

January 25, 2007

Sandra DeSarno Hlatky, Deputy Clerk
Office of Administrative Law
9 Quakerbridge Plaza
PO Box 049
Trenton, NJ 08625-0049

Re: In the Matter of Barbara Hertz vs. Morris County Agriculture Development
Board
SADC No. 699
OAL Docket No. ADC 07672-06

Dear Ms. Hlatky:

Enclosed please find a final decision in the above-captioned matter. The State Agriculture Development Committee (SADC) issued this decision at its January 25, 2006 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

IN THE MATTER OF BARBARA HERTZ

vs.

MORRIS COUNTY AGRICULTURE
DEVELOPMENT BOARD

STATE OF NEW JERSEY

OAL DKT. NO. ADC 07672-06

SADC DKT. NO. SADC ID# 699

FINAL DECISION

This matter arises from an appeal of a decision by the Morris County Agriculture Development Board (CADB), finding that Barbara Hertz's operation fails to meet the definition of "commercial farm" in the Right to Farm Act (Act), N.J.S.A. 4:1C-3.

PROCEDURAL BACKGROUND

In May 2006, the Borough of Lincoln Park (Borough) filed a complaint against Barbara Hertz with the Morris CADB pursuant to the Right to Farm Act, N.J.S.A. 4:1C-10.1. The complaint alleged that the placement of "litter, refuse and rubbish" on Ms. Hertz's property violated the Borough's zoning ordinances. Ms. Hertz simultaneously applied to the CADB for a site-specific agricultural management practice (AMP) recommendation pursuant to N.J.A.C. 2:76-2.3. She sought a determination that her use of the alleged debris -- jugs and buckets -- was for irrigation purposes and constitutes a generally accepted agricultural practice. Ms. Hertz also sought a recommendation from the CADB that her planting of specific crops is a generally accepted practice.

The CADB combined the Borough's complaint and Ms. Hertz's site-specific AMP request into a single matter. It found that Ms. Hertz's operation did not meet the definition of "commercial farm" in the Right to Farm Act, N.J.S.A. 4:1C-3, and hence, could not preempt the Borough's ordinances. Specifically, the CADB found that Ms. Hertz failed to demonstrate that she produced agricultural or horticultural products worth \$2,500 or more annually.

Ms. Hertz appealed this determination to the State Agriculture Development Committee (SADC) by letter dated June 21, 2006, pursuant to N.J.S.A. 4:1C-10.2. The SADC transmitted the matter to the Office of Administrative Law (OAL) pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

Administrative Law Judge Imre Karaszegi, Jr., held a hearing on October 23, 2006. He issued an Initial Decision on November 28, 2006, affirming the CADB's decision that Ms. Hertz's operation did not meet the Act's definition of commercial farm. The decision was mailed to the parties on December 5, 2006.

Ms. Hertz filed exceptions and a motion to re-open the hearing with the SADC on December 15, 2006. The County of Morris submitted a reply to the motion on December 22, 2006 requesting that the motion be dismissed.

STATEMENT OF RELEVANT FACTS

Ms. Hertz is the owner/operator of Joy B Berry Bush Farm (hereinafter "Property"), located on a 15-acre parcel in the Borough of Lincoln Park. According to the certification she filed with the CADB, Ms. Hertz produces tree fruit, bush berry fruit, maple syrup, garlic and herbs, honey and beeswax. She also asserts that she operates

a community supported agriculture (CSA) operation through which she sells maple syrup, tree fruits and berries, garlic and herbs. She sells the honey separately.

Ms. Hertz submitted farmland assessment forms for years 1997 through 2007. No evidence was introduced to suggest that the Township denied these applications.

Ms. Hertz submitted federal tax form Schedule C-EZ for Form 1040, entitled "Net Profit from Business (Sole Proprietorship)," for tax years 2003, 2004 and 2005 for Joy B Berry Bush Farm. The ALJ did not admit the 2003 and 2004 forms into evidence. The 2005 form shows gross receipts in the amount of \$2,750. She also submitted a handwritten income and expense summary for 2005, as well as invoices for "farm-related purchases" and beekeeping supplies, all of which the ALJ did not admit into evidence.

EXCEPTIONS

Ms. Hertz filed exceptions with the SADC, as well as a motion to re-open the hearing. According to the exceptions, Ms. Hertz sought to obtain a transcript of the CADB's June 8, 2006 proceedings because she believed the minutes from that meeting were not an accurate representation of the proceedings. According to the exceptions, the ALJ denied Ms. Hertz's request for an adjournment to obtain a transcript and also denied her request to admit the audio recording of the CADB hearing into evidence. Ms. Hertz contests these denials and the ALJ's refusal to admit the following documents into evidence:

- federal tax forms for 2003 and 2004
- income and business expense summaries for 2003 and 2004
- request for transcript

- transcriber's letter stating that Ms. Hertz's statements were inaudible and could not be transcribed
- October 6, 2006 letter to Morristown Municipal Court requesting adjournment of October 17, 2006 hearing
- IRS Employer Identification Number
- Morris County Soil Conservation District recommendations
- letter from Morris County Mosquito Extermination Commission regarding destruction of beehives
- renewal of beehive registration documentation from New Jersey Department of Environmental Protection
- income and expense summaries and invoices from 2005

Ms. Hertz asserts that these documents are relevant and that the ALJ had no basis to exclude them from the record.

In response to the ALJ's finding that Ms. Hertz failed to produce evidence of CSA shares, Ms. Hertz stated that "the share applicant's document is never signed" and therefore she can't produced signed copies. She went on to explain that "[t]he only signing is my own, in a share-offer letter. Payment alone binds a 'CSA share.' There have never existed any 'actual, signed contracts.'"

In her exceptions, Ms. Hertz also includes a request to reopen the hearing for the purpose of including the exhibits that the ALJ did not admit into evidence.

LEGAL ANALYSIS

The Right to Farm Act may preempt municipal land use authority over commercial farms if the farm meets certain eligibility criteria set forth in the Act.

Township of Franklin v. den Hollander, 338 N.J. Super. 373 (App. Div. 2001), aff'd. 172

N.J. 147 (2002). First, the operation must meet the definition of “commercial farm” set forth in N.J.S.A. 4:1C-3.

The definition of commercial farm states that if a parcel of land producing agricultural products is greater than five acres, the farm must produce agricultural products worth at least \$2,500 annually and be eligible for farmland assessment.

N.J.S.A. 4:1C-3.

ALJ Karaszegi examined whether the Property met the production requirements contained in the definition of commercial farm and found that Ms. Hertz did not demonstrate that she met the \$2,500 threshold. The SADC agrees with this conclusion, as the documents submitted by Ms. Hertz do not sufficiently demonstrate \$2,500 of production.

The SADC finds that in determining whether a farmer meets the production requirements of the Act, it is reasonable to examine the tax year immediately prior to the year in which the right-to-farm matter was filed.* To support her claim that she met the production requirements, Ms. Hertz submitted the Schedule C-EZ that she submitted to the Internal Revenue Service with her 2005 federal tax return. She also submitted her farmland assessment form, a series of receipts for business expenses, and a handwritten accounting of sales of honey and community-supported agriculture (CSA) shares.

* In situations where agriculture is not a permitted use under the municipal zoning ordinance or consistent with the municipal master plan, the Right to Farm Act requires a commercial farm to have been in operation on the effective date of the 1998 amendments to the Act. N.J.S.A. 4:1C-9. Thus, in some circumstances, the SADC is required to determine whether an operation met the definition of commercial farm in 1998. See, In re Tavlario, 386 N.J. Super. 435. In this matter, no issue has been raised as to whether agriculture is a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan. The Borough of Lincoln Park did not assert that agriculture is not a permitted use in its right-to-farm complaint, nor did the Morris County Agriculture Development Board raise this as an issue in its decision. Accordingly, we limit our examination to agricultural production in 2005.

The SADC notes that the federal tax form submitted by Ms. Hertz is not the schedule required by the Internal Revenue Service to report farm income. The United States Individual Income Tax Return, Form 1040, contains a line to report farm income or loss, with a requirement to attach Schedule F to support the amount entered. Schedule F for Form 1040 is entitled “Profit or Loss From Farming” and is specifically tailored to farmers. It requires specific information about the type of farm income being reported.

Schedule C or C-EZ, on the other hand, is required to support the amount entered under “business income or loss” on the federal income tax return, Form 1040. It does not contain any specific information about the type of business income earned.

Although federal tax forms can be used to support a landowner’s claim that he or she meets the production requirements of the Act, they may not be sufficient without additional documentation. The SADC finds that if a farmer in a right-to-farm matter has not filed a Schedule F, he or she must produce contemporaneous evidence to show that his or her income is indeed from the sale of agricultural or horticultural products.

The fact that Ms. Hertz did not file a Schedule F with the IRS begs the question of whether she operates a commercial farm business. Although Ms. Hertz’s failure to submit a Schedule F is not conclusive evidence that she did not produce \$2,500 of agricultural or horticultural products, the SADC finds that she did not submit adequate additional evidence to support her claim that she met the Act’s definition of “commercial farm.”

The farmland assessment form, expenditure receipts and handwritten notes stating how much income she received from honey sales and CSA shares do not

establish that Ms. Hertz produced \$2,500 of agricultural or horticultural products. The farmland assessment form merely shows how much acreage is devoted to production. On its own, this could never establish the \$2,500 production requirement, as the minimum amount of gross income required to receive differential property assessment under the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 et seq., is only \$500. Some municipal tax assessors require a landowner to submit a supplemental farmland assessment form to provide additional information regarding farm income. It is not clear whether the Borough of Lincoln Park requires such a supplemental form, but one was not provided by Ms. Hertz.

The business expenditure receipts clearly show that Ms. Hertz purchased beekeeping-related products such as bees, jars, labels, a helmet, and other products. These invoices, however, do not establish sales of any agricultural products.

The handwritten notes stating her income from honey and CSA shares are not sufficient to establish the sales of such products. As the CADB testified at the hearing at the Office of Administrative Law, copies of contracts or receipts could have sufficiently corroborated the income listed on her tax forms.

The New Jersey Superior Court, Appellate Division, recently held that requiring “clear evidence of actual or future receipt of income from agricultural production” is a reasonable interpretation of the Act’s definition of “commercial farm.” In re Tavalario, 386, N.J. Super. 435, 444 (App. Div. 2006).

The court also recognized the importance of limiting the protections of the Right to Farm Act to commercial operations by finding

. . . it reasonable for the SADC, in balancing an owner’s right to farm against other interests, to construe the production

requirements of the Right to Farm Act narrowly so as to encompass agricultural production . . . and to limit its scope to agricultural production that is commercial in nature. Ibid.

The SADC finds that Ms. Hertz has failed to establish that she operates a commercial farm as she did not provide clear evidence of income from agricultural production.

ALJ Karaszegi concluded that without “copies of actual, signed contracts evidencing her claim that she has community supported agricultures shares,” he could not find that Ms. Hertz substantiated her income assertion. While we agree with this conclusion, we note that Ms. Hertz also failed to produce receipts for the sale of honey to corroborate her income assertions.

Regarding Ms. Hertz’s claim that the ALJ improperly excluded evidence from the record, we conclude that the excluded documents do not establish that Ms. Hertz met the \$2,500 production threshold in 2005. The only excluded document that could be deemed relevant is Petitioner’s exhibit, P-40, a hand-written page entitled “2005 Income from Farm Production,” which purports to show Ms. Hertz’s income from the sale of CSA shares and honey. As explained above, the SADC finds this does not sufficiently demonstrate receipt of income without evidence to substantiate the figures written on the sheet.

We also find that the audio recording from the CADB hearing, which Ms. Hertz asserts ALJ Karaszegi would not admit into evidence, would not substantiate her claim that she meets the definition of commercial farm. Ms. Hertz was presented with a new opportunity to present evidence at the hearing before ALJ Karaszegi, but failed to produce adequate proof that she meets the production requirements of the Act.

The SADC also finds that the exceptions do not set forth any new argument or fact to substantiate her claim that she meets the definition of commercial farm.

The SADC denies Ms. Hertz's motion to reopen the hearing because none of the excluded documents establish that Ms. Hertz met the definition of commercial farm.

CONCLUSION

For the reasons set forth above, the SADC adopts ALJ Karaszegi's Initial Decision in this matter.

IT IS SO ORDERED.

Dated: _____

Monique Purcell, Acting Chairperson
State Agriculture Development Committee

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