

## AG LAW NEWS

A Newsletter of the PBA Agricultural Law Committee

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Vicky Ann Trimmer, Editor  
Mette, Evans and Woodside  
3401 North Front Street, Box 5950  
Harrisburg, PA 17110-0950  
(717) 232 - 5000  
(717) 236 - 1816 (fax)  
[vattrimmer@mette.com](mailto:vattrimmer@mette.com) (email)

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### **Fourth Circuit Rules on Application of Age Discrimination Law to Foreign Applicants Who Apply in Foreign Countries for Jobs in the United States**

LUIS REYES-GAONA, v. NORTH CAROLINA GROWERS ASSOCIATION, INCORPORATED; DEL-AL No. 00-1963 ASSOCIATES, INCORPORATED

Decided: May 22, 2001

**Issue:** This case requires the Court to decide whether the Age Discrimination in Employment Act (ADEA, 29 U.S.C section 620 et seq.) covers foreign nationals who apply in foreign countries for jobs in the United States.

**Facts:** Plaintiff Luis Reyes-Gaona is a Mexican national over the age of 40. Defendant North Carolina Growers Association (NCGA) is an American corporation that assists agricultural businesses in North Carolina in securing farm labor through the federal H-2A agricultural worker program. Defendant Del-Al is an agent of NCGA that recruits H-2A workers for NCGA and its members. In May 1998, Reyes- Gaona went to a Del-Al office in Mexico and asked to be placed on a list of workers seeking employment in North Carolina via the H-2A

program. Del-Al told Reyes-Gaona that NCGA would not accept workers over forty years old unless that person had worked for NCGA before. Reyes-Gaona filed suit against NCGA and Del-Al, alleging age discrimination in violation of the ADEA.

**Discussion:** The Court began by acknowledging the "longstanding principle of American law `that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)). This interpretive canon is an especially important one as it "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Id. Thus, the presumption against extraterritorial application of a federal statute can be overcome only if there is an "affirmative intention of the Congress clearly expressed." Id. (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)). Since this determination is necessarily "a matter of statutory construction," Arabian, 499 U.S. at 248, we begin with the text of the ADEA itself.

The ADEA makes it unlawful "for an employer" to "fail or refuse to hire" or "otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The term "employer" means any company "engaged in an industry affecting commerce who has twenty or more employees" and includes the agents of such companies. *Id.* § 630(b). The term "employee" means "an individual employed by any employer," and "includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." *Id.* § 630(f). Prior to 1984, the ADEA did not contain the language regarding U.S. citizens employed in foreign workplaces. To the contrary, Section 626(b) adopted language from the Fair Labor Standards Act (FLSA) excluding from coverage any individual "whose services during the workweek are performed in a workplace within a foreign country." *Id.* § 213(f).

Many courts held that, before 1984, the ADEA had a purely domestic focus and did not cover American citizens working for American companies in foreign countries. *See, e.g., Thomas v. Brown & Root, Inc.*, 745 F.2d 279, 281 (4th Cir. 1984) (per curiam).<sup>2</sup> The presumption against the extraterritorial application of American laws required this result because absent a clear statement from Congress, the scope of American law is limited to "the territorial jurisdiction of the United States." *Arabian*, 499 U.S. at 244

In 1984, Congress partially closed this gap. Congress responded to the *Thomas* line of cases by amending the ADEA to give it limited extraterritorial application. The definition of "employee" was amended to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). This new statutory language explicitly expanded the ADEA to prohibit U.S. companies from

discriminating against U.S. citizens employed in foreign countries. Congress also included an accompanying provision outlawing such discrimination by subsidiaries of U.S. corporations. *See id.* § 623(h). The language was "carefully worded to apply only to citizens of the United States" who worked for a U.S. company or its subsidiary because Congress recognized that the "well-established principle of sovereignty" prohibited the United States from imposing "its labor standards on another country." *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147, 150 (3d Cir. 1997) (quoting S. Rep. No. 98-467, at 27 (1984)). Notably missing from the 1984 amendments, however, is any provision regulating the conduct at issue here. Congress explicitly gave the ADEA extraterritorial application with respect to certain U.S. citizens while simultaneously declining to extend coverage to foreign nationals like Reyes-Gaona. Nothing in the amendments regulates age discrimination by U.S. corporations against foreign nationals in foreign countries. And the doctrine of *expressio unis est exclusio alterius* instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded. Indeed, neither Reyes-Gaona nor the Equal Employment Opportunity Commission (EEOC) cites a case, and we can find none ourselves, where the ADEA was interpreted to reach a situation analogous to the case at bar. Thus, a faithful reading of the plain text of the statute, especially in light of the 1984 amendments, compels the conclusion that Reyes-Gaona's claim is not sustainable under the ADEA.

Reyes-Gaona and the EEOC disagreed. They claimed that this case does not require extraterritorial application of the ADEA because the job Reyes-Gaona applied for was in the United States. The crux of their argument is that when determining whether a suit requires extraterritorial application of the ADEA, courts

always look to the place of employment rather than the place where the decision was made. Because Reyes-Gaona applied for a job in the United States, they argue, the presumption The Court was not persuaded. It noted that all of these statutory references come from the 1984 amendments to the ADEA which, as previously explained, do not cover Reyes-Gaona. Nothing in the ADEA provides that it shall apply anytime the workplace is in the United States regardless of the nationality of the applicant or the country in which the application was submitted. And the fact that the 1984 amendments refer to workplace does not mean that the Act focuses on work situs to the exclusion of the situs of the application or the nationality of the applicant.

The simple submission of a resume abroad does not confer the right to file an ADEA action. Indeed, such a broad reading of the Act could have staggering consequences for American companies. Expanding the ADEA to cover millions of foreign nationals who file an overseas application for U.S. employment could exponentially increase the number of suits filed and result in substantial litigation costs. If such a step is to be taken, it must be taken via a clear and unambiguous statement from Congress rather than by judicial fiat.

**Holding:** The Court affirmed the judgment of the district court and held that the Age Discrimination in Employment Act did not apply to foreign nationals who apply in foreign countries for jobs in the United States, such as H2A workers.

### **Using a Limited Liability Company to Operate a Pennsylvania Family Farm Business** by Jeff Feirick, (J.D. May 2001)

Some say farming gets in your blood; it is a calling. Farming provides the freedom to make your own decisions and be your own boss. Farmers must work hard to succeed against formidable odds. Farmers know the blessings of

against extraterritoriality is not implicated by this suit.

spring rains as well as the devastation of a summer drought. Farming is a demanding job. It requires commitment 24 hours a day, seven days a week, starting well before sunrise and ending long after dark. Vacations revolve around spring planting and finding someone to care for the herd. People farm because they have farming in their blood.

Unfortunately, having farming in your blood alone is not enough to ensure success. Farming requires the blessings of God, intense perseverance and sound business planning. One aspect of sound business planning involves taking some of the positive business practices that your parents used and combining them with today's new forms of business organization. Recently, Pennsylvania approved a new way to structure a business called a Limited Liability Company (LLC). An LLC combines many of the best features of all types of business organizations. An LLC can provide protection from lawsuits and is much easier to form and operate than a corporation.

A Limited Liability Company (LLC) is a relatively new business form approved for use in Pennsylvania. An LLC is a separate legal entity, like a corporation in many respects, that is liable for its own debts and has the capacity to act as a legal person. For example, an LLC can buy, hold and sell property. As noted above, the best thing about an LLC is its ability to bring together in a single business organization some of the best features of other business forms.

A limited liability company is designed to promote business by offering farmers and other business owners protection from personal liability for business obligations combined with a business structure that is simple and easy to operate.

In Pennsylvania two documents are needed to form an LLC.

1. Certificate of Organization: Filing a certificate of organization with the Pennsylvania Department of State forms an LLC. The certificate of organization is a short, formal legal document that brings the LLC into existence. The certificate of organization must contain certain items, such as the names and addresses of all organizers, and failing to provide the required information may have adverse legal consequences. Your attorney will help ensure that the items are correctly reflected in the certificate.

2. Operating Agreement: An operating agreement is a document containing the internal business operating rules for the LLC. Pennsylvania law does not require the preparation or filing of a written operating agreement, but as a matter of good business practice a written operating agreement should be prepared. An LLC operating agreement allows the business members to organize and conduct their business as they see fit. If the operating agreement fails to address a particular issue, the Pennsylvania LLC statute will control the outcome.

In most areas LLC members may structure their business differently than the model set out in the Pennsylvania statute. For example, the LLC statute requires a unanimous vote to amend the certificate of organization. The operating agreement can change the number of members required to amend the certificate to any number the members agree upon. This flexibility allows for an LLC to reflect exactly what the members want. A few legal requirements may not be changed by contrary terms in the operating agreement. Your attorney can help you with these requirements. For example, the LLC statute forbids changing the requirement that a member who promises to contribute property to the LLC must do so in writing.

It is also important to remember that the LLC statute restricts the control of the operating agreement to internal business matters. The operating agreement may not affect the rights of people outside of the company. For example, if another Pennsylvania law says creditors with an agricultural lien take first priority over previously filed liens, the operating agreement cannot change that priority in favor of the LLC members. The operating agreement only affects the internal organization and operation of the LLC. Subject to this limitation, operating agreements allow LLC members the freedom to structure their internal business rules as needed for their particular business situation.

The name of a limited liability company is subject to some specific, mandatory requirements. The name must include the term "company," "limited" or "limited liability company," or abbreviations to that effect, such as "LLC." The purpose of this requirement is to ensure that the name of the company will put the public on notice that the company has limited liability. After a farmer forms an LLC, he should use the complete company name on every document sent out on behalf of the LLC or risk losing the limited liability protection of the LLC business form. If the company is named Red Oak Farms, LLC., it is not enough to refer to the LLC as "Red Oak Farms." The LLC designator must be attached so that third parties will realize that the farmer is not personally liable for obligations of the business.

Management of an LLC can be either "member managed" or "manager managed." As described below, the two differ as to who controls the day-to-day management of the LLC's business.

1. Member Managed LLC: All of the members (owners of the LLC business) manage the LLC by making the day-to-day business decisions, subject to the terms of the operating agreement.

2. **Manager Managed LLC:** The members may appoint one or more managers to manage the LLC. The manager may be, and often is, a member, but Pennsylvania law does not require that the manager be a member. In other words, the LLC can hire a professional manager if the members wish to do so. The manager will have the authority to set policy and run the day-to-day operations of the LLC. However, a manager only receives the authority given to him in the certificate of organization and operating agreement. For example, a farmer might form an LLC with other family members or business associates. Their agreement might appoint the farmer as manager and give him the authority to set company policy and run the day-to-day business of the LLC.

A Pennsylvania LLC can be comprised of one or more members. This point is significant because in Pennsylvania, unlike some other states, a single individual can form an LLC. Thus, a farmer who is the sole owner and manager of his farm can form a one-member LLC that will operate the farm. This will have the same legal effect as forming a corporation—protecting the farmer (and his personal assets) from liability for claims against the farm business. Alternatively, family members can be added as non-manager members and later elevated to managing member status by the farmer if he wishes to share control with the other family members. In either case, membership in an LLC gives the farmer and his family protection from personal liability for the debts, acts or liability of the LLC, or for the acts or omissions of any other member or employee of the company.

A farmer who forms an LLC has the following rights:

1. **Ownership Rights:** A farmer may define the ownership rights of LLC property. The general rule, unless changed by the operating agreement, is that property transferred to or otherwise

acquired by an LLC becomes property of the company and is no longer the personal property of the members who contributed it to the LLC. (The members own the LLC property collectively and indirectly through their ownership of the LLC, much like the stockholders in a corporation.) It is important to understand that an LLC member has no interest in specific property of an LLC. For example, contributions to the LLC such as money, equipment, and real estate become LLC property and are no longer the farmer's personal property. The controlling members must consent before anyone uses LLC property for personal reasons. Real estate may be acquired, held, and conveyed in the name of the LLC. The real estate property title will vest in the LLC itself, rather than in the members individually. The ownership interest of property placed in the LLC is indirect by virtue of the farmer's ownership interest in the LLC, which is defined by the operating agreement. Also, a family farm LLC qualifies for the Pennsylvania Realty Transfer tax exemption.

2. **Management Rights:** The farmer who is the managing member has the right to participate and manage the business.

3. **Economic Rights:** Any member has economic rights in the LLC business as specified in the operating agreement. Economic rights allow the member to receive the profits or deduct losses from the business. This is often called "pass through" tax treatment and is discussed in more detail below.

Businesses are constantly at risk of being sued. A properly organized LLC provides protection in the event of an otherwise uncontrollable event. If an LLC is sued, only the assets of the LLC are subject to legal liability—the personal assets of the members who own the LLC cannot be reached. In addition, the LLC can reimburse an employee or member for costs of a lawsuit arising out of a work related incident. This

protection does not include protection for an employee or member who is guilty of willful misconduct (deliberately violating the rules) or Accidents happen. To name one "worst case" possibility, if an LLC employee injures another driver in an automobile accident while conducting business for the LLC farm, the injured person may sue the LLC for the damages. If the LLC does not have enough assets to cover the damages, the farmer member does not have to pay for the damages out of his personal assets because of the LLC liability protection.

Neither the controlling members of an LLC nor the non-controlling members of an LLC are liable for the debts of the LLC solely by reason of being a member. An LLC has the same power and capacity as a corporation to act as a separate legal person and assume responsibilities for its debts. When a business loan is needed to purchase an additional piece of land or a new piece of machinery, the LLC itself can borrow money from the bank and even give a security interest in the land or equipment to secure the loan. The bank can make the loan directly to the LLC and its members need not be personally liable for the loan, so long as the bank is willing to make a loan on those terms. Banks should be willing to loan money to an LLC when the LLC proves to be a good business risk. The LLC must show a history of sound business management, yearly profits, and the ability to repay the loan. If the LLC has been adequately capitalized, with land, equipment, or other assets, and the history of the LLC shows a money-making business, then in most instances the LLC should be able to obtain credit and loans without the LLC member/owners assuming personal liability for the debt.

An LLC is a fairly simple way to operate a business. As noted above, the law allows the members of the LLC to set the rules for the company around the specific farm needs. As the circumstances on the farm change, the controlling members may change the ownership and management of the LLC. A farmer has the

recklessness (disregard of consequences involving danger to life or the safety of others).

flexibility to identify a potential business problem and institute changes with a simple vote of the controlling members. Planning for potential changes and providing an easy way to accomplish them—without disagreements or, worse yet, litigation among members—is an important part of the initial planning for the LLC. Some considerations relating to this kind of planning are listed below.

An LLC can use either the cash or accrual method of accounting. The cash method is by far the easier method because income is recognized when money is paid, not when the services are rendered. For example, if an LLC farmer plows snow from his neighbor's lane for \$20, he has income when he receives the \$20 payment. Under the accrual method of accounting, the farmer has \$20 income on the day he plowed the snow, even though the neighbor may wait months before he pays the farmer. An LLC allows farmers to use the easier cash method of accounting.

Corporate formalities are the procedures a corporation must follow to retain the liability protection of the corporate form of doing business. Corporate formalities include the election of a board of directors, holding annual board of directors and shareholder meetings, and maintaining corporate books and records of shareholder and board of directors meetings. A farmer can draft an LLC operating agreement to avoid the necessity of the kind of formal meetings and records required of corporations.

The ability of an LLC to provide for different classes of members may be useful for today's family farm situation. Many farm-raised children leave the farm and find employment elsewhere. One or more children may remain on the farm to help with the farm work and eventually continue the farm business after their parents are deceased. The LLC can spell out an equitable way to give non-farm children a share

in the farm business and still fairly compensate the farm children for their greater contribution to the family farm. Non-farm children can be compensated through distributions of farm Disagreements occur and can cause significant disruption to the operation of a family farm business. After disagreements arise each side may be unwilling to accommodate the interests of the other side. To prevent this from happening, the LLC operating agreement can specify a process for resolving family disputes through arbitration paid for by the LLC. The resolution process set out in the operating agreement can even contain penalties for members who refuse to cooperate. This may be an effective way to avoid expensive lawsuits which might consume the assets of the farm business.

If not planned for in advance the sudden impact of the unexpected death of a managing member can tear a family farm apart. The LLC operating agreement may provide guidance for dealing with this situation. A farmer who single-handedly runs the farm should provide instructions concerning who should take over the management of the farm in the event of his death. The farmer may even provide suggestions of what to do if none of the children are available to assume control.

The operating agreement may provide for the birth of a child by automatically placing a newborn into the membership class. For example, if a farmer forms an LLC with his spouse and children, he can give himself the majority of control and create a class of members which includes his children. The farmer may identify a future class of members in the operating agreement, which includes his future grandchildren.

Marriage and divorce provide a special dilemma for a family farm LLC. With a 50% likelihood that any marriage will end in divorce, farmers must prepare for the unpleasant results of divorce. The operating agreement should

business profits without necessarily sharing in management or control of the farm business.

provide a compensation plan that upon divorce, the ex-spouse of a family farm member receives a cash payout, on an agreed-upon basis specified in the operating agreement, instead of a membership interest in the LLC.

During times of economic downturn, an LLC offers more protection to the owner/member of an LLC than operation as a sole proprietorship or partnership. In a bankruptcy proceeding, a bankruptcy trustee collects all of the available assets of the bankrupt person or entity (i.e., land, homes, cars, equipment, crops, and animals) and disperses them to creditors in accordance with bankruptcy law. Certain items are exempt from inclusion in bankruptcy proceedings. The debtor must choose either the federal exemption or a state exemption. From the debtor's perspective, the federal exemptions are more generous than the Pennsylvania exemptions.

Operating a family farm as an LLC may provide significant benefits in the event of bankruptcy. When an LLC is formed, members contribute farm assets such as animals, buildings, equipment, land, and their services to the LLC in exchange for an ownership interest in the LLC. A farmer who owns a farm can choose to place farmland in the LLC, while excluding his farmhouse and non-farm real estate, or can retain ownership of the land and allow the LLC to use his farmland in return for paying rent.

An LLC has the ability to run the business and borrow funds as needed from a bank or other lender. This can be accomplished without any personal guarantees from the LLC members. In the event of a worst-case business reversal, only the assets placed into the LLC would be taken to pay off creditors. For example, farmland that is rented to the LLC is not LLC property and therefore is not subject to being seized by the bank (assuming it has not been pledged to the bank to secure a loan). Furthermore, if the

farmer placed the farm into the LLC but excluded his farmhouse, the bank could repossess the farmland but not the farmer's farmhouse property. In this way the formation of an LLC can protect a farmer's house, land and

Under the federal income tax regulations, LLC's can elect their federal tax classification (i.e., as a corporation, or as a partnership).

The owners of an LLC that elects to be classified as a partnership are not subjected to "double taxation" in the same way as shareholders of a corporation, which first pays corporate taxes before dividends are distributed and then individual shareholders pay personal income taxes on the dividends they receive. An LLC that elects to be taxed like a partnership is subject to "pass-through" partnership taxation. A pass-through entity passes through distributions to each member who pays taxes at his individual rate. The Small Corporation or "S-corp" is a form of business entity that follows the business structure of a corporation, but is taxed like a partnership. The S-corp is limited to 35 shareholders or less and involves more legal requirements and formalities than an LLC.

The Pennsylvania State tax rate is determined by the way the LLC elects to be taxed at the federal level. The members of an LLC that elects to be taxed as a partnership are subject to the same income tax treatment that would apply if they ran their business as individuals, without forming an LLC.

LLCs are subject to the Pennsylvania Capital Stock Tax. The Capital Stock Tax is imposed on the LLC's capital stock value, as derived by the application of a formula. The courts have construed this tax to be a property tax. The minimum Capital Stock Tax is \$200.00 annually. Further, LLC's in Pennsylvania are subject to local taxes such as a school district property assessment tax on property the LLC owns. You should consult your attorney or tax professional about the tax consequences of forming an LLC.

personal non-LLC property. The bankruptcy laws are complex and subject to important exceptions. Your attorney can help you plan in this area.

In a general partnership, the death of a partner often requires a division of partnership assets. This sudden unplanned event often disrupts the business requiring the remaining partner to sell off the business to pay the estate of the deceased partner. With careful planning, the sudden division of assets need not happen in an LLC. An LLC offers the distinct advantage of allowing a farmer to plan for the dissolution of the LLC. The farmer specifies in the operating agreement which events will terminate the LLC. If the dissolution of the LLC is not specified in the operating agreement, an LLC may be dissolved by a court order, the occurrence of an event specified in the certificate of organization or operating agreement, or the bankruptcy, retirement, death, resignation, or expulsion of a member. The LLC dissolution provision adds the distinct advantage of planning ahead of time for unexpected events.

A LLC member may sell or assign his membership interest in the LLC without the permission of the other members. The member who transfers his membership interest still retains the right to vote and manage the company business, he no longer gets any of the profits or takes the deductions for the losses. The creditor holding the membership interest is only entitled to receive the profits that members of that class would otherwise be entitled to recover. The creditor cannot force the remaining members to pay a dividend if the remaining members choose to reinvest profits.

The LLC may solicit additional member contributions to the LLC in exchange for an increased share of distribution, or the assignment of LLC property, with an option for the LLC to buy the property back. The LLC may also secure additional bank loans after obtaining



additional assets in this manner to collateralize the loans.

The simplicity of operating an LLC may justify starting a separate LLC for riskier business ventures. For example, after a farmer forms an LLC for his farming operation, he may decide to branch out into the risky area of raising exotic animals. Rather than risk losing his successful farm LLC business if the exotic animal business goes bust, he could form a second LLC. The second LLC provides protection from a sudden downturn in the exotic animal market.

The members of an LLC are not liable, solely by reason of being a member of the LLC for a debt, obligation or liability of the LLC of any kind or for the acts or omissions of any other member, agent, or employee of the LLC. However, an LLC member will be personally liable for any LLC debts which he personally guaranteed and for his own personal acts or omissions. For example, a farmer who is an LLC member and causes an accident while driving the LLC tractor on LLC business may be personally sued along with the LLC for the damages caused by the accident, just as an employee of a corporation could be sued personally in the same situation.

An LLC is a separate legal entity that is responsible for its own debts, and LLC members are not personally liable for the debts of the LLC. When the bank makes a loan, however, it may require one or all of the members to personally guarantee an LLC loan. In that case, if the LLC does not pay back the loan, the guarantor is responsible for the loan, but the reason is the personal guarantee and not the membership in the LLC.

The Pennsylvania Limited Liability Company entity may provide advantages for farm business persons by allowing a family farm to operate its business with the same protection from personal liability as shareholders in a corporation, yet retain the advantages of a partnership. Operating a business presents many risks (i.e., legal, financial, environmental), and the LLC may not

be the best form for you. Carefully consider and research all business entities and seek the advice of a local agricultural law attorney. Farmers who fail to choose a business entity allow the Commonwealth of Pennsylvania to choose for them.

### **Commonwealth Court Upholds Restrictive Zoning Ordinance** By David Kruff, Legal Research Assistant

The Commonwealth Court of Pennsylvania recently upheld a zoning ordinance that limits development on soils that are not prime farmland soils but are soils of statewide or local importance. In *C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board* (2001 Pa Commw LEXIS 261), the court affirmed a lower court's denial of a substantive challenge to the ordinance's constitutional validity.

The Bedminster Township (Bucks County) Board of Supervisors adopted an ordinance that protects 50% of "farmland of statewide importance" and 50% of "farmland of local importance" on any 10+-acre site located within an Agricultural-Preservation (AP) zone. These categories include non-prime Class II soils, Class III soils, and Class IV soils.

C&M Developers challenged the ordinance, stating that it does not allow the reasonable use of land in an AP zone. The Zoning Hearing Board denied the challenge and the Court of Common Pleas of Bucks County affirmed. C&M appealed.

The Commonwealth Court stated that the Municipalities Planning Code clearly supports agricultural preservation as a legitimate governmental goal. In addition, the court found that, in choosing to protect 50% of these soils, Bedminster Township balanced the goal of

farmland preservation against the need of its citizens to utilize and develop a plot of land that may represent their largest investment.

As a result, the court held that the ordinance was reasonable, related to the public welfare, and not unduly restrictive. The court affirmed the decision of the Court of Common Pleas.