State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ADC 20659-15
AGENCY DKT. NO. SADC 1580

IN THE MATTER OF CLC FARMS, LLC.

William J. Wolfe, Esq., for petitioner Township of Wall (Bathgate, Wegener & Wolfe, attorneys)

Matthew A. Peluso, Esq., for petitioners Kristen and Roelof Irausquin

Roger J. McLaughlin, Esq., for petitioners Mahedy, et al.[1] (McLaughlin, Stauffer & Shaklee, attorneys)

Christopher L. Beekman, Esq., for petitioner Monmouth County Agricultural Development Board (The Beekman Law Firm, LLC, attorneys)

Matthew N. Fiorovanti, Esq., for respondent-applicant CLC Farms, LLC (Giordano, Halleran & Ciesla, P.C., attorneys)

Record Closed: January 17, 2018 Decided: April 2, 2018

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[1] Mr. McLaughlin represents James and Theresa Mahedy; Christopher Bartlett; Joseph and Gina Itri; Charles and Agnes Jenners; Edward P. Kelly; William J. and Joan M. Kenneally; Gregory Kirk and Robin Necklin; Victor and Diane Lomet; Donald and Carol Martin; Roy and Christine Mittman; John and Deborah Mullen; John and Mary O'Beirne; William and Patricia Pyburn, Jr.; Luis and M. Loreto Riesco; Thomas and Janet G. Schneider; and John and Linda Sopko.

BEFORE **JEFF S. MASIN**, ALJ t/a:

Seeking the benefits offered by the Right to Farm Act, N.J.S.A. 4:1C-1 to -55, CLC Farms, LLC, applied to the Monmouth County Agricultural Development Board (MCADB, CADB, or County Board), for approval of a Site Specific Agricultural Management Practice (SSAMP), for property located at Block 742, Lot 22, in Wall Township, New Jersey. According to its proposal, CLC proposed to operate a farm on the property. This farm was to be the site for the growing of ornamental trees and shrubs. The property, undisputedly located in the Wall Township's RR6 Zone, in which agriculture is a permitted use, had previously been farmed by its prior owner, John H. Geiser, who had died. Geiser's estate owned the property prior to its sale to CLC Farms. CLC Farms claimed that its activities on the property deserved the protections afforded by the Act. These protections would shield the farm's activities from potential interference by local ordinances and other local enactments.

Several objections were raised to the applicant's request for an SSAMP. Wall Township and, separately, two groups of neighbors of the property, consisting of one large group and another made up of a husband and wife, the Irausquins, opposed the application on several grounds. The CADB decided to bifurcate its consideration of the application, first determining whether it had jurisdiction over the request, and then, depending upon the outcome of that inquiry, whether the application met the qualifications for the protections afforded by the Act, thus entitling it to the SSAMP it requested. Following hearings held on July 1 and September 2, 2014, on October 7, 2014, the CADB passed Resolution Number 2014-10-1, in which it determined that the applicant's property is a "farm management unit," which satisfied the eligibility criteria and met the statutory and regulatory requirements set forth in N.J.S.A. 4:1C-3 and N.J.A.C. 2:76-2.1, and is a "commercial farm," producing agricultural or horticultural products worth more than $2,500 annually, as defined by the Right to Farm Act. Given these conclusions, the CADB determined that it had jurisdiction to consider the requested SSAMP. Thereafter, in Resolution No. 2015-08-1, adopted on October 6, 2015, to memorialize its adoption of a Resolution on August 4, 2015, as amended on September 1, 2015, the Board, noting details of hearings held on October 7, 2014, and

January 13, February 10, May 5, June 2, August 4, and September 1, 2015, resolved that the applicant met the requirement to establish that its intended activity on the property constituted a "generally accepted farm management practice" and was a permissible activity for a commercial farm under the Act. It is from these determinations that the several objectors have filed appeals with the State Agricultural Development Board (SADB).

The SADB transferred the appeals to the New Jersey Office of Administrative Law (OAL) on December 16, 2015. The case was originally assigned to Administrative Law Judge Susan Scarola, who conducted conferences and managed the discovery process. However, Judge Scarola eventually found it necessary to recuse from the proceedings, and the case was reassigned to this administrative law judge, sitting on recall, on January 25, 2017. Following the reassignment, the parties conferred with this judge on May 4, 2017, concerning the nature of the proceeding to be held to consider the objectors' appeals, which included objections both to the determination that the County Board had jurisdiction and to its ultimate finding that the applicant was qualified for protection under the Right to Farm Act. As the parties prepared for hearings scheduled for later in the year, counsel for the applicant suggested discussion as to the most efficient method of proceeding to consider the appeal. With knowledge that the appeal was de novo, the parties agreed in July 2017 that, given the extensive testimony and exhibits presented over the numerous hearing dates before the CADB, it made sense for the record of those proceedings to be produced for review by this judge, with the proviso that once they were reviewed the parties would be given the opportunity to supplement the record with additional non-repetitive testimony and exhibits and that all of the exhibits submitted in evidence before the CADC would be submitted to the judge for review.[2] This understanding as to the nature of the hearing was first noted in my letter of July 17, 2017. On October 18, 2017, the parties were reminded by letter of the

[2] In connection with the review of the transcripts, it is noted that at times during proceedings members of the County Board made statements that can best be described as testimonial in nature, for instance, referring to information purportedly received from outside sources concerning plant growth rates. These statements were not made under oath, nor were the Board members offered as witnesses by any of the parties to the proceedings, nor were their statements subject to cross-examination. For the purposes of this de novo proceeding, all such statements made by members of the Board are not considered admissible evidence and will be given no consideration whatsoever.

deadline for submitting information concerning any additional evidence that they sought to present for the hearing of any such evidence, scheduled to be held, as needed, in December 2017. It is important to note that despite this no party requested to present either additional witness testimony or any additional evidence of a documentary nature. As such, the record of the proceedings consists of that which was presented to the CADB. Due to a previously scheduled out-of-state vacation, an extension was requested and granted for the issuance of this initial decision.

Briefs were received from CLC, Wall Township, the Irausquins, and the CADB. In regard to the latter brief, CLC objected to the Board's presentation, arguing that the Board was not a proper party to the proceedings. In response, I noted that the transmittal from the SADB had listed the CADB as a party, that Judge Scarola had treated it as such in correspondence, and that no objection about the Board's listing as a party had been raised until the brief was filed. In these circumstances, without ruling on the propriety of the Board's position as a party ab initio, I advised that I would consider the Board's submissions.

According to a letter received from Mr. McLaughlin, rather than file their own brief, the property owners he represented chose to rest their arguments upon those presented by the Township. However, after receipt of that letter, several letters were received from neighbors in December 2017, after the close of the period during which counsel first submitted briefs. Two of these letters were from persons not listed among those named as parties in the caption of the transmitted contested case. Nevertheless, as counsel were informed, as the comments of these several correspondents were so similar to the testimony received from witnesses before the CADB, before which two of these correspondents were witnesses, I have considered the content of these letters as part of the review of the record. Following the receipt of reply briefs, the record closed on January 17, 2018. However, during the preparation of the initial decision, I asked counsel for their input concerning the ownership of vegetation that had been purchased prior to the formation of CLC Farms, LLC, and was then brought to the farm property, from which it was later sold. Counsel's responses were received during the last week of March 2018.

Before addressing the substantive evidence, findings, and determinations that were made below and must be made herein, it is noted that at the county level, counsel for the Irausquins complained that members of the Board had demonstrated hostility and bias in favor of CLC. This claim was founded upon the contention that then counsel for the applicant, John Giunco, Esq., of the Giordano, Halleran & Ciesla law firm, "personally owns and operates a farm in Monmouth County, a fact known to members of the MCADB." Counsel argued that this created a conflict of interest for the Board members, or, at the very least, an appearance of bias. He argued that the Board should have transferred the application to a different county's agricultural development board, or Giunco should have "recused himself from any further representation of CLC before the MCADB."

Contention of Bias

The present matter involves a de novo appeal. The record made before the Board has been presented, with the agreement of all counsel. All counsel were offered the opportunity to supplement this record with such additional nonrepetitive testimony and evidence as they desired. None did so, including Mr. Peluso. The contention that the proceedings below were somehow tainted by Mr. Giunco's presence appears to be at best strained, but on appeal, Giunco has not appeared, although his firm remains counsel for CLC. I **FIND** no basis for any conclusion that Giunco's involvement below has limited or tainted the record upon which this case is being decided, with the full knowledge of counsel and without the addition of any evidence, despite the ability to provide such.

CLC Farms' Property

The property upon which CLC Farms, LLC, operates is comprised of approximately 9.67 acres. It was formerly owned by John Geiser, who operated a fruit and vegetable farm and sold agricultural products at a farm stand located on his property. Mr. Geiser passed away, and his estate sold the farm to CLC on January 7, 2014. The property is designated on the Wall Township Tax Map as Block 742, Lot 22. (Exhibit O-22; P-34.) Looking at this map, the CLC property is bordered on the right

side by Lots 12 and 18, owned by the objectors Irausquin and Mahedy, respectively. Each of these lots has two sides that border Lot 22. The tax map also shows that Lot 22 borders Lots 9 and 11, properties that lie at the end of a residential street identified as Barbee Lane. The homes on Barbee Lane are occupied by families who in some cases have small children. Although Barbee Lane appears to be a cul-de-sac as it runs right from Wall Church Road, it is not a traditional one, for rather than the street ending at a private property line with no further roadway access through that property (thus a "closed" cul-de-sac), the roadway constituting Barbee Lane allows vehicle access at the back end of the cul-de-sac onto the farm property. This means of ingress to and egress from the property, which was approved years earlier by the Township, is and has been used by vehicles, including trucks, entering and leaving the CLC property. And its use constitutes one of the prime elements of objection to the grant of an SSAMP.

Jurisdiction

As noted, when it considered CLC Farms' application, the CADB issued two separate Resolutions. The first of these reflected a determination concerning the fundamental question of whether the Board had jurisdiction to even consider CLC's application. This question arose from the provisions of the Right to Farm Act. In this Act, the Legislature, recognizing the importance of preserving farming as a viable part of New Jersey's economic life, determined that under certain conditions the right to conduct farming operations could supersede municipal enactments that might otherwise interfere with such farming operations. N.J.S.A. 4:1C-9.

> Notwithstanding the provisions of any municipal or county ordinance, resolution, or regulation to the contrary, the owner or operator of a commercial farm, 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 which commercial farm is in operation as of the effective date of P.L.1998, c.48 (C.4:1C-10.1 et al.), and the operation of which conforms to agricultural management practices recommended by the committee and adopted pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), or "and all relevant federal or State statutes or rules and regulations adopted

pursuant thereto, and which does not pose a direct threat to public health and safety may:

a. Produce agricultural and horticultural crops, trees and forest products, livestock, and poultry and other commodities as described in the Standard Industrial Classification for agriculture, forestry, fishing and trapping or, after the operative date of the regulations adopted pursuant to section 5 of P.L.2003, c.157 (C.4:1C-9.1), included under the corresponding classification under the North American Industry Classification System;

b. Process and package the agricultural output of the commercial farm;

c. Provide for the operation of a farm market, including the construction of building and parking areas in conformance with municipal standards;

d. Replenish soil nutrients and improve soil tilth;

e. Control pests, predators and diseases of plants and animals;

f. Clear woodlands using open burning and other techniques, install and maintain vegetative and terrain alterations and other physical facilities for water and soil conservation and surface water control in wetland areas;

g. Conduct on-site disposal of organic agricultural wastes;

h. Conduct agriculture-related educational and farm-based recreational activities provided that the activities are related to marketing the agricultural or horticultural output of the commercial farm;

i. Engage in the generation of power or heat from biomass, solar, or wind energy, provided that the energy generation is consistent with the provisions of P.L.2009, c.213 (C.4:1C-32.4 et al.), as applicable, and the rules and regulations adopted therefor and pursuant to section 3 of P.L.2009, c.213 (C.4:1C-9.2); and

j. Engage in any other agricultural activity as determined by the State Agriculture Development Committee and adopted by rule or regulation pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

As the provision indicates, it is intended to benefit "commercial farms." Thus, the fundamental question that must necessarily be addressed regarding any application seeking the protection of this Act is whether the applicant satisfies the requirement that its operation is a "commercial farm." If the answer is affirmative, then the County Board has jurisdiction to consider whether the farm's operation "conforms to agricultural management practices recommended by the committee" or "whose specific operation or practice has been determined by the appropriate county board . . . to constitute a generally accepted agricultural operation or practice." If the applicant fails to establish that it is a "commercial farm," the County Board has no jurisdiction to consider the matter any further.

When it considered CLC's application, the CADC chose to bifurcate its decision-making process. It first considered whether the applicant was operating a "commercial farm," and, only after determining that this was so, did it then consider whether the intended operations otherwise qualified for the protections afforded by a Site Specific Agricultural Management Plan. As part of their objection to the application, Kristen and Roelof Irausquin argue that the CADC improperly bifurcated its consideration. They claim that the Committee's decision regarding the "commercial farm" element failed to take into account certain necessary factors, particularly regarding alleged threats to public health and safety. Be that as it may, this contested case involves a de novo consideration of the application, and the bifurcated process used below does not mandate that this forum utilize the same approach in considering the application. That said, in order to arrive at the best approach to considering the application, it is wise to resort to the statutory provision to see precisely what it is that the applicant must establish in order to obtain the protection it seeks. That protection is from such municipal enactments as might in some manner interfere with the ability of the farm to operate successfully. The Right to Farm Act specifically addresses its offer of such protection to "the owner or operator of a commercial farm." Thus, the fundamental requirement for invoking the statute is that the applicant seeking its protection establish that it is indeed operating or intending to operate a "commercial farm." If it fails to establish this it cannot obtain any protection under this Act. It simply is the case then that if the property in question is not a "commercial farm," no further consideration need

be given to the application. As a result, it makes sense to see if the evidence establishes that the applicant is operating such a "commercial farm" before considering evidence that is only applicable to whether that commercial enterprise otherwise qualifies for the Act's protection. While nothing requires the sort of bifurcation of the hearing process that the CADB chose to utilize, the practical effect of the legal construct is such that there was nothing improper in that approach. Here, the review has been a combined review of the entire record below, with, as already noted, the opportunity to supplement that record. But it is still first essential to determine whether CLC's project is, indeed, a "commercial farm."

On July 1, 2014, the CADC heard testimony from Kevin Kloberg, described as a "member of CLC Farms, LLC." The testimony received that day from Kloberg was offered in order to establish that the applicant was operating a "commercial farm." N.J.S.A. 4:1C-3 defines a "commercial farm" as

> (1) a farm management unit of no less than five acres producing agricultural or horticultural products worth $2,500 or more annually, and satisfying the eligibility criteria for differential property taxation pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c.48 (C.54:4-23.1 et seq.), (2) a farm management unit less than five acres, producing agricultural or horticultural products worth $50,000 or more annually and otherwise satisfying the eligibility criteria for differential property taxation pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c.48 (C.54:4-23.1 et seq.), or (3) a farm management unit that is a beekeeping operation producing honey or other agricultural or horticultural apiary-related products, or providing crop pollination services, worth $10,000 or more annually.

Mr. Kloberg testified that while he has no formal training in forestry, agriculture or farming, among his other businesses he has operated a nursery for many years on another site. He described how, after taking over the Geiser property in January 2014, CLC proceeded to plant approximately 5,500 trees and shrubs on the property, with the first plantings occurring in late February 2014. The trees that were planted on the property were not originally grown there, but were brought in from other locations around the country. According to Kloberg, these trees and shrubs represent scarce

types of vegetation, which he described as hard to find, in both type and size. He explained that the trees/plants were purchased and shipped by rail car from growers who are mostly located in the western part of the country, although others are in the south. In most cases, the trees or shrubs were shipped in ball and burlap and were then placed in plastic containers. These containers contained humus. When the vegetation was replanted at the farm, the humus was placed back in the ground. Once planting occurs, mulch is placed to keep out weeds. The plants are pruned, although in the case of the plants that were received in 2014, once planted the plants required an acclimation period, and pruning is done after that has occurred, with the expectation of heavier pruning to be done in the spring of 2015. At considerable expense, CLC installed a drip irrigation system and a 500-foot deep well, as well as a nylon deer fence.

Mr. Kloberg explained that many of the trees were purchased during the fall of 2013, at a time when CLC Farms, LLC, did not yet exist. Mr. Kloberg testified that he has other businesses besides the farm business and that these businesses are conducted under other names and with separate tax numbers from that associated with CLC Farms, LLC. These businesses include a landscape contractor known as Chatham Landscape Contractors, Inc.; a pool company, CLC Pools; a construction company, CLC Construction, which builds custom homes and does home remodeling; KevSue Development; and several other companies. Trees that were purchased prior to the formation of CLC Farms, LLC, were bought by Chatham Landscape Contractors.

Mr. Kloberg testified that after the trees were brought onto the property in January 2014, and prior to his testimony on July 1, 2014, three sales occurred which constituted the basis for the claim that the applicant had produced the required $2,500 of agricultural or horticultural products necessary to meet the jurisdictional definition of a "commercial farm." Cancelled checks for these sales were submitted in evidence.

The first sale involved mulch produced entirely from apple trees that had been previously on the farm site and had been removed and ground into mulch. While the grinding process produced 2,200 yards of mulch, this sale involved only 90 yards. The sale was for $1,350 and occurred in June 2014. An invoice dated June 12, 2014,

describes the sale of these 90 yards from the larger 2,200 yards, and a canceled check from Chatham Landscape Contractors, Inc., to CLC Farms is dated June 16, 2014.

A second sale occurred on April 30, 2014. It involved a total sale price of $8,583, for which a deposit of $1,725 was received by canceled check dated April 23, 2014. Kevin Kloberg explained that this contract involved purchases intended for the site of a house that KevSue Development was constructing on speculation in Spring Lake, New Jersey. The invoice explains that the plant material installed at CLC Farms "will be installed at the Spring Lake property late September to early October." Kloberg said that it was necessary to have the trees intended for the property earmarked at the time the deposit was put down so that they would not be sold to another purchaser. This was particularly important because many of the plants involved were rare species.

The third sale occurred on June 25, 2014, for $2,390, for a specific list of plants, trees, perennials, and ornamentals. These plants were immediately delivered off-site to the purchaser, Chatham Landscape Contractors, another of Mr. Kloberg's companies. A canceled check for this purchase bears a date of June 26, 2014.

As a result of these sales, CLC Farms contended that it produced over $5,000 in sales within six months, well beyond the amount necessary on an annual basis to qualify the property as a commercial farm.

Mr. Kloberg explained that computerized information recorded the size of everything that came into the farm. Plants will grow after they have been replanted on the farm, and after a time they will be resized, depending upon how much they actually grow. This growth will then affect the pricing of the plant. He denied that he had merely placed plants brought onto the property in furrows, covered lightly with dirt and soil, but instead insisted that the plants had actually been planted. In purchasing the property, it was Kloberg's intention that "very unusual, hard to find products, things that are scarce

or of irregular size from the norm" would be grown on the farm, not simply stored there.[3] Some of the plants were saplings.

The Objectors' Position on Jurisdiction

The objecting parties argue that the applicant is not operating a farm on the Wall Township property. Part of this argument appears to be that CLC is merely storing plants, purchased off-site, on the former Geiser property until they are sold. In addition, they contend that to the extent that what the applicant is doing may be deemed to be "farming," the applicant failed to establish that it carried on any agricultural or horticultural production on the property equal to or exceeding the required $2,500 annual amount necessary to meet the statutory standard for a "commercial farm."[4] In part, Wall Township's arguments on this point concern the propriety of crediting the applicant for the sale of trees and shrubs without discounting for that portion of the plant already existing at the time that the items in question arrived at the farm.

In regard to whether CLC Farms' operations as outlined by Mr. Kloberg involve "farming," the applicant did not choose to present an expert arborist to testify until the proceedings moved on to consideration of the SSAMP, after the Board's jurisdictional decision had already been made. Expert testimony from the arborist as to issues such as what happened to the plants after their arrival on site, how they were treated, and their growth rates may be relevant to both the jurisdictional issue and the accepted-agricultural-practice question. As this is a de novo hearing dealing with both issues, consideration of whether the applicant has established the jurisdictional basis for its resort to the CADC is not limited to the testimony that was presented to that forum prior

[3] Mr. Kloberg explained that he operates a nursery in northern New Jersey where he buys the same plant material, but instead of putting the plants in the ground he keeps the plant material above ground and sells it to a wholesaler or a retailer. Unlike that operation, the form of operation in question here involved planting the material so that it could grow prior to any sale.

[4] It must be noted here that this decision is based solely on the record made in proceedings that occurred, at the very latest, in 2015. The determinations made here are therefore based on what the credible evidence supports about activities and events at the property only up to the time when the testimony ended. Whatever may have occurred thereafter, over the past more than two years, is not relevant to the decision as to whether jurisdiction existed.

to the issuance of its initial Resolution. As such, to the extent applicable, the testimony of Michael LaMana, offered on February 15, 2015, was as follows.

Mr. LaMana is a certified arborist and tree expert, licensed by the State of New Jersey and certified as an arborist by the International Society of Arboriculture. He is the general manager of Heartwood Consulting Services, LLC. Mr. LaMana visited CLC Farms only once, on the afternoon prior to his testimony. He described the operation as consistent with the farming and nursery business, "very intentionally designed specifically around the business model growing a wide variety of unusual trees that are to be grown to large size to yield a very high value per acre . . . . These are long-term perennial wooded plants that are going to be left in the ground until they're dug up and put on a truck and sold somewhere." Asked about whether he found the plants to have grown in a manner consistent with older nurseries that he had knowledge of, Mr. LaMana observed that he could not comment on this directly, as he had nothing to compare with because he only been on the CLC Farms site one time. However, he said, "it is my opinion looking at the conifers and other evergreen things where you can observe growth very readily that they obviously have grown well since they were installed in the late winter, early spring, reportedly, of 2014." He observed that certain of the ornamental trees have been pruned and, as they had only been installed a year prior, "the only logical inference is that they are growing over the past year. So things appear to be going pretty well."

As for the three transactions utilized by CLC to demonstrate the annual sales of $2,500 or more, the objectors specifically contest the inclusion of the second and third sales detailed above. Their first point of contention is in regard to the deposit of $1,725 for items that were to be delivered at a later date for use at the Spring Lake property. Wall Township's counsel describes this payment as arising from a "promissory contract," which, as he characterizes it, "represented the notion that at some future date, CLC would be paid sums exceeding $2,500."

The objectors also dispute the credit given for the $2,390 arising out of the sale of plants on June 25, 2014. CLC Farms offered an invoice in that amount, for plants supposedly sold to Chatham Landscape Contractors, a "sister company" of CLC Farms.

Wall argues that these trees, such as the five skip laurels included in the invoice at $165 each and described as being 5 to 6 feet tall, which were not grown from seed on the property but were instead brought in from outside, should not be counted at the full contract value against the $2,500 threshold. While it is possible to argue that a portion of the trees' value occurred through production on the CLC Farms site, the greatest portion of the alleged value of the trees was actually produced at some other site from which the tree was brought in. Therefore, the full value of the tree must be depreciated to reflect its value at the time that the plants were brought onto the farm site. Additionally, as these were sold after remaining on the property for only a short time and were sold well within the first growing season on which they were on the property, the sale should not qualify for inclusion in the calculation.

Addressing the issue of growth, Mr. Kloberg testified that even trees included in the April sale to CLC Construction, such as the trees described on the list of items purchased for the Spring Lake spec house as 2 sweetgum 14–16 foot trees, did not come to the farm at that height, but were probably 10 to 12 feet, and added that by the time they were to go to the Spring Lake property for planting they were assumed to have grown to 14–16 feet, and will likely be 17 or 18 feet tall. "It's an assumption and a price given." They will be resized and repriced in the fall. If they are 16–18 feet, "the price is going to go up and the company will pay the difference." In addition to Kloberg's testimony, CLC offered an exhibit, A-7, which described itself as a plant growth progress report, "a small but representative sample from CLC's inventory." This exhibit lists various plant types, planted height, current height as of August 27, 2014, and growth. Certain growth is described as "heavy," which the witness described as meaning the plant grew out as well as up. A supplemental exhibit, A-8, submitted September 29, 2014, did not indicate any change in the growth of the trees and shrubs.

Disputing Mr. Kloberg, Kristen Irausquin, an objector who lives on Lot 12 directly adjacent to the farm, bordering it on two sides, testified that the materials brought onto the farm were not planted, but were instead placed in troughs and mulched over, with "a little bit of dirt, but not a lot." Parts of the trees "planted" were above ground, with a large part of the burlap bag visible. Ms. Irausquin made these observations from her property at the end of March and/or beginning of April 2014. She did not see anything

occurring in January 2014. According to the witness, from the time that she first saw the trees going in, in late March, until the time of her testimony on September 2, 2014, the sizes of the trees had not changed.

Clint Hoffman, the mayor of Wall Township at the time of the hearing on September 2, 2014, questioned whether trees and shrubs purchased before the existence of CLC Farms were then "sold," purportedly by CLC Farms, LLC, to Chatham Landscape, even though he noted that trees on the property had Chatham Landscape tags with the address of "Chatham Landscape—Nursery Division, in Bound Brook." Exhibit O-10 shows yellow tags onsite; O-11 shows the tag itself; O-12 purports to show tags being removed. Testimony was offered that these tags were only removed just prior to a site visit conducted by the Board, and that the removal of the tags was observed by neighbors and documented in a photo. Mayor Hoffman questioned whether Chatham Landscape already owned trees, in whole or in part, that were then claimed to have been sold to Chatham Landscape as part of the required $2,500 annual sales.

Is CLC Operating a "Commercial Farm"?

The definition provided in the Act for a "commercial farm" is in part dependent upon the size of the property in question. Here, there is no dispute that the property exceeds five acres. As such, to qualify as a "commercial farm," the property must be "(1) a farm management unit of no less than five acres producing agricultural or horticultural products worth $2,500 or more annually, and satisfying the eligibility criteria for differential property taxation pursuant to the 'Farmland Assessment Act of 1964,' P.L.1964, c.48 (C.54:4-23.1 et seq.) . . . ." This means that the enterprise conducted on the property must be a "farm management unit," and if it is, then it must "produce" that required sum of product or more annually. A "farm management unit" is defined at N.J.S.A. 4:1C-3 as

> a parcel or parcels of land, whether contiguous or noncontiguous, together with agricultural or horticultural buildings, structures and facilities, producing agricultural or horticultural products, and operated as a single enterprise.

The parcel of land upon which CLC Farms carries out its activity is contiguous and contains buildings which are at least for some purposes agricultural or horticultural in nature. That being the case, the next portion of the definition relates to the production of "agricultural or horticultural products." A property coming within the definition of a "commercial farm" may

> a. Produce agricultural and horticultural crops, trees and forest products, livestock, and poultry and other commodities as described in the Standard Industrial Classification for agriculture, forestry, fishing and trapping or, after the operative date of the regulations adopted pursuant to section 5 of P.L.2003, c.157 (C.4:1C-9.1), included under the corresponding classification under the North American Industry Classification System.
>
> [N.J.A.C. 4:1C-9.]

The North American Industry Classification System (NAICS) identifies nursery and tree production as involving "[g]rowing nursery products, nursery stock, shrubbery, bulbs, fruits stock, sod and so forth, undercover or in open fields and/or . . . growing short rotation woody trees with a growth and harvest cycle of ten years or less for pulp or tree stock." NAICS Code 111421. Given this definition from a classification system specifically identified for reference in the definition of a "commercial farm," there can be no question that the general type of activity that CLC Farms intended to engage in on the property comes within the definition of allowable conduct under the Act. That said, is what CLC Farms is doing, as described by Mr. Kloberg and other witnesses, an act of "producing?" What precisely is meant by "producing" lies at the heart of the objectors' contentions that the enterprise conducted on this property is not a farm, and, to the extent that perhaps it might be such, it has not produced the necessary $2,500 or more annually necessary to qualify as a "commercial farm."

The Right to Farm Act does not contain a definition of "producing." That said, in In re Tavalario, 386 N.J. Super. 435, 445 (App. Div. 2006), the Appellate Division observed that "in light of the common goals of the Right to Farm and Farmland Assessment Acts [N.J.S.A. 54:4-23.1 to -23.23], we find it reasonable to read the two

acts *in pari materia* so as to derive support from the related tax act for the SADC's interpretation of the definition of 'commercial farm' . . . ."

In Bartonek v. Edison Township, 2004 N.J. Super. LEXIS 482 (App. Div. November 24, 2004), an unpublished decision,[5] the court considered an appeal from the Tax Court involving the denial of a taxpayer's application for farmland assessment pursuant to the Farmland Assessment Act. The opinion describes Mr. Bartonek as living on the property on which he "stored and cultivated nursery, floral, ornamental and greenhouse plants, most of which are grown in containers or balled with burlap bags rather than planted directly in the soil." Bartonek's applications for farmland assessment were denied by the Middlesex County Board of Taxation. On appeal, the Tax Court reversed the Board of Taxation's ruling, basing its opinion upon testimony received from a horticultural expert, Dr. John Martin. The Tax Court judge found that the property was "devoted to the production . . . for sale of nursery, floral, ornamental and greenhouse products within the meaning of the Farmland Assessment Act, N.J.S.A. 54:4-23.4." According to the Appellate Division opinion, the expert testimony included reference to the fact that in the United States, "approximately eighty percent of nursery production is done in containers." The expert explained a "dramatic" change in the manner of production of these products, so that "seeds are no longer sown and grown until the crop is fully finished. Instead, the industry relies on specialization where propagators plant seed, then 'stuck' the clippings, which are shipped as rooted seedlings to other producers who grow them into larger plants." Dr. Martin described "horticultural production as active participation of 'turning [a plant] into something else more valuable and then selling it.'" As described in the opinion, Dr. Martin "summarized Bartonek's production as 'bringing in product[,] growing it on for a period of time, and . . . doing things to it, shaping it, pruning it, training it, turning it into something else, and then selling it.'" The Appellate Division's decision notes that the Farmland Assessment Act

[5] Several unpublished judicial decisions and administrative decisions of county agricultural development boards are discussed in this decision. These are, of course, not precedential. However, they can serve as guidance in understanding this statute and its application to specific fact situations.

> deems land to be held in horticultural use when it is "devoted to the production for sale of fruits of all kinds . . . vegetables, nursery, floral, ornamental and greenhouse products . . . ." N.J.S.A. 54:4-23.4. The language "devoted to the production for sale" contained in the statutory definition of the horticultural use "encompasses making crops ready for sale, including storage pending sale." Van Wingerden v. Lafayette Township, 18 N.J. Tax 81,90 (Tax Ct. 1999), aff'd o.b., 335 N.J. Super. 560 (App. Div. 2000).

Given the reliance of both the Tax Court and the Appellate Division on the expert testimony of Dr. Martin regarding the manner in which much of horticultural production takes place in the United States, the question of whether or not CLC Farms actually planted the trees received from outside sources into the ground or placed them in furrows, or, for that matter, left them in containers above ground, is not determinative as to whether its operation involves "production." To the extent that the trees brought on site from outside are watered, tended, nurtured, pruned as necessary, and permitted to grow, such activities are part of what the expert in Bartonek and the courts reviewing that evidence found to be "production." Given this, it can be concluded that as a general proposition, the tree-farm concept that CLC Farms' principal described as intended for the site could qualify as a "farm management unit" engaged in "produc[ing] . . . horticultural crops." See also Heinemeyer v. Parker Wholesale Florist, Inc., t/a Parker Greenhouses & Garden Center, et al., No. A-6653-97T3 (App. Div. 2000) (unpublished) (relying on Dr. Martin's testimony before the Tax Court, the Appellate Division endorsed the conclusion that "horticultural use encompasses growing bulbs, seedlings, cuttings, plugs, and pre-finished plants into finished plants, regardless of whether that growing process is in the ground or in containers stored on the ground. We conclude such activity constitutes horticultural use of the property.").

While these cases support the conclusion that CLC Farms' concept involved the operation of a tree farm within the contemplation of the Act, questions remain regarding whether, in respect to its claim that it produced the required production of $2,500, that dollar amount was actually achieved through "production" that took place on the property in question.

CLC relies upon three transactions to reach the $2,500 requirement. One involved the sale of mulch, one the sale of trees and shrubs for immediate delivery, and the other a contract for sale, with a deposit received for product to be delivered at a later date, when the remainder of the sale price, possibly to be adjusted, would be due. The objectors note that two of these three transactions rest upon the sale of trees and shrubs that only came onto the CLC property sometime after January, or even later, and were sold, or were at least the subject of a down payment for a purported sale, at most within a few short months of their arrival. While it may be the case that trees and shrubs brought to the property in the condition described by Kloberg can, if properly managed and cared for over time, be "produce" of the farm, the quick turnaround of these particular items within no more than a few months of their arrival cannot involve the sort of activity described as "production."

Initially, the CADB decided that the amount of mulch created on the farm from grinding up the trees present on the farm when it was purchased provided enough "production" in and of itself to meet the $2,500 threshold, thus effectively making consideration of the other two transactions unnecessary. According to the testimony and documentary evidence, a limited portion of the mulch produced from the trees ground up following the removal of the abandoned orchard was sold to Chatham Landscape Contractors, Inc., for $1,350 on June 12, 2014. Despite what the record clearly shows to be doubt among the objectors about the "independence" of operations of various Kloberg companies, sales made by an independent corporation to another legally separate company, although each owned by the same person, may nevertheless be legitimate sales and may be used to calculate the amount of material produced by the seller. In In re Cipriano, SADB Resolution 2008-1, Chris Cipriano had a landscaping business, Cipriano Landscaping, located at a location separate from Cipriano's farm. The CADB noted its understanding that "under the statute," "even if the entire production of the Farm was dedicated to resale to landscapers in general and Cipriano Landscaping in particular," "the end user of agricultural production is not relevant . . . in determining acceptable agricultural management practices."

In addition to crediting the value of the mulch sold to Chatham Landscape Contractors, Inc., toward the statutory threshold, the Board also allowed the unsold

mulch to be included in determining that the total value of the mulch itself satisfied the threshold. Wall argues that the use of "that fictitious sale with an imputed sale price to bolster CLC's feeble sales history . . . was improper." However, crediting the value of unsold material produced on the farm as evidence that the statutory threshold has been met has been endorsed by the Appellate Division. In Cheyenne Corp. v. Byram Township, 14 N.J. Tax 167 (App. Div. 1993), "the Tax Court . . . found that the sale of wood, harvested from cutting trees and the use of five cords of wood by each plaintiff to heat a maintenance shop for each tax year involved should be considered in determining whether the minimum gross sale had been satisfied." Cheyenne's

> maintenance shop was used to maintain and repair equipment used for timber harvesting and woodland maintenance. Each plaintiff burned five cords of wood, valued at $115 per cord. That value was added to the value of wood sold from trees harvested from the land. Those computations revealed that plaintiffs satisfied the gross annual sales requirement of N.J.S.A. 54:4-23.5 for each tax year involved except for 1985, when Cheyenne failed to qualify.
>
> [Cheyenne Corp., 14 N.J. Tax at 170.]

The Appellate Division affirmed the Tax Court's analysis, adding that "N.J.A.C 18:15-6.3 permits consideration of crops grown for on-farm use at the retail sales value in determining whether the average gross annual sales requirement of N.J.S.A. 54:4-23.5 has been established. We are entirely satisfied that this regulation applies to plaintiffs' low level of 'agricultural' activity involved even though they were not engaged in conventional farming." Id. at 170. And in Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338 (App. Div. 2004), in a case involving the Right to Farm Act, the court noted that the defendant's farm is "'the largest provider of fresh organically grown vegetable[s] in the State of New Jersey.' The fact that this produce is given away to charities to feed the poor would not seem determinative, provided the produce has an annual value in excess of $ 2,500." Closter, 365 N.J. Super. at 351. Thus, where the Appellate Division has held that even in the case of produce given away for no compensation the value of the produce can be used to meet the threshold,

there is no impropriety in considering the value of the unsold mulch. I **FIND** that the value of the mulch, by itself, is sufficient to meet the qualifying amount.[6]

This conclusion renders consideration of the other two transactions cited by CLC unnecessary for the determination of the threshold amount of production. Nevertheless, it is appropriate to address the arguments concerning these for the benefit of the record.

As noted in the review of evidence, Mayor Hoffman questioned whether CLC Farms, LLC was actually the owner of the trees that were transplanted on to the property after they were purchased by CLC Landscaping, for as Mr. Kloberg explained, these trees were purchased by that company because, at the time CLC Farms, LLC, was not yet in existence. In a letter written in response to my query, counsel for CLC Farms, LLC acknowledged that the record did not contain evidence that CLC Farms, LLC had purchased the trees and shrubs from CLC Landscaping prior to the two sales of trees that the applicant offered as part of its proof of having met the statutory threshold. While counsel did offer that such a sale had occurred, nevertheless, the record as its stands does not prove such a transaction. As such, the question is whether the fact that the ownership of the trees remained in CLC Landscaping matters with respect to the possible inclusion of these sales.

The statute requires that the applicant prove that the farm has "produced" $2,500 annually. It does not ask whether it "sold" this amount. Thus, the focus of the inquiry is the activity taking place on the farm. Is the ground being used for agricultural or horticultural activity as defined by the statute and incorporated standards such as the NAICS? If it is, then, as the purpose of the statute is to preserve land for viable farm operations, the use of the land conforms with the legislative purpose. As such, whether the farmer who is conducting the farming operation owns the trees being farmed on the

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[6] Here all of the mulch whose value was counted in meeting the threshold was the result of the clearing of vegetation that existed on the property when it was taken over by CLC. There is here no situation such as addressed in In re Pomanowski & Becker's Tree Service v. Monmouth County Agricultural Board and Colts Neck Township, ADC 06084-11, SADC Docket No. 1261, initial decision adopted by SADC (February 28, 2013), http://njlaw.rutgers.edu/collections/oal/, where the issue involved what percentage of the income derived from mulching was generated from trees specifically brought onto the site for that purpose, as opposed to from those trees already present on the site and then mulched.

land is not relevant to the question of whether the farming operation is "producing" that agricultural or horticultural product at sufficient value to satisfy the threshold. While counsel for CLC Farms, LLC, notes that concept of "vertical integration" has been "approved" by the CADB and the OAL, the question then is not so much who owns the agricultural product "produced" on the farm site or who purchases that product, but whether the product is a product produced on the site. As will be explained, at least one of the two sales involved what is legitimately agricultural product that was "produced" on the farm. And, as the "value" is not necessarily measured by money actually received, but instead by what the "value" of the produce is, the fact that CLC Farms, LLC may not have owned what it was producing and "sold" the produce to its actual owner, CLC Landscaping, does not detract from the conclusion that the applicant farm "produced" the product.

If CLC's manner of operation simply involved the growing of such vegetation from seeds or saplings, it seems likely that the objectors, while having other grounds to object to the grant of protection, would be not be contending that this enterprise was not a farm. However, as the testimony revealed, when CLC took over the property it placed thereon thousands of trees and shrubs that had already passed through the seed and sapling stage and were, to some extent or another, established trees. The early lives of these trees and shrubs were lived at some other location, in the west or the south of the United States. Trees of various sizes were brought to the newly-acquired property and placed, or it may be said, planted, thereon. Indeed, according to Mr. Kloberg, they were planted in the ground and not merely placed in furrows. They were then watered by means of the newly installed irrigation system. The intent was then that so long as the trees or shrubs remained on the property they would be growing, and the operator would take the necessary steps to nurture such growth, including providing the necessary water, groundcover, and pruning. Among the necessary steps to protect the vegetation and encourage growth would be the installation of fences sufficient to keep deer from the vegetation.

In In re Cipriano, the Bergen County Agricultural Development Board (BADB) reviewed a request for an SSAMP by a farm on which Cipriano intended to operate a tree farm. In particular, both Mahwah Township and neighbors argued that to the extent

the "farm's" operation involved balled and burlapped trees that had grown off-site and that, once brought on-site, had then been rapidly retransferred, the operation actually constituted an outdoor warehouse/staging area for a commercial landscaping business and not a "farm" engaged in "production." In its findings of fact, the BADB noted there were three categories of balled, burlapped trees involved. The first were trees and shrubs that were removed from the soil on the farm, placed in burlap, and stored on the site for eventual sale and removal from the site. The second were trees and shrubs grown off-site and delivered, nurtured and eventually planted on the farm. These were watered, nurtured and pruned. The third category consisted of the trees and shrubs "grown off-site which are delivered in a balled and burlap condition and which remain on the site and are nurtured until the point of sale to wholesale buyers—whether immediate or very shortly thereafter. These trees and shrubs are sold and shipped in less than a growing season."

The BADB concluded that trees and shrubs grown on the farm which are balled and burlapped for a period of time, which the opinion described as "(i.e., a growing season or healed over the winter) and which also receive significant watering, nurturing, pruning, etc. clearly qualify as agricultural production." However, those trees and shrubs

> which are delivered in a balled and burlap state and which are sold within a growing season do not necessarily constitute "production" but qualify for protection in the totality of the Farm's operation, as a permitted, "related" activity in connection with the usage of the Farm as a wholesale farm market as set forth in N.J.A.C. 2:76-2.

This reasoning would suggest that the sale, or as it may better be considered, the transfer of trees from the farm site to Chatham Landscape Contractors, Inc., on June 25, 2014, for $2,390 of trees and shrubs would not qualify for consideration as a part of the required production of $2,500, because these plants were only brought to the property in the late winter or perhaps very early spring and were sold and delivered from or taken off the farm just three or four months later, within only a limited portion of a growing season. CLC points out that in the Heinemeyer tax decision, the court, which was of course not there dealing with the dollars-of-production requirement in the Right

to Farm Act, did not specify any duration of time needed for the plant to be on site and under the care of the farm for the farm's involvement with the plants to qualify as enough of the "process" of production so as to be includable as horticultural activity of the farm. However, under Cipriano's analysis, the sale of these short-term "occupants" would only qualify as a "related" activity. While the point may be debatable, this "sale", or more appropriately, the value of the trees transferred, is best understood as excluded from consideration.

As for the "sale" of trees and shrubs to CLC Construction Company for later delivery for use at the Spring Lake property, in In re Arno, OAL Dkt. No. ADC 4748-03 (February 25, 2004), Arno owned woodland. His stated intention was to harvest trees for firewood. The SADC determined that unharvested trees in a forest

> can be deemed production of agricultural products when all of the following criteria have been met:
>
> 1. the farmer has a written contract to provide a specified amount of wood from his trees within a specified timeframe;
>
> 2. the farmer has obtained a woodland management plan prepared by a certified forester; and
>
> 3. the farmer has received a signed statement from a certified forester certifying that the farmer has a sufficient amount of trees ready for harvest to fulfill the terms of the written contract.

Here, CLC is operating a tree farm. The contract entered into with CLC Construction Company, Inc., was for the delivery to the construction company of specified trees and shrubs, each listed by description of type and size. As per the document offered in evidence, the delivery of these specified items was to be made in late September or early October 2014. The agreement was made on April 30, 2014, and a deposit of $1,725 was paid as of April 23, 2014, with the total purchase price stated as $8,583. While some witnesses appeared to question whether the property in Spring Lake would be ready to receive these plantings as early as September/October 2014, the fact is that if the trees remained on the farm until the later part of September, or for that matter

beyond that time, they would have be on the farm site for most, if not all, of a growing season. There is no suggestion made that CLC Farms did not have these trees and shrubs on site. There is also no evidence from which to question the legitimacy of the agreement.

In Tavalario, Tavalario owned horses. In discussing the prospect of inclusion within the necessary $2,500 of the possibility that he would sell horses that he had kept on his property, the Appellate Division discussed Arno. Likening the horses to the trees Arno had on site, and considering the SADC's conclusion as to the need for evidence of an actual, as opposed to a theoretical, "future sale," the court said:

> We agree that a horse, like timber, requires a period of maturation. However, a horse is also like timber in that it can be enjoyed without any contemplation of sale. Alternatively, its sale can be fortuitous both in circumstance and timing, and not the product of a concerted commercial program of animal husbandry. In this light, the SADC's acknowledgement of the potential for future sale, but its requirement of clear proof that such sale will occur and the terms of the sale can be viewed as creating a reasonable method of distinguishing between those engaged in the commercial agricultural production protected by the Act and those merely keeping horses for private use, thereby achieving a reasonable balance between the protection of commercial farm operations and the "varied and sometimes conflicting interests of all lawful activities in New Jersey. N.J.S.A. 4:1C-2e.
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> [Tavalario, 386 N.J. Super. at 446–47.]

As has been discussed, the record as it stands indicates that CLC Farms, LLC did not own these trees. Yet, as the trees were "produced" on the farm site, and as they remained on that site for a period of time sufficient to be considered as "produce" of that site, the issue at hand again is the value of that "production." Under the facts of this case, I am satisfied that the existence of the contract between CLC Farms and CLC Construction Company and payment of the deposit by CLC Construction is sufficient evidence to support the value attributed to the trees and the inclusion of the value represented by this vegetation in the calculation of the required $2,500 of annual production.

I **FIND** that the value of the mulch, both that sold and that produced but not sold and instead used on the farm, is sufficient in itself to meet the statutory threshold. Additionally, I **FIND** that the value of the trees that were to be delivered to CLC Construction in the fall of 2014 after a deposit was paid also qualified as "production" that could be counted to meet the threshold. However, I **FIND** that the "sale" of trees and shrubs on June 25, 2014, cannot be utilized to meet that threshold, as the items were not "production" attributable to the farm site. I **CONCLUDE** that CLC Farms is a "commercial farm" as defined in the Right to Farm Act.

Does CLC Farms Qualify for an SSAMP?

In its second Resolution, No. 2015-08-1, adopted on August 4, 2015, and amended on September 1, 2015, the CADC noted that it had been asked to affirm that the growing of ornamental trees and shrubs is an accepted farm-management practice and the applicant would be permitted to sell the agricultural output and establish a farm-market facility for consumers to purchase the output produced on the farm. More specifically, the applicant described the following, which the Board was asked to evaluate:

> The plant materials that will be farmed are ornamental trees and shrubs are very rare or difficult to obtain due to shortages in the industry. The farm will be operating as a wholesale farm with the majority of plant material being sold to our other companies (Chatham Landscape Contractors, C.L.C. Construction and CLC Pools). The other portion of our business we'll be selling to wholesale nurseries that typically do not inventory unique or one-of-kind plant material however; require these items to fulfill certain orders. We would also accommodate landscape architects and designers to purchase directly from the farm.

Noting that it had conducted a site visit, the Board found that the property was 9.67 acres and was located within the Township's RR-6 zone, in which agriculture was permitted, as verified by the Wall Township Master Plan and township land-use ordinance. The property had historically been utilized as a farm and was farmland assessed.

Paraphrasing, the Resolution adopted by the Board

- approved the applicant's proposed site-plan improvements, including a deer fence, which it found to be an acceptable agricultural management practice;

- approved the hours of operation for the farm market, which were set as 6:00 a.m. to 10:00 p.m., Monday through Sunday, with the hours of operation for the sales center able to be extended to 11:00 p.m. for seasonal events;

- approved hours of operation for the farm as between 5:00 a.m. and 10:00 p.m. Monday through Saturday, and 7:00 a.m. to 9:00 p.m. on Sundays;

- allowed deliveries to the farm between 7:00 a.m. and 5:00 p.m. Monday to Saturday, with no deliveries on Sunday. This limitation applied only to deliveries to and from the farm related to farm activities and did not apply to private use of vehicles owned by residents traveling on and off of the property;

- imposed a limitation on the use of equipment with back-up beepers and vehicles that create excessive noise. Such equipment was restricted to operation between 7:00 a.m. and 5:00 p.m. Monday through Saturday and 9:00 a.m. through 5:00 p.m. on Sundays, unless the noise-making features were disabled or turned off;

- determined that the production of ornamental nursery stock and shrubs, and irrigation, pesticide, and fertilizer use on the nursery stock and shrubs to assist their growing, were acceptable agricultural management practices;

- determined that mulch production from the agricultural output of the farm is a protected activity under the Right to Farm Act. However, mulch production from materials brought onto the farm for processing was not protected;

- determined the placement of storage bins, as depicted on the amended drawings submitted to the Board, to be acceptable, "so long as the bins are used to store materials for agricultural use, including topsoil, mulch, sand and sub-soil fill";

- approved the barn addition with proposed lean-to to provide shade for nursery stock until planted or shipped as acceptable as a structure built for farming purposes;

- determined that retail sales were customary in the nursery business and approved the operation of a farm market in a proposed building, although the applicant would be restricted from conducting non-agricultural business within that market;

- concluded that the location of the farm market was in compliance with the On-Farm Direct Marketing AMP, so that the market would not be subject to the Wall Township Ordinance preventing structures to be built on the front yard at a property without a variance;

- approved the location and renovation of existing hoop houses;

- provided that the applicant was to provide buffers to neighboring properties at Lots 12 (Irausquin) and 18 (Mahedy), Block 742, in accordance with a specified schedule for growth and preservation;

- concluded that the parking lot and number of proposed parking spaces, as depicted in plans and testified to by Jason Fichter, were consistent with

the retail ratio found in Wall Township's Ordinance and in excess of the general requirements of N.J.A.C. 2:76-2A.13(i)(2)(iv)(1), (2), and (3) and were thus acceptable as proposed;

- noted that Barbee Lane and other avenues of ingress and egress were municipal roads under the jurisdiction of Wall Township;

- noted that the Board recognized that "the intensity of travel and work on the farm reached its peak at the initial stages of operation and subsided significantly once the operation was up and running. This can be evidenced by submissions of the objectors as the pictures and videos provided were from early to mid-2014.";

- provided that "vehicles and equipment stored on the subject property must be primarily used for farming activities." It specifically prohibited the applicant from using the farm as a "staging area" to prepare for work on other properties off of the farm site. Additionally, vehicles and equipment brought on the farm for active use on a temporary basis must not be stored on the subject property;

- provided, in addition to several other approvals for lighting and erosion control and stormwater management, that "educational activities are permitted on the subject farm as long as they are related to the agricultural output of the commercial farm," and "recreational activities" are also permitted, "as long as they are uniquely suited to the agricultural use of the farm" and are not detrimental to its output;

- provided that the implementation and usage of the farm market with regards to production and sales/service of the agricultural output had to conform with all relevant federal and State statutes and regulations and that if "over time the subject farm substantially changes its operations to deviate from the provisions agreed upon in these Resolutions, the

> Applicant, Municipality or any other aggrieved party would be entitled to return to the Board to request relief."

It seems fair to state that several objections to CLC Farms' expressed intention to use the former Geiser Farm in the manner described in its application and in Mr. Kloberg's testimony arise from what Wall Township describes in its brief as the "radical transformation of the Geiser Farm," which the Township and objecting neighbors claim has had "a significant, adverse impact on the residents of what had been a quiet residential neighborhood." To Wall Township, the situation is one that demands that only it, rather than the MCADB, have "the scope of authority, resources and unbiased incentive to regulate the use of the property owned by CLC." But, of course, while the CADB has a role to play in the process under the Right to Farm Act, as does the SADB, it is the Legislature, through the enactment of that Act, that has determined as a matter of overriding State interest that, if an applicant meets all of the appropriate criteria for qualification for the protection afforded by the statute, the Township's ability to regulate use of the property is to be, at least to some extent, curtailed, in the interest of supporting agriculture, which the Legislature has determined to be of such great importance that certain elements of local control must be superseded in order to protect the ability of farms to operate successfully.

The Township contends that CLC's activities have created what is, in effect, a public nuisance, a situation that in its view precludes the grant of farmland status. CLC has "transformed" what was previously a "modest agrarian enterprise into a much more invasive business venture." It has "destroyed" what was a "symbiotic relationship between the small farmstead and the adjoining neighborhood." It has created a "conflict between residential and agricultural use" which is 'obvious.' For that reason, agricultural development should not be permitted in an area characterized by suburban development." [7]

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[7] In arguing its contention that CLC Farms is a "public nuisance," Wall cites Curzi v. Raub, 415 N.J. Super. 1 (App. Div. 2010). Curzi determined that claims that a farm seeking protection under the Right to Farm Act was such a nuisance had to be determined by the CADB and SADB, not by the Superior Court. The reference to this decision in Wall's brief may seem to imply that the Curzi decision found the existence of a nuisance, but it did not, as it concluded that the issue had to be decided in that administrative forum. But the court did note that

Another element of the objections arises from what is clearly the suspicion of at least many of the objectors that CLC is actually intent on using the farm property as a storage and staging area for operations of other businesses owned by Mr. Kloberg, such as his construction companies.

Wall Township Mayor Clint Hoffman testified that he was "distressed" that the neighbors were so upset because of what he termed, referring to CLC and/or Mr. Kloberg, "a situation with a bad neighbor." Indeed, neighbors testified that, in contrast, Mr. Geiser had always been a "good neighbor."

The potential for conflict between local control of land use and State concern for the promotion and preservation of farming in this most urbanized of states was addressed by the New Jersey Supreme Court in Township of Franklin v. Den Hollander, 172 N.J. 147 (2002). There the Court discussed the role of the county and state

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> [a]s amended in 1998, the Act "utilizes strong language to preempt municipal land use authority over commercial farms. The Act was designed 'to promote to the greatest extent practicable and feasible, the continuation of agriculture in the State of New Jersey while recognizing the potential conflicts among all lawful activities in the State.'" Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 346, 839 A.2d 110 (App.Div.2004) (quoting Senate Natural Resources and Agriculture Committee Statement to Assembly Bill No. 854, L. 1983, c. 31 (1998)), certif. denied, 179 N.J. 372, 845 A.2d 1254 (2004). Thus, the Act "provides that a commercial farm 'whose specific operation or practice . . . constitute[s] a generally accepted agricultural operation or practice, . . . and which does not pose a direct threat to public health and safety may' perform various farming functions that may be considered annoying or a nuisance by other citizens." Ibid. (quoting N.J.S.A. 4:1C-9). In listing the Act's purposes, the Legislature provided:
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> > It is the express intention of this act to establish as the policy of this State the protection of commercial farm operations from nuisance action, where recognized methods and techniques of agricultural production are applied, while, at the same time, acknowledging the need to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in New Jersey.
> >
> > [N.J.S.A. 4:1C-2(e).]
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> [Curzi, 415 N.J. Super. at 15.]

agriculture development boards and the relationship between the Right to Farm Act's interest in preserving and advancing farming activities in New Jersey and the need to consider local concerns, as expressed in ordinances that might, in some cases, appear to conflict with those goals.

> In other words, although the CAB and the SADC have primary jurisdiction over disputes between municipalities and commercial farms, the boards do not have carte blanche to impose their views. Because the authority of the agricultural boards is not unfettered when settling disputes that directly affect public health and safety, the boards must consider the impact of the agricultural management practices on public health and safety and "temper [their] determinations with these standards in mind."
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> As a general rule the threshold question will be whether an agricultural management practice is at issue, in which event "the CAB or SADC must then consider relevant municipal standards in rendering its ultimate decision." den Hollander, supra, 338 N.J. Super. at 393, 769 A.2d 427. There will be those cases where the local zoning ordinance simply does not affect farming. There will be other disputes where, although the ordinance has a peripheral effect on farming, it implicates a policy that does not directly conflict with farming practices. In such cases greater deference should be afforded to local zoning regulations and ordinances. Even when the CAB or SADC determines that the activity in question is a generally accepted agricultural operation or practice according to N.J.S.A. 4:1C-10.1(c), the resolution of that issue in favor of farming interests does not vest the board with a wide-ranging commission to arrogate to itself prerogatives beyond those set forth in the Act. The boards must act in a matter consistent with their mandate, giving appropriate consideration not only to the agricultural practice at issue, but also to local ordinances and regulations, including land use regulations, that may affect the agricultural practice. Id. at 390-391,769 A.2d 427.
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> Examples invest those abstract principles with meaning. A farmer may seek to erect a 150-foot silo in a municipality where there is a 50-foot height limitation, or he may wish to construct a barn with a 50-foot sideyard, but the local ordinance requires 100 feet. On the face of it, such ordinances do not interfere with farming and, therefore, the zoning ordinance limitations ordinarily should be respected. However, some cases may present closer questions.

> Assume a farmer intends to erect a barn that is 60 feet tall, but the local ordinance prohibits structures exceeding 50 feet. The town may contend that 50 feet is more than sufficient for the barn's height, but the farmer may be able to demonstrate a legitimate, agriculturally-based reason for needing the extra space.
>
> The point of those examples is that a fact-sensitive inquiry will be essential in virtually every case. Agricultural boards will have to deal with an array of matters that are within the traditional jurisdiction of local authorities such as hours of operation, lighting, signage, ingress and egress, traffic flow, and parking, to name just a few. In those circumstances boards must take into account the interests of farmers, while simultaneously "consider[ing] the extent of [the] use [of agricultural management practices] and consider the limitations imposed on such uses by a municipality." Id. at 392,769 A.2d 427. See also Cappture Realty Corp. v. Board of Adj., 133 N.J. Super. 216, 224-25, 336 A.2d 30 (App.Div.1975) (holding that municipality may forbid uses that create noxious emissions such as odor, dust, smoke, or gas "dangerous to the health or safety of residents"); N.J.S.A. 40:55D-38 (setting forth appropriate considerations for subdivision or site plan approval including concerns relating to public health and safety).
>
> . . . .
>
> We recognize that the task before the agricultural boards is complex. Agricultural activity is not always pastoral. The potential for conflict between farming interests and public health and safety exists. Nevertheless, we repose trust and discretion in the agricultural boards to decide carefully future disputes on a case-by-case basis and to balance competing interests. We are confident that the boards will conduct those proceedings and reach their determinations in good faith, cognizant that the benchmark for those decisions is the understanding that government has an obligation to deal forthrightly and fairly with property owners and their neighbors. Citizens for Equity v. Department of Envtl. Prot., 126 N.J. 391, 397, 599 A.2d 507 (1991).
>
> [Den Hollander, 172 N.J. at 151–53 (citations omitted)].

As has been noted, this is a de novo review of CLC's request for an SSAMP. The applicant and objectors each had the opportunity to present their evidence and arguments during lengthy and at times contentious hearings before the CADB. They

have chosen to use that record for this appeal, with the opportunity offered for additional evidence, although no one decided to present any. In considering the matter, I have been guided by the issues and arguments that each counsel has presented in their extensive briefs. To the extent that no specific objections have been raised as to certain of the determinations made in the CADB's 2015 Resolution, I have not revisited their conclusions and have determined that the record supports these determinations. Therefore, the remaining discussion focuses on those points that the opponents of the grant of the SSAMP have argued in their briefs.

Traffic and the Safety Issue

Much of the complaint made by neighbors of the property during the hearings related to the traffic created by the farm's operations from the time that CLC Farms began to receive deliveries of the trees and shrubs it purchased elsewhere, up through the time when the testimony of these objectors was received by the CADB. Additionally, these objectors offered testimony and exhibits concerning the vehicles that they contend were being utilized and/or stored on the property.

Addressing issues regarding traffic, CLC Farms presented testimony from Jay Troutman, a principal with the traffic engineering firm of McDonough and Rea Associates. Mr. Troutman is a licensed professional engineer in the state of New Jersey who specializes in traffic engineering, which is a branch of civil engineering. He has worked in this subspecialty for twenty-eight years and has done multiple traffic studies in Monmouth County, including in Wall Township, and elsewhere. He explained that his task was to determine what the operations of the proposed use would have on road systems, projecting traffic estimates, and whether these roadways had the necessary capacity to accommodate the projected volume of traffic. Over objection, Mr. Troutman was permitted to testify and provide his expert opinions. In this de novo hearing, I **FIND** that based upon his training, licensing, and experience, his ability to offer expert-opinion evidence under the standards applicable in New Jersey is clear, and he is accepted as an expert in traffic engineering.

It is important to note here that throughout its consideration of the CLC Farms' application, the CADB took the position that it would only consider the operations of the farm itself, and that it was not in a position to consider the alternate options for access and egress from that site that might possibly exist. It understood that it had no jurisdiction over such matters as determining whether another possible option, known as Todd's Alley, was a private roadway or a public right-of-way. It therefore limited its consideration to the activity taking place on Barbee Lane. In their arguments made during consideration of the case before the OAL, the objectors have not suggested that the issue of alternative access arrangements is one that should be considered.

Mr. Troutman described his review of logs kept by the applicant over a nine-day period in late August and early September 2014. This log showed that approximately 10.22 vehicle trips occurred per day, whereas Troutman's own independent study showed that in November the volume over eight days from November 13 through 20 was 5.63 trips per day. Information gathered from the Institute of Transportation Engineers Trip Generation Manual, used by traffic engineers throughout New Jersey, as well as by the New Jersey Department of Transportation, showed that a "typical single-family home" would generate, on a given day, anywhere from 8.62 to 9.91 trips per day. Thus, the average number of trips generated by the farm on an August day was "very similar" to the number an average single-family home would generate. In the "off season," the traffic generated by the farm was less than that of such a home. As for the tractor-trailer traffic, the applicant's data showed four tractor-trailer deliveries in March, six in April, and two in May 2014. These occurred in the period when the farm was starting up operations. The "design" center that was "added to the property" in the plans that were submitted and described at the last hearing would generate a traffic impact, including its use for passive storage. Also, existing employees at the site had been counted in the existing traffic. Only visitor traffic would add to the existing traffic. Based upon his discussion with the applicant, Troutman expected that this traffic would add approximately the number of trips equivalent to that of another single-family house, or perhaps two such houses.

Mr. Troutman opined that, considering the surrounding roadway and capacity available to access this property, "there's no question that there's plenty of roadway

capacity to get in and out of this site just on Wall Church Road and Barbee Lane alone." The traffic would be "very light," with "extreme freedom to maneuver." Based on the low volume-to-capacity ratio, the level of service would rate an "A" rating on a scale used by traffic engineers. This scale runs from "A" at the highest to "F" at the lowest.

Troutman also noted that an automatic-traffic-recorder study was conducted in January 2015 of the traffic in and out of Wall Church Road for a period of one week. On the average weekday there were 200 trips in and out, on Saturday 193, and on Sunday 149. There are twenty-nine homes in the overall subdivision. The study did not capture traffic on and out of New Bedford Road. There was a spike of traffic on weekdays between 7:00 a.m. and 9:00 a.m., and around 4:00 p.m. Traffic began at about 6:00 a.m. and there were trips to midnight, although nothing significant so late in the evening or overnight. Troutman opined that with these levels of traffic, the Wall Church Road connection to New Bedford Road and Barbee Lane had the capacity for the additional traffic generated by CLC Farms.

Mr. Troutman also noted that the parking and proposed internal circulation for farm activities on the CLC Farms site complied with the Wall Township Ordinance and provided for "safe and efficient on-site traffic circulation."

The witness explained that, in his professional opinion, the Wall Church Road and Barbee Lane access from New Bedford Road provide "safer access."

> They're adequately designed and constructed carrying the vehicle generated by the farm. The sight distance is excellent throughout the area. The speed is set such that vehicles would be operating at slow speeds and again could operate safely on these roadways.

As for the number of trips generated by CLC, this traffic in this neighborhood "does not" create additional risk to the neighborhood. And the number of trips can be expected to be lower in the "dead of winter" than even the lower number of trips measured in November. The operation of the farm at full capacity would be safe and efficient in

terms of the use of these roadways. "There would be no public health or safety issues with accessing this farm via Wall Church or Barbee."

On cross-examination, Troutman offered that his opinion as to the traffic expected to be generated by the retail component of the farm was based upon the impact of the building shown on the plan submitted to the Board, with passive space that would generate no traffic, a bottom floor used primarily for office space, and a retail component which "from a traffic standpoint of this actual plan that's before this Board is miniscule in my opinion." However, he agreed that if the owner determined that it was profitable to sell smaller trees on a retail basis, trees grown "in planters," as counsel for Wall described them, traffic would likely increase in intensity.

The witness denied that the prospect of larger vehicles using Barbee Lane and the nearby roadways had a negative impact on safety to the residents. Restrictions on hours of operation for farm-related deliveries limiting these to 7:00 a.m. to 5:00 p.m. "would be acceptable."

Wall Township presented as an expert witness in traffic engineering Mark W. Kataryniak, PE, of French and Parrello Associates. Mr. Kataryniak has practiced in the area of traffic engineering for more than twenty years and has extensive experience in the field. He is certified by the Institute of Transportation Engineers, Transportation Certification Board. The applicant stipulated to his expertise, and I **FIND** that he was qualified to render expert opinions regarding these traffic issues.

Mr. Kataryniak reviewed the plans, testimony and documentation offered by the applicant. He agreed that Barbee Lane was sufficiently wide and had "ample capacity" for the uses projected by the farm operation that would travel on this roadway. The witness also agreed with Mr. Troutman's overall assessment of the likely traffic volume increase on Barbee Lane as approximately equivalent to the traffic volume of two residential homes. However, he did not think that this estimate took into account the difference in the character of this added traffic, as it would be commercial in nature. Also, the "vagueness" of the intentions regarding the retail operation at the farm could mean that the added amount of traffic would be somewhat higher than Troutman

believed, "maybe not in terms of four or five times, but I think that number could vary somewhat." In this context, Kataryniak would utilize Institute of Transportation Engineers' standards for trip generation, mainly Land Use 817, for a garden-center nursery, and Land Use 817, for a wholesale nursery. These might not exactly fit with the actual type of activity that might be carried on at CLC Farms. These provide for average trip generation rates per thousand square feet, and this calculation would result in an expectation of trips "that would be higher than what is represented by the applicant."[8] Again, however, the vagueness he saw as to hours and type of operation for the retail site did not allow for a very specific determination.

Discussing the impact of tractor-trailers on Barbee Lane, Mr. Kataryniak opined that while the roadway is sufficient to accommodate commercial trucks that would be associated with the site, Barbee Lane "is currently configured as a dead-end residential street with only residential uses." The introduction of

> commercial at the extreme terminus of that dead-end roadway, requiring that all of the residents along that roadway be subjected to that commercial traffic, is not in keeping with traditional land-development practices from the standpoint of traffic management, . . . but I think as a general practice of organizing the hierarchy of street traffic along roadways, this goes counter to the traditional hierarchy of keeping commercial traffic on the higher classification roadways, on the major roadways by bringing commercial traffic, be it cars or trucks, through a dead-end residential street is counter to traditional and accepted practices for, recommended practices for, development.

Asked if there might be alternatives that could be implemented to address this problem, the witness noted that an access would be needed off of New Bedford Road, with possible Ordinance changes. Another would be restrictions on total volume of trucks on Barbee Lane, as well as time restrictions regarding the early morning and late evening

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[8] The garden-center nursery weekday twenty-four-hour trip per thousand square feet is 36.08 trips per thousand square feet, or about 55 trips for a 1,500-square-foot facility. This would be higher than the estimated 20 trips proffered as equivalent to the traffic of two single-family homes. Additional activities at the building might drive the number even higher. The roadway could handle this traffic, but, given the characteristics of this "only residential use and dead-end use," he said, "I don't believe it's appropriate."

hours, as well as restriction of deliveries to avoid school pick-up and drop-off hours. "So it would clearly be restricted to an off-peak activity during the middle of the day." The introduction of such "commercial traffic through a dead-end residential street" "has a negative impact on the quality of life of the residents . . . by intermixing that traffic with the residential traffic, I think there's a negative impact associated with disruption to the residents along that area."

He also noted that the peak hours for commercial traffic might not be coincident with the typical peak hours of the current traffic in the neighborhood. And, he agreed, such restrictions might not be optimal for the particular business involved.

Asked by counsel for CLC Farms about the prior approval of access from the residential neighborhood to the former farm operated by Mr. Geiser, Mr. Kataryniak suggested that it might not be easy to compare that to the present situation, as CLC has a retail component that changes the characteristic of the site:

> I don't know if a retail component existed previously. A lot of times when accesses are created through subdivisions they're created for the very specific use on that particular site, not just a generality. So I don't know if it's a fair comparison of the two.

Counsel for neighbors/objectors asked if the conflicts that Mr. Kataryniak saw between the commercial traffic and the characteristics of the neighborhood posed a safety concern. He responded:

> Yes. I think it definitely conflicts with the characteristics of the neighborhood, the typical activity associated with living in a residence, conflicts with pedestrians and other activity that would ordinarily occur on residential streets

He also referred to a potential safety hazard arising from people who might be trying to find the retail store and might get lost because the sight lines from Wall Church Road to the retail activity are not "traditional line of sight of the destination." People might turn the wrong way on Barbee Lane and then have to recirculate in the neighborhood,

creating a potential for distracted driving that poses a threat to safety in the neighborhood.

Kristen Irausquin testified that Mr. Geiser, the previous owner of Lot 22, had a small vegetable farm and had only small equipment, i.e., "a few tractors," on the property. He did not operate the equipment at 11:00 p.m. She commented, in a manner that was repeated several times by witnesses, that Geiser was "always very respectful of the neighbors." When Geiser had the farm, there were no trucks that traversed "back and forth" with products of the farm "being moved off site."

Terry Mahedy lives on Block 742, Lot 18, which lies contiguous with the CLC property at Lot 22, with frontage between the two lots on two sides of Lot 18. Lot 18 is located at the closed end of Carol Court, a cul-de-sac that does not have an access byroad through it onto the CLC property, as does Barbee Lane, thereby causing Barbee Lane to not actually be a fully closed cul-de-sac. Mahedy and her family have lived on this property for ten years, and have resided in the neighborhood for twenty-one years. Mahedy presented photographs of various trucks and other vehicles that she had observed on the property from the time that CLC Farms began operations up to the date of her testimony on September 2, 2014. Some of these photographs were actually taken from the Irausquins' property at Lot 12, some from Mahedy's property. They purport to show trucks and other construction equipment, such as an excavator, labeled Chatham Landscape, on Lot 22 (O-8; O-13). According to Ms. Mahedy, these trucks move "on and off" of the property. To the extent that she had observed, this movement was not "daily." In addition, Mahedy identified photographs that showed tractor-trailers and construction equipment traveling on Barbee Lane to or from Lot 22. (O-15; O-16; O-17; O-18.)

After first testifying in September 2014, Ms. Mahedy was recalled to testify in the second phase of the hearing on May 5, 2015. During this second round of testimony, Mahedy described her property as immediately adjacent to the sales center and other proposed structures. She related how the prior operations of the Geiser farm had very little impact upon her neighborhood, as opposed to what has occurred since CLC took over the property. As the property has been altered, neighbors from Barbee Lane have

a "clear view of everything that's going on on the farm." This is the result of clear-cutting of trees that formerly buffered the farm from the neighborhood near the Barbee Lane entrance. Only the Irausquins still have a buffered view from their property, as pine trees have been left in place.

Ms. Mahedy identified photographs showing trucks and other equipment that had CLC Farms logos on them that were photographed at the Spring Lake homesite in October 2014 and January 2015, and which she identified as having been stored at the farm site.

Mark Mako testified on September 2, 2014, that he lives on Lot 10 (...1), which is on Wall Church Road at the point where it turns right onto Barbee Lane. Mr. Mako confirmed that the types of vehicles shown in the photographs identified by Ms. Mahedy did "come out of the Kloberg property onto Barbee Lane and Wall Church Road." Exhibit O-17 was taken "right in front of my house," as was Exhibit O-18. There are no sidewalks on Barbee Lane or Wall Church Road. Mako noted that Exhibit O-19, a video, shows a truck "which seems to be going pretty fast in front of my house where my daughter's bike is in the street," and where she does ride her bike. Mako described the truck activity occurring in the neighborhood over the two weeks prior to his testimony. Trucks can be heard even before they come past his house. Dump trucks had driven from Lot 22, and he estimated that "last Friday alone must have been seven to eight trips." These were not carrying trees or nursery material either to or from the CLC property.

When witnesses presented testimony such as that of Mr. Mako, then counsel for CLC questioned them as to whether the trucks and other such vehicles remained on the roadway during their passage or entered onto their properties, which the witnesses confirmed they did not. The applicant has consistently noted that the street is a public road, and that, to the extent that children may play in the street or use it to ride bicycles, they do so on this public thoroughfare. Mako acknowledged that cars traverse Wall Church Road and Barbee Lane, but "not ten or 15 trucks a day, no."

Kevin Brennan, a retired police officer who worked for the Environmental Crimes Unit in the Attorney General's Office and lives in the neighborhood, testified that a "head count" showed that there were twenty-three children under the age of seventeen "that ride bikes in the neighborhood . . . just in the immediate area . . . not counting children a bit older who also ride bikes." He vigorously asserted that the presence of tractor-trailers and dump trucks "up and down the street," driven "like assholes," posed a threat to the health and safety of the community. He also noted noise issues "that go on to 11:00 at night."

John Mullen, who testified that he has a 200-foot common border with the CLC property, explained that the neighborhood "was under siege." He described how his house shakes from the noise "over there" and how his children, ages seven and nine at the time he testified in October 2014, cried from the noise and were "sick" from the "banging." He noted that the noise is "stressful," and, "our health and safety is at risk."

As has been noted, the parties were offered the opportunity to supplement the record made before the CADB with such additional non-repetitive evidence as they felt necessary. None of the attorneys for the parties indicated any intention to do so. As also noted, counsel for the various neighbors (other than the Irausquins) advised that he was not participating further, but was joining in the arguments of counsel for the other objectors. Despite there being no indication that additional evidence would be offered, several neighbors submitted letters to this forum in December 2017. These letters from Darilyn P. Moss, Ruth Brant, Loreto Riesco, John O'Beirne, and Joan M. Kenneally each express their opposition to the application and in some instances noted concerns about the trucks that come down the street and the noise that has affected the community. While, given the lack of any indication by counsel that additional evidence would be submitted, the receipt of these letters was not anticipated, I determined to allow the letters into the record in the interest of permitting the fullest participation by the neighbors. It is fair to say that the comments made in these letters merely supplement the same concerns and positions expressed by witnesses who testified during the hearing, and in that sense they do not unfairly add new evidence or arguments that have not previously been presented and addressed by counsel for the several parties.

N.J.S.A. 4:1C-9 requires that any supposed threat to health and safety arising from the proposed agricultural activity must be "direct." Based upon the evidence presented, I **FIND** that there is no basis for concluding that the operations that are being carried out or are to be carried out on the farm property itself pose any such identifiable "direct" threat. Indeed, the record does not appear to include any such allegation. Of course, any such conclusion must assume that to the extent pesticides or other such materials may be used on the farm they will be used in accordance with the appropriate safety measures. But there is no evidence at all that could lead to a conclusion that allowing this farming to proceed on the farm site, which is already zoned for farming, poses any threat to health and safety.

That said, the claim is made that approval of the operation does pose a direct threat to public health and safety. The claim is that the traffic on the public roadway leading up to the already existing ingress/egress from the farm at the end of Barbee Lane will carry such danger. The size of the vehicles, the number of vehicles, and the noise that these vehicles, particularly the trucks, can produce, are the bases for the contention that the application should be denied. Thus, the contention is that off-site conditions should prevent the approval of a farming use on property that is zoned for farming under the municipality's zoning ordinance.

In Dunkin' Donuts of New Jersey v. Township of North Brunswick, 193 N.J. Super. 513, 515 (App. Div. 1984), the Appellate Division held that a planning board did not have the right to deny site-plan approval due to off-site traffic conditions. In its decision, the court endorsed the similar conclusion that had been reached by Judge Havey in Lionel's Appliance Center, Inc. v. Citta, 156 N.J. Super. 257 (Law Div. 1978). The Dunkin' court said,

> A planning board should consider off-site traffic flow and safety in reviewing proposals for vehicular ingress to and egress from a site, N.J.S.A. 40:55D-7, 41(b). Pursuant to ordinance it may condition site plan approval upon a contribution to necessary off-site street improvements, N.J.S.A. 40:55D-42. But the authority to prohibit or limit uses generating traffic into already congested streets or streets with a high rate of accidents is an exercise of the

> zoning power vested in the municipal governing body, N.J.S.A. 40:55D-2, 62.

Judge Havey put it this way:

> The language in this provision of the statute clearly mandates the municipality to implement standards dealing with on-site conditions. In reading this section together with the definition of "site plan" under N.J.S.A. 40:55D-41, the court concludes that the planning board may deny a site plan application only if the ingress and egress proposed by the plan creates an unsafe and inefficient vehicular circulation. No provision in the statute is found that would vest in the planning board the power to deny a site plan because of the intensity of vehicular traffic on adjoining roadways or in other parts of the municipality.
>
> In conclusion, the court finds that defendant planning board had no power to deny defendant's application for site plan approval because of off-site traffic conditions unless it had found that the proposed means of ingress and egress created vehicular traffic problems. N.J.S.A. 40:55D-46.
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> [Lionel's Appliance Center, 156 N.J. Super. at 268–69].

The approval process existing under the Right-to-Farm Act is much like that of a municipal planning board. The CADB, and ultimately the SADB when there is an appeal to it, must consider whether the proposed activity comes within the type of activity permitted on a particular property under the applicable local zoning provision, as well as under state and, where not conflicting with the legislative goal of the Act, other relevant local provisions. If the proposed activity comes within the definition of a commercial farm, and such a farm is permitted in the particular zone under the local ordinance, then the review process must consider whether the activities on site, including any construction, lighting, parking, and screening, are acceptable. If they are, and do not themselves pose threats to public health and safety, then to the extent that the review process may consider off-site traffic conditions, that review is rather circumscribed. Does the proposed means of ingress and egress "create vehicular traffic problems?" Here, the ingress and egress from Barbee Lane onto the farm property has existed since well before CLC took over the property. Despite the contentions and

concerns of the objectors, there is absolutely no suggestion that the means of ingress and egress at the rear of Barbee Lane is itself problematic, as, say, an entry and/or exit to and from a highway onto a commercial property such as in Dunkin' Donuts or the proposed activities in Lionel's Appliance Center. As for the concerns about the traffic that will occur on Barbee Lane as it passes the residences on its way to the entrance or from the exit of the farm property, it is hard to see, if the planning board could not prohibit the use in a case of a property located on the side of an extremely busy, heavily congested and proven accident-prone roadway such as in Dunkin' Donuts on the basis of concerns about off-site traffic, how the SSAMP review can deny approval where the road conditions on Barbee are completely dissimilar to those existing in that case. This said, it is recognized that here we deal with a roadway that is not a main commercial and commuter highway such as Route 1 or Route 130 (Dunkin' Donuts) or State Highway 37 (Lionel's Appliance Center). The property in question here, although zoned for farming, is located adjacent to a residential neighborhood. The roadway that is available for entry and exit from the farm runs directly through that residential community and is surely not a main thoroughfare for transit for commuter, normal shopper or commercial traffic. The "passageway" along Barbee onto the farm property is a reality that existed for some time before CLC purchased the former Geiser Farm. CLC did not create the zoning plan and did not create the entryway to the property at the end of what could have been a closed cul-de-sac.

It is entirely understandable that neighbors who for years coexisted with the low-key operation of the Geiser Farm are very unhappy and very troubled by the increased level of traffic, noise, and activity that the existence of CLC Farms has brought to Barbee Lane. However, the evidence that the farm's on-site operation is a true, direct threat to the health and safety of the objectors is non-existent. As for traffic concerns, the case law makes it clear that off-site roadway traffic issues are of at most limited concern for planning boards, which in the case of the Right-to-Farm Act would appear to be the role played by the county and State boards. That said, even if one were to consider that the means of ingress and egress should, in this instance, be considered all of Barbee Lane from the point where vehicles must turn to the right from Wall Church Road, here, while the concern about children playing in the public roadway is certainly understandable, I **CONCLUDE** that such a generalized concern simply does not rise to

the level of the particularized, "direct" threat necessary to defeat an otherwise lawful activity. It is, of course, always a concern when children use the public streets as play areas, or to ride bicycles, particularly where there are no sidewalks, and this is a concern that is hardly limited to the public street in question here. That the types of vehicles traversing the street may be bigger or smaller does not change the essential concern. Street signs, speed limits, and other traffic-control measures, including limitations on the time when certain vehicles may make use of the street, are all appropriate means of limiting the risk and balancing the legitimate concerns with the farming interest. In respect of both the safety and the noise issues, the anecdotal evidence of noisy vehicles is not to be doubted, but again, the very limited scope of the evidence, based on occasional incidents and without any significant data as to frequency, level, and duration of noise, over an evidentially significant period of time, is wholly insufficient to deny the applicant the right to conduct a lawful activity on a property where farming is an accepted use.

The Farm Market

N.J.S.A. 4:1C-3 defines a "farm market":

> "Farm market" means a facility used for the wholesale or retail marketing of the agricultural output of a commercial farm, and products that contribute to farm income, except that if a farm market is used for retail marketing at least 51% of the annual gross sales of the retail farm market shall be generated from sales of agricultural output of the commercial farm, or at least 51% of the sales area shall be devoted to the sale of agricultural output of the commercial farm, and except that if a retail farm market is located on land less than five acres in area, the land on which the farm market is located shall produce annually agricultural or horticultural products worth at least $2,500.

CLC's proposed improvements to the property included what is described on a plan sheet, entitled "Proposed Improvements," number 3 of 4 sheets that were presented to the CADB, as a "proposed farm sales center and second story storage," a two-story building that was to be 1,500 square feet in size. Additionally, the applicant intended to add approximately 1,300 square feet to an existing barn. Jason L. Fichter, a

licensed professional engineer and professional planner with Insite Engineering, testified for CLC concerning the plans that Insite prepared for the applicant. He related that the barn would be used to store equipment overnight. This would not include pick-up trucks, dump trucks, tractors and trailers, which would be too large for the barn. An excavator that was on site "to get the site up and running" was to be taken off-site and only returned as needed for farm-related work, such as with heavier trees.

The farm sales center was to be located in the southeastern portion of the site. According to Fichter, this center was to be dedicated to the on-farm direct marketing as a farm sales center and farm office. The office and sales center would be on the first floor, which would have 1,500 square feet, and the second floor, also 1,500 square feet, would be used for office space, sales, storage, and supplies. An 860-square-foot garage would be attached to the building, and the sales center would have "small" porches located on either end of the building. Fichter described the activity to be carried out in this building as follows:

> non-farm direct marketing facility, will be dedicated to the wholesale retail marketing of agricultural output of CLC's commercial farm for products that will contribute to the farm income. Meetings will take place in this building as well. Existing and prospective customers who are interested in the type of trees grown at CLC farms, they could have discussions of the varieties. . . the general idea of that building is for operations of the farm to meet with vendors, meet with customers to discuss, you know, what plants are appropriate for what types of sites and so forth. They also have an opportunity in this building to create a meeting spot for the agricultural-related educational activities, farm-based recreational activities . . . where they can meet with interested members of the public to create the farming experience, talk about sustainable farming practices and so on . . . this might include school trips, hands-on farming activities, educational display, farm tours and other similar activities. This building is also where their front and back office daily functions will take place, . . . accounting, telephone calls, bookkeeping . . . on the first floor.

During cross-examination, Fichter related that in his discussions with Kevin Kloberg, he was told that such meetings and discussion that might take place in the sales office

would "center around the operations of the farm." He believed that the intention was that the sales from the market would be both retail and wholesale. There was no discussion of the percentages expected for each of these types of sales activity.

The proposal for this building raised several concerns during the hearings, and these are reflected in the briefs. One concern was regarding the exact nature of the use to which this building was to be put, and another was its proposed location, which, it is argued, violated the Township Ordinance, as it was to be located in what, in the objectors' view, would be the "front yard" of the property, as the building would stand in front of an existing house on the property. Section 140-190 of the Township's Ordinance specifically bars accessory structures, with limited exceptions not including such a building as proposed, "within any front yard." Section 140-200 provides that "detached accessory buildings shall be located in other than a front yard, and when located in a side or rear yard area, shall comply with the Schedule of Zone Requirements, and the requirements of this chapter."

Jason Fichter offered that the setback and other requirements for the building met the Ordinance requirements in Wall Township. This included the side-yard setback from Lot 18, the Mahedy property, which is located most closely to the sales center. Regarding the "front yard" concern, Fichter offered, presumably as a professional planner and not as an attorney, that compliance with the Ordinance arose from the Ordinance's definition of "front yard." He understood that the Ordinance defined the "front yard" as, in his words, "the area between the front lot line and the nearest point of the principal building." Township Ordinance Chapter 140 Part 4, Zoning Article III, 140-17 Definitions, actually identifies a "front yard" as "a yard lying between the front line of the lot and the principal building." Further, the Ordinance defines the "Front Lot Line" as "a lot line or portion thereof which is coexistent with a street line and along which the frontage is calculated." A "Street Line" is the "line determining the limit between the highway rights of the public and adjoining private property." Additionally, the Ordinance defines the "Lot Frontage" as "the horizontal distance measured along a continuous uninterrupted lot line which is coexistent with a street right-of-way line." According to Fichter, if one viewed the residence to be the principal building (a point not conceded by CLC in its brief), then, if the property line is that "short stretch of property line that co-

exists with Barbee Lane," if you then measure to the residence you get a certain distance. If you then measure the distance from that same point to the sales center you get a greater distance, 184 feet. Thus, the sales center is not in the front yard.

Parking needs were calculated based upon a conservative approach using the Ordinance's requirement for retail parking, which meant that they needed five spaces for 1,000 square feet of building. This meant fifteen spaces for the 3,000-square-foot building (two 1,500-square-foot floors). These are located adjacent to the sales center. Four additional spots were provided for employees during "times of high demand."

Mr. Fichter testified that in his professional opinion the proposed improvements to the site did not require any variances from the Wall Township municipal land-use ordinances. There was one pre-existing variance, granted in 1992 for the prior owner's farm market.

Scott Taylor, a licensed landscape architect and professional planner with twenty years of experience and the vice president of Taylor Design Group, testified as an expert witness for Wall Township. Mr. Taylor was, at least at the time of his testimony, the appointed consultant for planning for Wall Township. Mr. Taylor confirmed that although Wall Township Ordinance 140-201D required that the applicant submit plans for review, no submission had been tendered to the Township regarding the proposed storage barn.

Regarding the proposed farm market, Mr. Taylor noted concern about what was perceived as the suggestion that landscape design might be carried out in the building. He noted that in his testimony Mr. Lamana stated that no landscape architect would be working there, "turning out plan after plan." Yet, he noted that Mr. Troutman and other professionals had referred to the building as a "design center." Also, there was testimony about "landscape design or garden planning or horticultural consulting that is going to occur in here." Given this, Taylor offered that

> that building is not to be utilized for the sale of the agricultural product. There is an additional service. There is

> an additional sales. There is something else, but that the applicant has alluded - - that the applicant's professionals have alluded to in couched comments regarding consulting with clients.

Landscaping services and landscape architectural services are not included as permitted activities under either Wall Township's own Right-to-Farm Ordinance or the NAICS Subchapter 11. If either were to be carried out, they would be prohibited uses and would be subject to review by the Wall Township Board of Adjustment.

In addition to the concern as to the use the building would be put to, Mr. Taylor also noted that the minimum front-yard setback under the municipal Ordinance was 75 feet. However, that setback requirement does not permit accessory buildings to be constructed in the front yard, even if they are set back by that amount or more. The front yard is defined as "the point from the front of the principal building forward." According to Taylor, while he "would not disagree" that the proposed farm market is 530 feet from the Barbee Lane driveway, the farm sales office is approximately 50 feet off of the nearest, right-side property line and would have to be moved 70 feet north of where it is presently located. As it is now, its location violates the municipal Ordinance. He defined the front line of the lot as partially coexistent with the street line, but actually 804 feet in total, as depicted on Insite sheet 3 of 4. Taylor interpreted the "front lot line" to be the 804-foot line as it is "coexistent" with the street, meaning the cul-de-sac end of Barbee Lane. A "farm market" located 593 feet from the cul-de-sac end of Barbee Lane is "absolutely" in the "front yard" of the property. However, Taylor did note that if the "farm market" were operated in conformity with the Right-to-Farm Act, then under the Ordinance it could be considered a principal use and permitted in the front yard. The residence could then be an accessory use.

Taylor referenced the 1992 Resolution of the Township Board of Adjustment. He suggested that that involved property that then included Lot 21, which is no longer owned by CLC. Additionally, Taylor believed that that pre-existing non-conforming use had been abandoned and that its lawful existence was thus lost.

The concern about the use of the building that was to house the "sales center" appears to arise from some admitted uncertainty as to the specific activities that might be carried on in such a building. It seems clear that at the time of the hearings, the applicant's witnesses did not pin down precisely what might occur there other than the sale of farm-produced materials. The most clearly expressed concern stated by the opponents was that some sort of design center, possibly involving a resident landscape architect or such sort of professional, might be housed in the "sales" center, making it into a "design" center, where it might be the case that customers of other CLC-related businesses would come to meet to discuss and plan for their projects.

In its second Resolution, the CADB referred to the Agricultural Management Practice for On-Farm Direct Marketing Facilities, Activities and Events, which is codified at N.J.A.C. 2:76-2A.13. That regulation recognizes that the presence of such marketing facilities, whether referred to as "sales center," "sales area" (the term defined in the regulation in subsection b[9]), or otherwise, is a well-recognized and approved part of the operations of a "commercial farm." Thus, the approval of such a site at CLC Farms was entirely appropriate. Of course, the caveat to that is that the operations of the "sales area" must stay within the bounds of the defined authorization, both as to the hours of operation and the type of activities that are carried out. The regulation, N.J.A.C. 2:76-2A.13, defines the sort of "activities" and "events" recognized as acceptable.[10] The

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[9] "Sales area" means the indoor, outdoor, covered, and uncovered areas of an on-farm direct marketing facility whose primary and predominant use is the display, marketing, and selling of the agricultural output of a commercial farm and products that contribute to farm income. Sales areas do not include: PYO and other production fields; pastures and other areas occupied by livestock on a regular basis; non-public areas, such as areas used for the storage of equipment and other items; and areas dedicated to farm-based Recreational activities. Covered sales areas include sales areas inside structures and sales areas underneath tents, awnings, and other canopies.

[10] "On-farm direct marketing activity" or "activity" means an agriculture-related happening made available by a commercial farm that is accessory to, and serves to increase, the direct-market sales of the agricultural output of the commercial farm. Such activities are designed to attract customers to a commercial farm by enhancing the experience of purchasing agricultural products and include, but are not limited to: agriculture-related educational activities; farm-based recreational activities; and ancillary entertainment-based activities.

"On-farm direct marketing event" or "event" means an agriculture-related function offered by a commercial farm that is accessory to, and serves to increase, the direct-market sales of the agricultural output of the commercial farm. Such events are designed to attract customers to a commercial farm by enhancing the experience of purchasing agricultural products; may include on-farm direct marketing activities as components; are either product-based or farm-based; and occur seasonally or periodically. Product-based events, provided they demonstrate the required relationship to marketing the output of the

Resolution noted the limitations in somewhat more compact language. Resolution No. 2015-08-1, nos. 12, 21 and 22.

To the extent that a potential purchaser of farm produce at CLC Farms may need to consult with someone as to whether a particular type of tree or shrub is appropriate for use at some particular site, such consultation is to be expected. It might be that such consultation might in the eyes of some be seen as "design" work. But such routine customer inquiry prior to purchase would not run afoul of the limitations imposed by regulation on the direct-marketing facility. The presence on-site of a "resident" landscape architect or such other professional, designing and consulting on the planning stages of off-site projects, apart from the direct-buying activity with clients on-site for the purpose of actually purchasing material, would appear to go beyond the allowable boundaries for permitted use of such a "sales area." Of course, to the extent that any specific alleged actions, activities or events might be challenged as exceeding the allowable limits, such particular matters would presumably be the subject of specific complaint to the Board. But here, the general concerns that Kloberg and CLC will exceed what is allowable under regulation and Resolution are speculative at best and are not grounds for denying the SSAMP.

Location of the Farm Market

The parties dispute whether the sales center lies within the front yard of the property. The concern about this question arises because, if the sales center is considered an "accessory building," under Ordinance 140-17, it may not be located in the "front yard."

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commercial farm, may include, but are not limited to: an apple, peach, strawberry, pumpkin, wine, or other agricultural or horticultural product festival held at a commercial farm that produces that particular product. Farm-based events provided they demonstrate the required relationship to marketing the output of the commercial farm, may include, but are not limited to: seasonal harvest festivals held at a commercial farm that produces such seasonal farm products, farm open house events, CSA membership meetings, and farm-to-table events that showcase the agricultural output of the commercial farm.

An "accessory building" is defined as "a building . . . , the nature of which is related to and customarily incidental and subordinate to that of the principal use on the lot." A "principal use" is a "primary or principal purpose for which a building . . . is used. Any use which is distinct from and independent of other uses on a lot by virtue of its purpose or the persons involved is a principal use and a lot may accommodate more than one such use."

Both the applicant and Wall Township presented expert witnesses who have described their own interpretations of the Township Ordinance. Each addressed themselves to this question based on the assumption that the residence is the building that constitutes or embodies the "primary or principal purpose" and is therefore the "principal use," thereby making the sales center/office building an "accessory building." Initially, having considered their positions as to the proper interpretation of what constitutes the "front yard" of this property in this context, I find that the most reasonable interpretation was presented by Mr. Fichter. As the Ordinance identifies a "front yard" as "a yard lying between the front line of the lot and the principal building," the essential question is how to understand what is meant by the "front line of the lot." The Ordinance defines "front lot line" as "a lot line or portion thereof which is coexistent with a street line and along which the frontage is calculated." Thus, what is the "street line"? It is the "line determining the limit between the highway rights of the public and adjoining private property." The public's "highway rights" in this particular area end at the back end of Barbee Lane, the entrance onto the farm property that marks the transition from the public roadway to the private property. And what is "coexistent"? "Existing together at the same time or in the same place" Oxford Living Dictionaries, https://en.oxforddictionaries.com/. The definition of "front lot line" then refers to "the frontage." The "lot frontage" is "the horizontal distance measured along a continuous uninterrupted lot line which is coexistent with a street right-of-way line." According to Mr. Taylor's understanding, this "frontage" is the entire 804-foot length of the southern border of the CLC property. It is true that if a line is drawn to the right and to the left of the line between the back end of Barbee Lane and the CLC property line, it extends for the distance in a straight line. However, the definition of "front yard" refers to the "front line," a term that specifically notes that it may be either "a lot line" or that portion of the lot line that is coexistent with the street line. This definition then understands that the

"front line" is not necessarily coexistent with the entire "lot frontage." There is no "street line" to either the right or left of the portion of the "lot line" at Barbee Lane that touches the CLC property. If Mr. Taylor's interpretation were accepted, that would mean that if the CLC property extended for a much greater distance than it does, for instance a mile, and the only street line touching the property line were Barbee Lane, the whole area for that mile stretch that was closer to the property line than the residence would be considered the front yard. Such an interpretation appears to be unreasonable.

Of course, this debate over the proper understanding of the "front yard" was triggered by the thought that the residence was the "principal use" on the property. However, as Mr. Taylor noted, if the farm office and sales center were considered the principal use, it could then of course be permitted where it was planned. Since this is a farm, and the farm business is ultimately to sell its produce, and both the business office of the farm and the retail/wholesale sales area are to be in this building, viewing it as the principal building makes great sense.[11] The residence then is either an accessory use, or, as it is, as a residence used for a distinct purpose independent of the use of the property as a farm, an additional primary or principal use.

> The Farm Act, as amended in 1998, utilizes strong language to preempt municipal land use authority over commercial farms. The Act was designed "to promote to the greatest extent practicable and feasible, the continuation of agriculture in the State of New Jersey while recognizing the potential conflicts among all lawful activities in the State." Senate Natural Res. and Agric. Comm. Statement, No. 854--L. 1983, c. 31 (N.J.1998).
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> [Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 346 (App. Div. 2004).]

A reasonable understanding of the evidence here shows that the location of the sales center is either not in violation of the Ordinance because it is not in the front yard, or that, alternatively, the sales center can be viewed as a "principal use." Either of these

[11] In its resolution, the CADB appears to have concluded that as this use was allowed by the On-Farm Direct Marketing AMP, its location was not subject to the Township Ordinance restriction. As even Mr. Taylor appears to have conceded, recognition of the farm market as the principal use eliminates concern about the "front yard" restriction.

positions appears acceptable, and given the strong preference for not allowing municipal enactments to interfere with farm operations that qualify for Right-to-Farm protection, I **CONCLUDE** that the location of the sales center is acceptable.

Wall Township Ordinance § 140-201 provides that storage sheds and barns shall be subject to certain size restrictions. Subsection D provides that farm properties may construct storage barns to a "height demonstrated to the Land Use Officer as necessary to accomplish a legitimate farming activity such that the side and rear setback of the barn shall be no less than the height of the barn . . . . No barn shall be higher than 35 feet and all barns shall comply with all front yard setback requirements." Wall Township contends that the CADB improperly disregarded its Ordinance by permitting the construction of a barn. It is undisputed that CLC did not submit plans for this barn to Wall Township's land-use officer. The barn proposed by CLC was to be 28 feet high, below the maximum permitted under the Ordinance. Resolution 2015-08-1 determined that "the barn addition with proposed lean-to . . . was discussed by the Board and found to be acceptable pursuant to the Right to Farm Act as a structure built for farming purposes." This determination meant that in the eyes of the Board, the structure was, in the words of the Ordinance, "necessary to accomplish a legitimate farming activity." As such, the Township could not have used its Ordinance to interfere with the construction of the barn, unless it could establish that the barn as it was to be constructed posed a "direct threat to health and safety." No such claim is made by the Township. Additionally, while the Township's brief states that the "proportions of that structure do not comply with the Township's ordinances," the next sentence only relates that "specifically, the Township's Land Use Officer . . . has the authority to decide whether the height of a proposed barn is necessary to achieve a legitimate farming objective." Thus, the Township's objection seems to simply be that the Board usurped this review function, not that any specific element of the proposed barn's proportions raises some legitimate ground for objection.

The Right to Farm Act places the responsibility for determining whether the protection from interference by local ordinance is necessary with the CADB. It may be that in an instance where the proposed barn is not to be built to such proportions or in such a location as to violate the ordinance that the ordinance poses no threat of

interference with the legitimate operation of the farm. In such case, it may be that there is no concern that resort to review by the local official will involve such a threat. Perhaps then the proper course is for the farm applicant to first seek review under the Ordinance and to only invoke the jurisdiction of the CADB if that local review does result in a problematic outcome. But in this case, where the CADB did review the matter and heard from the Township as to its position regarding the barn, I **CONCLUDE**, in this de novo setting, that there is no basis for a legitimate objection to approval of the barn.

Wall Township's "Peace and Good Order" Ordinance

Wall Township contends that the CADB Resolution adopted in 2015 violates Township Ordinance 22-2014, passed on October 22, 2014, after the first two days of hearings on the jurisdictional phase of the CADB's consideration of the CLC matter. This Ordinance, which amended Wall Township Code Chapter 164-2D, addresses restrictions on the time in which certain types of "unreasonable noise" and activities that can generate what might be called "commercial" noise can occur. In the words of the Township's brief, this Ordinance "sets forth specific restrictions on commercial and non-commercial activities that could have a negative impact on the quality of life of the residents of the Township." The CADB was made aware of this Ordinance in December 2014. Wall alleges that in establishing its own time frames for the operation of the farm, the CADB failed to consider the impact on the health and safety of the members of the adjacent neighborhood when it ignored the Ordinance and "established hours of operation for the CLC sales center." "The MCADB should have given greater deference to the Township Ordinance relating to Peace and Good Order." Wall contends that the Board violated Den Hollander's command to balance considerations of preemption against local concerns regarding public health and safety.

Initially, there is some uncertainty as to whether the objection here is to only the hours for the operation of the sales center, which the Resolution set as 6:00 a.m. to 10:00 p.m. Monday through Sunday, and until 11:00 p.m. for "Seasonal Events," or whether the objection is more broadly aimed at any differences between the Resolution-permitted hours for the farm's operation and noise restrictions in the Ordinance. I believe that Wall's brief indicates that the objection is broader, as it notes the hours

during which the farm is permitted to operate, as well as the hours when the sales center is allowed to be open.

Essentially, the Ordinance addresses noise issues in three provisions. It establishes restrictions on the hours in which "any unreasonably loud and disturbing sound[s] of any type . . . which transmit beyond the bounds of the property from which they emanate" may occur (the "unreasonably loud" provision).[12] In addition, it sets hours during which the operation or use of certain equipment of a commercial nature, such as cranes, backhoes, bulldozers, front-end loaders, trucks, dump trucks, and hydraulic lifts, and the running of engines or attached auxiliary equipment on motor vehicles in excess of 10,000 pounds while stationary in a public-right-of-way, is restricted ("the "commercial noise" provision"). The Ordinance also prohibits the use of sound trucks, loudspeakers, and sound amplifiers between 7:00 p.m. and 7:00 a.m. on weekdays and between 7:00 a.m. and 6:00 p.m. on Saturdays. No such operations are permitted on Sundays (the "amplifier" provision).

The "unreasonably loud" sounds restrictions apply from 11:00 p.m. Friday night to 7:00 a.m. Saturday morning and from 11:00 p.m. Saturday night to 7:00 a.m. Sunday morning. On all other days the restrictions apply from 10:00 p.m. until 7:00 a.m. the next morning. For days preceding legal holidays, the restriction is in place for the same hours as applicable for Friday and Saturday evenings (11:00 p.m. to 7:00 a.m.).

The hours allowed for the operation of the farm in the CADB Resolution differ from the hours during which the Ordinance prohibits certain sources of "unreasonably loud" noise. The Resolution permits farm operations from 5:00 a.m. until 10:00 p.m., Monday through Saturday. The Ordinance's "unreasonably loud" sounds restrictions apply from 11:00 p.m. Friday night to 7:00 a.m. Saturday morning and 11:00 p.m. Saturday night to 7:00 a.m. Sunday morning. On all other days the restrictions apply from 10:00 p.m. until 7:00 a.m. the next morning. For days preceding legal holidays the restriction is in place for the same hours as applicable for Friday and Saturday evenings

[12] These include, but are not limited to, music amplified sound, crowd noise, or loud conversations or celebrations.

(11:00 p.m. to 7:00 a.m.). Thus, under the Resolution, on Monday through Saturday, the farm can operate from 5:00–7:00 a.m., while the Ordinance allows "unreasonably loud" sounds to start no sooner than 7:00 a.m., two hours after farm operations can begin under the Resolution. On weekdays the Resolution allows operations until 10:00 p.m. The Ordinance prohibits "unreasonably loud" noise after 11:00 p.m. on Friday and Saturday nights. The Resolution permits operations until 10:00 p.m., while the Ordinance allows the "noise" to go on until 11:00 p.m. As for Sunday, the Resolution allows the farm to operate between 7:00 a.m. and 9:00 p.m. The Ordinance's "unreasonably loud" provision also kicks in at 7:00 a.m. However, while the Resolution prevents the farm from operating after 9:00 p.m., the Ordinance's "unreasonably loud" provision prohibits unreasonable noise only after 10:00 p.m. Thus, there is only a small clash between these two, affecting only two hours in the morning on weekdays and Saturday mornings.

As for the Ordinance's "commercial noise" provision, it prohibits such noise between 7:00 p.m. and 7:00 a.m. on weekdays and after 6:00 p.m. on Saturdays. It prohibits any such noise on Sundays and legal holidays. However, the Resolution allows for the farm to be operating starting at 5:00 a.m. Monday through Saturday and starting at 7:00 a.m. on Sunday.

CLC Farms has its own problem with the Resolution. It objects to the Resolution's declarations regarding limitations on noise, specifically, item 7, which sets hours for farm operations. Item 7c provides for "additional limitation" regarding the use of equipment with back-up beepers and vehicles that create excessive noise. Such equipment was restricted to operation between 7:00 a.m. and 5:00 p.m. Monday through Saturday and 9:00 a.m. through 5:00 p.m. on Sundays, "unless the noise-making features are disabled or turned off." CLC charges that this limitation violates federal law. Specifically, 29 C.F.R. 1926.601(b)(4) (2017) provides

> No employer shall use any motor vehicle equipment having an obstructed view to the rear unless:
>
> > (i) The vehicle has a reverse signal alarm audible above the surrounding noise level or:

> (ii) The vehicle is backed up only when an observer signals that it is safe to do so.

Also, regarding earthmoving machinery, such as loaders, tractors, and similar equipment, 29 C.F.R. 1926.602(a)(9)(ii) (2017) states

> No employer shall permit earthmoving or compacting equipment which has an obstructed view to the rear to be used in reverse gear unless the equipment has in operation a reverse signal alarm distinguishable from the surrounding noise level or an employee signals that it is safe to do so.

Since the Resolution prohibits the use of such "reverse signal alarm[s]" at certain times which are otherwise hours in which the farm is permitted to operate, if the farm uses such equipment for its intended use without the ability to actuate the back-up beepers, it will be forced to do so in defiance of federal law. Indeed, CLC's brief notes that it has received summonses for the use of beepers. It argues that the provisions of the SSAMP incorporated in the Resolution cannot be imposed, due to federal supremacy, as the action of the Occupational Health and Safety Administration in adopting these regulations acts preempts local authority to impinge on the ability of CLC to operate in accordance with the federal mandate. New York v. FCC, 486 U.S. 57, 63-64 (1988) (citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986) ("the statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof")).

In response to CLC's dispute with these restrictions, Wall Township objects to any consideration of the applicant's claim, noting that after the CADB adopted its second resolution in 2015, containing this restriction, CLC did not file an appeal with the SADB. Thus, it never suggested that it was unsatisfied with the results of the CADB's decisions, and should not now be able to seek to overturn any of the Resolution's provisions.

The CADB defends this limitation. The provision does not offend federal supremacy. The farm is not required to operate these vehicles in defiance of the OSHA

regulations. To the extent that it is not allowed by federal law to use these vehicles without the beepers, it can still use them under an alternative method. There is here no affirmative command to violate federal law. Instead, there is merely a negative command not to use the vehicles with beepers during certain specified hours.

Effectively, the provision means that while the farm can operate during the hours of 5:00 a.m. to 10:00 p.m. weekdays and Saturdays, to the extent it needs to carry out activities requiring the use of machinery equipped with back-up beepers in conformity with federal law, it may not carry out such work during the hours before 7:00 a.m. and after 5:00 p.m. weekdays and Saturdays. On Sundays, the operating hours are 7:00 a.m. to 9:00 p.m., but the beeper prohibition applies from 7:00 a.m. to 9:00 a.m. and from 5:00 p.m. to 9:00 p.m., thus restricting these "beeper" operations to 9:00 a.m. until 5:00 p.m.

Wall Township is correct to point out that CLC did not seek to appeal the Board's conclusions. As such, it should not be allowed to convert an appeal filed with the SADB only by those who opposed what the Board did into its own appeal. There is no provision in the Uniform Administrative Procedure Rules for cross-appeals to be raised after a matter has been transferred from a transmitting agency that has determined that an appeal filed by one or more appealing part(ies) is a contested case and should be transferred for hearing at the OAL. I agree that in the absence of a filed appeal, CLC has not proceeded in the proper manner to seek review of the issue. Given that fact, I **CONCLUDE** that it has no grounds for objecting to the measure in this proceeding. If it was dissatisfied with the provision, it should have filed its own appeal with the SADB. Thus, the provision should stand. However, that said, it may be best to present the SADB with some thoughts on the issue, should it determine that the de novo review should open up the whole Resolution for review.

The crux of Wall's overall argument against the grant of an SSAMP to CLC Farms is that there exist public safety and health concerns sufficient to override the legislative commands that provide for preemption of local controls if the agricultural activity otherwise qualifies for protection under the Act. And once again, it must be said that while it is certainly true that residents of the area are quite upset by what has or

may occur due to the operations of CLC Farms, the evidence simply does not satisfy the rather pointed legislative direction that the alleged threats to public health and safety must be "direct" in nature if the applicant is to be denied the ability to operate the farm. In the absence of such proof, the CADB, in determining to grant the SSAMP, was perfectly within its right to establish what it saw as reasonable time frames for the operation of the farm and the sales center. Wall is correct that in doing so, the Board had to effectuate a proper balance between the right of the farm to operate in an efficient and successful manner and local interests as represented in local enactments. As Den Hollander taught, the balancing of the interests of the agricultural operator and the local public, as represented by local ordinances, can be a delicate one, and the specific facts will govern.

> There will be other disputes where, although the ordinance has a peripheral effect on farming, it implicates a policy that does not directly conflict with farming practices. In such cases greater deference should be afforded to local zoning regulations and ordinances. Even when the CAB or SADC determines that the activity in question is a generally accepted agricultural operation or practice according to N.J.S.A. 4:1C-10.1(c), the resolution of that issue in favor of farming interests does not vest the board with a wide-ranging commission to arrogate to itself prerogatives beyond those set forth in the Act. The boards must act in a matter consistent with their mandate, giving appropriate consideration not only to the agricultural practice at issue, but also to local ordinances and regulations, including land use regulations, that may affect the agricultural practice.
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> [Den Hollander, 172 N.J. at 152 (citation omitted).]

It is certainly the case that reasonable persons might differ over exactly what limits should apply to the operations of the farm so as to accord to its neighbors some measure of quiet and repose from the noisier aspects of its activities while not significantly impacting the ability of the farm to operate. There is evidence that it is sometimes necessary for the farm business to be able to provide early-morning delivery of its products to purchasers. The farm is permitted to operate as early as 5:00 a.m. However, located as it is adjacent to a residential neighborhood and not in an isolated area or surrounded on all sides by other farms, it appears reasonable and not likely to

have a significant impact on the farm's ability to operate for it to be restricted from utilizing the sort of "commercial" equipment identified in section 2(a) of Ordinance 22-2014 before 6:00 a.m. on weekdays and Saturdays. As for the farm market, it does not appear that its being open at 6:00 a.m. on weekdays is likely to generate very much noise, particularly "unreasonable noise." However, the restrictions on such noise as identified in Chapter 164-2D, as amended, subsection (1), will apply, so that such noises as are prohibited therein will not be permitted until 7:00 a.m.

As for the "beeper" restriction, the only violation of federal mandate that could occur here would be for CLC to use the equipment requiring the beepers during such time as the Ordinance and/or the SSAMP does not permit such use without utilizing the option contained in 29 C.F.R. § 1926.601(b)(4) (2017), C.F.R. § 1926.602(a)(9)(ii) (2017), and 29 C.F.R. § 1926.601(b)(4) (2017) of having an observer signal that it safe to back up. It can comply with the OSHA regulations by simply not using the equipment during such hours or by having such an observer present. During weekdays and Saturdays, the hours when such equipment may be used, of course with the beepers operational or with an observer, shall be from 6:00 a.m. until 5:00 p.m. and on Sundays from 9:00 a.m. until 5:30 p.m. Any use at other times when operations are otherwise permissible shall be only with an observer present.

CONCLUSION

In conclusion, based upon the evidence and with due regard for the arguments of the parties, I **CONCLUDE** that the applicant has established that it operates a "commercial farm," more specifically, a tree farm, and that the production and sale of ornamental trees and shrubs and the maintenance of a farm market is a generally accepted farm-management practice. I **CONCLUDE** that the location of the farm market as described in the record is, for the reasons discussed above, acceptable. Additionally, **IT IS HEREBY ORDERED** that CLC Farms shall be **GRANTED** an SSAMP with the following provisions and shall operate in accordance therewith:

—the construction of the barn addition with lean-to is acceptable as a structure built for farming purposes;

—the farm market shall operate in accordance with the limitations and directions as expressed in the AMP for On-Farm Direct Marketing Facilities, Activities, and Events. It shall not be utilized for any business of any companies other than CLC Farms, and shall not be utilized for the business interests of any other CLC- or Kloberg-related business, except as those directly involve business transactions involving produce and farm-related materials produced at the farm or sold within CLC Farms as a part of the allowable activities of the farm market under the AMP for On-Farm Direct Marketing Facilities;

—any "educational" or "recreational" activities to be conducted at the farm shall be solely limited to those permitted under the AMP for On-Farm Direct Marketing Facilities, Activities, and Events;

—the building housing the farm market, and the CLC Farms property in general, shall not be utilized for the provision of any design-related business, including planning, design, or other matters, by any business other than CLC Farms, and in connection only with the produce and farm-related materials produced on-site by CLC Farms;

—the barn and, more generally, the entire CLC Farms property, shall not be utilized for the storage of any non-farm-related equipment, vehicles, or other property and shall not be a "staging area" to prepare for work on other properties off of the farm site. To the extent that vehicles and other equipment may be brought to the farm for temporary farm-related use, they may be stored on-site only for so long as reasonably necessary to accomplish the specific on-farm activity for which their use is necessary, and they must then be removed from the farm site immediately once such work is completed;

—the operating hours for the farm market shall be within the hours of 6:00 a.m. to 10:00 p.m., Monday through Sunday, and these may be extended for Seasonal Events until 11:00 p.m.;

—work on the farm shall be conducted within the hours of 5:00 a.m. to 10:00 p.m., Monday through Saturday, and 7:00 a.m. until 9:00 p.m. on Sunday.

—deliveries to the farm shall take place within the hours of 7:00 a.m. to 5:00 p.m. Monday to Saturday, with no deliveries on Sundays. This limitation on deliveries to and from the farm relates to farm activities and does not include any private use of vehicles owned by residents that travel on and off of the subject property. Further, this condition does not apply to deliveries to the residence that are associated with the residential use.

—equipment with back-up beepers and vehicles that create excessive noise are not to be utilized with such beepers active on weekdays and Saturdays prior to 6:00 a.m. and after 5:00 p.m., or on Sundays prior to 9:00 a.m. and after 5:30 p.m. It is understood that such vehicles will not be operated at any time except in compliance with applicable OSHA regulations and such other federal and State laws as may apply;

—all other provisions of Resolution No. 2015-08-1, including the approval of deer fencing, lighting, parking provisions, bin storage areas and allowable contents therein, buffers, the location and renovation of hoop houses, erosion and storm-water-management provisions, and diesel storage tanks, shall be incorporated in this decision and be effective, except to the extent modified herein.

Any claims that CLC Farms is operating in violation of this SSAMP may be brought to the attention of the Monmouth County Agriculture Development Board, which has jurisdiction to consider such contentions.

I hereby **FILE** my initial decision with the **STATE AGRICULTURE DEVELOPMENT COMMITTEE** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE AGRICULTURE DEVELOPMENT COMMITTEE**, which by law is authorized to make a final decision in this matter. If the State Agriculture Development Committee does not

adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE STATE AGRICULTURE DEVELOPMENT COMMITTEE, Health/Agriculture Building, PO Box 330, Trenton, New Jersey 08625-0330**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 2, 2018
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

EXHIBITS

It is noted that in submitting briefs and appendices, counsel have, to a great extent, mixed copies of exhibits formally introduced at the CADC hearings with copies of cases and of portions of transcripts from the CADC hearings. The following list consists only of the exhibits entered into evidence at those hearings and constitutes the official record of the exhibits considered in this hearing. However, the CADC marked summation briefs as exhibits. Briefs and legal argument are not generally "exhibits." These "exhibits" are listed for the sake of completeness, but only those briefs submitted to this tribunal following the close of the record in December 2017, have been considered.

CLC Farms Exhibit from 2014 Hearings Regarding Commercial Farm Eligibility:

A-1 Invoice and cancelled check for sale of mulch off CLC Farm in 2014
A-2 Invoice and cancelled deposit check for CLC Farm sale from April 2014
A-3 Invoice and cancelled check for the sale of nursery stock from June 2014
A-4 Township of Wall Schedule of Permitted and Conditional Uses for Residential Zone Districts
A-5 Township of Wall 1999 Master Plan Excerpt
A-6 Township of Wall September 2005 Master Plan Reexamination Report Excerpt
A-7a "CLC Farms 2014 Plant Growth Progress Report" dated August 27, 2014
A-7b "Supplemental Documentation CLC Farms 2014 Plant Growth Progress Report" revised September 24, 2014

CLC Farms Exhibits from 2015 Hearings Regarding SSAMP Application:

A-1 "Aerial Exhibit
A-2 "Zone and Tax Class Exhibit
A-08 SSMP Application, dated May 4, 2014, revised June 20, 2014
A-09 Eligibility Verification documents with July 1, 2014 cover
A-10 July 1, 2014, submission from John Giunco, Esq. with Exhibits A-G

A-11 E-mail from Sondra Lohnes to Amanda Brockwell, dated July 1, 2014, enclosing Bergen CADB Resolution regarding Cipriano Farms and Resolution 2001-11-02 of the MCADB

A-12 Letter from John Giunco, Esq. to Christopher Beekman, Esq., dated August 14, 2014, enclosing Elenbe Associations LP v. Township of Scotch Plains

A-13 August 20, 2014, submission from John Giunco, Esq., "Supplemental Filing-Status Update Since Last Meeting" with Exhibits A and B

A-14 November 25, 2014, letter from John Giunco, Esq. with five attachments including Traffic Report (also marked as Exhibit O-25b), Machinery Usage at CLC Farms and Truck Usage at CLC Farms

A-15 December 31, 2014, "Amended Site Specific Agricultural Management Plan Submission" from John Giunco, Esq. with Tabs 1-7(A-G). Tab 1 includes 4 Plats

A-16 Farmhouse and Curtilage exhibit

A-17 Agricultural Cultivation Areas exhibit

A-18 January 30, 2015 "Supplemental Submission for February Meeting" from John Giunco with Tabs 1-9

A-19 Not submitted

Objector's Exhibits:

O-1 through O-19 "Objector Photos Submitted by Roger McLaughlin, Esq.," dated September 2, 2014

O-20 "Trees and Shrubs Farmed by CLC Farms" from June 20, 214 SSAMP application materials

O-21 Wall Township Tax Map, page 34

O-22 Not submitted

O-23 Plumbing permit

O-24 2005 Plan of Survey Lot 22, Block 742

O-25a Not submitted

O-26b McDonough & Rea Associates Traffic Count Chart

O-26 Not submitted

O-27 Not submitted

O-28 "§215-37 Schedule V: Trucks over 8,000 Pounds GVWR"

O-29 "§140-190 Accessory Structures in Front Yards Restricted"

O-30 "Article XXVII: Accessory Buildings and Structures"

O-31 "Ordinance No. 22-2014: Chapter 164: Peace and Good Order"

O-32 Not submitted

O-33 Microsoft Word document from January 2015 containing Terrie Mahedy's photos labeled Photo A through Photo J

O-34 MSL listing for 218 Atlantic Avenue, Spring Lake, NJ

O-35 March 30, 2015 e-mail from newbedford2broadlawn@gmail.com to rmclaughlin@wall-lawyers.com containing links to eight videos

O-36 Mullen bus stop video, dated April 16, 2015

O-37 Not submitted

O-38 June 23, 2014 legal brief filed by Sean Kean, Esq.

O-39 December 1, 2014 legal brief filed by Sean Kean, Esq.

O-40 December 2, 2014 legal brief filed by Sean Kean, Esq.

O-41 January 9, 2015 legal brief filed by Sean Kean, Esq.

O-42 May Trucking company tractor trailer photo

O-43 July 1, 2015 summation brief filed by Matthew Peluso, Esq.

O-44 July 1, 2015 summation brief filed by Roger McLaughlin, Esq.

O-45 June 30, 2015 summation brief filed by Sean Kean, Esq.

Board's Exhibits:

B-1 Bill Sciarappa's Site Visit Report June 10, 2014 and May 2015 supplement

B-2 Elia Sarrinikolaou's Site Visit Report, dated June 14, 2014

On behalf of Respondent/Moving Party

R-1 Appendix Volume One, with items as listed therein

R-2 Appendix Volume Two, with items as listed therein