

July 27, 2004

Joanne Restivo, Deputy Clerk
Office of Administrative Law

Re: Anthony Tavalario
(Appeal by Township of Washington, Gloucester County of Determination made by
Gloucester County Agriculture Development Board)
SADC ID # 0818-04
OAL Docket No. ADC 52-04
(On Remand from OAL DKT. NO. ADC-6192-02)

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 July 22, 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 ANTHONY TAVALARIO
(APPEAL BY TOWNSHIP OF WASHINGTON,
GLOUCESTER COUNTY OF DETERMINATION
MADE BY GLOUCESTER COUNTY
AGRICULTURE DEVELOPMENT BOARD)

STATE OF NEW JERSEY
OAL DOCKET NO. ADC 52-04
SADC Docket No. 0818-04
(On Remand from OAL DKT. NO.
ADC-6192-02)

FINAL DECISION

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

PROCEDURAL BACKGROUND

In April 1999, the Township of Washington Township (Township) issued a notice of zoning violation to Anthony Tavalario, informing him that he was in violation of the Township's zoning ordinances. Specifically, the Township cited Mr. Tavalario for keeping horses on his property, an unpermitted use in "A Residence" zoning without a conditional use approval.

Mr. Tavalario and the Township appeared before a municipal court judge on the alleged violation in May 2002. Mr. Tavalario contended that based upon the Right to Farm Act, N.J.S.A. 4:1C-11 et seq., the Township should have filed its complaint with the Gloucester CADB and not in municipal court. The municipal court judge remanded the matter to the CADB, supposedly with instructions that the CADB make a

determination as to whether Mr. Tavalario's operation meets the Act's definition of commercial farm.

The Township filed a complaint with the Gloucester CADB in August 2000 regarding the same zoning issue.

On June 13, 2002, the Gloucester CADB held a public hearing and found that Mr. Tavalario's operation satisfied the Act's definition of commercial farm. The Township appealed this determination to the State Agriculture Development Committee (SADC) on June 23, 2002 pursuant to the Act, 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 (ALJ) Edgar R. Holmes returned the matter to the SADC in September 2003 based upon Mr. Tavalario's failure to appear. The SADC retransmitted the matter to the OAL in December 2003 to give the Township of Washington the opportunity to present ex parte proofs pursuant to N.J.A.C. 1:1-14.4 and to give the Gloucester CADB the opportunity to defend its recommendation, which was the basis of the appeal.

ALJ Holmes held a prehearing conference on February 20, 2004 in which the parties agreed that the matter would be determined on cross-motions for summary judgment.

The Township, Gloucester CADB, and Mr. Tavalario filed briefs and the Township submitted a letter in response to the CADB's brief.

ALJ Holmes issued an Initial Decision on June 8, 2004, which was mailed to all parties on June 14, 2004.

The Township filed exceptions with the SADC on June 28, 2004.

STATEMENT OF RELEVANT FACTS

1. Horse Operation

Mr. Tavalario purchased a 7.37-acre parcel of land, designated as Block 70, Lots 7, 7.01 and 7.02 in the Township of Washington (“the Property”), in 1993. At the time of purchase, the Property was located in an agriculture zone. The Township rezoned the Property in 1995 to A Residence District.

Mr. Tavalario began operating a horse farm on the Property in 1996. (Exhibit I, Tavalario Brief). Based on his 1998 application for farmland assessment and the birth and death records of his horses that are contained in the record, Mr. Tavalario kept and bred the following horses on the Property in 1998 and 1999:

- 2 broodmares kept primarily for breeding (Proculator and Morning Chant, but Morning Chant died in 1998)
- One stallion kept primarily for breeding (Nasty Charger)
- Two foals born in 1998 (Son Chant and unknown)
- One foal born in 1999 (Lady Winsum)

(Exhibits C, L and M, Tavalario Brief)

The record also shows the following horses were boarded on the Property:

- Two ponies owned by Theresa Veneziale. (Exhibit K, Tavalario Brief)
- One horse owned by Harry F. Horner, Jr., from 1996 to 1999. (Exhibit K, Tavalario Brief)

In addition, one broodmare was sold on April 18, 2002 for \$8,000. (Exhibit K, Tavalario Brief). Other than the sale of the broodmare, the record does not contain any

information about horses bred, kept, or boarded on the Property after 1999.

2. Zoning

In April 1999, the Township sent two zoning violation letters to Mr. Tavalario. A letter dated April 6, 1999 stated that “it has come to the attention” of the Township that Mr. Tavalario is “planning to own several horses, with the intention of possibly breeding them.” The letter informed Mr. Tavalario that the raising, boarding, or breeding of horses in A Residence District requires a conditional use approval from the Planning Board.” (Exhibit C, Township Brief). A letter dated April 14, 1999 contained a similar notice of violation. (Exhibit C, Township Brief).

Mr. Tavalario’s attorney sent a letter to the Zoning Board in November 1999 advising that his clients were withdrawing their application based upon the Right to Farm Act. (He is presumably referring to an application for Conditional Use Approval.) (Exhibit I, Tavalario Brief).

It appears that the Township pursued the alleged zoning violation in municipal court and that the municipal court judge adjourned the matter pending a determination by the Gloucester CADB as to whether Mr. Tavalario’s operation met the Act’s definition of commercial farm.

3. Farm Income

The following is a summary of the record regarding Mr. Tavalario’s farm income:

1. 1998

- a. a supplemental farmland assessment form shows gross income from the farm was \$600, derived from stud fees. (Exhibit C, Tavalario Brief)
- b. Profit or Loss From Business Form (IRS Schedule C to Form 1040) shows gross receipts were \$675. (Exhibit E, Township Brief)

2. 1999
 - a. Profit or Loss From Business Form (IRS Schedule C to Form 1040) shows gross receipts were \$580. (Exhibit E, Township Brief)
3. 2000
 - a. Profit or Loss From Business Form (IRS Schedule C to Form 1040) shows gross receipts were \$600. (Exhibit E, Township Brief)
4. 2001
 - a. Profit or Loss From Business Form (IRS Schedule C to Form 1040) shows gross receipts were \$600. (Exhibit E, Township Brief)
5. 2002
 - a. Profit or Loss From Business Form (IRS Schedule C to Form 1040) shows gross receipts were \$5,400. (Exhibit E, Tavalario Brief)

(The IRS appears to have changed this form in 2002 to stipulate that the farm income should “not include sales of livestock held for draft, breeding, sport or dairy purposes”; that those sales are to be listed on a separate IRS form.)
 - b. Receipt from Licciardello Farm shows purchase of one broodmare from Mr. Tavalario on April 18, 2002 for \$8,000.
6. 2003
 - a. Profit or Loss From Business Form (IRS Schedule C to Form 1040) shows gross receipts were \$5,400. (Exhibit E, Tavalario Brief)

EXCEPTIONS

The Township filed exceptions with the SADC, asserting that the Property was not used as a horse farm before Mr. Tavalario purchased it, nor was it farmed by the prior owner. The Township also stated that the Property has not been assessed as

farmland since 2000 and that Mr. Tavalario does not have horse pens on the property, except for a 100 x 100 pen “in the front yard,” housing two ponies.

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, it must meet the definition of “commercial farm” set forth in N.J.S.A. 4:1C-3. The Act also requires that the commercial farm satisfy at least one of the following two conditions:

- (1) it is located in an area in which, as of December 31, 1997, or thereafter, agriculture is a permitted use under municipal zoning ordinances and is consistent with the municipal master plan, or
- (2) the commercial farm was in operation as of the effective date of the amended Right to Farm Act , July 2, 1998. [N.J.S.A. 4:1C-9].

The definition of commercial farm is set forth in N.J.S.A 4:1C-3 and 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. If the parcel of land producing agricultural products is less than five acres, the farm must produce agricultural products worth at least \$50,000 annually and otherwise satisfy the eligibility criteria for farmland assessment. Ibid.

ALJ Holmes examined whether the Property met the production requirements contained in the definition of commercial farm and concluded that Mr. Tavalario did not

need to actually realize profits to meet the \$2,500 threshold. He determined that Mr. Tavalario's ownership of a stallion and racing stock could satisfy the \$2,500 threshold "irrespective of whether [the horses] earn stud fees or win at the track in any given year." Tavalario Initial Decision, p. 4. Judge Holmes's finding is similar to the CADB's decision, which held that the production requirements of the Act were not limited to income, but could be attributed to the worth of the horses.

In reaching his decision, ALJ Holmes relied upon the SADC's final decision in another Right to Farm case where the SADC found that unharvested timber in a forest could meet the Act's production requirements. In the Matter of Joseph P. Arno (Appeal of Resolution Issued by the Monmouth County Agriculture Development Board, SADC ID # 1328-02, OAL Docket No. ADC 4748-03 (February 26, 2004). This finding was explicitly conditioned upon the farmer producing, among other things, a written contract to provide a specified amount of wood from his trees within a specified timeframe and a signed statement from a certified forester certifying that the farmer had a sufficient amount of trees ready for harvest to fulfill the terms of the written contract. Ibid.

Similar to its decision in the Arno matter, the SADC now finds that the unrealized value of a horse can be used to satisfy the Act's production requirements only if the farmer has an existing written contract to sell the horse for a specified amount of money within a specified period of time.

With regard to income received for equine activities, the SADC's position is that the following can be used to satisfy the production requirements in the definition of

commercial farm: *

- Income from sales of horses that have been bred on the farm, as breeding of livestock is clearly agricultural production.
- Income derived from raising horses
- Imputed income from pasturing horses, as determined by the State Farmland Evaluation Advisory Committee created pursuant to N.J.S.A. 54:4-23.20.
- Stud fees, as the stallion is being used for breeding/agricultural production.

The following income cannot be used to satisfy the production requirements:

- Earnings from races, as this income is not agricultural production.
- Fees received from boarding or training horses.

Applying the standards set forth above to the matter at hand, the record shows that Mr. Tavalario did not satisfy the production requirements for 1998, 1999, 2000 and 2001, as his farmland assessment and federal tax forms show gross profits of less than \$2,500 annually and the record does not contain contracts for sales of horses that would qualify as anticipated income.

Although the record documents Mr. Tavalario's income from 1998 through 2003, the Property had to qualify as a commercial farm in 1998 to receive the protections of the Act. As discussed above, to be eligible for Right to Farm protection, agriculture must be a permitted use on a property under the municipality's zoning ordinance as of December 31, 1997, or the "commercial farm . . . [must be] in operation as of [July 2,

* The SADC recently proposed a rule addressing this issue, which was published in the July 19, 2004 New Jersey Register. Although this rule is a proposal on which the public is invited to comment for a 60-day period, and has not yet been adopted, the SADC relies upon the standard set forth in it for guidance as to what can be deemed production in the matter at hand. The rule proposal states that income derived from raising horses and imputed income from pasturing horses may be used to satisfy the production requirements in the definition of "commercial farm" set forth in the Act, N.J.S.A. 4:1C-3. Proposed N.J.A.C. 2:76-2B.3(d). Fees received from boarding or training horses or from riding and driving lessons, however, cannot be used to satisfy the production requirements. Ibid.

1998]. . .” N.J.S.A. 4:1C-9.

In the matter at hand, agriculture was not a permitted use on the Property in 1997 without a conditional use approval and Mr. Tavalario did not have such approval. To qualify for the protections of the Act, therefore, the Property had to be a commercial farm in operation as of July 3, 1998.

Although the record shows that Mr. Tavalario’s farm was in operation as of July 3, 1998, the record does not support a finding that the Property met the definition of commercial farm in 1998. Mr. Tavalario reported gross income for 1998 as \$600 on a supplemental farmland assessment and as \$675 on the Profit or Loss From Business Form (IRS Schedule C to Form 1040). Although the record does not indicate imputed income from pasturing horses, it indicates that 3.28 acres of the Property were used for this purpose. Given that imputed income from pasturing horses in 1998 in Gloucester County was between \$70 and \$77 per acre depending upon the type of soils, the Property would fail to meet the \$2,500 production requirement even if such income was included. 34th Report of the State Farmland Evaluation Advisory Committee Productivity Values for 1998 Tax Year.

Based on this analysis, the SADC rejects ALJ Holmes’s conclusion that the Property met the Act’s definition of commercial farm. The SADC also rejects the conclusion that the Gloucester CADB’s action was not unreasonable, arbitrary, or capricious.

It should be noted that the Property may have met the Act’s production requirements in 2002 and 2003, but the record was incomplete regarding whether the

Property was eligible for farmland assessment in those years. Although ALJ Holmes did not address whether the Property was eligible for farmland assessment in any given year (i.e., whether the Property satisfied the second part of the definition of commercial farm), that issue does not need to be addressed because the SADC finds that the Property failed to produce agricultural products worth \$2,500 in 1998.* The SADC's conclusion that the Property failed to meet the threshold requirement of being a "commercial farm" in 1998 precludes Mr. Tavalario from receiving the protections of the Act after 1998.

Likewise, a determination of whether the Property meets the remaining criteria of the Act is irrelevant because the Property was not a commercial farm in operation as of July 2, 1998. It is important to note, however, that the criteria discussed in this decision are merely threshold conditions that a farm must meet to qualify for the protections of the Right to Farm Act. If the Property had met the conditions discussed in this decision, the Property would have had to meet the remaining criteria to receive the protections of the Act:

1. the operation or activity in dispute must conform to agricultural management practices promulgated by the SADC pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., or if the activity in dispute is not addressed by any promulgated AMPs, it must conform to generally accepted agricultural operations or practices;

* The record seems to indicate, however, that Mr. Tavalario received farmland assessment for 1998 and 1999 and that the Township revoked it in 1999 based on change in use, although the Township's brief states that the township tax assessor denied Mr. Tavalario's request for farmland assessment for 1998 and 1999. This statement contradicts the records produced by Mr. Tavalario showing that the property was assessed as a "Qfarm" for those years. (Exhibits C and O, Tavalario Brief). Also, the Township could not have revoked farmland assessment had it never assessed it as farmland.

The record also indicates that Mr. Tavalario has two tax appeals pending in the New Jersey Tax Court. An independent inquiry by the SADC into the tax appeals that are pending in the New Jersey Tax Court revealed that Mr. Tavalario has appealed tax determinations for 1998, 1999 and 2000. The record is not clear as to the specific issues on appeal. It is also unclear from the record whether Mr. Tavalario applied for farmland assessment after 1999 and was denied, or whether he failed to apply. (Exhibit I Tavalario Brief)

2. the commercial farm must conform with all relevant federal or State statutes or rules and regulations; and
3. the agricultural operation must not pose a direct threat to public health and safety. [N.J.S.A. 4:1C-9 and 10.1].

It is not necessary to address these conditions, however, as the SADC finds that the Property failed to satisfy the threshold requirements of the Act, including the production requirements in the Act's definition of commercial farm.

CONCLUSION

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

IT IS SO ORDERED.

Dated: 7-22-04

Charles M. Kuperus, Chairman
State Agriculture Development Committee

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