added.) (Petitioner's Ex. 9). *Compare Phelps Preferred Invests.*, 2022-Ohio-2540, at ¶ 36 (taking note of the "the project description portion of the [OPSB's] certificate of approval" for the pipeline project in which Columbia Gas represented that "'Pipeline construction will occur within a 75-foot easement, 25-feet of which is temporary, with the remainder being permanent'" before the OPSB).

{¶84} As evidence for issuance of the certificate, the OPSB relied on Columbia Gas's letter-of-notification application in which it included obtuse information regarding the easements in the relevant sections. Significantly, Columbia Gas did not include any information regarding the specific easements that it sought from the landowners under the section of its application (or corresponding appendix) discussing the "list of properties for which [it] ha[d] obtained easements * * * necessary to construct and operate the facility and [the] list of the additional properties for which such agreements have not been obtained." (Petitioner's Ex. 1).

{¶85} Furthermore, the record reflects that the general-information section of Columbia Gas's application informed the OPSB that "[t]he majority of the 12-inch natural gas main will be constructed within permanent private pipeline easements * * * as depicted in the construction plans in Appendix B." (*Id.*). In

other words, Columbia Gas did not mention the necessity of a temporary easement in the general-information section of its application. However, the reader must look to Appendix B of the application to learn of Columbia Gas's full intention to construct the pipeline using a permanent *and* temporary easement. Yet, a review of Appendix B reflects that Columbia Gas characterized the temporary easement as just that and *not* a perpetual-temporary easement.

{¶86} Nevertheless, Columbia Gas inconspicuously declared that "the proposed pipeline route will only include a 75-foot wide (50-foot permanent easement and 25-foot temporary easement) construction footprint" in the section of its application discussing the impact to *wetlands*. (*Id.*).

{¶87} Notwithstanding the evidence before the OPSB, Columbia Gas attached the specific easement rights that it sought from the respondents in relation to its pipeline project to its petitions filed with the trial court. Importantly, the easements granted Columbia Gas a "temporary-easement area" "to temporarily use an additional twenty-five feet (25') of space adjoining [the] Permanent Easement Area * * * , as shown on Exhibit B, only for the purpose of enabling [Columbia Gas] to initially construct the pipeline and to later alter, replace, and repair said pipeline and to conduct all activities incident [to], including restoration or clean-up activities." (Case No. 21CV0112, Doc. No. 1, Ex. 18); (Case No. 21CV0113, Doc. No. 1, Ex. 18). Exhibit B depicts a "gas pipeline easement to [Columbia Gas]" and

a "25' *perpetual* temporary easement." (Emphasis added.) (*Id.*); (*Id.*). *Compare Phelps Preferred Invests.*, 2022-Ohio-2540, at ¶ 36 (acknowledging the transformation of the temporary easement from its application before the OPSB to "a 'perpetual temporary easement' at the necessity hearing," and finding significance that "the proposed easement * * * had no expiration date").

{¶88} During the necessity hearing, Columbia Gas presented the testimony of Thompson, who acknowledged the categorization of the "temporary perpetual easement" and described such easement as "necessary when Columbia [Gas] is doing its initial construction of the pipeline, as well as any future repairs or maintenance on the pipeline that require that kind of extra space for its equipment." (Nov. 17, 2021 Tr. at 58). She further described that Columbia Gas "does not plan to utilize or permanently encumber that 25 foot easement, * * * every day [u]nlike a permanent easement where Columbia [Gas] is laying a pipeline it will be permanently encumbering that easement area." (*Id.*). Rather, she testified that the (temporary) easement is "characterized as perpetual" because it grants Columbia Gas "the ability * * * to utilize it when it needs it for various specific activities" as described in the easements. (*Id.* at 59). On cross-examination, Thompson testified that the temporary easement does not include any temporal limitation. She further testified that the purpose of the temporary easement is the initial construction and the maintenance of the pipeline, which is also the basis of the permanent easement.

{¶89} Consequently, contrary to Columbia Gas's argument under its fourth assignment of error, it is evident that the trial court not only reviewed the specific easement rights that Columbia Gas sought from the respondents but concluded that Columbia Gas acted in bad faith to satisfy its burden of proving that the taking is necessary. Therefore, the trial court's determination that Columbia Gas is not entitled to the rebuttable presumption under R.C. 163.09(B)(1)(b) is supported by some competent, credible evidence. *See Phelps Preferred Invests.* at ¶ 36 (concluding that Columbia Gas's "reliance upon testimony to indicate that the 75-foot corridor—a 50-foot permanent easement area and 25-foot temporary perpetual construction easement area * * * is factually inconsistent"). *See also id.* at ¶ 37. For these reasons, Columbia Gas's third and fourth assignments of error are overruled.

{¶90} Finally, Columbia Gas's argument under its sixth assignment of error advocating for this court to remand the cases to the trial court for compensation hearings under R.C. 163.09(B)(2) is without merit. *Accord Phelps Preferred Invests*. at ¶ 43. Indeed, under R.C. 163.09(B)(2), "if the landowner appeals from a necessity determination, the trial court's ability to hold a compensation trial is extinguished until the appeal is decided." *State ex rel. Bohlen v. Halliday*, 164 Ohio St.3d 121, 2021-Ohio-194, ¶ 17. Therefore, Columbia Gas's sixth assignment of error is overruled.

Respondents' Cross-Appeal

{¶91} Regardless of any presumption applied to Columbia Gas's petitions, the respondents contend under their first assignment of error that they are entitled to judgment in their favor as a matter of law because Columbia Gas's appropriation of the specific easement rights in these cases is not authorized as a result of the agricultural easement. Specifically, the respondents argue that "the express terms of the Ag Easement prohibit the installation of the Columbia Gas pipeline on the [protected] Property." (Appellee's/Cross-Appellant's Brief at 25).

{¶92} "An easement is a non-possessory property interest in the land of another." *Pomante v. Marathon Ashland Pipe Line, LLC*, 187 Ohio App.3d 731, 2010-Ohio-1823, ¶ 7 (10th Dist.). "An easement 'entitles the owner of the easement, the dominant estate, to a limited use of the land in which the interest exists, the servient estate.'" *Tower 10, LLC v. 10 W Broad Owner, LLC*, 10th Dist. Franklin No. 18AP-998, 2020-Ohio-3554, ¶ 27, quoting *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, L.L.C.*, 138 Ohio App.3d 57, 66 (4th Dist.2000). Easements are either appurtenant or in gross. *Id.* "An easement appurtenant runs with the land and is transferable to future buyers," while an "easement in gross is personal only to the grantee and, therefore does not run with the land." *Id.*, quoting *Walbridge v. Carroll*, 172 Ohio App.3d 429, 2007-Ohio-3586, ¶ 17 (6th Dist.).

{¶93} "Easements may be created by grant, implication, prescription, or estoppel." *Id.* at ¶ 28. "'When an easement is created by express grant, the extent and limitations of the easement depend upon the language of the grant.'" *Id.*, quoting *Pomante* at ¶ 7. "'There are no particular words required to create an easement by express grant, provided that the intent of the parties is clear from the document.'" *Id.*, quoting *Cincinnati Entertainment Assocs., Ltd. v. Bd. of Commrs.*, 141 Ohio App.3d 803, 813 (1st Dist.2001).

{¶94} "When an easement is set forth in a written agreement, it is subject to the rules of contract law." *Zagrans v. Elek*, 9th Dist. Lorain No. 08CA009472, 2009-Ohio-2942, ¶ 9. "When the terms of an easement 'are clear and unambiguous, the construction of an express easement presents an issue of law.'" *Tower 10* at ¶ 29, quoting *Pomante* at ¶ 7. In that case, we apply a de novo standard of review. *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶ 38, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995). "De novo review is independent and without deference to the trial court's determination." *ISHA, Inc. v. Risser*, 3d Dist. Allen No. 1-12-47, 2013-Ohio-2149, ¶ 25.

{¶95} "'If there is no specific delineation of the easement, or if the document is ambiguous, the court must then look to the circumstances surrounding the transaction in order to determine the intent of the parties.'" *Tower 10* at ¶ 29,

quoting *Delaware Golf Club, LLC v. Dornoch Estates Homeowners Assn.*, 5th Dist. Delaware No. 19 CAE 04 0027, 2020-Ohio-880, ¶ 43, citing *Hemmelgarn v. Huelskamp & Sons, Inc.*, 3d Dist. Shelby No. 17-19-07, 2019-Ohio-5298, ¶ 13 (addressing that "if there is no specific delineation of the easement, or if the document is ambiguous, then the court must look to the surrounding circumstances in order to determine the intent of the parties"). An easement "is ambiguous if it is 'susceptible to more than one reasonable interpretation.'" *Westlake v. VWS, Inc.*, 8th Dist. Cuyahoga No. 100180, 2014-Ohio-1833, ¶ 34, quoting *Michael A. Gerard, Inc. v. Haffke*, 8th Dist. Cuyahoga No. 98488, 2013-Ohio-168, ¶ 11. Because the intent of the parties becomes a question of fact when a court finds an ambiguity in the easement language, the trier of fact may rely on extrinsic evidence to ascertain such intent. *See Mulchin v. ZZZ Anesthesia, Inc.*, 6th Dist. Erie No. E-05-045, 2006-Ohio-5773, ¶ 36.

{¶96} A conservation or agricultural easement must be liberally construed in favor of the underlying intention for the easement as well as the policy and purpose of Sections 5301.67 through 5301.70 of the Revised Code. *Taylor v. Taylor*, 12th Dist. Butler No. CA2017-05-061, 2018-Ohio-1571, ¶ 27. *See also Beaumont v. FirstEnergy Corp.*, 11th Dist. Geauga No. 2004-G-2573, 2004-Ohio-5295, ¶ 18 ("Since an easement is set forth in a written agreement, it must be interpreted in the

identical manner as any other legal contract; i.e., the primary goal in construing the terms of an easement is to ascertain and enforce the intent of the parties.").

{¶97} Decisively, the respondents argue that the agricultural easement restricts the construction of the pipeline project by means of the "[t]he prior public use doctrine." (Appellee's/Cross-Appellant's Brief at 26). That is, the respondents advocate that the "doctrine prohibits the taking [of the respondents' property] because of the prior public use in place under the Ag Easement to perpetually preserve agricultural lands through the preservation and protection of soils for the full range of agricultural activities available under law, as defined by R.C. §5713.30 * * * ." (*Id.*).

{¶98} Ohio's prior public use doctrine provides

> that when a condemner, to which the power of eminent domain is given by law, seeks to exercise its power with respect to property already devoted to public use, its action may be enjoined if the proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction, unless the law has authorized the acquisition either expressly or by necessary implication.

Blue Ash v. Cincinnati, 173 Ohio St. 345, 351 (1962). *See also Worthington v. Columbus*, 100 Ohio St.3d 103, 2003-Ohio-5099, ¶ 19 (addressing "that the prior public use doctrine arose as the result of interpretation of statutes vesting municipalities and other public entities with the power of eminent domain"). Moreover, "[t]he manner in which the property was originally acquired has no

bearing upon the operation of the general rule." *Blue Ash* at 351. "[D]efining the parameters of the power of eminent domain is a judicial function." *Worthington* at ¶ 21.

{¶99} The respondents argue that "[t]he preservation of farmland and agricultural soils is a public use" and that "the agricultural easement is a statement of a public use that existed prior to the attempt to appropriate the" protected property in this case. (Appellee's/Cross-Appellant's Brief at 26). By way of historical timeline, the respondents illustrate that the State of Ohio codified "the 'Clean Ohio' amendment to the Ohio Constitution" in 2000 for the "'conservation and preservation of * * * farmlands and other lands devoted to agriculture, including by acquiring land or interests therein * * * ." (*Id.* at 26-27, quoting Ohio Constitution, Article VIII, Section 2o(A)(1)). Therefore, the respondents contend that the protected property is already devoted to public use under the agricultural easement.

{¶100} In Ohio, "R.C. 5301.67 through R.C. 5301.70 govern the creation, ownership and enforcement of conservation" and agricultural easements. *Lightle v. Washington Court House*, 12th Dist. Fayette No. CA2006-08-033, 2007-Ohio-2069, ¶ 12. An

> "agricultural easement" means an incorporeal right or interest in land that is held for the *public purpose* of retaining the use of land predominantly in agriculture; that imposes any limitations on the use or development of the land that are appropriate at the time of creation of the easement to achieve that purpose; that is in the form of articles of dedication, easement, covenant, restriction, or condition; and that

> includes appropriate provisions for the holder to enter the property subject to the easement at reasonable times to ensure compliance with its provisions.

(Emphasis added.) R.C. 5301.67(C). R.C. 5713.30 defines land devoted exclusively to agricultural use. Generally, "land devoted exclusively to agricultural use" means devoting a minimum of ten acres of land for at least one of the purposes described in the statute for the three years prior to an application filed under R.C. 5713.31. R.C. 5713.30(A)(1). An application filed under R.C. 5713.31 generally requests "the auditor to value the land for real property tax purposes at the current value such land has for agricultural use." R.C. 5713.31(A).

{¶101} R.C. 5301.68 permits "[a]n owner of land [to] grant an agricultural easement to the director of agriculture * * * ." Importantly, that landowner "may grant an agricultural easement only on land that is valued for purposes of real property taxation at its current value for agricultural use under section 5713.31 of the Revised Code or that constitutes a homestead when the easement is granted." R.C. 5301.68. R.C. 901.21(B) authorizes the ODA to accept such agricultural easements. That statute provides, in its relevant part that

> [t]he director of agriculture may acquire real property used predominantly in agriculture and agricultural easements by gift, devise, or bequest if, at the time an easement is granted, such an easement is on land that is valued for purposes of real property taxation at its current value for agricultural use under section 5713.31 of the Revised Code or that constitutes a homestead. Any terms may be included in an agricultural easement so acquired that are necessary or appropriate to preserve on behalf of the grantor of the easement the

> favorable tax consequences of the gift, devise, or bequest under the "Internal Revenue Act of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended.

R.C. 901.21(B).

{¶102} R.C. 5301.70 advises that "[c]onservation easements are not unenforceable for lack of privity of contract or estate or lack of benefit to a particular dominant estate." Likewise, the statute directs that "[t]he terms of a conservation easement may be enforced by injunction or in any other civil action by the holder of the easement." R.C. 5301.70. *See Zagrans*, 2009-Ohio-2942, at ¶ 9. Even though "conservation easement" and "agricultural easement" are independently defined under the Revised Code, such definitional distinction does not change the enforceability of the agricultural easement in this case.

{¶103} Here, the respondents assert that the statutory definition of an agricultural easement necessitates judicial review of the prior public use doctrine in this case. That is, because the General Assembly defined an agricultural easement under R.C. 5301.67(C) to mean a right in land that is held for "the public purpose," the respondents insist that they have invoked the prior public use doctrine since there is an agricultural easement encumbering the protected property. Columbia Gas opposes the respondents' argument by advocating that "[a] 'public use' and a 'public purpose' are different things." (Appellant's/Cross-Appellee's Reply Brief at 15). Columbia Gas's argument is a distinction without a difference. Indeed, the

Supreme Court of Ohio uses the phrases synonymously when discussing the prior public use doctrine. *See, e.g.*, *Worthington*, 100 Ohio St.3d 103, 2003-Ohio-5099, at ¶ 23.

{¶104} Our review of the record reflects that the respondents' presented some competent, credible evidence that the protected property is encumbered by a prior public use. That is, the respondents presented evidence that the protected property is encumbered by an agricultural easement (as defined under R.C. 5301.67(C)) granted in favor of the ODA. Specifically, Respondents' Exhibit H reflects that the agricultural easement was filed on August 21, 2003, recorded in Volume 509 of the Official Records at Page 369, in the Union County, Ohio Recorder's Office.

{¶105} Nevertheless, Columbia Gas seeks to exercise its power as a public utility to appropriate the protected property. The Supreme Court of Ohio unequivocally held that such "taking may be enjoined if it will result in the destruction of an existing public use." *Northwood v. Wood Cty. Regional Water & Sewer Dist.*, 86 Ohio St.3d 92, 95 (1999). That is, "[t]he Ohio Constitution does not expressly or by necessary implication authorize a city [or agency] to take property already used for public purposes in order to further a proprietary function * * * ." *Worthington*, 100 Ohio St.3d 103, 2003-Ohio-5009, at ¶ 23. Importantly, the Supreme Court of Ohio has not refined the prior public use doctrine to permit the

courts to balance the competing public uses to determine which necessity best serves the public interest. *See id.* at ¶ 27 (Pfeifer, J., dissenting). Accordingly, to overcome application of the prior public use doctrine, Columbia Gas must present evidence to contradict (evidence presented by the respondents) that the proposed pipeline project will destroy the existing public use of the protected property. *Accord id.* (holding that "Worthington did not contradict evidence proffered by Columbus that its proposed use of the subject property as a cemetery would destroy the existing public use of the land as an open-space park").

{¶106} Even though "there is abundant evidence in the record, we are loath to make a factual determination, especially in the first instance" since the trial court did not resolve this issue. *Northwood* at 95. Accordingly, we reverse the trial court's determination that the agricultural "easement prevents eminent domain in this action" and remand the matters to the trial court to determine whether Columbia Gas's proposed easement will destroy the existing public use of the protected property. (Case No. 21CV0112, Doc. No. 63); (Case No. 21CV0113, Doc. No. 58).; *Northwood* at 95 ("Accordingly, we reverse the judgment of the court of appeals and remand to the trial court to review the current record to determine whether the proposed taking will result in the destruction of the district."). That is, we remand these cases to the trial court to determine whether Columbia Gas presented evidence contradicting the evidence presented by the respondents that Columbia Gas's

proposed use will destroy the existing public use of the protected property. Based on the foregoing, the respondents' first assignment of error is sustained.

Columbia Gas's Assignment of Error No. V

> **The Trial Court erred by admitting into evidence at the Haring settlement discussions regarding the terms of the easements before the underlying appropriation cases were filed because such settlement discussions constitute compromise negotiations and are inadmissible under Rule 408 of the Ohio Rules of Evidence.**

Respondents' Assignment of Error No. II

> **The Trial Court erred by not allowing the testimony of Appellees/Cross Appellants/Respondents'' expert witness, Patrick Hornschemeier.**

{¶107} Under its fifth assignment of error, Columbia Gas contends that the trial court abused its discretion by admitting Conklin's testimony because it constituted compromise negotiations. Similarly, under their second assignment of error, the respondents argue that the trial court abused its discretion by excluding Hornschemeier's testimony.

Standard of Review

{¶108} An appellate court reviews decisions involving the admissibility of evidence for an abuse of discretion. *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, ¶ 22. *See also Akron Bar Assn. v. Shenise*, 143 Ohio St.3d 134, 2015-Ohio-1548, ¶ 13 ("We review a decision on the admission or exclusion of expert witness testimony under an abuse-of-discretion standard."). As

we previously stated, an abuse of discretion suggests the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore*, 5 Ohio St.3d at 219.

Analysis

{¶109} We will begin by addressing Columbia Gas's argument that the trial court abused its discretion by admitting Conklin's testimony. Specifically, Columbia Gas contends that Conklin's testimony should have been excluded because "[c]ompromise negotiations between an appropriating entity and a landowner concerning land rights before an appropriation action is filed * * * are inadmissible as a matter of law pursuant to Evid.R. 408." (Appellant's/Cross-Appellee's Brief at 22). Therefore, Columbia Gas asserts that the trial court abused its discretion by admitting Conklin's testimony "regarding his pre-suit negotiations with Columbia Gas for the land rights sought by Columbia gas and Appellees' proposed revisions to the easements." (*Id.*).

Evid.R. 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue

> delay, or proving an effort to obstruct a criminal investigation or prosecution.

See also Toledo v. Bernard Ross Family Ltd. Partnership, 165 Ohio App.3d 557, 2006-Ohio-117, ¶ 64 (6th Dist.) ("Evid.R. 408 prohibits introduction of evidence regarding settlement or compromise that is offered 'to prove liability for or invalidity of the claim or its amount.'"), quoting Evid.R. 408.

{¶110} "Evid.R. 408 does not prohibit all evidence concerning settlement negotiations, as such evidence may be admissible under the relevancy test of Evid.R. 401, to show a witness is biased or to impeach a witness." *M.M. v. V.S.*, 6th Dist. Lucas No. L-21-1176, 2022-Ohio-1531, ¶ 28, citing *Kane v. Inpatient Med. Services, Inc.*, 9th Dist. Summit No. 29087, 2019-Ohio-1975, ¶ 18. "Where a statement is not made in the context of an offer of compromise, however, it is not granted the protection of the exclusionary rule contained in Evid.R. 408." *USCA/USA, Inc. v. High Tech Packaging, Inc.*, 6th Dist. Wood No. WD-05-088, 2006-Ohio-6195, ¶ 34. "In addition, Evid.R. 408 is applicable only to bar the admission of evidence which is offered to show 'that because a settlement offer was made, the offeror must be liable, because people [do not] offer to pay for things for which they are not liable.'" *Id.*, quoting *Boyle v. Daimler Chrysler Corp.*, 2d Dist. Clark No. 2001-CA-81, 2002-Ohio-4199, ¶ 95. "In other words, Evid.R. 408 does not bar information from settlement negotiations when it is offered for another purpose and not to prove liability against one of the parties to the negotiations." *Id.*

{¶111} Here, the trial court did not abuse its discretion by admitting Conklin's testimony regarding his pre-suit negotiations with Columbia Gas in this case. That is, the evidence was not offered for the purpose of establishing liability or the value of any claim. Rather, the respondents offered Conklin's testimony to prove that the specific easement rights sought by Columbia Gas are *not* necessary. Consequently, Conklin's testimony is outside the scope of Evid.R. 408. *See High Tech Packaging* at ¶ 35. Therefore, Columbia Gas's fifth assignment of error is overruled.

{¶112} Turning to the respondents' second assignment of error, based on our conclusion as to the applicability of the prior public use doctrine, we conclude that the trial court abused its discretion by excluding Hornschemeier's testimony. Indeed, under their second assignment of error, the respondents argue Hornschemeier's testimony was admissible because he is "an expert in conservation easements, including agricultural easements" and he "would have testified and provided expert opinion on the significance of Federal tax law with regard to the agricultural easement." (Appellee's/Cross-Appellant's Brief at 33). In other words, Hornschemeier would have testified to the intersection of ODA's argument that the protected property will remain "predominately" for agricultural use against the federal tax code's preservation requirements.

{¶113} For a witness to testify as an expert witness under Evid.R. 702, three conditions must be satisfied: (1) his or her testimony must "'relate to matters beyond the knowledge or experience possessed by laypersons; (2) [the witness] must be qualified as an expert by specialized knowledge regarding the subject matter of the testimony; and, (3) [the] testimony must be based on reliable scientific, technical, or other specialized information.'" *Levine v. Kellogg*, 10th Dist. Franklin No. 18AP-694, 2020-Ohio-1246, ¶ 63, quoting *Laketran Bd. of Trustees v. Mentor*, 11th Dist. Lake No. 2001-L-027, 2002-Ohio-3496, ¶ 54, citing Evid.R. 702. Typically, "[e]xpert testimony under Evid.R. 702 'is admissible in the form of an opinion to aid the court in arriving at a correct determination.'" *Id.*, quoting *Copper & Brass Sales, Inc. v. Plating Resources, Inc.*, 9th Dist. Summit No. 15563, 1992 WL 368497, *5 (Dec. 9, 1992). However, "[t]here is no requirement that an expert possess complete knowledge of the field in question but must possess enough knowledge that he or she will aid the trier of fact in performing its fact-finding function." *Id.* at ¶ 52.

{¶114} In response to the respondents' argument, Columbia Gas asserts that the trial court did not abuse its discretion by excluding Hornschemeier's testimony because his "proffered testimony * * * is irrelevant and would have constituted nothing more than an improper legal opinion and conclusion." (Appellant's/Cross-Appellee's Reply Brief at 19). Generally, "'[a]n expert witness is not permitted to

give an opinion relating to the law, and a trial court that allows such an opinion abuses its discretion.'" *Hubbard v. Defiance*, 3d Dist. Defiance No. 4-12-22, 2013-Ohio-2144, ¶ 27, quoting *Witzmann v. Adam*, 2d Dist. Montgomery No. 05-CV-4086, 2011-Ohio-379, ¶ 62. However, that rule applies to jury trials. *See Wizmann* at ¶ 62, citing *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618, at ¶ 21 (providing that a trial court abuses its discretion when it allows an expert witness to interpret for the jury what a statute requires).

{¶115} "[I]n the context of a bench trial, reviewing courts 'afford broad leeway to the trial court in deciding the reliability of particular expert testimony' under Evid.R. 702." *Levine* at ¶ 67, quoting *Knott v. Revolution Software, Inc.*, 181 Ohio App.3d 519, 2009-Ohio-1191, ¶ 46 (5th Dist.). "Further, '"[w]hen a matter is tried before the court in a bench trial, there is a presumption that the trial judge 'considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'"'" *Id.*, quoting *In re Fair*, 11th Dist. Lake No. 2007-L-166, 2009-Ohio-683, ¶ 66, quoting *Jackson v. Herron*, 11th Dist. Lake No. 2003-L-145, 2005-Ohio-4046, ¶ 28, quoting *State v. White*, 15 Ohio St.2d 146, 151 (1968).

{¶116} Based on our conclusion that the prior public use doctrine applies to the facts and circumstances of this case (and our decision to remand the matter to the trial court to determine whether Columbia Gas's proposed easement will destroy

the existing public use of the protected property), Hornschemeier's testimony is relevant to whether Columbia Gas's proposed easement will destroy the existing public use of the protected property. Specifically, Hornschemeier's testimony is relevant to ensuring that the parties to the agricultural easement comply with the federal-tax requirements pertaining to the donation of an agricultural easement. His testimony is further relevant to the trial court's consideration of whether Columbia Gas's proposed easement will destroy the existing public use of the protected property. Therefore, the trial court abused its discretion by excluding Hornschemeier's testimony. Consequently, the respondents' second assignment of error is sustained.

{¶117} Having found no error prejudicial to the appellant/cross-appellee herein in the particulars assigned and argued in appellant/cross-appellee's assignments of error, but having found error prejudicial to the appellees/cross-appellants herein in the particular assigned and argued in appellees/cross-appellants' assignments of error, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Judgment Affirmed in Part,
Reversed in Part and
Cause Remanded

MILLER, P.J. and WILLAMOWSKI, J., concur.

/jlr