

November 8, 2004

Joanne Restivo, Deputy Clerk
Office of Administrative Law

Trenton, NJ 08625-0049

Re: In re Samaha Farms
SADC No. 1309005
OAL Docket No. ADC 8497-02

Dear Ms. Restivo:

Enclosed please find a final decision in the above-captioned matter. The State Agriculture Development Committee (SADC) issued this decision at its November 4, 2004 meeting. Please note that the SADC's action is not effective until the Governor's review period expires pursuant to N.J.S.A. 4:1C-4f.

If you have any questions, please contact me at (609) 984-2504.

Sincerely,

Marci D. Green
Chief of Legal Affairs

Enclosures

c: attached service list

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IN RE SAMAHA FARMS
(APPEAL BY RONALD AND DONNA
SAMSON FROM THE DECISION OF
THE MONMOUTH COUNTY
AGRICULTURE DEVELOPMENT BOARD)

STATE OF NEW JERSEY
OAL DOCKET NO. ADC 8497-02
SADC Docket No. 1309-05

FINAL DECISION

This matter arises from an appeal of a decision by Ronald and Donna Samson (Appellants) from the decision of the Monmouth County Agriculture Development Board (CADB) finding that Samaha Farm's (Samaha's) use of a liquid propane cannon to prevent bird predation of a sweet corn crop constitutes a generally accepted agricultural management practice pursuant to the Right to Farm Act (Act), N.J.S.A. 4:1C-1 et seq.

PROCEDURAL BACKGROUND and FACTUAL DISCUSSION

The State Agriculture Development Committee (SADC) adopts the "Statement of the Case and Procedural History" and "Factual Discussion" set forth in the Initial Decision issued by Administrative Law Judge (ALJ) Martone on August 27, 2004.

EXCEPTIONS

Appellants filed exceptions to the Initial Decision on September 2, 2004. They contest ALJ Martone's legal conclusion that the SADC has "adopted 'by implication'" noise standards applicable to noisemaking devices, stating that the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. does not authorize rulemaking by implication.

Appellants also contend that the Samaha application for a site specific agricultural management practice recommendation from the Monmouth CADB was

defective because Samaha had not been issued a valid noisemaking permit. They allege that Samaha included a phony and fraudulent document in its application to the Monmouth CADB and allege that the “Committee and now the ALJ are apparently unconcerned” with this.

Appellants allege that the Monmouth CADB failed to “take into account the impact the proposed agricultural activity has on residents.” They also assert that Samaha’s expert reports were personal and subjective evaluations and that the Initial Decision fails to “deal with the objective testing performed by an acknowledged expert. . .”

LEGAL ANALYSIS

The Right to Farm Act protects a commercial farm operation against private and public nuisance suits if the operation satisfies the eligibility criteria of the Act. N.J.S.A. 4:1C-10. If the conditions are met, an operation is entitled to an irrebuttable presumption that it, or a specific agricultural activity, does not constitute a public or private nuisance, and does not invade or interfere with the use and enjoyment of any other land or property. Ibid.

For a farm to receive this protection, the appropriate CADB must determine that the activity at issue conforms with agricultural management practices (AMPs) adopted by the SADC pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. or that it constitutes a generally accepted agricultural operation or practice. Ibid.

Farmers must also be in compliance with all relevant federal or State statutes and rules and their operations must not pose a direct threat to public health and safety.*
Ibid.

a. Noise Control Standards

In this matter, appellants contend that Right to Farm Act requires the SADC to adopt noise control rules and that the SADC's failure to adopt such rules precludes the CADB from having jurisdiction over Samaha's request for a site-specific agricultural management recommendation regarding the use of a noisemaking device. Appellants further contend that the Act does not preempt the regulations of the New Jersey Department of Environmental Protection, Division of Fish and Wildlife (Division), governing permits for noisemaking devices and that the Division has sole jurisdiction over the employment of noisemaking devices in an agricultural setting.

ALJ Martone agreed that the SADC is required to adopt noise control rules, citing N.J.S.A. 4:1C-6c and 7d, and found that the SADC has not adopted such regulations. He found, however, that the SADC adopted by implication noise standards applicable to noisemaking devices that are permitted as an approved agricultural management practice. (Initial Decision, pages 20-21).

The SADC disagrees with Appellants' contention and the ALJ's conclusion that the Right to Farm Act and rules promulgated thereunder require the SADC to adopt noise control standards. The statutory provisions cited in the Initial Decision are not the provisions that require the SADC to promulgate AMPs for use in determining whether a farm operation is entitled to right-to-farm protection. Rather, N.J.S.A. 4:1C-7d requires the SADC to recommend to State agencies agricultural management practices for farms located in agriculture development areas and enrolled in farmland preservation programs. N.J.S.A. 4:1C-6c also requires the SADC to recommend AMPs to State agencies with the intent that other State agencies can incorporate these AMPs into their

* Other eligibility criteria, which are not at issue in this matter, are set forth in N.J.S.A. 4:1C-9.

programs and regulations. These recommendations, however, are not for use in determining right-to-farm matters pursuant to N.J.S.A. 4:1C-9, 10 and 10.1.

The Act authorizes the SADC to adopt AMPs, but does not require adoption of specific AMPs. N.J.S.A. 4:1C-9, 10 and 10.1 The AMPs required in these provisions establish standards for agricultural activities with which a farm operation must be in compliance to receive the protections of the Act. Ibid. Pursuant to this authority, the SADC has adopted numerous AMPs pursuant to the Administrative Procedure Act and is continually adopting additional AMPs. see N.J.A.C. 2:76-2A.

The Legislature recognized, however, that it would be impossible for the SADC to adopt AMPs for every agricultural activity that could be the subject of a right-to-farm dispute. It included in the Act an alternative standard if there are no promulgated AMPs that address a disputed agricultural activity. Specifically, a commercial farm operation must be in compliance with generally accepted agricultural operations or practices, as determined by a CADB or SADC on a site-specific basis to receive the protections of the Act, where the activity at issue has not been addressed by the AMPs promulgated by the SADC. N.J.S.A. 4:1C-6c, 7d and 10.1b (emphasis added).

Accordingly, if a right-to-farm matter concerns an activity that is not addressed by a promulgated AMP, the CADB and SADC are to determine whether the particular activity, as it occurs at that location, conforms with generally accepted agricultural operations or practices. In making such determinations, CADBs may consult with the New Jersey Department of Agriculture, the New Jersey Agricultural Experiment Station, the State Soil Conservation Committee, and “any other organization or person which

may provide expertise concerning the particular [agricultural] practice.” N.J.A.C. 2:76-2.3(d).

While it is true that the SADC defines “agricultural management practice” as a practice adopted by the SADC pursuant to the Administrative Procedure Act, “which shall include, but not necessarily be limited to, air and water quality control, noise control, pesticide control, fertilizer application. . .” the absence of such promulgated AMPs does not preclude a farmer from receiving right-to-farm protection. Rather, the Act provides the SADC and CADBs with authority to review specific activities occurring at that site, and to determine whether that farmer’s specific practices conform with generally accepted practices. N.J.A.C. 2:76-2.1; see N.J.S.A. 4:1C-9, 10 and 10.1c. Operations approved on this site-specific basis are entitled to the protections of the Act.

Furthermore, even if the SADC had promulgated a noise control AMP, the rule would not be applicable in the matter at hand as DEP regulations already require noisemaking permits for exploding devices. The Right to Farm Act does not preempt State regulations -- it requires that agricultural activities be in compliance with all relevant State and federal statutes, rules and regulations. N.J.S.A. 4:1C-9 and 10. As noted in the Initial Decision, the AMP promulgated by the SADC for commercial vegetable production recognizes the use of “noise-producing devices to scare away injurious birds” from sweet corn crops, but states that a noisemaking permit issued by the Department of Environmental Protection, Division of Fish and Wildlife is required for exploding devices. N.J.A.C. 2:76-2A.5, incorporating by reference Commercial Vegetable Production Recommendations, Rutgers University, 2002, page 144.

For the reasons set forth above, the SADC rejects the ALJ’s conclusions that the

Right to Farm Act requires the SADC to adopt noise control rules and that the SADC has implicitly adopted noise standards. The requirement for a DEP noisemaking permit is merely a condition a farm operation must meet for a determination that it is in compliance with the Commercial Vegetable Production AMP.

It is also necessary to clarify the role of CADBs and the SADC in right-to-farm matters. Appellants, the Monmouth CADB, and the ALJ characterize the Monmouth CADB's role as one of granting approval or authorizing the use of a liquid propane cannon. (Monmouth CADB Resolution, p.7; Initial Decision, page 21; Appellant's October 14, 2003 letter to ALJ Martone, p.3). While the SADC agrees that the CADB and SADC have jurisdiction over this matter*, it rejects the ALJ's conclusion that they have jurisdiction to authorize agricultural activities. The Act does not give CADBs or the SADC regulatory authority over agricultural activities; it merely authorizes them to determine whether an activity is entitled to an irrebuttable presumption that it is not a nuisance or whether municipal regulations governing the activity can be preempted. N.J.S.A. 4:1C-9, 10, and 10.1.

b. Noisemaking Permit

With respect to Appellant's contentions that Samaha did not have a valid noisemaking permit issued by DEP at the time of Samaha's application to the Monmouth CADB for an agricultural management practice recommendation, the SADC adopts the ALJ's findings that there is no evidence in the record that at the time of

* Township of Franklin v. den Hollander, 338 N.J. Super. 373 (App. Div. 2001), aff'd. 172 N.J. 147, 151 (2002) (CADBs and SADC have primary jurisdiction over disputes between municipalities and commercial farms); Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 348 (App. Div. 2004) (CADB and SADC have primary jurisdiction over right-to-farm disputes). Beyond this determination, however, CADBs and the SADC have no authority over a farmer's activities.

Samaha's application there was a valid permit in effect. Indeed, a letter from the Division of Fish and Wildlife indicates that there was no valid permit in effect at that time. The SADC further adopts the finding of the ALJ that, as of the 2002 growing season, a valid noisemaking permit had been issued and that any defect in the original application was cured by the issuance of this permit.

As no evidence was presented before the CADB or the ALJ to refute the validity of the noisemaking permit produced by Samaha for the 2002 growing season, the SADC finds that Samaha has met the condition in the Commercial Vegetable Production agricultural management practice, N.J.A.C. 2:76-2A-5, which requires a farmer to obtain a noisemaking permit. The SADC further finds that Samaha has satisfied the requirement in the Right to Farm Act that his operation was in compliance with all relevant State law during the 2002 growing season, N.J.S.A. 4:1C-9 and 10. Of course, to maintain right-to-farm protection Samaha has a continuing obligation to operate in compliance with the AMP and all federal and State requirements, including the obligation to obtain and operate in compliance with any required permits.

The SADC adopts the ALJ's conclusion that Appellants have failed to overcome the presumption of validity of the Monmouth CADB finding with respect to the noisemaking permit, but clarifies that conclusion by finding that Appellants failed to meet their burden of proving that the CADB's determination was improperly issued.

In their exceptions, Appellants contend that Samaha had submitted a "phony and fraudulent document at least in violation of N.J.S.A. 2C:21-3 and N.J.S.A. 2C:21-4, frauds relating to public records, recordable instruments and falsifying or tampering with records." Appellants also raised this argument in their June 25, 2002 letter brief to the

Monmouth CADB, contending that Samaha submitted a fraudulent noisemaking permit to the Monmouth CADB for the time period July 10, 2001 through August 31, 2001. The statutes cited by Appellants, N.J.S.A. 2C:21-3 and N.J.S.A. 2C:21-4, are criminal liability statutes, and their enforcement, or the identification of a violation thereof, is not within the authority of the SADC, or the scope of this proceeding. The SADC, therefore, does not make any determination or findings as to these allegations.

Further, we note that although this permit is included in the Monmouth CADB's record, it is listed in the CADB resolution as evidence submitted by Appellants, not as evidence submitted by Samaha. Indeed, it appears that the only copy of this permit in the record is attached to Appellant's brief submitted to the CADB. The Monmouth CADB record also includes a letter from the Division of Fish and Wildlife stating that Samaha had not been issued a noisemaking permit for that time period. The document that is the subject of appellant's objection thus is not part of the basis on which the ALJ concluded that the activity is protected by the Right to Farm Act. The ALJ's decision does not extend right-to-farm protections to the period during which the propane cannon was not permitted in accordance with State law.

c. Effect of Cannon on Neighbors, Public Health and Safety

Appellants assert in their exceptions that the reports submitted by Samaha were "personal and subjective evaluations of the disruptive nature of the propane cannon."*

* In their exceptions, Appellants described Bill Sciarappa, who provided a report to the Monmouth CADB as "an agent of the Committee." Mr. Sciarappa was referred to as a "County Agent" during the CADB proceedings, but this title refers to his being an agent of Rutgers Cooperative Extension for Monmouth County. He is not an agent of the CADB or SADC.

They also contend that the Initial Decision did not “deal with the objective testing performed by an acknowledged expert, Sharon Paul Carpenter.” The SADC adopts the ALJ’s conclusion that the CADB properly considered the effect of the propane cannon on the neighbors and imposed reasonable conditions on its use.

The SADC finds that the ALJ properly considered all of the expert reports submitted by both Appellants and Samaha in this matter regarding the noise levels of the liquid propane cannon. There is sufficient evidence in the record to support the ALJ’s conclusion that the activities of Samaha are not highly disruptive and nuisance-like in character. Indeed, the test results of Appellant’s own expert, Sharon Paul Carpenter, demonstrate that the noise produced by the cannon is within the acceptable limits of the DEP permit. Contrary to what Appellants contend in their exceptions, ALJ Martone did discuss the findings of Ms. Carpenter. (Initial Decision, pp. 22-23). The SADC adopts the ALJ’s conclusion that there is no basis in the record for the assertion that the activities of Samaha are highly disruptive and nuisance-like in character. Consequently, the SADC concludes that the use of the cannon does not “pose a direct threat to the public health and safety.”

The New Jersey Supreme Court recognized that the Right to Farm Act may preempt municipal regulations, but directed the CADBs and SADC to consider relevant municipal standards and, in instances where the ordinance “has a peripheral effect on farming that does not directly conflict with farming practices,” defer to the ordinance. Township of Franklin v. den Hollander, 338 N.J. Super. 373 (App. Div. 2001), aff’d. 172 N.J. 147, 151-152 (2002). CADBs and the SADC are also required to consider the impact of the agricultural activity on public health and safety “and temper their

determinations with these standards in mind.” Ibid.

The record shows that Colts Neck has two ordinances regarding noise control. One ordinance prohibits the use of sound-producing devices in a manner that “shall annoy any person or persons or disturb the comfort, rest or repose of any person or persons being in his, her or their place or places of abode.” Colts Neck Code, §164-6. The other is a set of noise standards promulgated under the Township’s Development Regulations. It is not clear from the record whether the latter set of standards is limited to noise associated with the construction of buildings, or whether it contains general noise standards. Colts Neck Code, Development Regulations, §102-66.

As part of his findings, the ALJ concluded that the Monmouth CADB was not required to give deference to the noise protection ordinance adopted by the Township of Colts Neck. Specifically, the ALJ concluded that the ordinance was not valid because it did not receive DEP approval, as required by N.J.A.C. 7:29-1.7(a). For the reasons that follow, the SADC cannot adopt the ALJ’s conclusion without evidence from DEP to establish that such approval was necessary, but nonetheless finds that the ALJ adequately considered the impact of the noise from the cannon on public health and safety.

DEP drafted and distributed a Model Ordinance in or around 1997. Pursuant to DEP’s instructions, if a municipality adopts the Model Ordinance, it does not need DEP approval. Specifically, the instructions accompanying the model ordinance state:

If a governing body of a municipality adopts this model ordinance without change, the ordinance shall be deemed to be approved by the Department. Changes in formatting, numbering, or any other changes of this type shall not be considered changes requiring review and approval by the Department. Within 30 days after a municipality adopts this

ordinance, the municipality shall submit to the Department, and the CEHA agency governing its region if one exists, a certification signed by the Township Clerk, Borough Manager or Administrator. (excerpted from DEP's website regarding noise control, <http://www.nj.gov/dep/enforcement/noise-ord.pdf>).

On the other hand, if a municipality adopts noise standards that are more stringent than the State's noise code, but which do not conform to the model ordinance, the municipality is required to receive DEP approval of its ordinance. The instructions accompany the model ordinance address this as follows:

If a governing body of a municipality wishes to change any provision(s) of this model ordinance or wishes to develop a noise ordinance that is not based on the model, the entire noise control ordinance including the proposed change(s) shall be submitted to the Department for review and approval, prior to adoption. The Department will review noise ordinances to determine consistency with the statewide scheme for noise control and whether the ordinance is more stringent than the State's noise code, in accordance with the Noise Control Act. (excerpted from DEP's website regarding noise control, <http://www.nj.gov/dep/enforcement/noise-ord.pdf>).

Based upon the above, it is possible that the Township did not need to receive explicit approval from DEP. Although it appears that neither of the Township's noise ordinances conform to the Model Ordinance based on a comparison conducted by the SADC, such a determination should not be made by the SADC, but rather should be made by DEP, which has sole jurisdiction over such determinations. The transcript from the Monmouth CADB hearing reflects that a CADB staffperson spoke to a planning official in Colts Neck who advised her that the Township did not receive DEP approval for its noise ordinance. (Transcript of Proceedings, August 8, 2002, pp. 73-74). This conversation, however, is not conclusive of whether DEP approval was required.

The municipality's adoption of noise ordinances, whether valid or invalid, is nonetheless relevant to the question of whether the use of the liquid propane cannon presents a "direct threat to public health and safety," N.J.S.A. 4:1C-9, to the extent that the ordinances reflect a general municipal concern with noise. At the same time, however, the ordinances may not be entitled to the deference they would normally receive if they were validly adopted.

The SADC concludes that any issues raised by the attempt to adopt ordinances, regardless of their validity, were encompassed and adequately addressed by the CADB's and ALJ's consideration of the overall noise issue. It is also important to note that the Township did not submit its position despite receiving notice from the CADB about the matter. Therefore, we adopt the ALJ's finding that the CADB's decision properly considered the impact of the noise from the liquid propane cannon on the public health and safety, and imposed appropriate limitations on the use of the propane cannon.

It should also be noted that agricultural activities are exempt from the State's noise code. N.J.A.C. 7:29-1.4. The Monmouth CADB concluded that even if the municipal ordinance were valid, it could not apply to agricultural activities. The ALJ did not specifically address this issue. The SADC finds that it is possible that the Township's noise ordinances would not apply to Samaha's use of a liquid propane cannon even if the ordinances were validly adopted, but that such a determination should be made in the first instance by DEP.

CONCLUSION

The SADC rejects the ALJ's conclusions that the Right to Farm Act requires the SADC to adopt noise control rules and that the SADC has implicitly adopted noise standards. The SADC finds that a DEP noisemaking permit for the operation of liquid propane cannon is a condition for receiving the protections of the Right to Farm Act and does not constitute implicit rulemaking. This condition is set forth in the Commercial Vegetable Production agricultural management practice, as well as in the Right to Farm Act, which requires that an operation be in compliance with all relevant State laws to receive the protections of the Act. The SADC adopts the ALJ's finding that Samaha met this condition.

The SADC rejects the ALJ's conclusion that the Monmouth CADB was not required to give deference to the noise protection ordinances adopted by the Township without a DEP determination that approval of the ordinances was necessary. The SADC finds, however, that the ALJ properly considered the impact of the noise from the liquid propane cannon on the public health and safety, and imposed appropriate limitations on the use of the propane cannon.

The SADC adopts the remainder of the ALJ's findings with clarifications as set forth above, including his conclusion that Appellants failed to meet their burden of proving that the site-specific agricultural management practice issued by the Monmouth CADB should be reversed or modified in any way.

IT IS SO ORDERED.

Dated: _____

Charles M. Kuperus, Chairman
State Agriculture Development Committee

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