



UNIVERSITY OF MARYLAND  
**AGRICULTURE LAW  
EDUCATION INITIATIVE**  
EMPOWERING THE STATE

# Recent Legal Decisions Affecting Agricultural Land Conservation

Sarah Everhart

ALEI Legal Specialist

Kelly Winslow Nuckolls

ALEI Extension Legal Specialist



Maryland Land Conservation  
Conference, May 17, 2018

# Agriculture Law Education Initiative



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

The Agriculture Law Education Initiative (ALEI) is a collaboration of the Francis King Carey School of Law at the University of Maryland, Baltimore (UMB); the College of Agriculture & Natural Resources at the University of Maryland (UMCP); and the School of Agriculture and Natural Sciences at the University of Maryland Eastern Shore (UMES).

ALEI is an initiative of the University of Maryland Strategic Partnership: MPowering the State, a collaboration between UMB and UMCP. This partnership leverages the sizable strengths and complementary missions of both institutions to strengthen Maryland's innovation economy, advance interdisciplinary research, create opportunities for students, and solve important problems for the people of Maryland and the nation.

**Website:** [www.umaglaw.org](http://www.umaglaw.org)

**Twitter:** @MdAgLaw

**Facebook:** [www.facebook.com/MdAgLaw](http://www.facebook.com/MdAgLaw)

**Email:** [umaglaw@umd.edu](mailto:umaglaw@umd.edu)

# Disclaimer



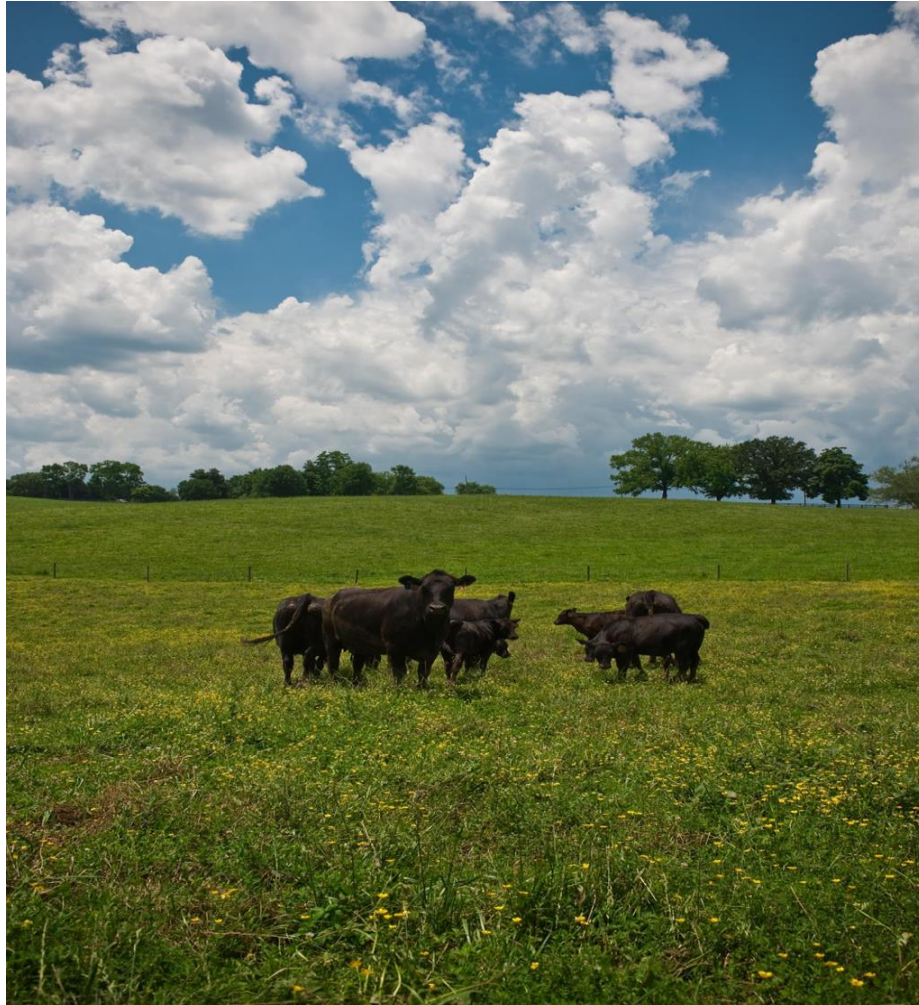
UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

This presentation is intended to provide general information and should not be construed as providing legal advice. It should not be cited or relied upon as legal authority. For advice about how these issues might apply to your individual situation, consult an attorney.

# Ag Land Conservation



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE



- Who can enforce an ag conservation easement?
- Can an eased farm be partitioned?
- Who does the IRS consider to be a qualified farmer?
- What legislative changes were made in 2018?
- What can be done to encourage conservation practices on leased farmland?

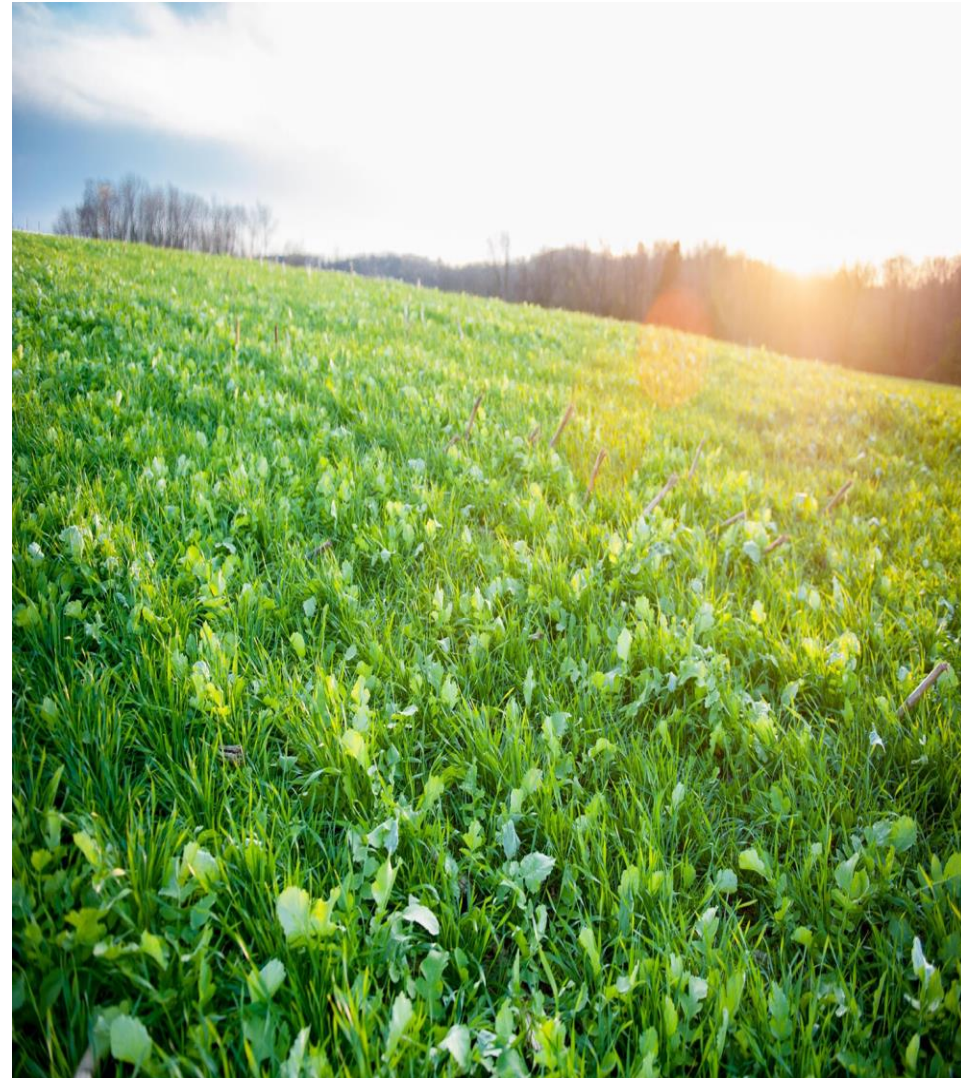
# I'm Still Standing



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

Legal standing-whether the party has the sufficient legal interest to bring the case

- a property interest
- an interest arising out of a contract
- an interest that someone has lost through a tortious action, or one founded in law.



# I'm Still Standing



UNIVERSITY OF MARYLAND  
**AGRICULTURE LAW  
EDUCATION INITIATIVE**  
EMPOWERING THE STATE

- With an agricultural conservation easement, clearly the grantor and the grantee have standing, but what about third parties?



# Two's company, three is a crowd



- Does a neighbor/3<sup>rd</sup> party have standing to enforce an agricultural conservation easement?
  - *Schwartz v. Chester County Agricultural Land Preservation Board*, Nos., 180 A.3d 510 (2018)

# *Schwartz v. Chester County Agricultural Land Preservation Board*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- Ag conservation easement was granted to the local township, the County and the Chester County Agricultural Land Preservation Board (Board) to limit development and use of the land for non-agricultural purposes.





# *Schwartz v. Chester County*

## *Agricultural Land Preservation Board*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- Farm operators began an organic composting business on a portion of land under easement.
- Schwartz (neighbor) submitted a formal complaint to the Board claiming the use was in violation of the easement and asked the Board to take enforcement action.

# *Schwartz v. Chester County*

## *Agricultural Land Preservation Board*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- Board conducted an inspection and held a public hearing.
- Board sent Schwartz a letter explaining that the composting use was consistent with the terms of the easement.

# *Schwartz v. Chester County*

## *Agricultural Land Preservation Board*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- Schwartz filed a Petition for Judicial Review of Board's action.
- Common Pleas Court: denied the Board's Motion to Dismiss the action (upheld standing) but ruled that the use did not violate the Easement.
- Both sides appealed.

# *Schwartz v. Chester County Agricultural Land Preservation Board*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- Commonwealth Court agreed with lower court's interpretation of the use but also granted the Board's Motion to Dismiss.
- 3<sup>rd</sup> party standing?
  - When the plaintiff is not a party to the easement, look to the easement language and the regulatory framework.

# *Schwartz v. Chester County Agricultural Land Preservation Board*



UNIVERSITY OF MARYLAND  
**AGRICULTURE LAW  
EDUCATION INITIATIVE**  
EMPOWERING THE STATE

- The easement provides the Board with the power to determine if there has been a violation of the easement and does not provide third-parties with an enforcement right.
- Neither the county's easement program nor state law provides a third-party right of enforcement.



# *Schwartz v. Chester County Agricultural Land Preservation Board*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- The Board’s letter to Schwartz was not an “adjudication” subject to judicial review.
- There was no procedure for complaints to be filed with the Board- that would have made the Board’s decisions quasi judicial.
- “When an agency considers whether or not to take an enforcement action, it exercises *prosecutorial* discretion that is beyond judicial review.”



# Standing to Enforce

- *Long Green Valley Ass'n v. Bellevale Farms, Inc.*, 432 Md. App. 292 (2013)
- Similar case to *Schwartz*
- Neighbors and a community association unhappy with the use of an eased property filed suit to force MALPF to enforce an easement.
- CSA and COA examined whether the plaintiffs had standing.

# *Long Green Valley Ass'n v. Bellevale Farms, Inc.*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

In CSA case- Plaintiffs claimed they were intended 3rd party beneficiaries.

They argued 3rd party beneficiaries included

- The general public

- Other parties with easements

- Neighbors



# Standing to Enforce Quiz



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

Quiz- What is one way to tell if a 3<sup>rd</sup> party has standing?

- Answer- look to the language of the easement!

# *Long Green Valley Ass'n v. Bellevale Farms, Inc.*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

The MALPF Easement Agreement provides that the State, as the grantee, may enforce the easement, and expressly limits public access and use of the land.

No express statement in the Easement that others who have placed their property under MALPF easements, the general public, or adjoining property owners, are intended 3<sup>rd</sup> party beneficiaries to the Easement.

# *Long Green Valley Ass'n v. Bellevale Farms, Inc.*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

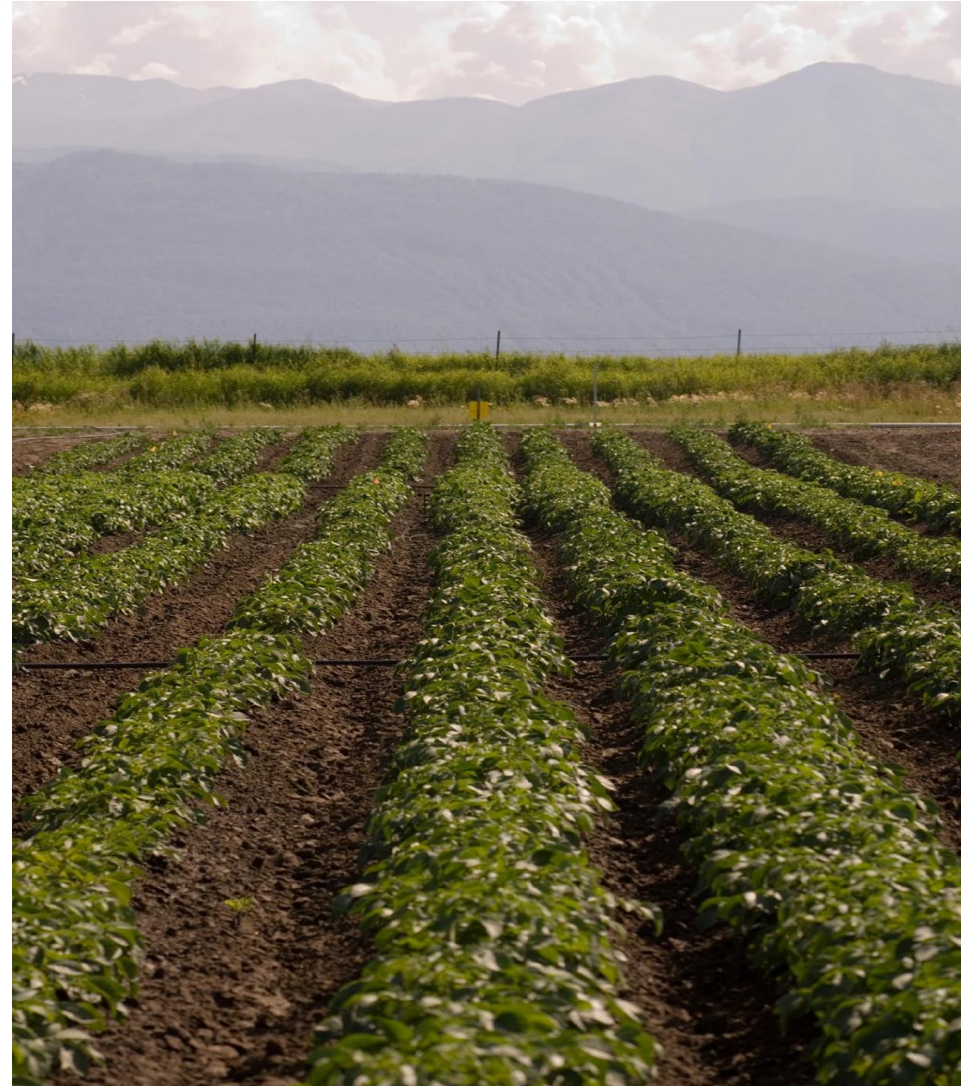
- Parties also claimed standing to enforce the easement based on the charitable trust doctrine.
- COA- a MALPF easement did not constitute a charitable trust that could be enforceable by any interested person.
- Language of the easement and MALPF program's statutory scheme demonstrated that objective of the easement was maintaining agriculture as a profitable endeavor not charitable.

# More than a Neighbor, Less Than a Party with Standing



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- *Estate of Merrill P. Robbins v. Chebeague & Cumberland Land Trust et al*, 154 A.3d 1185 (2017)
- Marion Payson donated a conservation easement on 100 acres of coastal land to the Chebeague & Cumberland Land Trust (CCLT).



*Estate of Merrill P. Robbins v. Chebeague &  
Cumberland Land Trust et al,*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- Easement allowed for 10 building lots. After her death, Payson Estate agreed to sell the bulk of the protected property to a developer, and the family retained a two-acre parcel.
- Developer sold 25 acres of the property to the Town for a beachfront park, including paving an existing dirt access road and grading a parking area and adding portable toilets and a pier.

*Estate of Merrill P. Robbins v. Chebeague  
& Cumberland Land Trust et al*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- Payson Estate filed suit against CCLT and the Town, claiming that the park improvements violated the easement.
- The Town and CCLT filed motions to dismiss, contending the Estate had no standing because it owned only the two-acre parcel, which was separate from the beach park parcel.

# Standing to Enforce Quiz



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

Quiz- What is one way to tell if a 3<sup>rd</sup> party has standing?

- Answer- look to the regulatory/legal framework!

*Estate of Merrill P. Robbins v. Chebeague  
& Cumberland Land Trust et al*



- The statute provides a grant of standing to “[a]n owner of an interest in *the* real property burdened by the easement”
- The Estate argued their interest in the 2 acre parcel gave them standing to enforce the easement on the remainder of the land owned by the Town.



*Estate of Merrill P. Robbins v.  
Chebeague & Cumberland Land  
Trust et al*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- What do you think?
- Does it mean an owner of any real property burdened by the easement or the owner of the property subject to the enforcement action?

*Estate of Merrill P. Robbins v.  
Chebeague & Cumberland Land  
Trust et al*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

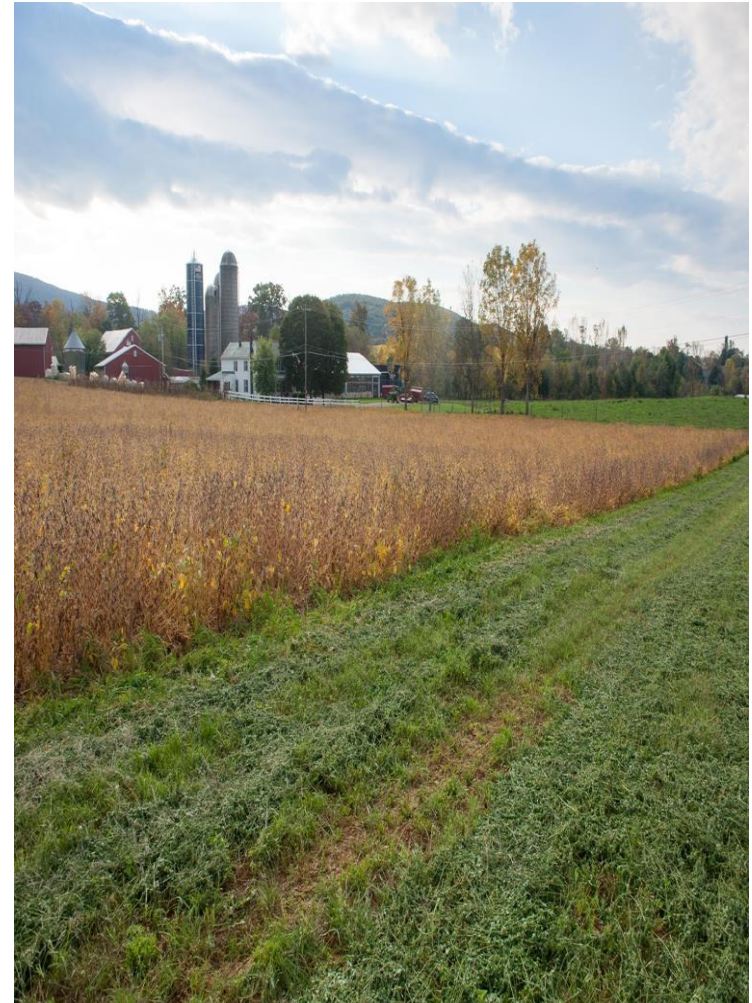
- Court found:
- A landowner of one geographic portion of an easement-protected property does not have standing to enforce that easement as it pertains to a separate area of the protected property owned by another person.
- Takeaway- Neighbors can seek to enforce local zoning regulations but have limited authority to enforce conservation easements.

# Are you a farmer enough for a full deduction?



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- *Rutkoske, et al. v. Commissioner of Internal Revenue*, 149 T.C. No. 6 (2017)
- Two brothers were members of a limited liability company (LLC) established to own farmland.
- In the same year, the brothers sold a conservation easement and sold the farmland at issue to an unrelated third party.



# *Rutkoske, et al. v. Commissioner of Internal Revenue*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- For income tax purposes the two brothers classified themselves as “qualified farmers” as defined by the Internal Revenue Code, eligible to deduct 100% of their contribution base.
- A “qualified farmer or rancher” is an individual whose gross income from the trade or business of farming is greater than 50% of their gross income for the taxable year ((26 U.S. Code Section 170(b)(1)(E)(v)).

# *Rutkoske, et al. v. Commissioner of Internal Revenue*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- Farming includes
- (A) cultivating the soil or raising or harvesting any agricultural or horticultural commodity (including animals) on a farm;
- (B) handling, drying, packing, grading or storing of any commodity in its unmanufactured state if the owner of the farm regularly produces more than one-half of the commodity so treated, and/or
- (C) planting, cultivating, caring for or cutting of trees or the preparation of trees for market (26 U.S. Code Section 2032A(e)(5)).

# *Rutkoske, et al. v. Commissioner of Internal Revenue*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- The brothers in *Rutkoske* argued that the income derived from the sale of the conservation easement and from the sale of the land constituted income derived from the trade or business of farming.
- The Court disagreed, explaining it was confined to look to the income derived from the sale of agricultural products, not from the sale of land development rights or the land on which agricultural products are grown.



# *Rutkoske, et al. v. Commissioner of Internal Revenue*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- The Court also explained that even if it had agreed with the brothers' reasoning, the brothers still would not have prevailed because the LLC which sold the property was not in the business of farming; it was in the business of leasing real estate.
- The LLC's income from the sale of the property, which flowed to the brothers individually, did not constitute income from the trade or business of farming.

# Can Tenants in Common Split up?



- *Taylor v. Taylor*, 2018 Ohio Misc. LEXIS 1705 ( Ohio Ct. App. Apr. 23, 2018).



- Brother and Sister own farmland that includes a conservation easement as tenants in common
- Can the property be divided if the conservation easement agreement prohibits division of the property?



# *Taylor v. Taylor*



- Trial Court held that the conservation easement's unlimited prohibition on dividing the property was invalid under state law and that the property could be divided
- Court of Appeals:
  - So long as it is not an absolute restraint on alienability the agreement to prohibit the division of property is valid
    - The agreement does not prohibit the sale of the property

# Partition Splits & Maryland Courts



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- Tenants in Common have the right to compel a partition in Maryland, but . . .
- Md. Real Property Code Ann. 1-104 & *Balderston v. Balderston*, 388 A.2d 183
  - Court of Special Appeals stated a co-owner can give up their right to compel partition or sale of property through an **express agreement**



# Don't Forget About Those Local Tax Benefits ... And Their Rules



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- *Woolford v. Virginia Dept. of Taxation*, 806 S.E.2d 398 (Va. 2017)
- Dept. of Taxation in Virginia took back a \$4.9 million land preservation state tax credit
- 1. Was the appraiser “qualified” ?
- 2. Can the Department audit the tax credit after its approved?



Photo by Edwin Remsberg

# *Woolford v. Virginia*

## *Dept. of Taxation*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- “Qualified” appraiser as defined under federal law governing charitable contributions ( 26 U.S.C. § 170(f)(11)(E)(ii) )
- Who can be a qualified appraiser?
  - Earned designation of appraiser from a professional appraiser organization
  - Receives compensation for appraisals on a regular basis
  - Must have verified education and experience with valuing that type of property

# *Woolford v. Virginia Dept. of Taxation*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- Court stated:
  - A license alone doesn't mean the appraiser is "qualified"
  - Must have experience in that specific type of property, not just general experience in real property
  - Need either formal class room education or experience



# Woolford v. Virginia Dept. of Taxation



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- The law does not restrict the Department's audit authority to only false or fraudulent claims



# *Woolford v. Virginia*

## *Dept. of Taxation*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

## Issues Still in Litigation:

- The Dept. of Taxation is also claiming the Woolford's tax credit's value is flawed because:
  - The mining area is not the type of land that qualifies for this credit
  - If the mining area does qualify, it should only be a 25% FMV tax credit allowed for “land improvements”
  - The need for the expansion of the special use permit under county zoning laws reduces its FMV under the law

# *Woolford v. Virginia*

## *Dept. of Taxation*



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- Court:
  - Unless the Dept. can prove the value of the conservation easement is zero, it must award a tax credit based on the FMV of the donation



Photo by Edwin Remsberg



# Maryland Income Tax Credit



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- Requires a certified real estate appraiser not a “qualified appraiser”
- The amount of the Credit is different:
  - Limited to \$5,000 per year and can carry forward remaining credit amount up to 15 years



# Income Tax Deduction in Maryland



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- Same “qualified appraiser” rules as the federal law
- Tips:
  - What type of land is this? Farmland, farmland with mineral rights, forested land, etc.
  - Keep in mind the appraiser’s experience



Photo by Edwin Remsberg

# Legal Updates from the MD General Assembly



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

## **HB 1229/SB0571- Agricultural Land Preservation Easements- Signs, Billboards, and Outdoor Advertising**

Allows a MALPF easement landowner to erect a sign on the farm without seeking the approval of the MALPF Board.

- Sign must be no larger than 4 feet by 4 feet.
- Advertise the name, address, occupant, farm or forest-related uses or a home occupation (if previously approved by the Board), and the sale of ag products.



# What's Your Sign?

- A sign may also be posted to advertise the sale or rent of the property, forbidding trespass or hunting, marking boundaries, identifying protected status of the land or supporting a political candidate.
- Larger signs must be approved by MALPF.

# MALPF- Who is a Child?



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

## SB 1140 MALPF Definition of Child

- The term “child” is used under existing provisions allowing a landowner whose land is subject to a MALPF easement to apply for the release from the easement of a lot for a dwelling house for the landowner or child of the landowner.
- As amended the law– defines “child” as a biological child, an adopted child, or a stepchild, and specifies that “child” **does not** include a foster child, a grandchild, or a descendent more remote than a grandchild.

# MALPF- Who is a Child?



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- The bill will apply retroactively and be applied to and interpreted to affect any person who is subject to the restrictions of an agricultural land preservation easement held by MALPF.

# Special Occasions



## **HB 1351 Agriculture- Easements- Special Occasion Events**

- This bill will allow an owner of land that is under ag land preservation easement to have a special occasion event which includes a wedding, a lifetime milestone event, or other cultural or social event.
- To be allowed to have this event, the property must have been under easement for at least 10 years, be approved by the local land preservation board and the event must be allowed by the federal, state and local regulations.

# Inheritance Tax



## **HB0198- Inheritance Tax- Perpetual Conservation Easement- Farming Purposes- Exemption**

- This bill creates an exemption from the inheritance tax for real property that has been placed in a perpetual conservation easement (such as MALPF and Rural Legacy easements) that passes from a decedent to a niece or nephew of the decedent. A recapture would occur if the property ceases to be used for farming. The bill applies to decedents dying after December 31, 2017.



# Maryland Inheritance Tax



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- Does NOT apply to:
  - A deceased person’s grandparents, parents, child, spouse, child’s spouse, grandchildren, grandchild’s spouse, sibling, a corporation, partnership, or LLC with only members that are excluded from the tax, or a nonprofit organization
- Would apply to: an aunt or uncle, niece or nephew, friend
- 10% of the “clear value” of the property (FMV – allowable expenses)
- Special Valuation for Farmland applies if meets requirements 5 years before the owner’s death



Photo by Edwin Remsberg

# Income Tax Changes



- H.B. 43
  - The first \$50,000 of compensation received that tax year for the sale of a perpetual conservation easement in the state must be subtracted from the amount of federal adjusted gross income you plan to deduct to determine your Maryland adjusted gross income

# Agricultural Conservation Leasing Project



UNIVERSITY OF MARYLAND  
**AGRICULTURE LAW  
EDUCATION INITIATIVE**  
MPOWERING THE STATE



UNIVERSITY OF MARYLAND  
**AGRICULTURE LAW  
EDUCATION INITIATIVE**  
MPOWERING THE STATE



HARRY R. HUGHES CENTER FOR  
AGRO-ECOLOGY, INC.



This project is supported by the Northeast Sustainable Agriculture Research and Education (SARE) program. SARE is a program of the National Institute of Food and Agriculture, U.S. Department of Agriculture.

# Agricultural Conservation Leasing Project



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- The project will engage agricultural service providers (University of Maryland Extension, NRCS, land trusts, etc.) in an education program about agricultural conservation leasing.

# Agricultural Conservation Leasing Project



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- There will be an informational webinar and a series of five regional workshops
- Attendees will gain the knowledge, skills, tools and confidence to educate and advise landowners and farmers how to overcome the challenges of implementing conservation practices on leased farm land.
- Interested landowners and farmers are also encouraged to attend!

# Agricultural Conservation Leasing Project



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
MPOWERING THE STATE

- **Informational Webinar**  
11/15/18 12:00 -1:00
- **Lower Shore Workshop**  
12/10/18 8:00 am -3:00  
Salisbury
- **Mid-Shore Workshop**  
1/8/19 8:00 am - 3:00  
Wye Mills
- **Western MD Workshop**  
1/23/19 8:00 am -3:00  
Frederick
- **Central MD Workshop**  
1/28/2019 8:00 am - 3:00  
Cockeysville
- **Southern MD Workshop**  
• **TBD**  
• Waldorf

# Agricultural Conservation Leasing Project



UNIVERSITY OF MARYLAND  
AGRICULTURE LAW  
EDUCATION INITIATIVE  
EMPOWERING THE STATE

- For additional information and/or to register go to <https://agresearch.umd.edu/agroecol>.
- Anyone with questions may contact Nancy Nunn at 410-827-8056 or [nnunn@umd.edu](mailto:nnunn@umd.edu)





# Questions/Thanks

## Contact Information:

Kelly Nuckolls

[knuckoll@umd.edu](mailto:knuckoll@umd.edu)

301-405-1295

Sarah Everhart

[severhart@law.umaryland.edu](mailto:severhart@law.umaryland.edu)

410-458-2475

