

September 23, 2005

(via fax and regular mail)

Frank Bottone, Jr.
Livingston, NJ 07039
Fax: (973) 992-3324

Joseph Roberts
Director of Planning/Building
Township of Livingston

Livingston, NJ 07039-3994
Fax: (973) 535-7967

Re: Site Specific Agricultural Management Practice Determination –
Final Agency Decision

Dear Messrs. Bottone and Roberts:

At its September 22, 2005 meeting, the State Agriculture Development Committee (SADC) reviewed Bottone Farms' request for a site-specific agricultural management practice (SSAMP) determination.

Specifically, Bottone Farms had requested that the SADC determine whether its farm market operation complied with generally accepted agricultural practices and whether the farm was eligible for the protections of the Right to Farm Act.

The SADC determined the following:

- 1) Mr. Bottone's farm market meets the eligibility criteria of the Act, including conformance with generally accepted agricultural practices, and
- 2) Notwithstanding the Township of Livingston's prohibition of "retail sales" in the Limited Industrial District, Mr. Bottone may operate a retail farm market on his commercial farm pursuant to the Right to Farm Act (Act).
- 3) These protections do not preempt municipal authority over the parking area associated with the farm market.

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- 4) The SSAMP determination does not address vehicular circulation or ingress/egress issues. The Township may evaluate these issues, however the SADC retains jurisdiction over this matter in the event that Mr. Bottone relocates the parking area to his farm, and believes that the Township is imposing unreasonable requirements upon him with respect to his traffic plan.

This decision is a final agency decision appealable to the Appellate Division of the

Enclosed please find a copy of the SSAMP report adopted by the SADC at its September 22, 2005 meeting. If you have any questions, please contact me or David Kimmel, Agricultural Resource Specialist, at (609) 984-2504.

Sincerely,

Marci D. Green
Chief of Legal Affairs

c: Via mail and fax: (973) 535-7967)
Honorable David B. Katz, Township of Livingston Mayor
Michelle Meade, Township of Livingston Manager
Sharon L. Weiner, Township of Livingston Attorney

STATE AGRICULTURE DEVELOPMENT COMMITTEE

Site Specific Agricultural Management Practice (AMP) Recommendation (Farm Market)

September 22, 2005

Requestor

Frank Bottone, Jr., t/a Bottone Farm, Inc.

Livingston Township, Essex County

Background

Frank Bottone farms a leased parcel of land designated as Block , Lots in Livingston Township, Essex County. The property is 14.65 acres (see tax map, Attachment A), about half of which is being farmed. He has requested a Site Specific Agricultural Management Practice (AMP) Recommendation from the State Agriculture Development Committee (SADC) regarding his farm market. (Attachment B).

Mr. Bottone's grandparents purchased the farm in 1918, which was part of a larger tract of land. The Bottone family has farmed the property as owners and tenants since the 1920's. Public Service Electric and Gas (PSE&G) condemned the property in the 1930's to construct a high tension wire. PSE&G has been leasing it back to members of the Bottone family for agricultural purposes since it purchased the property.

From the 1970s until 2000, Mr. Bottone was involved with the farm on a part-time basis while other relatives managed the farm. In 2000, he assumed full-time management responsibilities. The farm historically produced fruits and vegetables, and under Mr. Bottone's direction, has continued to produce a variety of fruits and vegetables. The primary crops this year are tomatoes, corn, cut flowers, and fruit from a variety of fruit trees (cherries, plums, peaches, apples, and pears). Mr. Bottone also planted pumpkins, peas, radishes, summer squash, and ornamental squash, but these plants suffered significant losses due to animal depredation. (See Mr. Bottone's Commercial Farm Certification Form, Attachment C.)

The property is located in the Township's Limited Industrial Zone.

Farm Market

Prior to 2000, the Bottone family operated a farm market on nearby property once owned by the family. The market and an adjacent greenhouse complex, however, were removed by Mr. Bottone's aunt a few years ago following the passing of Mr. Bottone's uncle. From 2000-2004, Mr. Bottone sold the farm's produce to restaurants and donated produce to local soup

kitchens/shelters. In 2005, Mr. Bottone decided to open a retail market to maintain the profitability of the operation.

In late July 2005, Mr. Bottone opened a farm stand in the parking lot of an adjacent office building, with the approval of the owner of the building. He situated a trailer (without a cab) in this parking lot and used the trailer for enhanced market visibility as well as for temporary storage of some produce. Mr. Bottone displayed his produce on tables and in baskets, and he posted temporary signs to inform passing motorists of the market.

In addition to setting up the market in the parking lot, he also utilized the lot for customer parking. The parking lot is bordered by the farm (approximately to the north), Dorsa Avenue (south), Eisenhower Parkway and a grassy setback (east), and a commercial/office building (west). (See Attachment D for pictures of the market, trailer, and parking lot.)

As stated above, Mr. Bottone obtained permission from the owner of the adjacent office building to use the parking lot for the market and customer parking. (Attachment E). He also obtained a health license from the Township of Livingston Department of Health, Welfare and Human Services to operate the market. (Attachment F) This document, dated July 29, 2005, certifies that “the licensee [has] complied with all the requirements of ordinances necessary for obtaining [this] license.” The license further specifies the license will be forfeited if “the licensee, his agent, or servant [violates] any law or ordinance regulative of the business or occupation licensed.”

During a “Walk-Thru-Inspection” on August 4, the Health Department presented an inspection report to Mr. Bottone ordering him to cease and desist the farm market operation. The report states,

It has come to this Department’s attention that you are operating a fruit and vegetable stand at the above location without the approval/licenses from other Departments. Therefore, you are operating an illegal business. The present license [from the Health Department] is rescinded as of this time and date. You must cease and desist this operation immediately. (Attachment G)

According to Joseph Roberts, the Township of Livingston’s Director of Planning/Building, Mr. Bottone’s farm market did not comply with the Township zoning code and had been set up without a building permit. Specifically, Section 170-117.B(2)(g) prohibits retail sales in the Limited Industrial District. (Attachment H).

After receiving the cease and desist order, Mr. Bottone contacted the SADC to request a site-specific AMP recommendation from the SADC, as Essex County does not have a county agriculture development board. N.J.A.C. 2:76-2.4.

Eligibility for Right to Farm Act Protections

A. Location of Farm Market

There is a preliminary issue regarding the off-site location of the farm stand, as right-to-farm protection cannot be extended to agricultural activities occurring off the farm. Mr. Bottone has stated that he will move the farm stand to his own property to make the operation eligible for right-to-farm protection. Thus, this site-specific AMP recommendation and any protection provided by the Right to Farm Act as a result of this recommendation, are subject to Mr. Bottone relocating the farm market to his property.*

It is the SADC's understanding that Mr. Bottone would like to continue utilizing the parking area of the adjacent office building because it offers a convenient and safe area for his customers to park and to access his farm market. The Right to Farm Act does not preempt municipal regulation of parking areas associated with farm markets. Specifically, the Act states that a farmer may "[p]rovide for the operation of a farm market, including the construction of building and parking areas in conformance with municipal standards." N.J.S.A. 4:1C-9c. Regardless of the location of the parking area, therefore, the parking area must comply with municipal standards for parking.

B. Eligibility Criteria

To be eligible for the protections of the Right to Farm Act, N.J.S.A. 4:1C et seq., a farm must meet the following criteria:

1. Meet the definition of commercial farm
2. Be located in an area in which, as of December 31, 1997 or thereafter, agriculture is a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan; of be in operation as of the July 2, 1998 (the effective date of the amended Right to Farm Act)
3. Be in compliance with generally accepted agricultural practices
4. Be in compliance with all relevant Federal or State statutes and rules
5. Not pose a direct threat to public health and safety

1. Definition of Commercial Farm

After reviewing the information contained in a certification submitted by Mr. Bottone (Attachment C), SADC staff concludes that Mr. Bottone's operation meets the definition of "commercial farm" set forth the Right to Farm Act, N.J.S.A. 4:1C-3. Altogether, the farm is greater than five acres, produces agricultural products worth more than \$2,500 annually, and appears to be eligible for farmland assessment. Although the landowner (PSE&G) has not

* The office parking lot used by Mr. Bottone cannot be deemed part of a "farm management unit," pursuant to N.J.S.A. 4:1C-3, as there is no production of agricultural or horticultural products on the office parking lot.

applied for farmland assessment, the land has been farmed since the 1920s and appears to satisfy the eligibility criteria for differential property taxation pursuant to the Farmland Assessment Act, P.L.1964, c.48 (C.54:4-23.1 et seq.).

The farm stand also meets the Act's definition of "farm market," as all of the produce sold in the market is grown on Mr. Bottone's farm.

2. Zoning Requirement

The farm was in operation as of July 2, 1998, thereby satisfying that eligibility criterion.

3. Generally Accepted Agricultural Practices

SADC staff inspected the farm stand on August 19, 2005. Prior to receiving the cease and desist order by the Township, Mr. Bottone had parked a trailer on the adjacent parking lot, which he used for the temporary storage of produce. He also displayed his produce on tables and in baskets located on the paved and grassy areas.

Mr. Bottone's plans to relocate the farm stand to his farm involve orienting the trailer so that the rear section can be used as a temporary storage area for some of the produce. He will also have a smaller, refrigerated trailer for the temporary storage of produce, which will be located next to the larger trailer. Mr. Bottone has indicated that customers will not be able to enter these trailers. Mr. Bottone has rented both trailers for use during the farm market season.

He also intends to erect a temporary tent to provide shade for the produce and customers. The roof of the tent will measure approximately 16' x 8'. The approximate surface area dimensions of the table, to be located partially underneath the tent, are 24' x 4'. This table will be freestanding and rise about 4' off the ground.

After inspecting the farm stand, evaluating Mr. Bottone's plans for when he moves the farm stand, and consulting with Ron Good, Bureau Chief of Marketing and Development for the New Jersey Department of Agriculture, SADC staff concludes that the farm stand and the plans conform with generally accepted practices. The market is a seasonal, temporary stand, which is a common method of selling produce on a retail basis in New Jersey. Further, it is a generally accepted practice to utilize temporary storage trailers (with or without refrigeration) to store produce for a farm market.

4. Compliance with all relevant Federal or State statutes and rules

Mr. Bottone's farm market appears to be in compliance with relevant Federal and State statutes and rules.

A building permit for the proposed tent is not needed pursuant to the exemption for temporary structures in the Uniform Commercial Code, N.J.A.C. 5:23-3.14, as the tent is less than 900 square feet in area, less than 30 feet in any dimension, will be erected for a period of less than 180 days, and does not have appurtenances, such as platforms or electrical equipment.

A building permit is also not needed for the trailers, as they do not constitute buildings pursuant to the State Uniform Construction Code Act, N.J.S.A. 52:27D-119, 121. SADC staff consulted with the New Jersey Department of Community Affairs, who confirmed that such trailers are deemed motor vehicles and not buildings.

5. Public health and safety

Mr. Bottone's farm market does not appear to pose a direct threat to public health and safety, and the Township has not raised public health and safety concerns regarding the market.

It should be noted, however, that this site-specific AMP recommendation does not address vehicular circulation and ingress/egress issues. The Township has not indicated any concerns with these issues, as its position is simply that retail use is not permitted on the subject property.

If Mr. Bottone relocates the farm stand and parking area to his property, the Township may address vehicular circulation and ingress/egress. If Mr. Bottone relocates the parking area to his farm, the SADC retains jurisdiction over the traffic plan, however. If Mr. Bottone believes that the Township is imposing unreasonable requirements on him, he may notify the SADC. The SADC will then seek input from the Township, evaluate the Township's requirements and balance the Township's public health and safety concerns against the agricultural needs of the commercial farm operator to determine whether the farmer's traffic plan preempts the municipal requirements. Mr. Bottone will have the burden of establishing a legitimate, agriculturally-based reason for not complying with the municipal requirements.

If Mr. Bottone does not relocate the parking area to his farm, the SADC does not have jurisdiction over vehicular circulation and ingress/egress issues.

Conclusion and Conditions

Notwithstanding the Township of Livingston's prohibition of "retail sales" in the Limited Industrial District, Mr. Bottone may operate a retail farm market on his commercial farm pursuant to the Right to Farm Act. The market meets the eligibility criteria of the Act, including conformance with generally accepted agricultural practices. The conclusion that Mr. Bottone's farm market can preempt the Township's ordinance prohibiting retail sales on his farm, however, is contingent upon Mr. Bottone relocating the farm stand to his farm. These protections do not preempt municipal authority over the parking area associated with the farm market, regardless of whether the parking area is located on the farm, or if Mr. Bottone continues to use the parking lot of the adjacent office building.

Lastly, this recommendation does not address vehicular circulation or ingress/egress issues. The Township may evaluate these issues, but the SADC retains jurisdiction over this matter in the event that Mr. Bottone has relocated the parking area to his farm, and believes that the Township is imposing unreasonable requirements upon him with respect to his traffic plan. If Mr. Bottone does not move the parking area to his farm, the SADC does not have jurisdiction over vehicular

circulation and ingress/egress.

Attachments

- A – Tax map
- B – Site-specific AMP request by Frank Bottone
- C – Commercial farm certification form
- D – Pictures of Frank Bottone’s farm
- E – Letter of support from Magnum Eisenhower Associates, LLC
- F – Health license from Township of Livingston
- G – Walk-Thru-Inspection Report from Township of Livingston
- H – §170-117 of Township Code

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