

Legal Concerns Triggered by Alternative Land Use — Subtle Issues and Potential Traps

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According to the common law and tradition, landowners should be able to use their land as they choose. Farmers and rural landowners identify strongly with their land ownership and property rights. They naturally assume that they can do as they please with land they own. In many cases, the land has been part of the family heritage for many generations. Counsel must be alert to the domino effect that a change in land use, from agriculture to some other enterprise, can initiate. In addition, the attorney must be insistent and unequivocal in bringing home to the client the many consequences and the complex legal problems the landowner could face.

This Article is not exhaustive. It is intended only to highlight some of the more interesting and unexpected possible consequences of a change in land use.

I. DEED RESTRICTIONS

The initial inquiry to be made before seriously contemplating alternative use of the land is to ascertain what restrictions run with the land by virtue of clauses in deeds or separately recorded restrictive or permissive easements, restrictive covenants, or rights of way. It is not sufficient to examine only the deed that conveyed the property to the present landowner. A thorough title search requires a meticulous, or perhaps a slightly paranoid, title searcher. Many old deeds contained what best can be described as peculiar restrictions and Draconian reversionary clauses for breaching these restrictions. Rights of way granted in different days under different circumstances must either be extinguished or provided for in the plans for alternate land use. Those restrictions that violate public policy or conflict with present civil rights and equal access legislation might be voidable by an action to quiet title or similar court action. At a minimum, such actions cost time and money. The outcome of a quiet title suit is by no means certain because of the strong common law bias in favor of allowing landowners to do as they please with their property and the strong private property rights associated with land ownership.

Agricultural and open space easements are in vogue in many areas of the country. Once these restrictions are placed on a tract, they

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remain in force and limit the use of the land in perpetuity or for the term of years specified. "Clean and green" and other preferential tax assessments allowed for agricultural land might be evidenced by recorded easements or by registries in the county courthouse. Old restrictive covenants might control such unlikely considerations as storm water runoff.¹ If the matter has been dealt with previously and resolved by a recorded document, courts will not apply statutes or case law to the facts.²

II. TAX PREFERENCES

Jurisdictions that grant preferential tax assessment to farmland or land used for agricultural purposes base the value of the land on its agricultural use rather than its highest and best use. State constitutional requirements of equality and uniformity of taxation and equal protection clauses generally have not been a bar to preferential assessment. A few courts have overturned preferential treatment.

The statutory requirements for granting preferential assessment are diverse. They look both to the use of the land and to the occupation of the taxpayer. Among the use criteria employed are:

- actual cultivation of the land
- limitation to minimum lot size
- exclusion of the value of the farmhouse from the preferential assessment
- restriction to solely agricultural use
- restriction to primarily agricultural use
- disqualification of the land from preferential tax treatment for diverting the use to different or additional activities

Especially in states that rapidly are losing farmland to development, restrictions are being placed on preferential assessment to balance competing tensions. Allowing farmers to continue agricultural activities in areas with high real estate values and intense development pressures is weighed against granting unjustified and unexpected tax assessment windfalls to speculators biding their time for development opportunity.

Legislation has addressed these opposing interests by incorporating penalties for terminating prematurely the agricultural use. Alternatively, preferential tax treatment might be conditioned upon the landowner's entering into a long-term contract, restricting the use of the land, with the taxing body. The land alternatively might be subject to a rollback tax upon the cessation of the agricultural use.

1. See, e.g., *Woodward v. Cloer*, 68 N.C. App. 331, 315 S.E.2d 335 (1984).

2. *Id.*

In the good-faith attempt to address all of these concerns, to achieve a result that meets constitutional mandates of equal protection and uniformity, and — more basically — to give the appearance of fairness, courts have engaged in tortuous reasoning. In *North Eastern Fruit Council v. State Board of Equalization and Assessment*,³ the court rejected preferential assessment for land devoted to an apple orchard. The court held that vineyards and orchards fundamentally were different because they contained components of taxable real property not present in other types of agricultural land.⁴ The fruit trees themselves were the component of taxable real property.

Conversely, Florida courts treat orange groves as an agricultural use. In *Hausman v. Hartog*,⁵ the court found that twenty-five acres used for an orange grove were entitled to preferential treatment. However, twenty-five acres of vacant land were improperly classified as agricultural use. This decision addressed the concerns that developers might profit and that areas of Florida currently devoted to production agriculture have intense development pressures.

New Jersey also is under strong developmental pressures. The court in *Jackson Township v. Paolin*⁶ analyzed a statute requiring assessment of rollback taxes when agricultural property was applied to a use other than agriculture or horticulture. The court held that ceasing the agricultural use was not sufficient to trigger a rollback provision absent employment of the property in another activity.⁷

Consistent with *Jackson Township* is *Department of Environmental Protection v. Franklin Township*.⁸ In *Franklin Township*, the state acquired land classified as agricultural to develop a reservoir. The fact that the reservoir was used to benefit agriculture in the region did not preserve preferential assessment.⁹ In addition, the property became subject to the rollback provision upon the date of cessation of the agricultural use.¹⁰

The distinguishing feature between the Florida case and the two New Jersey cases seems to be timing. Once the subsequent use begins, the New Jersey rollback relates back to cessation of the use. The effect on the developers is the same. Although New Jersey developers will

3. 124 Misc. 2d 67, 475 N.Y.S.2d 1010 (N.Y. Sup. Ct. 1984), *aff'd*, 115 A.D.2d 139, 495 N.Y.S.2d 925 (N.Y. App. Div. 1985).

4. *Id.* at 69, 475 N.Y.S.2d at 1012.

5. 371 So. 2d 1036 (Fla. Dist. Ct. App. 1978).

6. 181 N.J. Super. 293, 3 N.J. Tax 39, 437 A.2d 344 (1981).

7. *Id.* at 309, 437 A.2d at 353.

8. 181 N.J. Super. 309, 3 N.J. Tax 105, 437 A.2d 353 (1981).

9. *Id.* at 330, 437 A.2d at 364.

10. *Id.* at 337, 437 A.2d at 368.

enjoy the cash flow benefit of the preference for a longer time than developers in Florida, the former will pay the full price when they go on to other activities.

In *Smith v. Padgett*,¹¹ the applicable agricultural use provision of the property assessment statute required that livestock be raised under natural conditions as a venture for profit. A feedlot operation did not qualify as a natural condition.¹²

III. FINANCING

Because of the high number of troubled financial institutions, lender nervousness about the falling real estate market, and general concerns about the economy, lenders are scrutinizing loan applications and the supporting documentation carefully and are monitoring outstanding loans diligently. Major issues for borrowers considering alternative uses of their land follow.

A. Loan Purpose

When funds are borrowed from governmental entities, drastic results might follow when the borrower diverts the proceeds of the loan. Persons presenting false applications for the loans under the Commodity Credit Corporation and other federal preference programs are subject to the criminal punishments and civil penalties of the False Claims Amendment Act of 1986.¹³

Commercial loans and lines of credit from conventional lenders generally are made on the basis of loan purpose. Applying the proceeds to an activity or purpose other than that stated on the loan application breaches the contract with the lender and could cause acceleration of the loan or calling of a note.

B. Source of Funds

A second constraint upon the use of the loan proceeds is the source of the funds. Funds lent under specific entitlement programs often are subject to income limitations and restrictions on the timing of advances and repayments of proceeds. Generally, the loan agreement tightly structures the application of loan proceeds.

11. 596 S.W.2d 530 (Tex. Civ. App. 1979), writ ref. n.r.e.

12. *Id.* at 533.

13. 31 U.S.C. § 3729 (1988 & Supp. 1990). Penalties are found at 18 U.S.C. § 1001 (1976).

C. *Lender Assessment of Risk*

The purpose of the loan might significantly alter the lender/borrower relationship. Agricultural landowners who are accustomed to borrowing on revolving lines of credit or seasonal notes might find that the lender assessment of the financial risk of the alternative activity or land use is different. In particular, some lenders view recreational enterprises as unstable and subject to declining revenues during periods of economic downturn. The results of a less favorable assessment of the risk include:

- increasing the amount of collateral required
- reducing the term of the loan
- increasing the rate of interest to compensate for the additional risk
- requiring personal guarantees and third-party guarantees

D. *Environmental Audit Requirements*

Because of the requirements of the Federal Superfund Law¹⁴ and the applicable state hazardous site cleanup acts, lenders increasingly require environmental audits prior to committing to loans. This requirement has been imposed upon current landowners seeking new financing, additional financing, or refinancing. The most basic Phase I audit can carry a price tag of \$5,000. If any problem is revealed at the Phase I stage, more detailed audits are required to perform exhaustive site testing. As the sophistication in site testing increases, so does the cost. Landowners wind up between the proverbial rock and hard place. They already own the site. They cannot walk away from the deal. Whether or not the loan is granted, the landowner must face the remediation (cleanup) costs.

IV. ZONING

Each zoning ordinance is unique. Not all agricultural use ordinances are drafted equally. The crucial element to any analysis of the legality of an activity in a particular land use district is the applicable zoning ordinance. No generalizations can be made about which activities will be classified as an agricultural use or which activities will be permitted in a district zoned rural or agricultural. In addition, zoning decisions are political. They are made by elected officials responsive to the biases

14. Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 (1988 & Supp. 1990); see *infra* note 80 and accompanying text.

and prejudices of their constituents. The results frequently turn upon who the applicant is and the local sentiment concerning the activity. Neighborhood opposition is a factor in the decision-making process.

Abuses of discretion in zoning decisions are appealable. Appeals take time and cost money. To the extent appeals are decided upon the record made before the local government agency, a meaningful change in result on appeal is doubtful. The following sections discuss crucial zoning issues.

A. Definitions

The scope of activities permitted or precluded is strictly a factor of the definition of terms. Key terms are defined so disparately as to produce diametrically opposite results. Zoning ordinance terms are construed according to the standard dictionary definition unless a more specific definition of the term is provided in the definitions section or unless a special purpose definition is provided in a particular section. All zoning is in derogation of the state or commonwealth. Therefore, any ambiguity is construed in favor of allowing the landowner to use the land as the landowner chooses. The terms that cause special concern in considering alternative use of the land are "agricultural use" and "farm use."

In *Barnhart v. Zoning Hearing Board*,¹⁵ use of land for boarding horses was sufficiently pastoral in nature to classify it as "agriculture" pursuant to the statutory definition, despite the "clearly commercial" aspects of the operation. The court noted that eighteen of the thirty-three horses boarded were pastured on a full-time basis and that the remaining horses were pastured on a part-time basis.¹⁶

In *Zoning Hearing Board v. Zlomsowitch*,¹⁷ the ordinance provided that buildings devoted to farm use were exempt from area regulations. The court found that the ordinary meaning of "farm use" was synonymous with agricultural use and that use encompassed the keeping of horses.¹⁸ Conversely, in *Appeal of Jaffe*,¹⁹ although the R-2 zoning designation permitted agricultural land use, the court held that the construction of buildings designed for commercial boarding of horses was not an agricultural use within the terms of the ordinance.²⁰

In *Farmegg Products, Inc. v. Humboldt County*,²¹ proposed mechanized chicken houses did not qualify for exemption as an agricultural

15. 49 Pa. Commw. 481, 411 A.2d 1266 (1980).

16. *Id.* at 484, 411 A.2d at 1268.

17. 87 Pa. Commw. 123, 486 A.2d 568 (1985).

18. *Id.* at 126, 486 A.2d at 569.

19. 100 Pa. Commw. 498, 514 A.2d 1016 (1986).

20. *Id.* at 503, 514 A.2d at 1019.

21. 190 N.W.2d 454 (Iowa 1971).

use. The birds were to be raised from small chicks to laying hens.

The distinction between *Barnhart* as a permitted use and *Appeal of Jaffe* and *Farmegg* as not-permitted uses seems to lie in natural versus artificial conditions. The *Barnhart* court paid attention to the fact that the horses were pastured.²² In *Farmegg Products*, the court considered a sophisticated commercial operation.²³ A like result to *Farmegg* could be expected for veal calf confinement houses, sow-farrow operations, or any similar husbandry activity that takes place in artificial-light, a climate-controlled environment, or both.

In *Commonwealth v. Proctor*,²⁴ raising minks was not a permitted use under the designation "farm" because minks were not included in the phrase "domestic or other animal." The land therefore was not devoted to an agricultural purpose within the terms of the ordinance.²⁵

In *Davidson v. Abele*,²⁶ the operation of a mink ranch fell within the definition of "agriculture." The statute defined "agriculture" as including animal husbandry, which in turn included the operation in question. Because the activity was "agriculture," the Board of Commissioners had no authority to zone.²⁷

In *Harris v. Rootstown Township Zoning Board of Appeals*,²⁸ the court held that the breeding, raising, and care of dogs constituted "animal husbandry." That term was included in the term "agriculture" as defined in the zoning statute and included the use of land or buildings for "agriculture." The statute exempted such use from zoning regulation.

In *Appeal of Lowney*,²⁹ the court held that the use of a kennel for the purpose of boarding and grooming dogs could not be classified as a traditional agricultural use permitted in an industrially zoned area. However, the determination that the use was of the same general character as permitted uses justified the granting of a special exception to construct the kennel.³⁰

In *County of Kendall v. Aurora National Bank Trust No. 1107*,³¹ the statutory definition of agricultural use did not include sand mining. The owners claimed that they excavated the sand to create a pond to

22. *Barnhart*, 49 Pa. Commw. at _____, 411 A.2d at 1268.

23. *Farmegg Products*, 190 N.W.2d at 458-60.

24. 355 Mass. 504, 505, 246 N.E.2d 454, 455 (1969).

25. *Id.*

26. 2 Ohio App. 2d 106, 206 N.E.2d 583 (1965).

27. *Id.* at 107, 206 N.E.2d at 584.

28. 44 Ohio St. 2d 144, 149-50, 338 N.E.2d 763, 767 (1975).

29. 46 Pa. Commw. 213, 217, 406 A.2d 1160, 1162 (1979).

30. *Id.* at 218, 406 A.2d at 1162.

31. 170 Ill. App. 3d 212, 524 N.E.2d 262 (1988), *appeal denied*, 122 Ill. 2d 576, 530 N.E.2d 242 (2d Dist. 1988).

irrigate the sod that they had planted. Sod growing was an agricultural use within the statute. The landowners also had an existing gravel and sand operation and had applied for rezoning to a mining classification. In determining if the use was an agricultural purpose, the court "focused on the nature of the specific activity being conducted in relation to the definition of agriculture."³² The evidence supported the contention of the property owner that the pond they intended to dig would be used for agricultural purposes.

B. *Extent of Use*

In some cases, activities are classified under a particular ordinance so long as they fall within certain parameters. At some point in the expansion process, these activities lose their agricultural status.

In *Farmland Industries, Inc. v. Zoning Hearing Board*,³³ the ordinance permitted the sale of farm products by special exception in certain agricultural and residential districts. No language in the ordinance restricted the farm products permitted to be sold to those produced on the farms of the holder of the special exception. The broad definition included fruits, vegetables, eggs, milk, butter, poultry, and meat that had not been substantially processed or commercially packaged, bottled, or canned.

In *Anderson v. Humble Oil & Refining Co.*,³⁴ the court held that the growing of nursery plants was farming. The use would extend to selling plants grown upon the land. However, the owners of the tract not only were growing plants on the property but also were buying and reselling large quantities of nursery plants. The additional activity supported a holding that the property was used for commercial purposes.³⁵

In *Jackson v. Building Inspector*,³⁶ the court considered the use of a dehydration machine on a farm to be an accessory use incident to farming. The use fit within the zoning ordinance if it was restricted to fodder and manure actually used or produced on the farm.

In many areas of the country, a sawmill is a fixture on the farmstead. However, in *Smith v. Miller*,³⁷ when the sawmill was used to manufacture excelsior, wood fiber, or sawdust products, the court held the use was not agricultural.

32. *Id.* at 216, 524 N.E.2d at 265.

33. 65 Pa. Commw. 288, 442 A.2d 395 (1982).

34. 226 Ga. 252, 253, 174 S.E.2d 415, 417 (1970).

35. *Id.* at 254, 174 S.E.2d at 417.

36. 351 Mass. 472, 477, 221 N.E.2d 736, 739 (1966).

37. 249 Md. 390, 239 A.2d 900 (1968).

C. *Incidental Uses*

In *Schantz v. Rachlin*,³⁸ an airplane landing strip limited to personal use was an accessory use of the property in a residential and agricultural district. The zoning ordinance defined an accessory use as clearly incidental to or subordinate to the principal use and located on the same lot as the principal use. The airplane was owned by a farmer who cultivated crops and raised livestock on approximately 135 acres. The airstrip was unlighted and used only in daytime. Photographs showed that the airstrip did not alter the appearance of the farm. There were no buildings incident to the airstrip. The plane was used only for the farmer's personal pleasure. The court analogized the farmer's use of and pleasure from an airplane to having a pool or radio antenna support, which already were permitted uses.³⁹ The court noted that although airstrips were not as prevalent in the defendant's location as in other parts of the country, the use of private aircraft is expanding.⁴⁰ The court further rejected a neighbor's contention that the owner's use of the airplane in part for a real estate and investment business made these enterprises the primary use for the craft.⁴¹

V. EQUAL ACCESS AND CIVIL RIGHTS CONSIDERATIONS

Federal civil rights laws and various state public accommodation acts restrict landowners' ability to allow only those people with whom they are comfortable to come onto their land. The goal of the various civil rights mandates is to protect certain classes of individuals from discrimination and to ensure that they are accorded equal protection of laws both under the United States Constitution and under various state constitutions. The following examples of such laws by no means are exhaustive. They serve only to suggest the scope of the problem.

Federal law makes it illegal for two or more persons to conspire to deprive any person the equal protection of the law.⁴² In particular, various occupational groups have sought status as protected classes. A plaintiff must show that the defendant's actions were motivated by racial or otherwise class-based invidiously discriminatory animus. Generally, the protected classes are race, ethnic origin, sex, religion, and political loyalties. An advocate for the rights of nursing home patients was not allowed the protection of the Act.⁴³

38. 101 N.J. Super. 334, 244 A.2d 328 (1968), *aff'd*, 104 N.J. Super. 154, 249 A.2d 18 (1968).

39. *Id.* at 341, 244 A.2d at 332.

40. *Id.* at 342, 244 A.2d at 333.

41. *Id.*

42. 42 U.S.C. § 1985 (1988).

43. *Hack v. Oxford Health Care, Inc.*, 562 F. Supp. 295 (N.D. Ind. 1983).

In *Griffin v. Breckenridge*, the United States Supreme Court held that to state a claim under section 1985(3) or the pertinent part of subsection (2), a plaintiff must allege racial or otherwise class-based motivation for the conspirator's action.⁴⁴ Although the allegation was racial bias, "otherwise class-based invidiously discriminatory animus" has been relied on in employment cases as the litmus test for section 1985 civil rights conspiracy claims.

Generally, discrimination against an occupational class is not the kind of irrational class discrimination that is protected. Farm workers are an exception. They have been held to constitute a class of persons within the meaning of section 1985(3). Advocates for farm workers have argued that the occupational group constitutes a class of persons and that the class has been subject to the types of actions that Congress intended to prohibit.

In considering the actions of a tobacco growers association, the United States District Court for Connecticut held that camp rules dealing with access to labor camps infringed upon the freedoms of speech, religion, and association.⁴⁵

Title II of the Civil Rights Act of 1964⁴⁶ proscribes discrimination and segregation based on race, color, religion, or national origin in motion picture houses, theaters, concert halls, sports arenas, or other places of exhibition or entertainment. Over the years, court decisions have expanded the Civil Rights Act to include both spectator events and active participation in sports or other activities.

A family-owned recreation complex with a swimming area, picnic area, dancing area, snack bar, pool tables, and jukebox was held to be "a place of entertainment."⁴⁷ In this case, it is significant that all of the directors were related to the corporate president by blood or marriage, and that the president and his wife owned all of the stock in the corporation. This was the quintessential family business.

A facility owned and operated by a youth football association to conduct its football program was "a place of entertainment" within the meaning of the same Act.⁴⁸ A similar result would likely follow for a day camp, a sports camp, or some other recreation or athletic facility open to the public.

44. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

45. *Velez v. Amenta*, 370 F. Supp. 1250, 1256 (D. Conn. 1974).

46. 42 U.S.C. § 2000a (1988).

47. *United States v. Johnson Lake, Inc.*, 312 F. Supp. 1376, 1380 (S.D. Ala. 1970).

48. *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474, 482 (E.D. La. 1974).

The denial of admission to a skating rink based upon hair length did not state a cause of denial of equal accommodation under a Michigan statute.⁴⁹ However, an amendment to the statute proscribed sex discrimination. Because the length of hair test applied only to males, the defendant in the future could refuse to admit the plaintiff only for actual misconduct.⁵⁰

State and federal equal access legislation could require modification of any facility to meet the needs of the public. Recent federal legislation and the laws of the particular state must be carefully reviewed. The Americans With Disabilities Act of 1990⁵¹ prohibits discrimination in the areas of employment, public services, public accommodations, services operated by private entities, and telecommunications against persons with disabilities. The Act specifically at section 2(a)(3) addresses the need to make recreational opportunities accessible. The mandate of the Act to make parking lots, access routes to and from buildings, entrances, bathrooms, and common areas readily accessible to and usable by those who are hearing impaired, visual impaired, or who are wheelchair-bound must be of special consideration to persons who invite the public onto their land. Regulations have not been promulgated to date. In their absence, construction and facilities design should be undertaken only in careful consultation with architects and designers experienced in projects which meet these needs.

VI. EMPLOYER/EMPLOYEE ISSUES

A. *Disability Insurance for the Landowner*

A major reason for taking land out of agriculture or farm use is that the landowners no longer are able to work the land, tend the livestock, or milk the cows. Disability insurance for many self-employed persons provides a financial safety net in the event of illness or injury. The insurance yields steady income that allows the recipients to meet their obligations and, to some extent, maintain their lifestyles.

Any consideration of utilizing the land to obtain some alternative source of income must address the consequences of disability insurance or social security payments. Budding enterprises notoriously generate a lot of red ink. A crushing blow to the landowner can result when the safety net he or she counted on also vanishes just when the landowner is most desperate for regular income. The landowner's right to receive

49. *Riegler v. Holiday Skating Rink, Inc.*, 48 Mich. App. 449, 451, 210 N.W.2d 454, 456 (1973), *aff'd*, 393 Mich. 607, 227 N.W.2d 759 (1975).

50. *Id.* at 452, 210 N.W.2d at 456.

51. Act of July 26, 1990, Pub. L. No. 101-336.

income depends upon the policy language. Crucial words and phrases include:

- total disability
- permanent disability
- continuous disability

The meanings given to these terms are questions of law. Any determination of total disability looks to whether the policy is an occupational disability policy or a nonoccupational policy.

An occupational disability policy protects against the loss resulting from the inability to engage in a particular occupation. Usually the occupation is that in which the insured is engaged at a particular time. An occupational disability policy gives the insured the right to claim benefits if the insured is disabled from that occupation even though the insured might be able to engage in some other type of work.

A nonoccupational policy, more commonly known as general disability insurance, provides protection only when the individual is unable to engage in any remunerative occupation or work. The ability to engage in any occupation for wages or profit generally is interpreted to relate to an occupation in which the insured is trained or has worked at some time during his or her lifetime or to an occupation that the insured could follow based upon his or her particular age, training, experience, reputation, and other relatively precise factors. As in all other areas to be considered, the interpretations of these general concepts vary by policy language and court decisions. Whether the insured is able to collect under the policy depends upon the interpretation of the term "total disability."

The liberal viewpoint is that benefits are paid when the claimant is unable to work in his or her particular occupation. This viewpoint is illustrated by the case in which a dairy farmer sold his herd because of heart trouble.⁵² Coverage under the disability policy was allowed in that case even though the farmer engaged in a trucking business and enjoyed improved health while so doing.⁵³ The policy covered occupational disability.

A middle-of-the-road approach is that if the claimant is unable to work in his or her particular occupation or another occupation for which he or she is fitted or qualified, the claimant will recover under a nonoccupational policy. An illustration of this intermediate view involves a fruit grower who was considered totally disabled when he was afflicted by tuberculosis to such a degree that he could not earn wages for profit

52. *Scharbach v. Continental Casualty Co.*, 83 Idaho 589, 366 P.2d 826 (1961).

53. *Id.* at 597, 366 P.2d at 830.

within the range of his capabilities.⁵⁴ His disability was recognized even though he was able to fish and hunt occasionally. Significant, however, is the fact that this claimant had very little schooling and had only engaged in sheep raising in addition to fruit growing.

The strictest viewpoint is that the claimant is unable to work in any occupation whatsoever. This harsh view was implemented in denying recovery to a farmer who was prevented from continuing farm work.⁵⁵ The farmer's only employment was \$40.00 a month as a court crier. The policy prevented a claimant "from pursuing any occupation whatsoever for remuneration or for profit."

The eligibility requirements and disqualifications for benefits under the Social Security Act contain numerous traps for unwary land use and business attorneys who do not regularly practice this specialized branch of administrative law. There are two distinct programs: The Old Age, Survivors and Disability Insurance Program (OASDI)⁵⁶ and the Supplemental Security Income (SSI).⁵⁷ The former is an insurance benefit that requires the claimant to be fully insured by meeting earnings-related requirements. The latter is a needs-based program. Both programs are grounded in statutory and regulatory provisions replete with terms of art. These terms must be met squarely. Qualification under one program does not guarantee qualification under the other. Disqualification from one program does not necessarily cause disqualification from the other. The economic feasibility of any alternative land use plan for a benefits recipient can be evaluated only after consultation with competent claimants' counsel who has a thorough working knowledge of the system.

B. Agricultural Employees

The Migrant and Seasonal Agricultural Worker Protection Act⁵⁸ protects employees engaged in agriculture. What constitutes "agricultural employment" is defined to be

employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f) [29 USCS § 203(f)]), or § 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g) [26 USCS

54. *Shockley v. Travelers' Ins. Co.*, 17 Wash. 2d 736, 137 P.2d 117 (1943).

55. *Thigpen v. Jefferson Standard Life Ins. Co.*, 204 N.C. 551, 168 S.E. 845 (1933).

56. 42 U.S.C. § 402 (1988 & Supp. 1990), with regulations promulgated at 20 C.F.R. §§ 404.1-.2127 (1990).

57. 42 U.S.C. §§ 1381-.1599 (1988 & Supp. 1990), with regulations promulgated at 20 C.F.R. § 416.101-.2227 (1990).

58. 29 U.S.C. §§ 1801-1872 (1985 & Supp. 1990).

§3121(g)) and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.⁵⁹

Various court decisions have brought within the scope of this definition employees engaged in the following activities:

- forestry and horticulture
- fur-bearing animal husbandry
- weeding or compost removing
- cannery or packing work

Decisions have exempted from the definition:

- drivers of vans or buses used to transport such workers
- employees of tobacco haulers

The Fair Labor Standards Act of 1938,⁶⁰ as amended, exempts agricultural workers. The distinctions are subtle. The Seventh Circuit affirmed a National Labor Relations Board determination that employees of five out of six duck farms were exempt agricultural employees.⁶¹ Employees of the sixth farm were not exempt because a substantial and regular amount of their work was with ducks of contract growers.⁶² However, the employees of the sixth farm were exempt from the particular bargaining unit because they did not share a sufficient community of interest to warrant their inclusion in the bargaining unit.⁶³

In another case, piece-work woodsmen who felled trees and hauled them on tractors leased by the employer and recruited crews were not considered "agricultural workers" within the exclusion from the definition of employee contained in the National Labor Relations Act.⁶⁴ Their work was integrated into an industrial production process.

By contrast, the National Labor Relations Act is not applicable to nursery employees who spent 68%-77% of their time in the fields.⁶⁵

VII. ENVIRONMENTAL ISSUES

Local ordinances provide many of the parameters and limitations involved in environmental issues. Zoning ordinances, storm water or-

59. 29 U.S.C. § 1802(3) (1988).

60. 29 U.S.C. § 201 (1988 & Supp. 1990).

61. *NLRB v. C & D Foods, Inc.*, 626 F.2d 578 (7th Cir. 1980).

62. *Id.* at 582.

63. *Id.* at 583.

64. *NLRB v. Scott Paper Co.*, 440 F.2d 625, 626 n.3 (1st Cir. 1971); *see* 29 U.S.C. § 152(3) (1973).

65. *NLRB v. Kelly Bros. Nurseries, Inc.*, 341 F.2d 433 (2d Cir. 1965).

dinances, on-lot standards for sewage treatment, and requirements that condition certain uses of the land upon availability of public water and sewers all affect the landowner's ability to use the land. Local ordinances requiring environmental impact statements as a condition for zoning approval or variances look to such factors as air pollution, noise level, drainage and flooding, aesthetics, the ability of the project to fit into the existing community, and soil type.

A. *Environmental Impact Report Requirements*

A plan submitted by timber companies pursuant to a state forest practice act that was not accompanied by an impact report was promptly set aside.⁶⁶ The court found that the timber harvesting had a significant effect on the environment, and held that the proposed activity came within the California Quality Act concept of "project."⁶⁷

Mini-warehouses, because of their collapsible nature, often provide an interim source of income from the land. One court held that the rezoning of a property from rural undeveloped to light manufacturing to permit construction of mini-warehouses had no environmental significance.⁶⁸ The proposed development was not a major action when environmental and socioeconomic factors had to be considered. The assessed factors included anticipated increased traffic; available water, sewage, and electrical service; proposed tenants' business operations; the need for the proposed use in the area; the current real estate market; and the availability of other light manufacturing sites.

B. *Surface Waters — Applicable Rules*

1. *Civil Law.*—The owner of the dominant (higher) tract has an easement in the servient (lower) tract to allow surface waters to flow naturally.⁶⁹ The owner of the servient tract is not required to accept water flowing from the dominant tract that would not do so in the course of nature.⁷⁰

In Illinois, the civil law rule has been modified by the "husbandry" exception. The interference with surface waters will be allowed if it is limited to that which is incidental to the reasonable development of the

66. *Natural Resources Defense Council, Inc. v. Arcata Nat'l Corp.*, 59 Cal. App. 3d 959, 131 Cal. Rptr. 172 (1976).

67. *Id.* at 967, 131 Cal. Rptr. at 177.

68. *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wash. App. 515, 525, 704 P.2d 1242, 1249 (1985).

69. *Seminole County v. Mertz*, 415 So. 2d 1286, 1289 (Fla. Dist. Ct. App. 1982), *rev. denied*, 424 So. 2d 763 (Fla. 1982).

70. *Id.*

dominant lands for agricultural purposes. The decision to abandon an activity that has been construed as agricultural can expose a landowner to a myriad of restrictions from which he or she previously had been excepted or exempt.

Even when the total amount of water flowing from the dominant estate onto the servient estate does not change, injunctive relief or money damages might be granted when the water is so concentrated in discharge and the concentration is caused by the construction of roads and culverts.⁷¹

2. *The Common Enemy Doctrine.*—The basic premise of this doctrine is that surface water is the common enemy and landowners may fight it off as best they can, provided the landowners do so reasonably and in good faith and not wantonly, unnecessarily, or carelessly.⁷² The Indiana version of the same rule states that the landowner cannot throw or cast water upon adjacent property in unusual quantities.⁷³

3. *The Reasonable Use Modification of the Common Enemy Doctrine.*—All landowners have the right to use their property, but must do so in a manner that does not cause unnecessary injury to other landowners in light of the surrounding circumstances. Factors that contribute to an analysis of the reasonableness of the use include: whether the improvements are the cause in fact of the injury to the servient landowner, the nature and importance of the improvements, the relative value of the harm compared with the relative value of the improvements, the foreseeability of injury, the extent of interference with surface water, the availability of mutually acceptable solutions to the drainage problems, and any negligent or willful misconduct by the owner of the dominant estate.⁷⁴

In an Alabama case, judgment was entered and affirmed against the upper landowner for causing damage to the lower landowner when the evidence showed that the lower landowner only had problems with water drainage after the upper landowner began construction on his property.⁷⁵ In this case, the construction increased storm water runoff by fifty percent. Removal of underbrush and trees coupled with construction of a driveway caused surface water to be channeled directly onto the lower property. The upper landowner also changed the grade of his property. This case especially is worth noting when planning to adapt agricultural land to activities in which large numbers of people

71. Powers v. Judd, 150 Vt. 290, 553 A.2d 139 (1988).

72. See Mullins v. Greer, 226 Va. 587, 311 S.E.2d 110 (1984).

73. See Argyelan v. Haviland, 435 N.E.2d 973 (Ind. 1982).

74. Argyelan v. Haviland, 435 N.E.2d 973, 977 (Ind. 1982); Rounds v. Hoelscher, 428 N.E.2d 1308, 1315 (Ind. Ct. App. 1981) (disapproved on other grounds).

75. Johnson v. Washington, 474 So. 2d 651 (Ala. 1985).

will be brought onto the land. To accommodate the public, construction of driveways, construction of parking lots, and brush-clearing are common modifications.

Covenants running with the land either as separately recorded documents or as restrictive clauses in deeds or easements must be scrutinized carefully with respect to surface water restrictions. For example, in *Woodward v. Cloer*, the court would not apply the reasonable use standard to an action to enforce a restrictive covenant prohibiting any obstruction or interference with the flow of water through the drainage channels within the easement.⁷⁶ The court reasoned that the rule was applicable only to determine the rights and duties of landowners in the absence of another source for reciprocal rights and obligations.⁷⁷ Because the rights and obligations sought to be enforced were expressly contained in the restrictive covenants, the court held that there was no need for the trial court to make a determination of the plaintiff's right to recover.⁷⁸

Limiting any analysis to the case law in a given jurisdiction dealing with surface water is insufficient. Counsel also must research applicable federal and state wetlands regulations, state environmental laws, and municipal storm water ordinances.

C. Wetlands

Compliance with wetlands regulations is difficult because of the overlapping jurisdiction and sometimes conflicting regulations involved. Among the actors are the United States Soil and Conservation Service, the United States Fish and Wildlife Service, the United States Army Corps of Engineers, the Federal Environmental Protection Agency, and state departments of environmental resources (known by a variety of similar names). Until recently, even the identification systems were at odds. Currently, the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*,⁷⁹ an interagency cooperative publication of the Fish and Wildlife Service, the Environmental Protection Agency, the Department of the Army, and the United States Soil Conservation Service, is utilized by all of those agencies and is recognized as definitive by some *but not all* state environmental resource agencies.

The United States Army Corps of Engineers employs a nationwide permitting system whereby projects that strictly meet the permit criteria are approved. However, no matter how surely a project falls within one

76. 68 N.C. App. 331, 315 S.E.2d 335 (1984).

77. *Id.* at 334, 315 S.E.2d at 337.

78. *Id.* at 335, 315 S.E.2d 337.

79. FEDERAL INTERAGENCY COMM. FOR WETLAND DELINEATION, FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (Jan. 1989).

of the Corps nationwide permits, there is no assurance that the activity will be allowed under state regulations. Most states recognize some but not all of the nationwide permits.

Wetlands regulations carry beneficial exemptions and grandfather provisions for certain continuous agricultural uses. The minute the land use ceases to fit strictly within the saving provision, this protection also is lost and strict compliance with all the agencies and all the regulations coming to bear on wetlands is required.

Wetlands issues cannot be dealt with as the project progresses. Violators are punished with harsh fines, remediation requirements, or both. Remediation easily can be 2:1. In addition, DER and the Corps of Engineers in various parts of the country have begun seeking criminal penalties against what the agencies perceive to be flagrant or egregious violations. No dirt should be moved and no ditch should be filled until the issue is resolved if the remotest possibility of a wetlands issue is present.

D. Superfund

The Federal Superfund Law, officially known as the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)⁸⁰ as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), imposes broad-based liability and severe penalties. Many states have enacted their own versions of the Superfund. These enactments have been the subject of numerous continuing legal education programs. The legislation is complex and highly technical. A detailed discussion is beyond the scope of this Article. For purposes of counseling landowners who wish to make alternative uses of their land, it is imperative that the attorney be thoroughly familiar with the requirements of the federal and pertinent state clean up laws. It is crucial to know the points upon which the two laws differ and to resolve any conflicts in interpretation or compliance with the regulating agencies. Possible exemptions exist for family farms in some of the state statutes. When the family farm ceases to be a family farm, possible exemptions are inapplicable and the duty to clean up is imposed.

E. Endangered Species Protection

The Federal Endangered Species Act⁸¹ and various state game codes and fish codes generate a list of endangered and threatened animal and bird species.⁸² Generally, there is a prohibition against killing endangered

80. 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1990).

81. 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1990).

82. 50 C.F.R. §§ 401-453 (1990); *id.* § 17.

species, even indirectly, by disturbing or destroying the habitat through development. The protection can be extremely far-reaching. For example, it has been held that the U.S. Army Corps of Engineers did not exceed its statutory authority in denying dam developers a nationwide temporary permit to discharge sand and gravel during the construction of a dam on a tributary of a navigable river.⁸³ The operation of the dam and the altered water flow would have adversely affected whooping cranes with a critical habitat 250 to 300 miles downstream.

In many areas of the country, the ability to purchase water is crucial to any business enterprise. The Secretary of the Interior's refusal to sell water for municipal and industrial use has been upheld because the Endangered Species Act required the Secretary to give priority to conserving endangered species of fish in a reservoir.⁸⁴ The Secretary did not abuse his discretion by determining that there was no excess water to sell and in rejecting an alternate plan for operating a reservoir.⁸⁵

Fee access hunting is a popular alternative use of the land. The Ninth Circuit has held that habitat destruction that could drive endangered species to extinction was a harm to be protected by the Act.⁸⁶ The Act defines "harm" to include not only physical injury, but also injury caused by impairment of behavior patterns. The court found that Congress intended the terms to be defined in the broadest possible manner and, therefore, "harm" included habitat destruction.⁸⁷ The court sustained an order for the removal of sheep that would destroy the woodland habitat upon which the Palila, an endangered species of bird, depended.⁸⁸ The flocks of sheep and goats were maintained on the land by the state for sport hunting. In essence, maintaining nonprotected animals will not be countenanced when their presence will adversely affect the existence and propagation of endangered species.

VIII. NUISANCE AND PUBLIC SAFETY

A. Noise

The customary legal response to a nuisance is to seek an injunction to halt the activity. An injunction will not lie for a nuisance that is

83. *Riverside Irrigation Dist. v. Andrews*, 568 F. Supp 583 (D. Colo. 1983).

84. *Carson—Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1841 (1984).

85. *Id.* at 263.

86. *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106, 1108 (9th Cir. 1988).

87. *Id.*

88. *Id.* at 1110.

common to the public. Generally, a plaintiff must show a special injury to have standing.

Gun clubs and private shooting ranges have been the subject of many actions over the years because of both the noise and the real or perceived danger posed by flying bullets. A finding that these facilities constitute a nuisance must be based on specific facts and circumstances. They have been held not to be nuisances per se. The plaintiff has the burden of proving particular circumstances, locations, and surroundings that make the activity a nuisance. The facts must support the contention that there is a real and immediate danger to the public which cannot be compensated by money damages. In complaints about noise, the defense of laches will lie.

In an early Pennsylvania decision, noise produced by guns at a defendant's private trap shooting range was not enjoined as a nuisance based upon

the locality, the degree of quietness consistent with the standard of comfort prevailing in it, the location of the trap, the distance away of the complainant's house, the degree and quality of the noise, the number of times and the hours of day when the trap is used, the character of such use, the days of the week when it is used, the effect of the noise made thereby upon persons of ordinary sensibility to sound when or near complainant's house, the number of persons concerned in complaining, and all other relevant circumstances disclosed by the testimony.⁸⁹

A 1966 Pennsylvania case held that the unusual noise created by trap, board, and block shoots held at the defendant's gun club which adjoined the plaintiffs' home constituted a nuisance during the summer months when the plaintiffs spent most of their time outdoors entertaining guests.⁹⁰ The court further held that these shoots were not a nuisance per se and could be held restricted to the winter months.⁹¹

B. Safety

As early as 1915, laches was not a defense when the danger was caused by bullets going into the public roadway.⁹² A preliminary injunction was granted. However, if the club rearranged the traps so that

89. *Roberts v. Clothier*, 37 Montg. Co. (Pa.) L. Rev. 165 (1920).

90. *Gundel v. Kemmick*, 60 Lanc. (Pa.) L. Rev. 116, exceptions dismissed, 60 Lanc. (Pa.) L. Rev. 230 (1966).

91. *Id.*

92. *Wolcott v. Doremus*, 11 Del. Ch. 58, 95 A. 904 (1915).

bullets no longer hit the public road, the court stated that it would no longer interfere with the operation of the club.⁹³

An agricultural location can be a benefit in defending an action against a gun club. In *Oak Haven Trailer Court, Inc. v. Western Wayne Country Conservation Association*, the club was situated in an area that mainly was agricultural and also in which hunting was allowed. The danger allegedly arising from the operation of the shooting range was "a fear of the mind, and not an actual danger . . ."⁹⁴ The court noted that the club employed appropriate safety precautions in building the range. The trial court judge had attended two demonstrations at the range.⁹⁵ Sound measurements were taken from the plaintiff's property. In affirming the trial court's decision, the appellate court also held that the noise level did not constitute a nuisance.⁹⁶ In reaching its conclusion, the court considered the zoning classification to be an important factor.⁹⁷

IX. BANKRUPTCY

Chapter 12 of the Bankruptcy Code, Adjustment of Debts of a Family Farmer with Regular Family Income,⁹⁸ provides relief for smaller family farms. In the belief that the financial crises facing agriculture would be temporary, Chapter 12 was enacted with a sunset provision to terminate the Chapter on 1 October 1993.⁹⁹ A family farmer for the purposes of Chapter 12 is an individual (or an individual and spouse) whose debts do not exceed \$1,500,000.00. At least 80% of this debt must be derived from farming. The 80% figure is computed after the debts on the principal residence have been excluded. Furthermore, more than 50% of the gross income of the individual or couple in the taxable year prior to the year of filing must have been received from farming.¹⁰⁰ A family farm corporation that meets the requirements under the definition may file under Chapter 12 as a family farmer. The relief of Chapter 12 is lost when the definition of "family farmer" no longer is satisfied.

X. WATER RIGHTS

Traditionally in the western states, water rights have been crucial. They were subject to the range wars of old. They are carefully negotiated,

93. *Id.* at _____, 95 A.2d at 908.

94. *Oak Haven Trailer Court, Inc. v. Western Wayne County Conservation Ass'n*, 3 Mich. App. 83, 92, 141 N.W.2d 645, 649 (1966), *aff'd sub nom.*, *Smith v. Western Wayne County Conservation Ass'n*, 380 Mich. 526, 158 N.W.2d 463 (1968).

95. *Id.*

96. *Id.*

97. *Id.* at 91, 141 N.W.2d at 649.

98. 11 U.S.C. § 1201 (Supp. 1990).

99. Family Farmer Bankruptcy Act of 1986, § 302(f), 100 Stat. 3124 (1986).

100. 11 U.S.C. § 101(17).

zealously guarded, and aggressively litigated. As the east coast becomes more crowded, the concern for safe, adequate water supplies has moved east. Whether water rights are part of a real estate transaction or separately negotiated, they generally are restricted to a particular use. Most commonly in rural areas, that use has been irrigation or livestock watering. In areas subject to drought, priorities for water usage again look to use. Many uses will be precluded by rights that have been transferred or secured. And some uses will be less favored under any rationing system.

A thorough title search is the starting point to pick up water restrictions contained in deeds or subject to separately recorded instruments. State and regional environmental agencies also should be consulted. Regional lake and river basin commissions have permit requirements to draw down water for nonagricultural use or for commercial or industrial use. In the alternative, a permit might be required for draw down needs in excess of a certain number of gallons.

XI. HISTORICAL STRUCTURES AND SITES

Buildings that are registered with the National Register of Historic Places or local historic structure registers are subject to strict guidelines for renovation and modification. Prior approval may be required before so much as a shutter can be replaced. The decision to change a barn or other farm building to a different use easily can bring out the preservationists in full force. Whether or not their cause succeeds, time is lost and expenses are incurred in trying to resolve the matter satisfactorily.

Several states are adopting history codes requiring that before any earth-moving activities take place on a site or before permits are granted for building or other activities, a survey must be performed to determine whether the site is likely to contain historic artifacts. If the result of the survey is positive, a digging first must be allowed to take place. In Pennsylvania, this legislation is contained within the History Code.¹⁰¹ By the power vested in the Pennsylvania Historical and Museum Commission, the Commission may

[e]xamine, or cause to be examined, research or excavate the occupation or activity sites or areas and the cultural material remains of Native Americans, Colonial American and more recent American cultures in this Commonwealth, under the professional direction of the commission through the techniques of archeology, anthropology and history;¹⁰²

101. 37 PA. CONS. STAT. § 101 (Supp. 1990).

102. 37 PA. CONS. STAT. § 302(3) (Supp. 1990).

Currently, at least one hazardous waste landfill project is being held up based upon notification by the Commission to the Pennsylvania Department of Environmental Resources that possible Indian artifacts and significant archeological sites exist in the project area.

XII. PERMITS AND LICENSES

Many of the activities to which agricultural land is suited require permits and licenses that are not needed for the usual agricultural activities. An exhaustive list is impossible because every state and many municipalities have unique requirements. Among the more common requirements in addition to those already cited are:

- regulated shooting ground permits
- propagation permits for game birds and animals
- amusement licenses
- state labor and industry occupancy permits for new construction or renovations to buildings open to the public
- kennel licenses
- food handling licenses
- river basin permits
- sales and use tax licenses
- liquor licenses (even for a one-time event)
- sign permits

XIII. CONCLUSION

The challenge to make a living from the land is age-old. Pioneer farmers struggled with adversities of weather, pestilence, illness, long hours, and lack of money. As enterprising landowners seek creative and innovative ways to make money from the land, attorneys must be both practical and thoroughly knowledgeable in the law of the land. The notion that landowners cannot do as they please with the land is unpopular. The more insistent attorneys become in their message, the more likely the attorneys will be met with anger or even with the loss of clients. The consequences of failing to do that which attorneys are paid to do — advise clients of the legality of their actions and protect clients from adverse consequences — reach beyond any one representation. This job is not for those who need to be liked. The rewards of doing the deal are many. The failure to accept the responsibility of the appropriate role of the attorney is scary. The client who never wanted to hear the message all of a sudden becomes the client who says: “Why didn’t you tell me this would happen?”

