

**RESOLUTION OF THE GLOUCESTER COUNTY
AGRICULTURE DEVELOPMENT BOARD**

**RE: DECISION ON THE “RIGHT TO FARM” HEARING ON THE
MATTER OF U.S HOME CORPORATION D/B/A/ LENNAR VS. GATTUSO
ESTATES, LLC/ MARINO BROTHERS, BLOCK 18, LOT 3, AND
BLOCK 19, LOT 2, SOUTH HARRISON TOWNSHIP, GLOUCESTER
COUNTY, NEW JERSEY**

WHEREAS, pursuant to the Right to Farm Act, N.J.S.A. 4:1C-10.1 and the State Agriculture Development Committee regulations, N.J.A.C. 2:76-2.3, any person aggrieved by the operation of a commercial farm shall file a complaint with the applicable County Agriculture Development Board prior to filing an action in court; and

WHEREAS, by letter dated August 30, 2007, the attorney for the Applicant/Complainant questions whether the Respondent’s farm meets the definition of a “commercial farm” as stated in N.J.S.A. 4:1C-3 of the Right-to-Farm Act, whether the agricultural operations or practices are accepted pursuant to N.J.S.A.4:1C-9, 10 of the Right-to-Farm Act and whether the farming practices constitute a public or private nuisance; and

WHEREAS, at the Board’s September 11, 2008, regular meeting, proper notice having been given in compliance with the Open Public Meetings Act, a quorum of the Board being present, and Acting Chairman George Dean officiating (Chairman Russell Marino, Sr., Jay Kandle and Mike Visalli did not sit with the Board or participate as a Board member due to their conflicts of interest), the Board conducted a public hearing on the application/complainant; and

WHEREAS, the Applicant/Complainant was represented at the hearing by Katherine Morris, Esq.; and

WHEREAS, the Board heard the opening remarks of Katherine Morris, attorney for U.S. Home Corporation D/B/A/ Lennar, who argued:

1. The “Right-to-Farm” Act should not be applicable as a protective measure for Gattuso Estates, LLC/Marino Brothers (the respondent).
2. The activities of the respondent pose a direct threat to the public’s health and safety.
3. The respondent was not conducting their agriculture operations in a responsible matter.
4. The operations have resulted in a public and private nuisance.

5. Water run off from the respondent's farm has invaded and interfered with the use and enjoyment of the land owned by the applicant.
6. An investigation by the applicant indicated that the respondent had planted their pepper crop in rows perpendicular to the applicant's property.
7. The applicant contacted Mr. Anthony Gattuso, the owner of the respondent's property, and inquired if the applicant could "come in and do some work at [their] own cost" along the roadway between the properties and alleviate the water run off problem. Mr. Gattuso denied the request; he did not want any alterations to his property.
8. The following year, the peppers were planted in the same manner and the applicant had two more flooding situations.
9. Nothing had changed on the respondent's farm including what was planted and the manner in which the rows are placed.
10. No expert testimony regarding agriculture would be provided in support of the complaint.

WHEREAS, the Board heard the sworn testimony of Mr. Anthony Migone, Vice-President for the applicant who stated:

1. He has been an employee for the applicant for seven years; he has a Bachelor's and Master's Degree in Civil Engineering.
2. The problem regarding the respondent's farm first occurred in July 2006.
3. The retention basins in the center of the applicant's property began to overflow.
4. An investigation revealed the applicant's property was "being invaded by a tremendous amount of flood water from the farm behind us" (the respondent's property).
5. The flooding was so intense, it started to erode away Route 45 and cause damage to a home across the street.
6. The applicant hired a surveyor, and the topography indicated that the flood water was entering the applicant's property from the low point of the respondent's property; the perpendicular rows directed the water onto the applicant's property.
7. There was a berm between the properties that had been eroded by flood waters which originated from the respondent's property.

8. The applicant built diversionary swales on their property, but heavy rains still caused the applicant's property to flood.
9. The applicant sustained damage due to the clean up after each flooding, including road erosion, flood of the basins and the flooding on the property of the homeowner across the street.
10. The applicant is cooperating with Gloucester County Soil Conservation District (GCSCD) to remediate the problem.
11. The applicant has been cited by the GCSCD for numerous violations for erosion and has made all required repairs.
12. He believed the violations were for defects in stabilization of the site caused by flooding.
13. The central retention area was basically in the center of Block 19, Lot 3 close to Route 45 and it flows under Route 45 into a creek area.
14. There is an existing pipe that is used for the drainage from the applicant's property.
15. There is a culvert in the central retention area that regulated the water flow into the drainage pipe to ensure that it was the same now as it was before the development was constructed.
16. Based on his observations, every one of the flooding events occurred when the respondent's farm had covered the crops with plastic.
17. The project of installing the pipe behind the vacant house next to Mr. Small was to be started on or about September 22, 2008. The pipe would drain into a retention basin that will be constructed on Block 28, Lot 6 and then discharged into the creek.

WHEREAS, the Board heard the sworn testimony of Michael Small, a homeowner on the applicant's property, who stated:

1. He could not drive up the road to enter his property due to the standing water in the street.
2. Water had recently come into his basement, but he could not determine its origins.
3. His property is the second closest home to the lowest point between Block 19, Lot 2 and Block 19, Lot 3, where the water drains from the respondent's farm.

4. He was advised of some flooding problems before purchasing his home, but was told the issues were being “addressed”.
5. He was informed that a pipe was going to be put behind the vacant home next to his, which would connect to a new drainage area down the street.

WHEREAS, the Board heard the sworn testimony of Russell Marino, a partner of Marino Brothers (the respondent), who stated:

1. His family has been farming the property for 30+ years and grows all of their vegetables with drip irrigation under plastic with high raised beds.
2. His crops are rotated and the area of the respondent’s farm in question is not in pepper production year-after-year.
3. Watersheds flow from a number of other farms onto his property, and he has always planted his crops in a direction to avoid run off damage.
4. Damaged peppers are left in the field to naturally decompose; a 7 inch rainfall washed the laying peppers onto the applicant’s property. In the past, there was a hedgerow between the properties that prevented the crops from washing onto the applicant’s property. These hedgerows have gradually been removed leaving no buffer.
5. He has been familiar with the respondent’s and the applicant’s property for decades and that the water has always flowed from the lowest spot on the respondent’s property across the center of the applicant’s property to the creek across Route 45.
6. The drainage pipe under Route 45 is not sufficient to handle the current water flow and when heavy rains occur “it comes out like a hydrant”. The pipe has been there for years which meant “some engineer way back knew that this watershed went that way naturally”.
7. The property across Route 45 has never received damage until the “new” development was constructed.
8. He felt he was adhering to natural farm practices and that if a significant snow storm came this winter or heavy rains come in the spring the applicant’s property was going to receive more water since “water has to go downhill, it can’t go uphill”.
9. The applicant built a development in the “lowest hole” and felt there should not have been any houses constructed in that area.

WHEREAS, the Board heard the testimony of Joseph Marino, a partner of Marino Brothers (the respondent), who stated:

1. The only thing that has changed in the area of the properties is the construction of the development; the direction of the rows for the crops has not changed.
2. The applicant's property used to be a nursery and that if you were to stand in the "center of the development and pan around, everything is higher elevation than the property itself". The area to the southeast of the properties gets lower.
3. The water that flowed onto the applicant's property used to be distributed through the natural flow ways on the nursery that use to be there.
4. The only difference now are the new homes and that the poor engineering of the development cannot handle the water flow that has "been diverted naturally from the property since the beginning of time".
5. He is farming by employing an approved agricultural practice and that he doesn't want to be seen as a nuisance by his new neighbors.
6. Since the applicant has constructed their drainage swale, he has lost approximately 60-80 feet of his farming land due to water coming onto the respondent's property.
7. Dan Brown from the GCSCD visited the respondent's property and stated to him that the farming practices were compliant and not the cause of the problem.

WHEREAS, the Board received the following exhibits into evidence:

1. Applicant's **Exhibit A** (aerial photos showing Complainant's property, Respondent's property and other area properties).
2. Applicant's **Exhibit B** (photos showing various areas where the flooding occurred and the peppers that accompanied the water that flooded the Complainant's property).
3. Applicant's **Exhibit C** (photos showing roadway flooding).
4. Applicant's **Exhibit D** (photos showing the pepper rows).
5. Applicant's **Exhibit E** (photos showing property flooding).
6. Respondent's **Exhibit M-1** 1996 aerial photo showing various changes in the area.

7. Respondent's **Exhibit M-2** 2002 aerial photo showing various changes in the area.
8. Respondent's **Exhibit M-3** 2006 aerial photo showing various changes in the area.
9. Respondent's **Exhibit M-4** topographical map showing various elevations of the area.

WHEREAS, the Board heard the sworn testimony of Victor DeVasto, District Manager, GCSCD, who stated:

1. Neither He nor Mr. Birchler are versed in agricultural practices.
2. The GCSCD did not prepare the topographical map (Exhibit M-4); it was prepared by the Natural Resource Conservation Services.
3. Dan Brown is an agricultural agent with GCSCD.

WHEREAS, the Board heard the sworn testimony of Wayne Birchler of GCSCD, who stated:

1. The applicant's development was at the lowest point considering where the natural water ways drained across it.
2. He is familiar with the topography of the area surrounding the applicant's development.
3. The existing culvert is at the lowest point of the property of the applicant's development and surrounding areas.
4. Based on the respondent's topographical map (Exhibit M-4), the highest point of Block 19, Lot 2 (the respondent's property) is approximately 60 feet higher than the lowest point of Block 19, Lot 3 (the applicant's property), but that estimate was not based on an actual survey.
5. It appears that water from other properties in the area also drained onto the applicant's property.
6. The GCSCD citations were not fines, but non-compliance fees for dirt in the road, lack of silt fence and erosion on site.
7. The new drainage pipe that was to be installed will handle the problem.
8. The GCSCD can only deal with soil and erosion control and not flooding; that issues rests with the Township.

WHEREAS, the Board has considered the complaint, testimony and all exhibits presented by the Complainant, all exhibits, and the arguments and objections presented by the Respondent, and makes the following determinations:

1. The Respondent is a “commercial farm” and therefore afforded protection under the “Right-to-Farm” Act.
2. The Respondent is following accepted farm management practices and does not follow farm practices that would be detrimental to the community.
3. The applicant cannot establish with sufficient proofs that the flood waters are caused or aggravated by the respondent’s farm, since drainage water flows through the respondent’s farm and applicant’s property is located 60 feet below grade of neighboring properties.
4. The Respondent is protected under the “Right-to-Farm” Act, based on the testimony of the Moving Party and the Respondent.

NOW, THEREFORE, BE IT RESOLVED, that based on the aforesaid factual findings, the Gloucester County Agricultural Development Board determines that the operation of the Gattuso Farm by Marino Brothers is a commercial farm, follows accepted farm management practices and is entitled to protection under the “Right-to-Farm” Act.

The undersigned, Vice Chairman of the Gloucester County Agricultural Development Board, hereby certifies that the above is a true copy of a resolution adopted by said Board on **October 9, 2008**.

Attest:

Ken Atkinson, Secretary

George Dean, Acting Chairman