

December 17, 2004

Michael Beneduce
Great Swamp Greenhouse

Leonard Hamilton

Re: Conflict Resolution
Great Swamp Greenhouses
Gillette, Morris County
Aggrieved party: Leonard Hamilton

Dear Mr. Beneduce and Mr. Hamilton:

Enclosed please find a copy of the hearing report for the Great Swamp Greenhouses matter. At its December 16, 2004 meeting, the State Agriculture Development Committee (SADC) adopted this hearing report.

The SADC is forwarding the report to the Morris County Agriculture Development Board (CADB), pursuant to the Right to Farm Act, N.J.S.A. 4:1C-10.1c. The Morris CADB is required to hold a public hearing within 60 days of receipt of the SADC's decision.

If you have any questions, please contact me or David Kimmel, Right to Farm Program Specialist, at (609) 984-2504.

Sincerely,

Marci D. Green, Esq.
Chief of Legal Affairs

Encl.

c: Katherine Coyle, Morris CADB

State Agriculture Development Committee
Right to Farm Conflict Resolution

Hearing Report

Re: Great Swamp Greenhouses/Michael and Casey Beneduce
Long Hill Township, Morris County
Aggrieved Party: Leonard W. Hamilton

Date of Hearing: September 29, 2004

I. Background

Michael and Casey Beneduce own and operate a nursery/greenhouse business. The operation consists of three properties: 9.5 acres in Gillette (also referred to as Long Hill Township); 51 acres in Pittstown and additional rented property in Montvale. The parcels are operated as a single enterprise, Great Swamp Greenhouses (hereinafter referred to as “GSG”). (Exhibit 1).

The Long Hill Township property (hereinafter referred to as “the Property” or “the Farm”) is the subject of this matter. It consists of a one-acre greenhouse, gravel parking area, outdoor storage of nursery stock, a farm market, office space, employee parking, and a few small ponds on one side of the greenhouse. The Beneduce home is also located on this property. The property is directly adjacent to the Great Swamp National Wildlife Refuge. The Beneduces have certified that at least 51 percent of the sales area on the Property is devoted to the sale of products grown by GSG and that at least 51 percent of the gross sales of GSG is derived from products grown by GSG. (Exhibit 1).

The Morris County Agriculture Development Board (CADB) received a complaint from Leonard W. Hamilton on March 19, 2004, regarding Great Swamp Greenhouses operation on the Property. In his complaint, he stated that he lives “within close proximity” of the farm but that his property is buffered from the “commercial

activity” of the farm by a private residence and the Great Swamp National Wildlife Refuge. He stated that the complaint addresses “broader and potentially more damaging impacts” of the farm. The issues in the complaint focus on potable water supply, potable water quality, fire danger, community flood hazard, damage to public lands, incompatibility with public goals, and damage to local property values. (Exhibit 2).

The activities that are the subject of the complaint are not addressed by any agricultural management practices adopted by the State Agriculture Development Committee. Accordingly, the Morris CADB forwarded the complaint to the SADC for a public hearing pursuant to N.J.S.A. 4:1C-10.1c.* The SADC held a public hearing on September 29, 2004.

II. Threshold Eligibility Criteria

To receive the protections of the Right to Farm Act (Act), the farm must meet the definition of “commercial farm” set forth in the Act, must 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, or the commercial farm must have been in operation as of the effective date of the Right to Farm Act amendments (July 2, 1998).

The Property does not receive differential property assessment pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1, but the Pittstown property is assessed as farmland. Mr. Beneduce testified at the hearing that he has not applied for farmland assessment on the Property, because “economically, it does not make a difference” whether the farm is assessed as farmland. He testified that it would qualify for farmland assessment, as that tract alone produces more than \$500 worth of horticultural product. He submitted a written certification to this effect. (Exhibit 3).

* GSG has a site-specific agricultural practice recommendation request currently pending before the Morris CADB. In addition, another neighbor has filed a Right to Farm complaint against GSG with the Morris CADB, which addresses the same issues as the site-specific agricultural practice recommendation. The second complaint will be heard by the Morris CADB after it issues the site-specific recommendation.

In their Commercial Farm Certification, the Beneduces certified that Great Swamp Greenhouses produces greater than \$2,500 of horticultural product annually, and attached tax records to support this.

It appears that Great Swamp Greenhouses meets the definition of commercial farm in the Right to Farm Act. It is a farm management unit, as defined by the Act; produces agricultural or horticultural products worth \$2,500 or more annually; one component of the farm management unit receives farmland assessment; and the Property at issue which is a component of the farm management unit appears to satisfy the eligibility criteria for differential property taxation pursuant to the Farmland Assessment Act of 1964.

Great Swamp Greenhouses also meets the other threshold criterion, as the Property has been in operation since 1979.

II. Issues

The issues before the SADC are whether Great Swamp Greenhouses conforms with generally accepted agricultural operations or practices and whether the operation poses a direct threat to public health and safety.

III. Complaint

Mr. Hamilton lives a few lots from GSG. His complaint addressed seven issues:

A. Potable Water Supply

The complaint alleges that the greenhouse operation relies on well water for irrigation, drawing “huge quantities of water from the aquifer. . . endanger[ing] the health and welfare of [his] family.

B. Potable Water Quality

The complaint alleges that there are unknown chemicals on plants and trees that Great Swamp Greenhouses imports from vendors, and that GSG

adds pesticides and fertilizers to the plants. This, combined with aerial spraying for irrigation, “provides a direct route for pesticides, herbicides, and fertilizers to enter both the groundwater and local waterways.” The complaint states that GSG has no facilities for treating polluted runoff, and that the chemicals endanger the health and welfare of his family.

C. Fire Danger

The complaint alleges that GSG has “consistently refused to follow the recommendations of local fire departments to provide adequate firefighting capabilities.” It alleges that the “inadequate supply of water on the site, the presence of burning chemicals and fertilizers, and the crowded footprint of the greenhouses would thwart the best efforts of local firefighters,” endangering the health and welfare of his family.

D. Community Flood Hazard

The complaint alleges that: GSG has “essentially no stormwater management practices”; stormwater runoff from the site goes directly into local waterways “with no abatement of either the rate of runoff or the volume of runoff” contributing to the “severity of local flooding for residents in the immediate region” and the flooding of the Passaic River in the center of Long Hill Township, endangering the health and welfare of his family and members of the community.

E. Damage to Public Lands

The complaint alleges that the increased volume of stormwater contributed by the impervious surfaces on the farm, as well as the “likely presence” of

fertilizers, pesticides and herbicides, present risks to the Great Swamp National Wildlife Refuge and Wilderness Area, endangering the health and welfare of public lands.

F. Incompatibility with Public Goals

The complaint alleges that GSG's attempts to expand their operation directly conflict with the "public goals" of the region, noting that the last three Master Plans of Long Hill Township "have used increasingly strong language to protect, preserve, and expand open space within the Great Swamp."

G. Damage to Local Property Values

The complaint alleges that property values of local residents are reduced "by their proximity to a commercial operation" and that the "continuing presence and expansion of a commercial operation in this zone endangers the welfare of my family and the community."

IV. Summary of Relevant Facts

A hearing was held at the State Agriculture Development Committee on September 29, 2004. The following people attended:

Daniel Somers, Esq., on behalf of Complainant Leonard Hamilton
Julia Somers, Great Swamp Watershed Association
John A. Thonet, private engineer on behalf of Complainant Leonard Hamilton
Kevin Sluka, Administrator of Township of Long Hill
Dennis M. Hado, neighbor of Great Swamp Greenhouses
Michael Beneduce, Great Swamp Greenhouses
Casey Beneduce, Great Swamp Greenhouses

Two County Agricultural Agents from Rutgers Cooperative Extension, Peter Nitzsche and Pedro Perdomo (hereinafter "County Agents"), visited the farm on July 8,

2004, and submitted a report dated July 29, 2004. (Exhibit 4). A.J. Both, Ph.D., an Assistant Extension Specialist, also visited the farm and submitted a report dated July 19, 2004. (Exhibit 5). Jake Woland, Assistant Professor at the Department of Landscape Architecture, Cook College, Rutgers University, submitted an e-mail with his opinion regarding the stormwater management practices on the farm. (Exhibit 6).

A. Background

The Beneduces purchased 4.3 acres of the Property in 1979 for a wholesale nursery and greenhouse operation. During the next 24 years, GSG expanded the operation into a wholesale and retail operation, and expanded the Property to a 9.54-acre tract. The Township of Long Hill Zoning Planning Board granted use approvals to GSG in 1979, 1982, 1986 and 1988. The Zoning Board of Adjustment granted approval for an expansion of the use in 1996.

In 1991, the farm was rezoned from an R-1 zone to a conservation zone. The zoning ordinance excluded greenhouses and nurseries, but expressly permitted those greenhouses and nurseries in operation as of the date of the zoning change. The Township of Long Hill granted a use variance to GSG to enlarge and expand its usage in 1995.

In 1996, GSG also expanded the size of the property from 4.3 to 9.5 acres. This expansion in the overall size of the property supposedly addressed the Township's concerns regarding impervious coverage limitations, as the increase in size of the property resulted in no net increase in impervious cover when GSG added a sales area to the property.

In December 2003, the Township of Long Hill Zoning Board of Adjustment adopted a resolution (hereinafter “the 2003 Zoning Board Resolution”) denying an application filed by GSG for variances, preliminary and final site approval, and a development permit under the Township Flood Damage Prevention Ordinance. (Exhibit 7). GSG did not appeal the Board’s decision and did not implement the changes to the Property that it sought in the 2003 variance application.

B. Potable Water Supply

Mr. Beneduce testified, and the County Agents stated in their report, that Mr. Beneduce has one private well with a 60 gallon-per-minute pump. According to the County Agents, the pump capacity is below what is required by the New Jersey Department of Environmental Protection (DEP) for agricultural water certification. In fact, his water usage does not exceed the capacity allowed for classification as a residential well (i.e., less than 70 gallons per minute). They concluded that GSG’s water use is a generally accepted practice for a greenhouse operation. (Exhibit 4).

Neither the complainant nor anyone who attended the hearing presented testimony or evidence of actual problems with water supply.

C. Potable Water Quality

The complaint alleges that GSG’s use of pesticides, fertilizers and chemicals degrade the potable water quality. Mr. Beneduce and three of his employees have pesticide licenses issued by DEP. (Exhibit 8). He testified that he applies pest management materials according to Rutgers Cooperative Extension recommendations. He uses an ultra low volume sprayer for pesticide application and that this sprayer technology utilizes very small amounts of water, reducing the potential for pesticide

runoff. According to Mr. Beneduce, the sprayer applies the pesticide mixture at night once the greenhouse has been completely closed and then the greenhouse is ventilated the next morning. The sprayer and farm inputs are located in a back room in accordance with DEP requirements. The only spraying done outdoors is an annual fungicide.

The County Agents stated that Mr. Beneduce is following generally accepted practices for pesticide application. SADC staff contacted DEP, Bureau of Pesticide Control, which confirmed that there are no outstanding violations of the pesticide licenses.

With respect to fertilizer use, the County Agents stated in their report that Mr. Beneduce follows the fertilizer recommendations of Rutgers Cooperative Extension. (Exhibit 4). The County Agents also concluded that he is applying fertilizer according to generally accepted practices. (Exhibit 4).

Neither the complainant nor anyone who attended the hearing presented evidence of water quality problems in the area, or allegations that Mr. Beneduce was improperly applying pesticides, fertilizers or chemicals.

D. Fire Safety

Mr. Beneduce presented a certificate of inspection from the Township of Long Hill Fire Prevention Bureau stating that the Property is in compliance with the New Jersey Uniform Fire Code. (Exhibit 9). He testified that although the Township issued this certificate, it requested GSG to install a pipe to connect the Property to public water. The Township wanted him to bear the full expense of this installation, which Mr. Beneduce testified would be at least \$200,000. Mr. Beneduce noted that most farms are in rural areas and are not connected to public water.

The County Agents noted that Mr. Beneduce is required to follow DEP regulations regarding the storage of pesticides and reporting of that storage to the local fire department. There have been no allegations from either the fire department or DEP that Mr. Beneduce has not been complying with these regulations.

In the 2003 Zoning Board Resolution, the Zoning Board found that there is no adequate or assured means of fighting a fire that might erupt on the property, based on a written statement provided by the Township Fire Chief.

E. Community Flood Hazard (Stormwater Runoff)

With respect to stormwater runoff, Mr. Beneduce testified that he has implemented the requirements of Long Hill Township's approvals with respect to stormwater runoff, including construction of a drainage basin. He noted that he also has a French drain off the roof of the greenhouse and that the greenhouse is gutter-connected. The greenhouse is constructed with an unlined, porous floor, so that excess water from watering the greenhouse plants goes into the ground. When he waters the outdoor nursery stock, he claims that the water goes into the ground and not off the property. Mr. Beneduce stated that water on the gravel parking lot drains into one of the farm's small ponds.

Mr. Beneduce stated that the farm also has an underground perforated pipe that serves as a stormwater management device. When it rains, water runs off of the greenhouse roof and collects in the pipe, which disperses the water through its perforations as well as through the end of the pipe, which discharges to the rear of the property. The Township had required installation of the pipe when it approved the construction of the greenhouse. Mr. Beneduce does not have a farm conservation plan.

The County Agents concluded that Mr. Beneduce's stormwater management is a generally accepted practice. (Exhibit 4). Jake Woland, Assistant Professor in the Department of Landscape Architecture at Cook College, also visited the property and stated that the stormwater management on the site is operating "in a generally accepted manner similar to other nursery operations I have seen within the state." (Exhibit 6).

Mr. Both, an assistant extension specialist who specializes in "controlled environment agriculture" and is a greenhouse engineering expert, stated in his report that runoff from the greenhouse and attached buildings is collected in a generally accepted and appropriate drainage system. (Exhibit 5).

John A. Thonet, a self-employed engineer, testified on behalf of the complainant. Mr. Thonet testified that the stormwater runoff from GSG is not de minimus, but did not produce any evidence to support this position. He stated that flooding has increased in the area over the years, affecting residential properties, and that proper installation of a stormwater management facility could contribute to lessening of flooding in area. Upon questioning, however, Mr. Thonet stated that the Township has approved other development in the area, and admitted that this development could also be contributing to area flooding.

Although Mr. Thonet was not testifying on behalf of Long Hill Township, much of his testimony addressed the Township's zoning regulations and actions with respect to GSG. He submitted Testimony Notes in which he outlines GSG's history of approvals from Long Hill Township. (Exhibit 10). He took issue with the potential characterization of GSG as a commercial farm, asserting that GSG is a "major commercial retail facility bearing little resemblance to a farm."

Mr. Thonet also took issue with GSG's implementation of the approvals granted by the Township, representations made by GSG on its applications, and the granting of approvals over the year by Long Hill Township to GSG.

Mr. Thonet testified that the property was rezoned to a conservation zone to maintain the Township's rural characteristic and preserve natural resources. He stated that most farming is compatible with the conservation zone goals, but the zone now specifically prohibits greenhouses because they are "impervious coverage intensive."

Mr. Thonet testified that the Township has repeatedly granted approvals to GSG; that there is no one project that causes the problem; that the stormwater runoff problems are caused by an accumulation of GSG's projects; and that he wants GSG to "get on board" with the Township's ordinances that state that there should be no net increase in stormwater runoff.

In the 2003 Zoning Board Resolution denying GSG's application for variances, etc., the Zoning Board stated that the site "lacks any stormwater management plan, such as would control the rate of runoff into the nearby National Wildlife Refuge." It is unclear, however, whether this statement refers to GSG's proposed expansion plans that were the subject of the resolution, or to the site as it currently exists. The resolution contains a summary of testimony from GSG's engineer, who stated that although runoff from the property takes several distinct routes, all of the water eventually drains into the Great Swamp watershed. This does not establish, however, that the runoff produces flooding in the Great Swamp watershed. A Watershed Biologist with the United States Fish and Wildlife Service also testified at the Zoning Board hearing, and he stated that

GSG's proposal "could produce an increase in impacts from stormwater runoff to the surrounding wetlands."

E. Damage to Public Lands

Mr. Hamilton asserted that the increased volume of stormwater "contributed by the impervious surfaces" of GSG and the "likely presence of fertilizers, pesticides, and herbicides present clear and present risks to both the habitat and health of the many threatened and endangered species" in the Great Swamp National Wildlife Refuge. No evidence was presented to substantiate these claims.

F. Incompatibility with Public Goals

Mr. Hamilton asserted that GSG is in direct conflict with the public goals for the region, citing the last three master plans adopted by Long Hill Township, which "have used increasingly strong language to "protect, preserve, and expand open space within the Great Swamp." Mr. Hamilton alleges that the "continuing expansion of a large commercial operation in a conservation and residential area interferes with the public good."

There was no testimony from local officials to substantiate this claim, nor is this issue a nuisance claim for which the Right to Farm Act could protect GSG.

G. Damage To Local Property Values

Mr. Hamilton asserts in his complaint that property values of local residents are reduced by their proximity to a commercial operation. No evidence was presented at the hearing to substantiate this claim, nor is this issue a nuisance claim for which the Right to Farm Act could protect GSG.

V. Township's Position

The Township has not taken a position on any of the issues set forth in the complaint. The Township Administrator, Kevin Sluka, attended the hearing, but stated that he was not in a position to comment on the Township's position on the issues. Mr. Sluka stated that the Township had issued summonses against GSG, but withdrew them, and has not filed a complaint with the Morris CADB pursuant to the Right to Farm Act.

In May 2003, a private land use planning and transportation consulting firm sent a memorandum to an attorney for Long Hill Township, listing 11 items for which he believed variances were required. (Exhibit 11). It does not appear that the Township took any formal action against GSG with respect to the memo. Aside from #3, "Development or waiver for 100 year flood zone", which could relate to stormwater management, the issues listed in this memo are not related to the items listed in Mr. Hamilton's complaint. Some of the issues are the subject of the site-specific agricultural practice recommendation currently being considered by the Morris CADB.

VI. **Factual and Legal Analysis**

To receive the protections of the Right to Farm Act, GSG must be in compliance with generally accepted agriculture practices and relevant State and federal law. Further, the operation cannot pose a direct threat to public health and safety. N.J.S.A. 4:1C-9.

The New Jersey Supreme Court recognized that the Right to Farm Act may preempt municipal regulations, but directed CADBs and the SADC to consider relevant municipal standards and the impact of the agricultural activity on public health and safety "and temper their determinations with these standards in mind." Township of Franklin v. den Hollander, 338 N.J. Super. 373 (App. Div. 2001), aff'd. 172 N.J. 147, 151-152 (2002).

It appears that with respect to the issues set forth in the complaint, GSG's operation conforms with generally accepted practices for greenhouse nursery operations

and is in compliance with relevant State laws. Although there are allegations that GSG poses a threat to public health and safety, Mr. Hamilton did not produce any evidence to establish direct threats to public health and safety regarding water supply, water quality and stormwater runoff. None of the testimony or evidence presented on Mr. Hamilton's behalf established depletion of water supply or degradation of water quality.

With regard to stormwater runoff, the witnesses who testified on behalf of Mr. Hamilton did not establish that GSG was the cause of flooding in the area or to the Great Swamp National Wildlife Refuge or that GSG failed to adequately control stormwater runoff.

Although the 2003 Zoning Board Resolution states that the site lacks a stormwater management plan, it is unclear whether this conclusion refers to GSG's proposals or the current site. Further, the resolution does not contain findings that GSG's current usage produces flooding in the area. Although GSG's engineer testified that water from the property drains into the Great Swamp watershed, the resolution does not conclude that this water causes flooding in the watershed. Although a watershed biologist with the United States Fish and Wildlife Service testified that GSG's 2003 proposal could produce an increase in runoff to surrounding wetlands, there was nothing in the resolution stating that the current usage produces a great amount of runoff or causes flooding.

On the other hand, GSG presented evidence of stormwater runoff facilities and devices and the SADC received expert opinion that GSG's stormwater runoff management is a generally accepted practice.

Although the Township requested GSG to install a pipe to connect to public water and the Township Fire Chief expressed concern about fire safety before the Zoning Board in 2003, the Township nevertheless found in May 2004 that GSG is in compliance with the New Jersey Uniform Fire Code.

Absent evidence that GSG's operation poses a direct threat to public health and safety, Mr. Hamilton's allegation that the use of the property is not compatible with

public goals is not a Right to Farm issue. His allegation that the operation could reduce property values of nearby residents is likewise not relevant to whether GSG is entitled to the protections of the Right to Farm Act.

It appears that Mr. Hamilton and his witnesses do not agree with the approvals granted to GSG by the Township over the years, and that they believe the operation is not compatible with current zoning requirements. This is not sufficient, however, to establish that GSG is not entitled to the protections of the Right to Farm Act. The Township has demonstrated a long history of granting approvals to GSG and neither Mr. Hamilton, his witnesses, nor the Township, can retract approvals that the Township already granted. If the Township believes that GSG is not complying with the approvals it granted, it can always seek to enforce those conditions, but the issues currently before the SADC are limited to those set forth in Mr. Hamilton's complaint.

Although the Township has chosen not to take any action against GSG, the den Hollander decision can be interpreted to require the SADC to obtain the Township's input on whether the GSG operation poses a direct threat to public health and safety. The Township chose not to provide an official position on the issues currently before the SADC, however, as demonstrated by its decision not to participate in the hearing despite the presence of its Administrator.

VII. Conclusions

GSG meets the definition of "commercial farm" in the Right to Farm Act; conforms with generally accepted agricultural practices; and is not in violation of relevant State or federal laws. Lastly, there was no substantive evidence presented to establish that GSG poses a direct threat to public health and safety.

Date:

Marci D. Green
Public Hearing Officer
State Agriculture Development Committee