New Jersey Farm Bureau

Because Agriculture Matters!

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October 17, 2023

Ms. Susan E. Payne, executive director
State Agriculture Development Committee
PO Box 330
Trenton NJ 08625-0330

Re: Soil Disturbance on Preserved Farmland and Supplemental Disturbance Standards
55 N.J.R. 89(1)
Proposal Number: PRN 2023-079

Dear Ms. Payne:

Enclosed is an opinion letter from our general counsel, Lewis Goldshore, regarding the rule proposal noted above. It is being forwarded by email as well as by USPS general mail.

This legal opinion will be followed by another letter on my signature prior to the November 6 public comment period deadline. That letter will be broader in scope than the legal opinion and will make reference to the opinions of other farmers, the basis for the widespread opposition to the proposed rule and a recommendation for the SADC to start over and formulate a more workable, streamlined approach to the issue.

Thank you for your consideration of our views.

Very truly yours,

Allen Carter
President

Cc: Holly Sytsema, State Board of Agriculture president
Joseph Atchison, Acting SADC chairman and Assistant Secretary of Agriculture
Office of the Governor
Lewis Goldshore, Esq.

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October 10, 2023

Susan E. Payne, Executive Director
State Agriculture Development Committee
P.O. Box 330
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RE: Soil Disturbance on Preserved Farmland and Supplemental Disturbance Standards
55 N.J.R. 89(1)
Proposal Number: PRN 2023-079
Written Comments on Behalf of the New Jersey Farm Bureau

Dear Ms. Payne:

I serve as general counsel for the New Jersey Farm Bureau ("Farm Bureau"). In that capacity, I was requested to review the proposed rules ("SPS") and submit written comments to the State Agriculture Development Committee ("SADC") concerning their legal sufficiency with particular reference to their application to the preservation deeds of easement executed prior to adoption of the rules ("preexisting DOEs"). For the following reasons, it is my considered opinion that the SPS are legally defective and cannot under any circumstances be applied to preexisting DOEs.

The Bond Act and the Implementing Laws

A review of the Farmland Preservation Bond Act of 1981 ("the Bond Act"), L. 1981, c. 276, the Right to Farm Act ("RTFA"), N.J.S.A. 4:1C-1 et seq., and the Agriculture Retention and Development Act ("ARDA"), N.J.S.A. 4:1C-11 et seq., indicates that the SPS impermissibly

conflict with the Bond Act's essential purpose and the legislative intent and purposes expressed in the implementing laws.

The Bond Act recognized that agriculture is at its core **an economic pursuit**. The agricultural preservation program was designed to preserve agriculture **as an ongoing viable industry** and not simply as an attractive bucolic vista for rural or suburban neighbors and passing motorists to admire or to function as an extension of the State's Green Acres Program that preserves land for open space conservation and recreation.

That distinction was made clear in several sections of the Bond Act: §2(a) provided that: "The development of agriculture and the retention of farmland are important to the **present and future economy** of the State and the welfare of the citizens of the State"; §2(c) recognized that the State was acquiring the development easements to assure that the farmland would "be retained in **economical viable agricultural production** . . ."; and §3(e) identified the principal purpose of the "Farmland preservation program" as assuring the long term preservation of "agricultural land and the **maintenance and support of increased agricultural production as the first priority use of that land**".

Following the Bond Act's approval by the electorate, the RTFA and the ARDA were approved to implement and advance the public policy expressed in its provisions. Both of the implementing laws included the identical legislative finding and declaration: "All State departments and agencies thereof should **encourage the maintenance of agricultural production and a positive agricultural business climate**." N.J.S.A. 4:1C-2(d); 4:1C-12(b). Thus, the Legislature has recognized that agriculture is a business, not just a description of a land use.

The RTFA also directed the SADC to "[r]eview and evaluate the proposed rules, regulations and guidelines of any State agency in terms of feasibility, effect and conformance with"

maintaining agricultural production and promoting a positive agricultural business climate. N.J.S.A. 4:1C-6(b). Presumably that statutory direction required that the SADC review and evaluate its own proposed rules and regulations for those purposes prior to their adoption.

Those essential purposes were reiterated in the ARDA where the Legislature found and declared that:

> The **strengthening of the agricultural industry and the preservation of farmland are important to the present and future economy of the State** and the welfare of the citizens of the State, and that the Legislature and the people have demonstrated recognition of this fact through their approval of the "Farmland Preservation Bond Act of 1981," P.L. 1981, c. 276. N.J.S.A. 4:1C-12(a).

The State's agriculture community was a strong proponent for the farmland preservation program and has continued to support it following its adoption. As a result, the program has been extremely successful and preserved approximately 2,900 farms comprising some 250,000 acres. Its continued success will be placed in serious jeopardy if the proposed SPS are not withdrawn.

The 102-page proposal, published on the SADC's website, required 40 pages of text to explain its 60 pages of regulations. That fact alone is telling and represents a failure to consider "the needs and difficulties of agriculture" and an attempt by a government agency to impermissibly micro-manage agricultural operations on preserved farms, N.J.S.A. 4:1C-4(a). The State's policy is to maintain and support increased agricultural production and a positive agricultural business climate not to impose layer upon layer of regulation that will "unnecessarily constrain essential farm practices". N.J.S.A. 4:1C-2(b).

Initially, the SADC staff indicated that only about 15 or so of the 2,900 preserved farms had engaged in what it considered to be excessive soil disturbance and that an equal number were close to that designation. Following its mapping, the staff may have finetuned the estimates, although questions have been raised as to the accuracy of the mapping process. In light of the small number

of farms that may have exceeded the arbitrary 12% limitation, it is especially disturbing that the agency would propose such complex and burdensome regulations on all the owners of preserved farms. Certainly, an agricultural agency charged with promoting farmland preservation by maintaining and supporting increased agricultural production as the first priority of that land should have been able to find a better way to deal with the minimal number of purported outliers without resulting in universal and sustained opposition from the agricultural community.

The basis for that opposition was underscored by the testimony presented at the September 27, 2023, hearing which was only reluctantly scheduled at the insistence of representatives of the agricultural community. Speaker after speaker at the hearing emphasized that agriculture was an economic pursuit not simply an activity engaged in for the casual enjoyment of the State's non-farming residents. The speakers explained that the proposed rules would unduly constrain current and future operations on preserved farms and threaten their economic viability.

Preexisting DOEs

The SPS' failure to distinguish between preexisting DOEs and those executed following the adoption of the rules misconstrues the legal significance of the underlying real estate transactions. While a State administrative agency may be free to change the terms of a regulation so long as it complies with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and other applicable law, it cannot unilaterally abrogate a contract or change the terms of a recorded easement after-the-fact without the consent of the landowner.

The preservation easement was the result of a real estate transaction in which the landowner, referred to as "the grantor", received a stated amount of monetary compensation and in exchange agreed to certain written deed restrictions prescribed by the grantee on the future use of the

property. In essence, the property would be devoted to agricultural use and not developed for non-agricultural purposes.

The parties negotiated the consideration to be paid to the landowner in exchange for the imposition of the restrictions. The easement resulted from a settled real estate transaction and was then recorded in the county recording office and was binding on the grantor, its heirs and assigns and was "construed as a restriction running with the land." N.J.A.C. 72:76-6.15(a)18.

The SADC adopted a standard non-negotiable form of easement, and the terms were also set forth in N.J.A.C. 2:76-6.15. It is particularly significant that those rules were repeated verbatim in the preservation deeds of easement.

Paragraph 2 in the easements provides that: "The Premises shall be retained for agricultural use and production in compliance with N.J.S.A. 4:1C-11 et seq., P.L. 1983, c.32, and all other rules **promulgated** by the State Agricultural Development Committee, (hereinafter Committee)." (emphasis added). The only reasonable interpretation of that provision is that the reference is to rules that were in place – had been promulgated - at the time the DOEs were executed.

The New Jersey Supreme Court has instructed that "[i]n the absence of specific intent to the contrary, words in a statute are to be given their ordinary and primary meaning." Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, 526 (1964). The same rule of interpretation applies in respect of regulations. In re Eastwick College, 225 N.J. 533, 542 (2016) (words in a regulation are to be given their ordinary and commonsense meaning).

The word "promulgated" in Paragraph 2 in the easements is the past tense of the word "promulgate". The ordinary and for that matter the only meaning of the term "promulgated" is that it referred to an action that had been taken in the past. In this case, it could have only referred to those rules that were in effect at the time that each particular easement was executed. If the SADC

intended a different result when the rules were adopted (N.J.A.C. 2:76-6.15, 2:76-17.15 and 2:76-17(a)-15) the deed restrictions would have expressly referenced both the rules that had been promulgated (past tense) **and** the rules "to be promulgated in the future" (future tense).

Had the SADC been candid and placed the landowners on notice that the terms of the easement were open-ended and that the **promulgated** rules could be changed in the future to impose additional burdens on the landowners it is likely that some grantors would have opted not to sell their development rights or demanded additional compensation for the interest that was being conveyed. The law of easements prohibits the easement owner from involuntarily increasing the burdens on the landowner. Tide-Water Pipe Coo. V. Blair Holding Co., 42 N.J. 591, 609 (1964), citing Tallon v. Hoboken, 60 N.J.L. 212, 218, 37 A. 895, 897 (E. & A. 1897); 2 Thompson, Real Property § 426, p. 694 (1961 repl.); and 2 American Law of Property § 8.66, p. 278 (1952). The SADC cannot through the artifice of a regulation attain what is otherwise impermissible.

What the SADC is proposing now is fundamentally unfair and is contrary to the well-established principle that the "government has an overriding obligation to deal forthrightly and fairly with property owners." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985). See also, W.V. Pangborne & Co. New Jersey Dep't of Transp., 116 N.J. 543, 561 (1989), where the New Jersey Supreme Court "insisted that in the exercise of statutory responsibilities, government must "turn square corners" rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens."

The SADC drafted the DOE and promulgated the implementing regulation, N.J.A.C. 2:76-6.15. The Appellate Division has observed that where that is the case the rule is that any "ambiguities will be construed against the drafter." St. George Dragons, L.P. v. Newport Real Estate Group, L.L.C., 407 N.J. Super. 464, 483 (App. Div. 2009); see also Terminal Construction Corp. v. Bergen

County Hackensack River Sanitary Sewer Dist. Authority, 18 N.J. 294, 302 (1955) ("Where an ambiguity appears in a written agreement, the writing is to be strictly construed against the draftsman.").

There is no ambiguity here: the reference is to the rules that had been promulgated by the SADC and were in place at the time the preexisting DOEs were executed. But if there were some questions about the timing issue, the New Jersey courts have held that any ambiguity should be interpreted against the drafter's (the SADC) position.

In sum, the SADC is attempting to reinterpret the preexisting DOEs so that it can get a better deal and impose additional burdens on the grantors (the landowners) that were never contemplated at the time the instruments were executed. The SADC's position is fundamentally unfair and must be rejected. In plain language, **a deal is a deal.**

Any suggestion that the SPS is merely a minor clarification of the existing provision in the preexisting DOEs that relate to "drainage, flood control, water conservation, erosion control, soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises" conflicts with the plain facts. See, e.g., N.J.A.C. 2:76-6.15(a).7 and paragraph 7 in the deeds of easement. If this was only a minor clarification it is inconceivable that the SADC would have considered it necessary to publish a regulatory document 102 pages in length. What we have here is an effort by the SADC to improperly intrude on the operations of previously preserved farms and something that the owners of those farms never consented to or could have envisioned.

Furthermore, SADC's attempt to apply the SPS retroactively – that is, to easements acquired prior to their adoption – is legally impermissible. As explained by the Supreme Court in Gibbons v. Gibbons, 86 N.J. 515, 522 (1981):

It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them.

Several of the speakers at the September 27th hearing, although unreasonably limited by the chair to only four minutes to present their comments, confirmed that the adoption of the SPS would adversely impact their businesses and seriously discourage future participation in the preservation program. They expressed the concern that if the SADC was able to adopt the SPS, what other restrictions on agricultural operations on preserved farms would it impose in the future.

The SPS conflicts with the Bond Act, the RTFA and ARDA and should not as a matter of policy be applied even prospectively, that is, to easements acquired after their adoption. However, in no event can they lawfully be imposed on the unsuspecting landowners who entered into arrangements with the government to preserve their farms prior to the adoption of the proposed SPS.

Lastly, there is nothing in the State v. Quaker Valley Farms, Inc., 235 N.J. 37 (2018) (QVF) decision that suggests or supports retroactive application of the SPS. That issue was simply not before the Supreme Court and the New Jersey courts do not issue advisory opinions. Crescent Park Tenants Association v. Realty Equities, 58 N.J. 98, 107 (1971).

The Court in QVF instructed the SADC to issue guidance or standards that would advise the owners of preserved farms when they could be subject to enforcement actions for violating the terms of the preexisting DOEs. It did not contemplate or authorize the SADC to issue a 102-page regulatory document that would have the effect of rewriting the terms of settled real estate transactions.

The *No Waiver* Provision

The so-called waiver provision warrants comment. SADC has indicated that the SPS provides for two types of limited waivers: production waivers and innovation waivers. But to qualify for a waiver the applicant would have to prove: (i) that there was "no apparent feasible alternative . . . which would avoid or substantially reduce the proposed soil disturbance"; (ii) that "[i]t is not feasible to utilize areas of existing soil disturbance that would provide sufficient land area for the proposed use"; and (iii) and that it is not "feasible to implement a certified rehabilitation project on the premises. . . which, once completed, would render the need for a waiver unnecessary".

The "feasibility" requirements for obtaining relief appears to have been lifted from rules adopted by the Department of Environmental Protection. The bottom line is that it would enable the SADC to deny a waiver application for any reason or no reason at all and is in direct conflict with the intent and policies expressed in the Bond Act, RTFA and ARDA.

The application process will be unduly lengthy, expensive and require the applicant to retain a team of technical and legal experts. To make matters worse the inevitable result of this costly wild goose chase would be a denial.

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For all the foregoing reasons, the SPS are inconsistent with the legislative intent and purpose expressed in the applicable laws and cannot lawfully be applied to preexisting DOEs, should not be applied to DOEs obtained in the future, and should be withdrawn by the SADC.

Very truly yours,

LEWIS GOLDSHORE

c: New Jersey Farm Bureau

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October 19, 2023

Susan E. Payne, Executive Director
State Agriculture Development Committee
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RE: Soil Disturbance on Preserved Farmland and Supplemental Disturbance Standards
55 N.J.R. 89(1)
Proposal Number: PRN 2023-079
Written Comments on Behalf of Holly Acres, L.L.C. (John and Janice Ackerman)

Dear Ms. Payne:

I represent Holly Acres, L.L.C., and Janice and John Ackerman, the members of Holly Acres (collectively referred to herein as "the Ackermans").

Janice and John are from long-established New Jersey farm families and are actively involved in agricultural operations and in businesses supportive of agriculture. They have been active participants in the State's agricultural preservation program for more than twenty-three (23) years.

In 2000, the Ackermans purchased a preserved farm from the State Agriculture Development Committee (SADC) comprising 197.16 acres. The property is designated as Block 18, Lots 70.01 and 70.03 in Upper Pittsgrove Township and Block 43, Lots 5, 7, 8 and 9 in Elk Township.

This was followed in 2003 with the SADC's sale of a second preserved farm to the Ackermans. That farm comprised 184.80 acres and is designated as Block 18, Lot 53 in Upper Pittsgrove Township and Block 43, Lot 1 in Elk Township.

In 2009, the Ackermans entered into a preservation Deed of Easement with the SADC for property located in Upper Pittsgrove Township (Block 18, Lots 62 and 63) and Elk Township (Block 43, Lots 4 and 6). The total easement area comprised 145.54 acres.

In 2013, the Ackermans entered into a preservation easement for Block 45, Lot 22 in Elk Township. The total easement area comprised 26.929 acres.

In 2021, the Ackermans purchased two additional preserved farms from David Bruce Dare, Tenant in Common with Louanne B. Koval comprising an additional 94.51 acres. Those farms are designated as Block 18, Lots 58, 58.01, 59, 60 and 61 in Upper Pittsgrove Township and Block 43, Lots 2 and 2.01 in Elk Township.

As a result of these real estate transactions, the Ackermans are the owners of approximately 650.38 acres of preserved farms on which they grow corn, soybeans and hay. The Ackermans have grown the operation for 23+ years and intend to continue to enrich and cultivate the land for future generations. The Ackerman family takes sincere pride in growing healthy crops and staying on top of the upkeep that is required to operate a successful farm. The former Secretary of Agriculture, Douglas H. Fisher, described the Ackerman farms as an exemplary operation.

It is against this background that the Ackermans received notices from the SADC concerning the proposed Soil Disturbance rule and maps depicting the extent of soil disturbance on their properties. The Ackermans have faithfully operated their preserved farms in accordance with the terms of the Deeds of Easement.

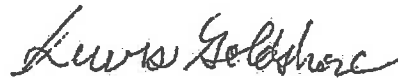
They were highly distressed and disappointed that the SADC, a governmental agency, would come along more than twenty (20) years after the fact and attempt to impose additional deed restriction-like regulations on settled real estate transactions. This unreasonably attempts to change

the essential terms of the Deeds of Easement and is far outside of the bounds of how a governmental agency is obligated to treat the public.

Had the SADC been candid and upfront when the Ackermans originally entered into the Deeds of Easement and advised them that the agency could change the terms of those deals at will decades later, they would not have gone forward with those transactions. Similarly, the Ackermans would not have proceeded with the purchase of the Dare and Koval preserved farms in 2021.

The Ackermans have always maintained a good working relationship with the SADC staff. They consider the proposed rules to be unfair, a breach of faith and a betrayal by the agency. The Ackermans incorporate the comments by the New Jersey Farm Bureau and the other objecting landowners and urge the SADC to withdraw the proposed Soil Disturbance rules.

Very truly yours,



LEWIS GOLDSHORE, ESQ.

c: Holly Acres

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October 6, 2023

Via Mail and Email SADC@ag.state.nj.us

Susan E. Payne, Executive Director
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P.O. Box 330
Trenton, NJ 08625-0330

Re: Comment on Proposed New Rule *N.J.A.C.* 2:76-25 and 25A Soil Disturbance on Preserved Farmland and Supplemental Soil Disturbance Standards

Dear Executive Director Payne:

N.J.A.C. 2:76-25.5(g) of the proposed rules provides:

"Removal of topsoil from the premises is expressly prohibited, except as directly related and incidental to the harvesting of agricultural and horticultural products, such as in soil that is removed with roots when sod is harvested."

The proposed rules and standards do not appear to specifically address ball-and-burlap harvesting of nursery products, which also involves removal of soil with roots. Is the above-cited exception intended to cover ball-and-burlap harvesting of nursery products?

SADC should develop appropriate standards for ball-and-burlap harvesting by which nursery farmers can avoid and rebut allegations of improper soil removal.

Cordially,

HORNER & HORNER, L.L.C.

By:
William L. Horner

WLH:jcc

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February 23, 2024

Via Email SADC@ag.state.nj.us
Susan E. Payne, Executive Director
State Agriculture Development Committee
Trenton, NJ 08625-0330

Re: Proposed Soil Disturbance Standards

Dear Ms. Payne and SADC Members:

From the comments on the proposed soil disturbance standards we (Quaker Valley Farms, LLC ("QVF") and David den Hollander) have had access to, there has been much discussion of the QVF New Jersey Supreme Court decision and the resulting soil disturbance regulations proposed by the SADC. This comment is meant to set forth the perspective of Quaker Valley Farms on the Supreme Court decision and the proposed standards. As a general proposition, QVF takes the position that: 1) the standards should not have retroactive application, 2) the standards will have a harmful effect on the ongoing strength of the agricultural industry (a stated purpose of the ARDA) and 3) the standards are antithetical to at least a twenty (20) year record of the SADC encouraging diverse agricultural pursuits on preserved farms.

There were two QVF Supreme Court problematic holdings with one far more important to the future of farming in this State. The QVF Court held there was no fact issue as to whether QVF "destroyed" soil: this holding was in contrast to the QVF Appellate panel expressly found a fact issue based on the unequivocal testimony of QVF's soil expert who stated that while soil profiles were separated they were preserved and never destroyed insofar as they could be reconstituted for crop use. ("Though the soil horizons are not in their original order or condition, the topsoil and subsoil have not been irreversibly damaged. Portions of the topsoil and subsoil were stripped, transported and stockpiled in preparation for hoophouse placement... At no time have I ever stated that earthmoving activities at Quaker Valley Farms destroyed the soil.") Indeed, one of the several trial court Judges handling the case once queried SADC

counsel that, if the soils were destroyed, how could they be remediated (as was being sought by the State?) While we appreciate that this is an issue particular to QVF, it certainly suggests that its property remains poised for the growing crop production even though QVF is a horticultural concern.

However, the QVF's far more disturbing holding was that the ARDA mandated that preserved farmland remain available for a variety of agricultural uses, particularly the growing of row crops, without any precise legislative authority or guidance:

> One of the fundamental purposes of the ARDA is to preserve farmland permanently for a variety of agricultural uses by future generations of farmers. See N.J.S.A. 4:1C-13(b) (providing non-exhaustive list of agricultural activities that are contemplated by ARDA). While the alterations to the soil may have made the land more suitable for nursery operations, Quaker Valley permanently destroyed the use of the soil for other agricultural uses, specifically the growing of row crops -- the very agricultural use which was a significant reason the property was originally selected to be preserved.
>
> 235 N.J. 37, 60 (2018).

First, the Supreme Court supported its holding by citing the ARDA definition of agriculture alone wherein there is no affirmative requirement that farmland be preserved for a variety of agricultural uses let alone a priority of growing row crops. No such priority exists in the ARDA; this erroneous assessment of agricultural priority is at the core of the soil disturbance standards. Second, the "variety" requirement only arose in the enforcement Deed of Easement ("DOE") provisions was when the SADC decided to impose a variety requirement in the DOE when dividing a preserved property: that is, the resulting preserved properties were expected to permit a variety of agricultural uses. In short, an unelected Court and executive branch agency are dictating farming policy in this State: when the Supreme Court states the growing of row crops was "the very agricultural use which was a significant reason the property was originally selected to be preserved" it ignored years of legislative and SADC statements that the State was not going to interfere with how a farmer was going to exercise their retained agricultural development rights. **HOW IS IT THAT POLICY DECISIONS FUNDAMENTAL TO THE FUTURE OF THE FARMLAND PRESERVATION PROGRAM ("FPP") ARE NOT BEING DISCUSSED BY THE LEGISLATURE?**

The State's challenge to QVF's soil grading first came to our attention (as a concern) in late November of 2007, when QVF and counsel were meeting with HCADB representatives and its counsel on matters pertaining to the non-preserved Garden State Growers's operation which is immediately adjacent to QVF. HCADB counsel informed us that work was proceeding without Soil Conservation District ("HCSCD") knowledge. We informed him he was wrong; the HCSCD would inform HCADB counsel within that very meeting that QVF had submitted a C. 251 plan to the HCSCD which plan was certified. At all times relevant to its grading work preliminary to heated temporary greenhouse construction, QVF adhered to that plan. Notably, regulations in place at the time (and presently), require that the construction of agricultural structures involving the disturbance of 5000 square feet of land or more required a C. 251 plan or NRCS farm conservation plan. See N.J.A.C. 2:90-1.8. QVF, though, was bound by prior agreement with the HCADB, HCSCD and SADC to submit a C. 251 plan.

Nearly ten (10) years prior to this November 2007 meeting, GSG and QVF requested the HCADB, in writing, to permit the ongoing construction of agricultural structures via a farm conservation plan which request was fully in keeping with prevailing regulatory guidance. See N.J.A.C. 2:90-1.8. However, the HCADB, and ultimately the SADC, refused this request: QVF (and GSG) were to proceed with the construction of agricultural structures via a C. 251 plan and not a farm conservation plan. Ironically, there are now fifteen (15) plus acres of detention basins on QVF property (four (4)) each of which required extensive soil disturbance (soil cuts up to eight (8) feet deep) all of which QVF thought were unnecessary. Having constructed four (4) basins over fifteen (15) acres on preserved property, obviously for an agricultural purpose, how was it unreasonable for QVF and/or David den Hollander to believe that it could not grade its property to create a 1% grade so as install heated hoophouses on a twenty-five (25) acre tract on its 118 acre preserved property? To this day, QVF has preserved nearly 18000 cubic yards of subsoil from basin work on its property. May we observe as well that QVF's 1993 DOE had no provision requiring it to promulgate and implement a farm conservation plan. We have read the comments: any belief in the farming community that the QVF matter could have somehow been avoided if QVF had not gone "rogue," or had only promulgated a FCP, is without any factual basis. QVF's plans for the work under review these past sixteen (16) years were presented and certified by the very entity (HCSCD) the HCADB and SADC had told them to approach with regard to hoophouse production.

Going back to the late November 2007 meeting, once HCADB counsel learned that QVF had promulgated and was faithfully implementing the C. 251 plan, counsel's next observation was that the work may still be in violation of the DOE's "variety" requirement.

Upon review of the DOE, we would all learn that QVF's DOE held no such requirement. On November 29, 2007, the HCADB considered a cease and desist order blocking the ongoing grading work on QVF, but, in a full vote of five (5) to one (1) dissent, declined to do so. At this public meeting, the HCSCD told the HCADB that QVF was in compliance with its C. 251 plan. The Board members indicated that they trusted the HCSCD to monitor the progress of land grading so as to assure it was done in compliance with the C. 251 plan. When asked by HCADB Board Members whether there was a "variety" requirement within QVF's DOE, HCADB counsel told the HCADB that there was no "variety" requirement in the QVF Deed. Again, that "variety" requirement first came into existence for easement division and not pervasive requirement. That is, the HCADB members did not interpret any part of QVF's 1993 Deed to require that the tract at issue be retained for a variety of agricultural uses. **DOES THE SADC INTEND TO TREAT DOE GRANTORS WITHOUT THE VARIETY REQUIREMENT IN THEIR DOE DIFFERENT THAN THOSE WHO DO WITH REGARD TO THE ENFORCEMENT OF THE SOIL DISTURBANCE STANDARDS?**

Most importantly, there ensued a fulsome discussion of the underlying purpose of the FPP: something which has been sorely missed by the SADC when considering these soil disturbance standards. Under oath at his deposition in the QVF case, the HCADB Chairman testified, having made personal observations of the work, that he understood QVF was grading its property in anticipation of construction of agricultural structures - something he understands had been done on many other Hunterdon County preserved farms:

A. ... When it says I talked about horse farms (in the meeting minutes), meaning large indoor riding arenas that are on preserved farms currently. You know, or I know there are farms that have put in big manure storage areas on preserve farms for manure. And they - - you know, there's really not that much difference in what is done.

Q. What do you mean by "difference"? Difference, in terms of impact to soil, difference - - I mean, I'm just trying to clarify what you were trying to get at there.

A. Yeah. Difference in what's done to the soil, grading, whether it's stripping off topsoil, getting down to the subsoil, level areas, that type of thing.

Q. So, your point was there may be other areas where this occurs on other preserve farms?

A. Well, there are.

At this November 29, 2007 meeting, the HCADB Chairman stated that he was concerned that regulating what Quaker Valley Farms did might **"limit what type of agriculture can take place on preserve[d] farms"** and that both temporary and gutter connected greenhouses are agriculture. QVF relied upon the testimony of the HCSCD District manager and his discussion of those Soil Erosion and Sediment Control standards applicable to the excavation which occurred on this property. This official, who is also an *ex officio* member of the HCADB, testified that excavation is "ordinary" when preparing a property for construction of farm structures or farm related activities: this official further testified that the HCADB was well aware of all basin construction which occurred on QVF. In fact, this official testified that he was not aware of any prohibition in the DOE which would have prevented QVF from excavating prior to the construction of an agricultural building. In fact, in October of 2007, an NRCS employee working within the HCCSCD conducted the annual inspection of QVF as a contractor for the HCADB: this NRCS official, fully aware of the land grading work being done, did not find QVF in violation of the DOE. While the NRCS official did not recall but did not deny, David den Hollander testified he told the official, at the official's request, that QVF was going to strip the topsoil and stockpile it.

We again ask the farming community to appreciate that QVF had not gone rogue, it had not merely done what it wanted to do without regard to consequences. That is, if the HCADB, knowing what QVF was doing on its property because they had observed it and had unfettered access to the HCSCD (after all the District Manager is an *ex officio* member of the HCADB) and still decided not to seek a cease and desist order by a vote of 5-1, how is it that the Supreme Court could conclude QVF should have somehow known its actions were so plainly wrong. The Supreme Court did not have a basis to conclude QVF's actions were so clearly unreasonable when at least five (5) CADB members, an NRCS official, the HCSCD District Manager and an Appellate Panel all thought otherwise. Anyone suggesting, including anyone in the farming community, that what QVF did was so clearly violative of DOE restrictions does not fully appreciate the history of the QVF or ultimately the ARDA.

At the inception of the ARDA, the record reveals that SADC leadership, like the HCADB in 2007, was concerned about limiting the type of agriculture which can take place on

preserved farms. Ultimately, the agricultural community should be asking itself by what legitimate authority the SADC is writing soil disturbance standards which clearly impinge on the retained agricultural development rights of farmers participating in the FPP. Indeed, the Appellate Division panel in the QVF case, when overturning the trial court opinion observed how the SADC had once been acutely concerned with limiting the type of farming which may ensue on a preserved farm:

> In its initial proposal of the rule prescribing the terms of a DOE, the SADC proposed that grantors "comply with agricultural management practices," which were prescribed by the New Jersey Agricultural Experiment Stations (NJAES); represented the "best collective professional judgment and opinion" of NJAES faculty; or were approved by the State Soil Conservation Committee, "relat[ing] to soil and water conservation and management." Proposed N.J.A.C. 2:76-6.15, 16 N.J.R. 1641 (July 2, 1984).
>
> That proposal and others prompted a comment that the DOE "should focus on restrictions prohibiting non-agricultural development and not dictating how the land should be farmed." 16 N.J.R. 2427 (Sept. 17, 1984). The SADC Committee accepted those concerns, deleted the proposed DOE provisions, stating, **"The deed restrictions at N.J.A.C. 2:76-6.15 are not intended to mandate how the land must be farmed but to ensure that the land will be retained for agricultural use and production." Ibid.**

ARDA provisions confirm this goal and judgment. In N.J.S.A 4:1C-32 the legislature clarified: "These restrictions and conditions shall state that any development for non-agricultural purposes is expressly prohibited, shall run with the land and shall be binding upon the landowner and every successor in interest thereto." The focus of original DOE restrictions was not intended to mandate how the land is to be farmed. Incredibly and unfortunately, these soil disturbance standards mandate how the land must be farmed and are particularly offensive for those farmers whose properties have been in the FPP since the 1980's. "The principle purpose for acquisition of development easements is for the long term preservation of **agricultural lands** in order to maintain and enhance the agricultural industry in the State." N.J.A.C. 2:76-6.1. At all times and until this day QVF has preserved the "agricultural lands" upon which it operates for its agricultural, i.e. horticultural, use and production. We are sure that other farmers who have performed agriculturally related soil excavation have similarly maintained their "agricultural lands" for ongoing production.

To be sure, QVF's "lands" are also comprised of topsoil and subsoil stockpiles should growing crop production once again become a priority. However, one of the more insidious aspects of the current Judgment is that QVF must engage in farming it has chosen not to pursue. While the farming community may believe that it can differentiate the QVF enforcement case, from the regulatory soil disturbance, make no mistake that the SADC obviously intends to impose these limitations on all farmers with DOEs from the inception of the FFP. The earlier iterations of the SADC would have found this unfathomable.

The SADC realized at the outset of ARDA passage that its focus was not to dictate how preserved lands were to be farmed let alone focus solely or squarely on the growing of row crops. In 1993, Farm Credit of Central New Jersey came before the SADC seeking clarification of what activities could proceed on a Franklin Township farmland preserved property it wished to sell. **See SADC Regular Meeting Minutes of August 26, 1993.** At the meeting, the prospective owner indicated that he wished to pursue both crop and equestrian activities. The equestrian related activities would be to have a polo pony breeding and training facility, which would include horse stables, turn out pastures and two (2) polo fields. An SADC member questioned if the top soil had to be removed from the polo fields in order to hold the polo matches. The prospective owner indicated that this was unnecessary because polo is played on a grassy surface. In response,

> Mr. Applegate (then executive director) stated that if the soils were moved it would have to be done under an approved conservation plan. Mr. Romano stated that the statute stipulates that no soils can be removed without an approved soil conservation plan.

That is, the movement of soil for an agricultural purpose was expressly understood to be part and parcel of those rights retained by the easement grantor so long as those soils were removed as part of an approved soil conservation plan. **Mr. Applegate would go onto comment: "the committee must be understanding of different kinds of agricultural pursuits."** There was no discussion of whether "variety" of uses was preserved, nor a stated preference for growing crops, but rather a tolerance for the "different kinds of agricultural pursuits."

In 1996, the predecessor in interest to QVF, the Mathews, requested the HCADB to divide what was to become QVF's 118 acre parcel above and below the Lockatong Creek (which essentially bisects QVF). QVF would have retained the fifty (50) or so acres above the creek and the Mathews would have retained the approximately seventy (70) or so acres below the creek. Neighbors and community members registered deep concerns with the spread of a

greenhouse operation, i.e. Garden State Growers, onto a farmland preserved property. However, the wider community had not realized that Garden State Growers had already begun, from the very time of the baseline inspection of the Mathews preserved property in 1993, to construct greenhouses, including ones with concrete floors, on the Mathews property.

In 1996, the key requirement with regard to the division of a preserved farm was that the two parcels result in agriculturally viable parcels. There was no mention in the 1993 Mathews Deed that the parcels, following division, had to allow for a "variety" of agricultural uses. Again, the word or concept of "variety" of agricultural is not even referenced in the ARDA: it took the imagination of the 2018 Supreme Court to somehow derive an affirmative variety requirement with an emphasis upon crop farming. The SADC, without any legislative or policy predicate, simply started using the term "variety" in the DOE in the late 1990s so as to assure that easement grantors would not develop their property for a singular agricultural purpose following a division. This is even though that singular purpose might represent the highest and best use of the owner's retained agricultural development rights. Now we find so many years later, an executive branch bureaucratic agency, the SADC, and the Judiciary unilaterally deciding, without any legislative support or guidance, to base the ARDA squarely within crop farming so as to severely restrict "different kinds of agricultural pursuits."

The record reveals that the SADC certainly did not act in such a way to place "traditional" crop farming at the center of the ARDA in 1996. As for the Mathew's proposed subdivision, the 1996 iteration of the SADC, then led by Art Brown, emphatically declared that it would not block a division of the Mathews farm which resulted in a parcel dominated by a greenhouse operation:

> "Chairperson Brown stated that agriculture is mainly open space but Greenhouse operations are becoming more and more prevalent in the agricultural community in New Jersey. He stated that the individuals opposed to the Greenhouses in some cases built their homes after the Greenhouses were erected and Greenhouse operations are considered agriculture under the definition of the Agriculture Retention & Development Act. He stated that Franklin Township must deal with the issue and pass an ordinance if it is in opposition to the impervious coverage. **He also stated that the SADC does not have the right or ability to get involved until the landowner violates the deed restrictions placed on the deed restricted property. The Department of Agriculture is available and could guide him in the proper use of the land to avoid violating the deed of easement.**

Meeting Minutes 09/26/96

In August of 1996 Assemblywoman Connie Meyers, while sympathizing with a protester's concerns regarding greenhouses on farmland preserved property, wrote a letter to the protestor with a copy to elected and bureaucratic officials. In it Assemblywoman Meyers said, in support of the subdivision:

> If the Farmland Preservation program were to limit the financial resources of its participants, we might hasten the day when there are no more farmers in New Jersey.

In 1996, the HCADB approved the division of the Mathews property with the condition that Garden State Growers would have to obtain a "soil conservation" plan from the HCSCD. The resolution provides that, as of 1996, there were 100 greenhouses already on the Mathews parcel, some with concrete and gravel floors. While that division never occurred, it would have resulted in a fifty (50) acre tract which would have been 50% greenhouses and hoop houses. With that 1996 approval, albeit never perfected, how could QVF or David den Hollander ever have construed when he purchased the Mathew preserved farm in 1997 that the SADC would one day essentially rewrite the DOE, that is exactly what it is doing with these soil disturbance standards, to impose severe restrictions on his horticultural pursuits? QVF would gladly give the easement purchase money back because it so damages its investment in a property it intended to use for horticultural purposes.

When the ARDA came into being the SADC, as well as newly begun CADBs, had to convince reluctant farmers to voluntarily participate in the FPP. We see this persuasion in the very terms of the DOE itself which provides several assurances to farmers as easement grantors. For example, nothing was to require the easement grantor to maintain the premises in any particular condition except as provided for in the DOE. The public was not to enter the property and signs were configured to alert the public as much. There was to be no prohibition on the construction of any new agricultural buildings. The DOE was not to restrict the use of the grantor's farm unless as expressly set forth in the DOE. Farmers coming to the program and relied upon those representations when deciding whether or not to sell to a housing developer or otherwise when forfeiting what made their land valuable: non-agricultural development rights. That is, farmers were being asked to voluntarily forfeit what was perhaps their most valued leverage when looking for financing to run their operation: the highest and best use of the property for commercial development. Having sacrificed that financing leverage, would the farmer who entered the FPP have done so knowing that they would face limitations on the type

of farming they could pursue, or the type of buyer they might eventually sell to? These limitations are what farmers face if the regulations such as these soil disturbance standards are imposed on them?

When advertising a New Jersey State owned Farmland Preserved Property for auction/sale in January of 2003, the SADC advertised, as an apparent inducement to buyers to consider the purchase of a preserved property, a protection afforded to easement grantors in the DOE:

The construction of agricultural buildings is not limited by the deed restrictions.

There was no mention of the amorphous variety requirement, soil disturbance restrictions or any matter of impervious coverage restrictions in the auction notice: of course not. The inducement presented to the would-be buyer was the same inducement made to farmers who came into the FPP in the first place: while the landowner would receive monies for the sale of development rights, they were given an assurance that they could farm their properties without interference. In the most simple terms, farmers have been baited to voluntarily participate in the FPP with DOE safeguards as to how they could farm their property, as is depicted on the foregoing auction statement promising that the Deed did not prevent construction of any new agricultural buildings, but are now receiving the switch to an SADC prioritizing an open space program which severely limits more advanced and complex types of agriculture. The SADC, with a judicial imprimatur, is recasting the FPP and rewriting the very DOEs which induced farmers to voluntarily come into the Program.

The consequences of this soil disturbance standards are dire and the CADBs know it. When the SADC and legislature considered a 3% impervious coverage limitation some twenty (20) years ago, there was there a common cry from County Boards that such limitations were deleterious to farming in this State. (Parenthetically, there was no indication that A3415, imposing the 3% limitation, was to applied retroactively.) Several County Boards rejected the limitation including Monmouth County (A) and Ocean County (B):

A. Monmouth County

WHEREAS, the equine industry and nursery industry are heavily dependent upon the use of structures such as stables and greenhouses in their operations:

....

WHEREAS the agricultural industry is dynamic, and impervious coverage restrictions would limit the ability of farmers in Sussex County to remain flexible and respond to future unknown market opportunities and realities.

NOW THEREFORE BE IT RESOLVED, that the Governing Body finds that the impervious coverage restriction ..... would have a significant negative impact upon the viability of both the agricultural industry and farmland preservation efforts in Monmouth County.

B. Ocean County

While it is understood that the intentions of this proposed rule are to protect traditional farming characteristics, they nonetheless conflict with the evolving nature of agriculture in New Jersey. The future viability of agriculture is extremely important to the OACDB and it is compromised by establishing these impervious coverage limitations.

When the public views preserving farmland in perpetuity, it conjures up the pleasant counrtyside images of rolling hills and open space covered with planted crops. Yet the ARDA describes agriculture as an "industry" that needs "strengthening", and declares that "[a]ll State departments and agencies, therefore, should encourage the maintenance of agricultural production and a positive agricultural business climate." Maintaining such a positive agricultural business climate in order to strengthen the agricultural industry in New Jersey requires that agriculture adjust to the economic realities of our times and not cling to an agrarian stereotype of past centuries. The transfer of consideration for non-agricultural development rights 30-40 years ago is inconsequential and comes as no solace to a farmer looking for flexibility when exploring new avenues of farming or making their farm available to a wider range of buyers. **HAS THE SADC TRULY CONSIDERED WHETHER AND/OR HOW THESE SOIL DISTURBANCE STANDARDS STRENGTHEN THE AGRICULTURAL INDUSTRY OF THIS STATE? ARE NOT THESE STANDARDS AN ATTACK UPON THE RETAINED AGRICULTURAL DEVELOPMENT RIGHTS OF THE EASEMENT GRANTOR?**

The flexibility ingrained in the FPP for its first twenty (20) years started to change, if not erode, in the mid-2000's with the advent of new leadership at the SADC. A colloquy between SADC Board members at a 2005 meeting reflects what the SADC has become, an open space advocate, as opposed to the farmer focused program the legislature intended it to

be. Selected members of the SADC committee visited QVF in May of 2005 to inspect the property having received a complaint from an immediately adjacent neighbor: no violations were found but there was a public discussion following this visit which provides insight to the erosion of the farmer focused SADC we see today:

> "Ms. Anderson stated that being out on the site raised many issues for her, such as a distinction between conservation of soil quality versus mitigation of damage that occurs." "She stated that there is a huge amount of land coverage with various types of structures with mitigation installations in place." "She stated this type of operation is a concern for her and how it will be addressed through the impervious coverage task force." "She stated that she was not sure that she is as comfortable with the assessment given, that everything is in compliance with the deed of easement."
>
> The minutes also reflect that a Mr. Bittinger replied to Ms. Anderson's comments: "Mr. Bittinger stated that he felt that this goes back to what the SADC purchased. He stated that the SADC purchased the landowner's right to building of single family homes. He stated that the SADC did not purchase impervious coverage"

To remind the reader, it was the HCADB and SADC who required the "mitigation installations." That being said, Mr. Bittinger appears to be one of the last voices on the SADC who appreciated that the SADC actually entered into a contract with the easement grantor to purchase its non-agricultural development rights prior to closing on the easement purchase and that should not interfere with how the easement grantor was to farm its property.

When this matter began, the SADC could not point to any express DOE provision which proscribed what QVF did. The SADC had to acknowledge that QVF was permitted to construct heated temporary greenhouses. The SADC had to acknowledge that the DOE permitted the removal of soil for an agricultural purpose. The SADC consulted an expert who informed it of ASAE EP460 FEB03 "Commercial Greenhouse Design and Layout" which provides at Section 6.1.6 that "[a] nearly level area for greenhouses reduces materials handling problems." That is, the grading of property by QVF was not whimsical but rather a necessary predicate for efficient and safe growing and handling of horticultural product.

In perhaps the most telling testimony in the entire matter, the SADC's then stewardship manager was asked what he told landowners who sought guidance as to what grading may be done prior to construction of agricultural buildings. The steward responded that he had been

asked the question by confused farmers and had answered that all he knew was that the SADC had found what QVF did to be too much, but, as to what constitutes an appropriate or acceptable level of soil movement or removal, he simply did not know, nor had he ever been provided guidance from the SADC to inform farmers what to do. Indeed, in oral argument on the Order to Show Cause, when SADC counsel was pushed by QVF to articulate any standard cognizable under the DOE, the DAG told the trial court that QVF's reliance upon the terms of the DOE was a "red herring." When QVF cited easement law to the trial court, specifically that there was absolutely no bright line standard by which the Court could rule that QVF had violated a DOE term, or a standard by which QVF could be told to go so far but no further, the trial court actually cited former US Supreme Court Justice Stewart's infamous pornography aphorism: "I know it (obscenity) when I see it." This was, of course, no standard at all.

This dereliction (of failing to articulate guiding standards) was so profound that the Appellate Division panel, when reconsidering its original affirmation of the trial court decision, found that the SADC had failed "to turn square corners" when dealing with QVF if not the entire farming community. U.S. Supreme Court Justice Holmes once held: "Men must turn square corners when they deal with the Government." Rock Island, Ark. & LA RR Co. v. United States, 254 U.S. 141, 143 (1920). In 1930, 10th Circuit Judge McDermott added the obvious counterpart: "[t]he Government ought to turn square corners when dealing with its citizens." Howbert v. Penrose, 38 F. 2d 577, 581 (10th Cir. 1930). The "square corners" doctrine stands for fairness and full compliance with required procedures and due process. To be sure and fair, the SADC in the 40th year of the FPP is now getting around to writing standards: however, and while we appreciate an estoppel against a public entity is difficult to obtain, soil disturbance and excavation have occurred on preserved properties for forty (40) years largely without interruption. Whether it likes it or not SADC inaction should have its consequences because the farming community has reasonably relied on the SADC's inaction; farmers who relied upon DOE provisions should not, now, after forty years be forced to make or otherwise alter longstanding decisions on how to exercise their agricultural development rights. QVF provided the courts with soil disturbance and impervious coverage deed provisions and regulations from other states that go back thirty (30) to forty (40) years. The SADC knew of soil disturbance on preserved properties from the initiation of the FPP and has only now come around to fashion standards well after farmers have come to rely on their inaction.

At the January 2018 Quaker Valley Farms Supreme Court argument, Chief Justice Rabner asked counsel for the SADC why, since the matter had arisen ten (10) years earlier, the

SADC had not promulgated regulations pertaining to the issue of soil disturbance on farmland preserved properties. When SADC counsel indicated that they were awaiting the ruling of the Supreme Court, Chief Justice Rabner was non-plussed by the reply and said that the SADC, not the Supreme Court, was the responsible governmental body to provide for such regulations. The Justices asked QVF counsel whether the SADC had the authority to pass regulations under the DOE. We answered yes as paragraph two (2) of the Deed of Easement indicated that the leased premises were to be retained for agricultural use and production in compliance with N.J.S.A. 4:1C-11 et seq., P.L. 1983, c.32, and all other rules promulgated by the SADC. However, at no time did QVF ever concede that paragraph two (2) of the DOE ever gave the SADC the license to override the DOE terms executed by its immediate predecessor. **HAS THE SADC CONSIDERED THAT THE PROPOSED SOIL DISTURBANCE STANDARDS REWRITE THE NEGOTIATED AND EXECUTED DEED ESPECIALLY IF THE STANDARDS ARE APPLIED RETROACTIVELY?**

QVF posits that the SADC did not begin the FPP with establishing actual baseline soil conditions on preserved properties. Throughout the litigation, QVF repeatedly observed that the SADC never took a baseline of actual soil conditions, i.e. they never verified the quality of the soil, prior to purchasing their non-agricultural development rights. There was no establishment of historic crop yields. If the SADC was truly interested in soil preservation they would have field verified the actual soil types on site at the time of baseline inspection (and not relied upon general survey mapping), as well as quantified any soil deposit or removal. There truly is no precise baseline soil condition for any farmland preserved property in this State.

The farming public should be informed that the soil surveys utilized by the SADC and/or County Boards, should never be offered as a definitive analysis of soils on any property. Perhaps, as a policy decision, the SADC could get away with using the soil survey for ranking purposes when considering a property for preservation, but now the SADC will be evaluating crop production following soil disturbance along with the success of any "rehabilitation" of any disturbed soil. As opined by QVF's soil expert:

> The USDA Soil Survey was made by field soil scientists, at a rate of 300 to 1,000 acres per day, using limited soil sampling by hand tools (shovel, auger), aerial photo interpretation and landscape shape interpretation, without the benefit of backhoe excavations, GPS, detailed elevation contours, or uniform permission for trespass. As I and other consulting soil scientists have done, [the SADC expert] has defined his career by being able to replace published soil survey mapping with detailed mapping based on

soil reclassification by using greater sampling density and better observation in excavated test pits, supported by modern survey location and cartography. The focus of such studies has been to map the actual extent of hydric soils, alluvial soils, prime agricultural soils, soils grouped by drainage and depth classes, soils with suitability for stormwater facilities, and soils feasible for supporting on-site sewage systems. Such detailed or "refined" soil maps are considered site-specific and are used to replace the more general soil survey mapping for studied tracts of land. Knowing the limitations of the level of detail provided in the published soil surveys, and the extent of allowed inclusions, the USDA NRCS encourages site-specific studies for detailed planning and design, while discouraging reliance on soil surveys for detailed planning and design.

In short, QVF's expert found that 50 to 60% of soil on the tract in question was not prime farmland as suggested by the soil survey. At the very least, as much as twenty-five (25) percent inclusions of different soils are allowed within each soil mapping unit. See Soil Survey Manual (USDA Soil Survey Division Staff, October 1993). The trial court ruled that 30% of the soil on the tract in issue was not as it was reflected in the soil survey and that the Quakertown (Qkb) 2% to 6% topsoil did not have the twelve (12) inch profile as reported in the soil survey. **AGAIN, DOES THE FARMING PUBLIC KNOW THAT SOIL SURVEY MAPPING DOES NOT CAPTURE THE ACTUAL NATURE OF SOILS ON THEIR PRESERVED PROPERTIES?**

Indeed there is a serious question as to whether the soils and row crop production were the primary focus of the SADC when it was evaluating properties for participation in the FPP:

. **SADC Regular Meeting of January 18, 1990**

Policy: Procedures for conducting preliminary review of easement purchase applications for FY 90: P-14-A Supplement

Due to an extensive review of Policy P-14-A Supplement by the Legislation and Policy subcommittee, Mr. Baumley proceeded to summarize the general provisions of the policy by noting the time line for completing the review and appraisals of the applications being considered for the current funding round.

He explained that the Committee's preliminary review will rank applications according to the Prioritization Criteria contained in policy P-14-A. Generally, the Committee will grant

preliminary approval to all applications but only a specified number of applications will be identified as being eligible for state cost share funds. Although approximately $19 million are estimated to be available for easement purchase, preliminary approvals would be granted on applications totaling roughly $28 million to allow for a percentage of applicants to drop out of the process and to stimulate landowners to negotiate lower selling prices.

At the time of final SADC review, the applications will be re-ranked according to the formula index obtained by application of the statutory formula. Funding priority will be given to those applications with higher numerical values. Mr. Baumley noted that the prioritization of applications in this manner directs the highest priority given to those applicants that were willing to negotiate a price less than the certified fair market value of the development easement which in turn provides the greatest reduction in the public's cost to purchase a development easement.

Emphasis added.

This policy, which implemented the statutory relative best buy criteria, set forth at N.J.S.A.. 4:1C-31, resulted in what Mr. Baumley would acknowledge under oath were inferior quality properties being purchased and permitted into the FPP: so much so, that some fifteen (15) years later the SADC began to set threshold minimum criteria for a farm's participation in the FPP.

To further illustrate, when the QVF, then Mathews, property entered the Hunterdon County farm ranking for the funding round to determine a farm's participation in the FPP there was another farm, which scored thirty-one (31) points lower on the quality ranking scale, but otherwise well ahead of the clearly "superior" Mathews farm. Why? This farm's relative best buy index vaulted them over the Mathews. Understandably, at the outset of the FPP, the SADC was casting a wide net to secure wider participation in the FPP. This meant taking on a wider array of farms which were not crop/soil focused; it took farms into the FPP, regardless of soil quality, which responded to SADC/CADB letters advising, in no uncertain terms, that if a farm lowered its asking price it would be far more likely to participate in the FPP.

In short, this iteration of the SADC seeks to promote today is simply not the same SADC and FPP which induced the New Jersey farming public to participate in the FPP when the program began some forty (40) years ago. The Supreme Court's shallow interpretation of the ARDA, relying only upon a definition of agriculture, to determine that the legislature required a "variety" of crops with an emphasis upon growing crops, cannot rewrite how the SADC began and

implemented the FPP for the first twenty (20) plus years of its existence. Those farmers who entered the FPP did so with assurances in the DOE that the SADC would not interfere with how they could farm their property: the proposed soil disturbance standards violate that assurance. The time to have set forth such standards was forty (40) years ago when farmers were making the leap into the voluntary relinquishment of their non-agricultural development rights. We urgently request the SADC to reconsider and withdraw the soil disturbance standards as an affront to the DOEs of all participating farmers.

Very truly yours,

/s/ Robert P. Merenich

Robert Merenich

RPM:tam

cc: David den Hollander (*via email*)
New Jersey Farm Bureau
c/o Lewis Goldshore, Esq. (*via email*)
All County Agricultural Development Boards (via email)

From:	Bob Merenich
To:	SADCPublicComments, NJDA [AG]
Cc:	Lewis Goldshore; Smith.Brian [AG]; David den Hollander
Subject:	[EXTERNAL] Soil Disturbance Comments
Date:	Friday, February 23, 2024 12:19:23 PM
Attachments:	2.23.24 SADC Comments.pdf

*** CAUTION ***

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The attached letter is self-explanatory,

Bob Merenich

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October 2, 2023

VIA E-MAIL TO SADC@ag.state.nj.us
Susan E. Payne, Executive Director
State Agriculture Development Committee
PO Box 330
Trenton, NJ 08625

Re: Proposed Soil Protection Standards

Dear Ms. Payne:

I am privileged to represent dozens of farmers throughout the State. These include the following:

Kurt Alstede-Alstede Farms
Tony Casola- A Casola Farms
Carmine Casola-Maple Leaf Farms
Dale Davis Stony Hill Gardens
Pete Gasko- Gasko's Family Farms
Harvey Ort/Nicole Ort- Ort Farms
Greg Staller and Catherine Haddad
Anthony Verdi
Bill Martin
Steve Gurba
Janet Farrand
Frank Carrajet
Andy Dietz
Joel Schnetzer
Larry Pesce
Alvin and Linda Dietz
Arie VanVugt
Mike Mueller
Pavel Yufit
Brian Caine
Bibi Salaman
Pamela Abma

Don Sherman- FLP Farms
Hans Lowensteiner
David Jaindl
Emine Buyuk

On behalf of these farm families and on my own behalf as an attorney who has represented the interests of farmers for over three decades, I offer the following.

The actions of Quaker Valley Farms presented this Committee and the Courts with unique challenges. Everyone familiar with the facts agreed that this farm had crossed the line. The permanent destruction of twenty acres of prime soil on a preserved farm had to be addressed. Ultimately the Supreme Court agreed that this conduct was egregious and on this basis put a stop to it, with the proviso that this Committee adopt regulations to protect soils on preserved farms.

This has resulted in the expenditure of countless hours by staff and this Committee and ultimately the draft regulations now being considered. I commend the Committee and staff for its efforts, but the end product is problematic on many fronts.

I could advance multiple legal arguments setting forth why these regulations are vulnerable. But others already have done so. Suffice it to say that courts historically extend deference to state agencies and their expertise, but at the same time courts also have been vigilant to protect the rights of property owners and to prevent government from infringing upon those rights.

I cannot predict what the courts will do should these regulations be adopted and challenged, and rest assured that they will be challenged, but I can predict with absolute 100% certainty that if these regulations are adopted you, the Committee, will **forever** lose the trust and confidence of the agricultural community, whose interests you were established to protect. This is what the law refers to as irreparable harm.

Virtually every farmer I speak to asks how can the Committee apply these rules retroactively? Why am I being forced to pay for the misdeeds of others? If the Committee adopts these regulations what else can and will they do in the future to restrict legitimate farming activities on preserved farms? I do not have any good answers to these questions. And make no mistake, these farmers are not appeased by the explanation that very few of them will be impacted by the proposed regulations.

Stripped of all the gloss, the unvarnished soil protection standards are really impervious coverage limits. Soil compaction and impervious coverage essentially are the same. To be sure, there are carve outs in the draft regulations for certain improvements that have resulted in soil compaction, but this is no different than how impervious coverage is treated. There is no universally accepted definition of impervious coverage. It is not defined in the Municipal Land Use Law and as a result some municipalities treat gravel as impervious cover while others do not.

The fundamental problem with the proposed soil protection standards is that they do much, much more than just protect the soil. The impact is far from incidental. Responsible farmers who are good stewards of the land will be prevented from making optimum legitimate agricultural use of their preserved farms. Two industries come to mind, greenhouses and equestrian operations. Done responsibly, prime soils can be protected and preserved without impervious cover limits. These regulations are too broad and just plain overkill, akin to tapping in a finishing nail with a sledgehammer.

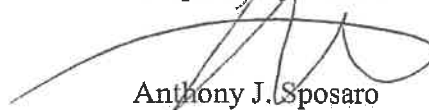
The ultimate irony of these regulations is that the Right to Farm Act would preempt a municipalities' attempt to limit impervious coverage on a commercial farm entitled to Right to Farm protection. Yet the agency, the very agency empowered to administer the Right to Farm Act is attempting to impose the same restrictions a town under its zoning powers cannot. How do you think that sits with preserved farm owners or those considering preserving their farms? You all know the answer.

There are better, more surgical ways of addressing soil protection. Establish limits and standards on the mixing or disposal of prime soils. Require preserved farm owners to submit an analysis of proposed soil disturbance as part of a SSAMP or site plan application. This, together with enforcing the requirement that a preserved farm have a current conservation plan and requiring adherence to the State's recently amended Stormwater Regulations, the most restrictive in the Country, will more than adequately protect the soil and equally important restore the faith and trust of the agricultural community in this Committee. A blanket limit on impervious coverage is not the answer.

Will there be push back to the requirement that soil disturbance be analyzed and regulated? Of course there will. Whatever you do there will be push back, but such requirements are a better alternative than the proposed regulations.

In closing, this Committee is at a rather historic crossroads. These draft regulations have consumed inordinate resources. Finding a solution has proved elusive, but your work is not done. You can do better. You must do better, not only for the long term viability and respectability of this Committee, but for the farmland preservation program and farming community as well.

Respectfully submitted,



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BY EMAIL AND PRIORITY MAIL EXPRESS
New Jersey State Agriculture Development Committee
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RE: SUBMISSION OF COMMENTS ON PROPOSED NEW RULES: PROPOSED N.J.A.C. 2:76-25 AND 25A, SOIL DISTURBANCE ON PRESERVED FARMLAND AND SUPPLEMENTAL SOIL DISTURBANCE STANDARDS.

Dear Ms. Payne:

This letter provides comments on the State Agriculture Development Committee (SADC) proposed new rules N.J.A.C. 2:76-25 and 25A which propose to regulate Soil Disturbance on Preserved Farmland and Supplemental Soil Disturbance Standards. 55 N.J.R. 8(1), August 7, 2023. I am a New Jersey real estate and land use attorney with a focus in agricultural properties including preserved farmland. I am familiar with the implications of farmland preservation in real estate transactions, due diligence and compliance, annual monitoring, appraisals, farm ownership and operation, valuations, special programs available to preserved farm owners, interpretation of agricultural use, rights under schedule B exceptions, division of preserved farmland, and so on. Please review and address the below comments.

Introduction

The proposed rules must be withdrawn. Below are twenty pages of concerns with the substantive and procedural implications of the proposed soil disturbance regulations. In sum, the proposed rules retroactively curtail agricultural development rights and in some cases residential development rights, take property rights without just compensation, discriminate against all form of agricultural production except for the most traditional methods of plant production, require navigation of overly complicated and burdensome procedures and standards that will be costly and time consuming to implement, reverse the SADC's decades long position on the farm conservation plan as the compliance mechanism for soil conservation, limit the use of tents necessary for production related activities in an arbitrary manner that disproportionately harms equine and on-farm retail farmers, contain inherent policy inconsistencies and discriminatory provisions, put nearly fifty farms in immediate noncompliance status causing them to lose eligibility for Right to Farm protections, and create complicated waiver procedures that require a farmer directly involving the SADC in the planned conservation of soil, water, and forestry resources on the entire preserved farm after notice to abutters and municipalities. This is not an exhaustive list. And this harm to

preserved farm owners is improperly founded as the proposed rules ignore the plain and settled rules of easement construction. The New Jersey Supreme Court has made it clear that an easement holder may not expand the scope of its right in a manner than unreasonably interferes with the rights of the landowner.

Before I was a land use lawyer, I was an ecologist. Make no mistake, I appreciate conservation values and am very familiar with the depth of existing regulations that protect natural resources. Preserved farm owners remain subject to NJDEP regulations including natural resource protection laws. The soil disturbance standards are not necessary to achieve natural resource protection goals, and objecting to the standards is not an objection to resource protection. Instead, the within objections are about protecting established property rights and limiting agency overreach through retroactive restrictions. *When it comes to balancing agricultural development against soil and water conservation, farm-specific soil and water conservation planning and projects are the intended compliance mechanism. This is the official position taken by the SADC since 1994,* which position was not before the New Jersey Supreme Court and now seems swept under the rug. Now, reading more into the Quaker Valley Farms decision than is legally defensible, the SADC overreaches in a manner that arbitrarily caps agricultural development even if it is done in accordance with Natural Resource Conservation Service (NRCS) guided soil and water conservation planning. This is inherently unfair and directly in conflict with the enabling statute, SADC's own regulations, SADC's past interpretations, and the Quaker Valley Farms decision. While the majority of farms are far under the disturbance limits, this does not justify wrong action, and agency overreach left unchecked will not stop with these regulations, nor with those farms that are currently over the 12 per cent limit.

Lack of Authority for Imposing a Soil Disturbance Limit

The SADC lacks jurisdiction and legislative authority to impose a soil disturbance limit, which imposition is not a reasonable interpretation of its own regulations nor the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq. ("ARDA"). The SADC may not promulgate rules which are arbitrary, capricious, unreasonable, or beyond the agency's delegated powers. In re Amend. of N.J.A.C. 8:31b-3.31 & N.J.A.C. 8:31b-3.51, 119 N.J. 531, 543-44 (1990). The SADC also may not extend a statute to give it a greater effect than its language permits. GE Solid State, Inc. v. Dir., Div. of Tax'n, 132 N.J. 298, 306 (1993) (citing, Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, 528 (1964)). See, Reilly v. AAA Mid-Atl. Ins. Co. of N.J., 194 N.J. 474, 486 (2008). "[A] rule will be set aside if it is "inconsistent with the statute it purports to interpret." That is, the agency "'may not under the guise of interpretation ... give the statute any greater effect than its language allows.' " In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004).

In the State of New Jersey, State Agriculture Development Committee v. Quaker Valley Farms, LLC, 235 N.J. 37 (2018), the New Jersey Supreme Court guided the SADC to provide guidance such that a farmer may understand the balancing of two competing provisions of ARDA and farmland preservation deeds of easement.

On the one hand, N.J.A.C. 2:76-6.15(a)(2), requires that preserved farmland be retained for agricultural use and production, which:

> "shall mean the use of the premises for common farmsite activities including, but not limited to: production, harvesting, storage, grading, packaging, processing and the wholesale and retail marketing of crops, plants, animals and other related commodities and the use and application of techniques and methods of soil preparation and management, fertilization, weed, disease and pest control, disposal of

> farm waste, irrigation, drainage and water management, and grazing (emphasis added)."

As such, "agricultural use" and "agricultural production" expressly refer to a wide variety of agriculture, without any priority given to "crops" and "plants" over "animals and other related commodities." To favor one form of agricultural production over another is contrary to the plain meaning of N.J.A.C. 2:76-6.15(a)(2) and ARDA. Agricultural viability "means that each parcel is capable of sustaining a variety of agricultural operations that yield a reasonable economic return under normal conditions, solely from each parcel's agricultural output (emphasis added)." N.J.A.C. 2:76-6.15. The deed of easement creates a legal and economic expectation that all forms of agricultural use and agricultural production are permitted with only non-agricultural development restricted. This right to engage in agricultural use and development cannot become illusory. Russell v. Princeton Labs., 50 N.J. 30, 38 (1967) ("A contract should not be read to vest a party ... with the power virtually to make his promise illusory."). The deed of easement "imposes no obligation or restriction on the Grantor's use of the Premises except as specifically set forth in [the] Deed of Easement." N.J.A.C. 2:76-6.15(a)(17).

On the other hand, N.J.A.C. 2:76-6.15(a)(7), provides:

> "No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation, erosion control, or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises.
>
> i. Grantor shall obtain within one year of the date of this Deed of Easement, a farm conservation plan approved by the local soil conservation district.
>
> ii. Grantor's long-term objectives shall conform with the provisions of the farm conservation plan (emphasis added)."

In its notice of rulemaking proposal, the SADC referenced only the first part of N.J.A.C. 2:76-6.15(a)(7), without subparts (i) and (ii) that pertain to farm conservation planning. However, a restrictive covenant should not be read in a way that defeats the plain and obvious meaning of the restrictions. Bubis v. Kassin, 184 N.J. 612, at 624 (2005). In interpreting a contract, a court must avoid interpreting one provision in isolation from others pertaining to the same subject. Newark Publishers Ass'n v. Newark Typogrpahical Union, 22 N.J. 419, 425-26 (1956).

The deed of easement's plain language, when read in its entirety, points to farm conservation planning as its soil and water conservation compliance mechanism. "It is particularly important to keep in mind that the easement must be read, and interpreted, in its entirety, so that the interpretation of each individual provision is consistent with the overall intent of the document and the interpretation of all other provisions." (State Agriculture Development Committee Deed of Easement Assessment Subcommittee, Interpreting the Provisions of the Deed of Easement, Report No. 1, General Guidance, revised May 26, 2011)(identifying N.J.A.C. 2:76-6.15(a)(7)(i) and (ii) (farm conservation planning) as key provisions of the deed of easement provisions).

Farm conservation planning should be the appropriate mechanism of confirming soil and water conservation planning for all forms of agricultural development. Farm conservation planning requirements were proposed at 26 N.J.R. 1419(a)(April 4, 1994), in which the SADC explained to the public the following:

> **The proposed amendments at N.J.A.C. 2:76-6.15(a) which require the landowner to secure a farm conservation plan within one year of selling a development easement reinforces the landowner's commitment that no activity shall be permitted on the farm which would be detrimental to drainage, flood control, water conservation, erosion control or soil conservation. A farm conservation plan is developed as a cooperative effort between the landowner and the local soil conservation district.**

26 N.J.R., at 1420.

The SADC responded to comments from the Hunterdon County Agricultural Development Board as follows:

> **COMMENT: The Hunterdon CADB suggested that the proposed amendment at N.J.A.C. 2:76-6.15(a)7ii be revised to read, "Grantor's long term management of the farm shall conform with the objectives of the farm conservation plan." The Hunterdon CADB further stated that a landowner's management of the farm can be measured in terms of compliance with conservation practices, but unwritten long term objectives might be more difficult to evaluate.**
>
> **RESPONSE: The SADC disagrees with the recommendation of the Hunterdon CADB that the "Grantor's long term management of the farm shall conform with the objectives of the farm conservation plan." The SADC's amendment requires that the grantor's long term objectives shall conform with the provisions of the farm conservation plan. Most importantly, the Grantor's long term objectives as they pertain to a particular agricultural operation must be reflected in revisions to the farm conservation plan. The plan contains the soil and water conservation practices which are needed for the specific type of agricultural operation.**
>
> **The term "management" as suggested by the Hunterdon CADB may imply other business related decisions or a broader interpretation than the specific purposes of the farm conservation plan. Ultimately, the measure of compliance is the Grantor's conformance with the farm conservation plan.**

26 N.J.R., at 3161. To quote the SADC, farm conservation plans are intended to contain "the soil and water conservation practices which are needed for the specific type of agricultural operation," and "the measurement of compliance is the Grantor's conformance with the farm conservation plan." 26 N.J.R., at 3161.

The SADC responded to comments from the Burlington County Soil Conservation District as follows:

> COMMENT: The Burlington County Soil Conservation District (SCD) expressed its concern that the proposed amendment at N.J.A.C. 2:76-6.15(a) mandates that a landowner who has sold a development easement obtain a farm conservation plan from the local soil conservation district and be approved by that district. The Burlington SCD further noted that while the local districts have the technical and staff resources to carry out this mandated work, they are not provided with a funding source to cover the expenses which are incurred in providing this service. Consequently, the development of the farm plans may have to be given a low priority in the district's workload assessments. This situation could be easily remedied by the SADC providing a dedicated funding source to the local soil conservation district which would cover the expenses incurred in the development of a farm conservation plan.
>
> RESPONSE: The proposed amendment at N.J.A.C. 2:76-6.15(a)7 allows the landowner one year from the date of the sale of the development easement to secure a farm conservation plan from the local soil conservation district. In reality, the local soil conservation district could be put on notice that a farm conservation plan would be needed on any application which has received final approval by the CADB. Generally, this would provide an additional six months notice to begin developing a farm conservation plan.
>
> Furthermore, there would be a limited number of farms requiring conservation plans from each county under each annual funding round. In many instances, the farms already have a farm conservation plan which may only need to be updated or modified to meet the landowner's long term objectives. Lands which are permanently preserved should be viewed as a priority consideration to ensure that the soil and water resources on the farm are protected.

26 N.J.R., at 3161. The following is further comment and response with the Burlington County Soil Conservation District:

> Since it is within the scope of the SADC to mandate and administer the rules pursuant to the Farmland Preservation Bond Act, the SADC should be required to secure a funding source for local soil and water conservation districts which carry out certain responsibilities for the SADC.
>
> RESPONSE: The Attorney General's Office has issued an opinion stating that the State bond funds do not permit the SADC to provide administrative costs to local soil conservation districts. It is the SADC's position that it will provide up to a 50 percent grant to landowners for legally permissible costs associated with approved soil and water conservation projects. If the SCDS have the authority to charge the landowner a fee for costs associated with soil conservation projects and the districts choose to charge fees, the SADC will reimburse the landowner up to 50 percent of the fees. Since the bond acts and the Agriculture Retention and Development Act permit such reimbursement, there is no need to enact regulations which provide for such payments.

The established statutory and regulatory framework call for agricultural development which is implemented in accordance with soil and water conservation practices that are developed through farm conservation planning under the jurisdiction of the soil conservation district. The SADC now proposes to set aside the plain meaning of N.J.A.C. 2:76-6.15(a)(7)(i) and (ii) and reverse its position on soil conservation compliance through farm conservation planning. Nothing in the Quaker Valley Farms decision supports such overreach.

Farm conservation planning is also an alternate compliance tool under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 and its regulations at N.J.A.C. 2:90-1.1. The Soil Conservation District is also responsible for reviewing major agricultural development under the Stormwater Management Rules, N.J.A.C. 7:8-5.2(k). Farm conservation plans are also the planning tool for agricultural development in the Highlands Preservation Area when the new impervious cover increases cumulatively by at least three percent (3 %) percent and not more than nine percent (percent 9 %), and recourse management systems plans are the planning tool for new impervious cover that cumulatively increases by over nine percent (9 %). N.J.S.A. 13:20-31; N.J.A.C. 2:92-1.1 et seq. Both farm conservation plans and resource management system plans are developed with the assistance of the Natural Resource Conservation Service local field office. These plans must conform with the June 1, 2005 NRCS New Jersey Field Office Technical Guide (NJ-FOTG), which contains many sections, and may be found at: http://www.nrcs.usda.gov/technical/efotg/. The primary difference between the Farm Conservation Plan and the Resource Management System Plan is that the Farm Conservation Plan need only conform to Section III and IV of the NJFOTG, while the Resource Management System Plan must conform to all sections I through V of the NJFOTG. These statutes must be read in harmony with the ARDA, which defines "Soil and water conservation project" as "any project designed for the control and prevention of soil erosion and sediment damages, the control of pollution on agricultural lands, the impoundment, storage and management of water for agricultural purposes, or the improved management of land and soils to achieve maximum agricultural productivity." N.J.S.A. 4:1C-13(l). ARDA requires appointment of a member of the local soil conservation district on all County Agriculture Development Boards. N.J.S.A. 4:1C-14(a). ARDA requires that the local soil conservation district approve soil and water conservation projects which receive grants. N.J.S.A. 4:1C-24.

The farmland preservation program creates investment backed expectations with respect to a wide variety of agricultural uses and developments which may occur on preserved farmland subject to farm conservation planning. Neither ARDA nor the standard easement provisions support an arbitrary limit on the extent of otherwise permissible agricultural use and development of preserved farmland. The terms, "soil disturbance," "disturb," or "disturbance" are not used in ARDA nor the preservation deed of easement. Yet, "soil conservation," as per N.J.A.C. 2:76-6.15(a)(7), which underpins the New Jersey Supreme Court's directive to the SADC to guide farmers, remains undefined in the rule proposal. And, the N.J.A.C. 2:76-6.15(a)(7) subparts which address farm conservation planning were not addressed by the SADC in its Rule Proposal nor were they an issue before the New Jersey Supreme Court in the Quaker Valley Farms decision.

Further, it is plainly clear that disturbance may occur on preserved farmland provided a balance is struck. The SADC prevailed in the Quaker Valley Farm litigation in part by providing testimony of how such disturbance may occur. Specifically, the New Jersey Supreme Court quoted the SADC's resource conservation witness testimony which compared the defendant's practices to permissible, large-scale grading activities where soil is carefully conserved in stockpiled layers so that it could be restored. (Quaker Valley Farms, at 46)(farm conservation planning was not specifically discussed in the New Jersey Supreme Court opinion, but the testimony refers to is a soil conservation practice). This soil stockpiling conservation practice was compared to the SADC's allegations of large scale and "total" destruction of prime farmland that precluded the use of the farmland for a variety of agricultural uses. Of all the testimony which must have informed the record, the New Jersey Supreme Court appears to have found the SADC's technical expert testimony of how large-scale disturbance may properly occur to be material to what was, and what was not, a reasonable soil conservation practice when disturbing soil. See also, proposed N.J.A.C. 2:76-25A.5, Topsoil Stockpiling.

ARDA's soil and water conservation mandate does not justify an arbitrary limit on agricultural use and development nor discriminating against a wide variety of agricultural production and farm conservation planning. A wide variety of agricultural development requires a wide variety of improvements which are

essential to the wide variety of agricultural production that is protected farming in New Jersey. Exemptions that only support a limited variety of agricultural production are arbitrary and capricious, exceed the delegated authorities, and interfere with ARDA's legislative findings and declarations, which require that the SADC encourage the maintenance of agricultural production and a positive agricultural business climate and make available to preserved farm owners financial, administrative and regulatory benefits in exchange for participation in the farmland preservation program.

The impacts on industries such as equine, poultry, greenhouses, and similar infrastructure-intensive agricultural production will be greatest. Yet, the express language of ARDA and the preservation deeds of easement acknowledge the right to such agricultural development, which is further protected farming under the Right to Farm Act, N.J.S.A. 4:1C-1 et seq. Rather than enabling a wide variety of farmers to make such improvements with guidelines on farm conservation planning with grants for soil conservation projects, the SADC holds the keys to the kingdom and puts farmers under a *de facto* conservatorship whereby it limits and manages the farmer's productivity and improvements through a time consuming, costly, complicated, and uncertain waiver process at best and total prohibition at worst. What's more, waivers have onerous requirements, are only granted after notice to the municipality and abutters, require information on zoning without acknowledging Right to Farm, and require that the farmer provide a certified plan stewarding all soil, water, and forestry resources on the entire preserved farm premises.

Proposed N.J.A.C. 2:76-25.4(b) acknowledges planning criteria and conservation practices and standards developed by the NRCS, Field Office Technical Guidance, and farm conservation plan approved by the local soil conservation district and NRCS prior to installation. However, the proposed rules only exempt conservation practices resulting from normal tillage and approved by the NRCS. Implementation of conservation practices via farm conservation planning for other agricultural uses and improvements are disregarded and will not be treated as exempt, which is arbitrary and capricious and contrary to the SADC's purposes and deed of easement language as previously interpreted by the SADC. Instead, any agricultural development made in accordance with soil and water conservation methods pursuant to a farm conservation plan should be an exempt activity.

The SADC is presumed to be aware of the NRCS, FSA staffing issues which disrupt a farmer's ability to obtain timely approvals of farm conservation plans and the technical service provider program which in part addresses this issue. However, the SADC has not authorized the use of private technical service providers when preparing farm conservation plans for tillage deemed exempt from the calculation of a farm's disturbance. By comparison, waiver applications must, in part, be completed and certified by a technical service provider, professional engineer, NRCS-certified conservation planner, or other SADC approved conservation professional. See, Proposed N.J.A.C. 2:76-25A.8(a)(4). The SADC should expand exemptions to include any agricultural development made in conformance with a farm conservation plan addressing soil and water conservation, the SADC should similarly accept such farm conservation plans when completed and certified by a technical service provider, professional engineer, NRCS-certified conservation planner, or other SADC approved conservation professional.

In sum, the proposed rules represent a leap from the concept of permissible agricultural development balanced against reasonable soil and water conservation practices to the much more stringent concept of arbitrary limits on soil disturbance that dispose of the farm conservation plan as a compliance mechanism.

Breach of Contract and Taking of Otherwise Permitted Development Property Rights

The proposed rules violate the deal made with farm owners at the time of preservation, breach the preservation deed of easement, and take property rights without just compensation. The deed of easement "imposes no obligation or restriction on the Grantor's use of the Premises except as specifically set forth in [the] Deed of Easement." N.J.A.C. 2:76-6.15(a)(17). I have also reviewed past notices of auction of preserved farms that were purchased in fee simple by the SADC and then auctioned. At least the notices that I reviewed include in disclosures to potential purchasers of the preserved farm the following seller's representation: "The construction of agricultural buildings is not limited by the deed restrictions."

Quite plainly, a deal is a deal, and purchasers relied upon the SADC's representations and deed of easement terms which permit agricultural development. The SADC may not retroactively change these deals. The proposed rules reduce the agricultural and residential development rights that have been expressly granted to farmers without any valid basis in law or contract. The myriad of problematic circumstances that will result is far reaching.

The SADC is attempting to retroactively expand the reach of the deed of easement to limiting not only non-agricultural development rights, but also to limiting otherwise settled agricultural and residential development rights in a manner that interferes with investment backed expectations. The SADC overreaches any reasonable interpretation of section 7 to create a new restriction not otherwise set forth in the deed of easement, which violates numerous aspects of the deed of easement, including N.J.A.C. 2:76-6.15(a)(17) (The deed of easement "imposes no obligation or restriction on the Grantor's use of the Premises except as specifically set forth in [the] Deed of Easement.").

A restrictive covenant is regarded in New Jersey as a contract, and enforcement of the easement constitutes a contract right. Cooper River Plaza East LLC v. The Braid Group, 359 N.J.Super. 519, at 527 (App. Div. 2003).

> The restriction thus must be analyzed in accordance with the principles of contract interpretation, which include a determination of the intention of the parties as revealed by the language used by them. *** [I]n the context of a deed restriction meant to bind subsequent purchasers that are strangers to the initial transaction, the intent of the restriction must manifest itself in the language of the document itself. * * *An intention disguised by an ambiguity cannot bind a subsequent purchaser who, as the result of an absence of clarity in the instrument of conveyance, lacks notice of restrictions that the initial parties have attempted to place on the property being conveyed. A holding otherwise would be inconsistent with principles of contract law, which require sufficient definiteness of terms so that the performance required of each party can be ascertained with reasonable certainty, as well as knowledge of and acquiescence in the stated terms. It would also undermine the central public policy underlying New Jersey's Recording Act: that "a buyer ... of real property should be able to discover and evaluate all of the ... restrictions on the property" from a review of the public record.

Cooper, at 527 – 528 (internal citations omitted). A restrictive covenant should not be read in a way that defeats the plain and obvious meaning of the restrictions. Bubis v. Kassin, 184 N.J. 612, at 624 (2005).

The preservation deed of easement is an express easement created by conveyance. Leach v. Anderl, 218 N.J. Super. 18 (App. Div. 1987). The preservation deed of easement clearly states that farm conservation planning is the tool for addressing soil and water conservation, and the SADC expressly stated as much in its 1994 rulemaking comments. The SADC might now attempt to claim an implied right to expand the scope of its easement to limit development in favor of soil conservation. However, such implication would fail to withstand legal scrutiny. Any implications must be established by clear and convincing evidence. Id. Here, neither the evidence nor the Quaker Valley Farms decision support the rights which SADC seeks to exercise through its arbitrary soil disturbance limit.

When determining the scope of the preservation deed of easement and the permissible reach of the SADC thereunder, the Court will look to the intent of the parties at the time of the deal making, which is the contract and its closing as memorialized in execution of the preservation deed of easement. Tide-Water Pipe Co., v. Blair Holding Co., 42 N.J. 591, 603 (1964); Leach, at 28; *citing*, Sergi v. Carew, 18 N.J.Super. 307, 311 (Ch.Div. 1952) . In ascertaining the intent of the farmer and the SADC, the parties will consider the situation which existed at the time the deed of easement was granted. Sergi, at 311. The SADC must exercise its rights in such reasonable manner as to avoid unnecessary increases in the burden upon the farm owner beyond that expressly dictated by the deed of easement. Tide-Water Pipe Co., at 604 - 605; citing, Lidgerwood Estates, Inc. v. Public Service Electric and Gas Co., 113 N.J.Eq. 403 (Ch. 1933). Where the language in the grant is plain, as derived from the language read as an entirety and in light of the surrounding circumstances, the language of the deed of easement will control, without resort to artificial rules of construction. Tide-Water Pipe Co., at 605; citing, Hammet v. Rosensohn, 26 N.J. 4115 (1958). The issue of farm conservation planning, the compliance mechanism for soil conservation on preserved farms, was never before the New Jersey Supreme Court in Quaker Valley Farms, yet it is plainly derived from the language of the deed of easement read as a whole. The SADC now chooses to rely on selective portions of the deed of easement language to claim right to a new, much more restrictive and burdensome compliance regulations, ignoring established New Jersey precedent which clearly restricts the SADC from increasing its servitude to the injury of the preserved farm owner. Id., at 609.

Most deeds of easement arose out of a contract to sell non-agricultural development rights for which consideration paid was limited to an appraisal of non-agricultural development rights based upon a valuation that permitted agricultural and certain residential development. Auction of SADC owned preserved farms included a representation that the deeds of easement did not restrict the construction of agricultural buildings.

The property rights which remained at the time of preserving each farm included agricultural development rights, any rights to construct or relocate a residence on preserved lands, and any rights to continue any Schedule B nonagricultural uses on preserved lands. The SADC cannot retroactively change the terms of the deed of easement to curtail agricultural development rights which remained intact in the preservation deed of easement, with no consideration paid by SADC for same.

Designating past and future residential development and areas used for pre-existing nonagricultural activities as "disturbed" further interferes with these established, investment backed expectations and is a taking of these development rights without just compensation. The failure to exempt housing relocation and residual dwelling site opportunities alone moves the needle on property valuations and the appraisals which supported not only the SADC's acquisition price, but also the appraisals which support existing and future mortgage loans. A farmers real estate asset value will be decreased, while mortgage loans remain in full. In appraising development easements, the New Jersey Farmland Preservation Program Appraiser Handbook sets forth specific Appraisal Considerations. These include:

> Pre-existing nonagricultural uses: Any pre-existing nonagricultural uses identified in the SADC's "Application for An Easement Purchase Cost Share Grant" must be noted in the appraisal report. The appraiser must determine if there is an effect on the development easement value if the existing nonagricultural use is permitted to continue in the "After" situation (emphasis added).
>
> Residential Opportunities: This term encompasses exceptions which permit a residence, existing residential units and residual dwelling site opportunities (RDSOs). Generally, the ability to reside on the property provides an increment of value attributed to the land, which is independent of the actual value of the physical structure (improvement). This ability may exist through an RDSO, existing residential unit, or an exception area, which is not encumbered by the general deed restrictions as contained in the Deed of Easement. The Appraiser should provide an explanation of any adjustments to the subject or comparable properties when reviewing Residential Opportunities (emphasis added).

Even if not expressly set forth in the appraisals used at preservation, the right to such preexisting nonagricultural uses and residential opportunities were a material term in the preservation deal and an expressly permitted right. Therefore, residential and schedule B non-agricultural improvements and activities which occur on the premises should be included as exemptions when calculating soil disturbance.

Placing retroactive limitations on otherwise permissible development rights is unauthorized in the preservation deed of easement. Without any basis in contract or legal authority, the proposed rules overreach the SADC's authorities and amounts to a taking without just compensation.

Proposed N.J.A.C. 2:76-25.1, Applicability

For the reasons stated above, the retroactive application of the rules is a violation of a preserved farm owner's contract, property, and constitutional rights, breaches the deed of easement terms, and takes agricultural and residential development rights without just compensation. Similarly, the application of the rule to properties under contract to sell non-agricultural development rights is a breach of contract and further changes material terms of the appraisals used to value the easement.

Proposed N.J.A.C. 2:76-A.2, Purpose

The authority for the rulemaking lies in the express language of ARDA as interpreted by Quaker Valley Farms, which decision called for a balancing of agricultural development against conservation of soil so that the land may be retained for a variety of agricultural uses. "Disturbance" is not defined anywhere in ARDA or the preservation deeds of easement, and "soil conservation," the very statutory term giving rise to the proposed rules, is not defined anywhere in the proposed rules. Also overlooked is the requirement that the land be available for a "variety of agricultural uses." The SADC's rule proposal purpose statement, which sets forth a right to place an arbitrary limit on "disturbance," memorializes the SADC's overreach.

Proposed N.J.A.C. 2:76-25.2 states:

> Exceeding the soil disturbance limitation established in this subchapter shall constitute a violation of the deed of easement, which prohibits activities

detrimental to soil conservation and detrimental to the continued agricultural use of the premises in accordance with N.J.A.C. 2:76-6.15(a)(7).

Preserved farms which exceed disturbance as of the effective date should be deemed prior nonconforming farms which are not in violation of the deed of easement as a result of the pre-existing disturbance. Without this revision, upon its effective date, the proposed regulations will immediately put property owners with greater than 4 acres/12% disturbance in violation of their deeds of easement. As a result, these farmers will have clouds on title and will not be afforded Right to Farm Protections which are unavailable to preserved farms with deed of easement violations.

Additionally, the additional 1 acre / 2% request is not available to farms with deed of easement violations, and, therefore, farms which exceed the 4 acre / 12 % disturbance limit are without a remedy except to remove disturbance and remediate soils, a highly inappropriate outcome. If the intent is instead to allow farmers that exceed the 4 acre/12 % limit to request the additional 1 acre / 2%, the proposed rules must include language establishing that preserved farms which exceed disturbance as of the effective date are deemed prior nonconforming farms. This will also ensure that Right to Farm protections remain available to such farms.

Proposed N.J.A.C. 2:76-25.3, Definitions

"Agricultural Productivity"

"Agricultural productivity" should be re-termed "soil agricultural productivity" due to its limited applicability to "the capacity of a soil to produce a specific plant...." This is necessary for consistency with N.J.S.A. 4:1C-13(l), the definition of "soil and water conservation project," in which "agricultural productivity" is specifically pertaining to the productivity of soils. This is necessary to avoid industry and interpretive confusion with the concept of "agricultural production," which is not limited to agricultural products grown in soil, but also includes many other forms of agricultural production, including the breeding and raising of animals. As per the ARDA, "increased agricultural production" is the first priority use of preserved farmland. N.J.S.A. 4:1C-13(h). To date, I am unaware of any precedent which prioritizes agricultural production of plants over other forms of agricultural production, such as equine, bees, honey, and similar. Therefore, distinguishing "soil agricultural productivity" from "agricultural productivity" appears imperative and necessary to avoid the slippery slope of SADC passing regulations which might be used to justify bias towards crop production over other forms of agricultural production.

"Normal tillage" and "Human-altered and human-transported soils"

The definition of "Normal tillage" includes only tillage where the practice does not meet the definition of human-altered or human-transported soils, which includes: 1) soils that have profound and purposeful alteration; 2) soils that occur on landforms with purposeful construction or excavation and the alteration is of sufficient magnitude to result in the introduction of a new parent material (human-transported material); or 3) a profound change in the previously existing parent materials (human-altered material). Please clarify if the third item as listed above is meant to be a separate criterion or a continuation of the second criterion. Please explain what this means and provide a variety of examples and scenarios so that the meaning, purpose, and intent of non-exempt tillage due to human activities may be ascertained with sufficient clarity to guide enforcement. Objections are also raised regarding the complexity and lack of clear understanding of acceptable tillage.

"Innovation Waiver"

The definition of "innovation waiver" only applies to new or innovative agricultural practices which are approved by the SADC "in advance." Please clarify the meaning of "in advance." May innovation waivers be applied to existing infrastructure or agricultural uses? There exists farmers who have invested in infrastructure with substantial technical guidance including soil conservation considerations, and in some cases these improvements were made under the direct supervision of the SADC. In one example, the SADC has reviewed pervious equine arenas which are laid over existing soil and found compliance with the preservation deed of easement. However, under the proposed rules, such areas are non-exempt disturbance and move a farmer towards or into noncompliance. Likely other examples of consciously installed infrastructure exists over the many decades of implementing the farmland preservation program. Farmers should be afforded exemptions for such carefully developed areas.

"Livestock training area"

The proposed rules define "livestock training area," but it appears this term is not elsewhere used in the proposed rules. Adequate provisions for equine and similar livestock-based agricultural development do not exist in the proposed rules. As a result, agricultural production of livestock, including equine, will be disproportionately and arbitrarily limited by the soil disturbance limit.

The proposed rules include an inherent bias towards plant production and discriminate against equine and similar production. They therefore fail to promote a variety of agricultural practices and instead discriminate against many forms of agricultural production. The bias is also found in inherent policy inconsistencies without a rational basis, such as treating tents on fields in a manner that is somehow more restrictive than parking vehicles on fields.

"Temporary Tent"

The definition of "Temporary tent" limits the exemption for temporary tents to tents that are in place for no more than 120 cumulative days per calendar year. This is inconsistent with the SADC's determination that temporary tents in place for 180 cumulative days or less will not be treated as impervious cover nor in violation of the deed of easement provided vegetative cover is maintained. Reducing the number of days that tents may exist on a preserved farm to 120 days despite vegetative cover is arbitrary when compared to temporary overflow parking which may exist under the proposed rules provided minimum vegetative cover is maintained.

Tents should also be permitted for a minimum of 180 cumulative days for consistency with N.J.A.C. 5:23-2.14(b) Construction permits, which exempts such tents from construction permits as follows:

> 4. Exceptions to permit requirements for temporary structures, tents, tensioned membrane structures, canopies, and greenhouses are as follows:
>
> * * *
>
> ii. Tents, tensioned membrane structures, and canopies: A construction permit is not required for tents, tensioned membrane structures, and canopies that meet all of the criteria in (b)4ii(1) through (5) below. Tents, tensioned membrane structures, and canopies meeting the following

> criteria shall be subject to the permitting requirements of the Uniform Fire Code (N.J.A.C. 5:70-2.7).
>
> (1) The tent, tensioned membrane structure, or canopy is 140 feet or less in any dimension and 16,800 square feet or less in area whether it is one unit or is composed of multiple units;
>
> (2) The tent, tensioned membrane structure, or canopy remains in place or will remain in place for fewer than 180 days;
>
> (3) The tent, tensioned membrane structure, or canopy is used or occupied only between April 1 and November 30;
>
> (4) The tent, tensioned membrane structure, or canopy does not have a permanent anchoring system or foundation; and
>
> (5) The tent, tensioned membrane structure, or canopy does not contain platforms or bleachers greater than 11 feet in height.
>
> iii. A temporary greenhouse, also called a "hoophouse" or "polyhouse," meeting the criteria stated in N.J.A.C. 5:23-3.2(d), shall not require a permit.
>
> iv. Regardless of whether the tent, tensioned membrane structure, canopy, or greenhouse requires a permit, a permit shall be required for any electrical equipment, electrical wiring or mechanical equipment that would otherwise require a permit.

Under the stormwater management rules, development on agricultural lands includes any activity which requires a permit or approval, including permits and approvals from the SADC. N.J.A.C. 7:8-1.2. Because tents that are in place for fewer than 180 days are exempt from UCC permit requirements and currently permitted under farmland preservation, they are also not considered agricultural development under the Stormwater Management Rules. N.J.A.C. 7:8-1.2. The SADC now proposes to restrict tents in place for more than 120 days, which restriction rolls back the current rights of farmers to utilize tents without building permits or SADC approval if they are in place for 180 days or less. The proposed definition of temporary tent must be revised to 180 days for consistency with existing property rights and existing rules and regulations in the State of New Jersey. The SADC has not provided any rational basis for discriminating against tents, especially when vegetative cover may be maintained, and especially when other exemptions allow arguably more intensive temporary use of fields provided vegetative cover is maintained.

"Unimproved travel lane"

The definition of "unimproved travel lane" includes a condition that, to be exempt, the unimproved travel lane may not be located closer than 300 feet to another unimproved travel lane or travel lane. Please clarify that this is not inclusive of intersections.

"Soil Conservation" and "Soil Conservation Methods"

The definitions do not define "soil conservation" or "soil conservation methods." This ignores the foundational concern raised by the New Jersey Supreme Court in the Quaker Valley Farms decision, which considered deed of easement language pertaining to "soil conservation" and directed the SADC to provide guidance on same.

Proposed N.J.A.C. 2:76-A.4, Exemptions

Conditional Exemptions

The language at N.J.A.C. 2:76-A.4(h) should be clarified to put readers on notice that some soil disturbance exemptions are conditional. As the exemption provision is currently written, readers are not alerted to the conditions that must be met for some of the enumerated exemptions to qualify.

For example, upon reviewing N.J.A.C. 2:76-A.4(h), a lay reader would reasonably believe that temporary overflow parking as per the agricultural management practice for on-farm direct marketing facilities, activities, and events, N.J.A.C. 2:76-2A.13(h), remains an exempt parking solution without specific conditions. However, proposed N.J.A.C. 2:76-25A.6 sets forth a list of new objective and subjective criteria which the SADC and the grantee may use to "determine" whether a temporary parking area may be considered exempt, including: 1) weight of the equipment or vehicles; 2) frequency of use; 3) the field's potential yield; 4) pasture management; 5) plant species present; 6) drainage; 7) soil type; and 8) weather conditions and season. Additionally, the SADC proposes a condition that minimum vegetative cover be maintained for temporary overflow parking, and sets forth a sampling plan (Proposed N.J.A.C. 2:76-25A.6(c)) which is typical of those utilized by field botanists by which measurements are taken along transects, and which sampling plan must result in 70 % or more vegetative cover. Only temporary overflow parking meeting the 70 % vegetative cover standard at least nine (9) months of the year, not inclusive of weeds, qualifies as exempt overflow parking. (See, definitions of "minimum vegetative cover," "vegetative cover," and "weed," at proposed N.J.A.C. 2:76-A.3).

Similarly, "On-farm utilities" are only exempt if they meet the construction standards established at proposed N.J.A.C. 2:76-25A.4. "Unimproved travel lanes" are only exempt if they are no more than 10 feet wide for one-way traffic or 16 feet wide for two-way traffic and constructed no closer than 300 feet to another unimproved travel lane or travel lane, with no exception provided for intersections. This is not an exhaustive list of examples of conditional exemptions.

Although I dispute that authority exists to place an arbitrary cap on disturbance, if the SADC persists in its efforts to roll back agricultural and residential development rights, conditions must be disclosed in the exemption section, and consideration should be given to the creation of many more conditional exemptions which are achievable without unduly burdensome, costly, and time-consuming proofs that necessitate the hiring of attorneys, engineers, soil scientists, and botanists.

Proposed Use of Farm Conservation Planning Discriminates Against All Agricultural Uses and Development Except for Tillage Not Involving Human Affected Soils

The plain meaning of N.J.A.C. 2:76-6.15(a)(7)(i) and (ii) and the SADC's prior interpretation of same permit soil conservation compliance through farm conservation planning. Accordingly, any agricultural development conducted in accordance with an approved farm conservation plan that addresses soil conservation is already compliant with the deed of easement and, therefore, must be included as an

exemption. This is necessary to reconcile the established terms of ARDA and the preservation deeds of easement authorizing same, as follows:

> "No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation, erosion control, or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises.
>
> i. Grantor shall obtain within one year of the date of this Deed of Easement, a farm conservation plan approved by the local soil conservation district.
>
> ii. Grantor's long-term objectives shall conform with the provisions of the farm conservation plan (emphasis added)."

N.J.A.C. 2:76-6.15(a)(7). As stated by the SADC, farm conservation plans are intended to contain "the soil and water conservation practices which are needed for the specific type of agricultural operation," and "the measurement of compliance is the Grantor's conformance with the farm conservation plan." 26 N.J.R., at 3161. Contrary to this position, proposed N.J.A.C. 2:76-25.4(b) only exempts conservation practices resulting from normal tillage and meeting additional criteria. The above discussion of N.J.A.C. 2:76-6.15(a)(7) and farm conservation planning is incorporated herein. Farm conservation planning should be the appropriate mechanism of confirming soil and water conservation planning for all forms of agricultural development.

Taking of Otherwise Permitted Non-Agricultural Property Rights

For the reasons set forth, above, residential and schedule B non-agricultural improvements and activities which occur on the premises should be included as exemptions when calculating soil disturbance.

Proposed N.J.A.C. 2:76-25.5 Soil disturbance limitations

Retroactive Deed of Easement Violations

One must reference proposed N.J.A.C. 2:76-25.2 to ascertain that exceeding the 4 acre/12% soil disturbance limitation is a violation of the deed of easement. Consider referring to proposed N.J.A.C. 2:76-25.2 in section 25.5 for clarification. Restated are comments on proposed N.J.A.C. 2:76-25.2, above, and objections raised about reneging on the preservation deal, breaching contract, taking property rights without compensation, lack of legislative authority, failing to carry out the SADC purposes, and the passage of a regulation which, upon its effective date, would immediately put property owners with greater than 4 acres/12% disturbance in violation of their deeds of easement.

Determination of 4 acre/12% with revocable production waiver to 6 acre/15%.

Please set forth the rational basis which underpins the SADC's determination that disturbance should be limited to the specific amounts of 4 acre/12% with revocable production waivers allowing up to 6 acre/15%.

Using a Fixed and Retroactive Soil Disturbance Date in Proposed N.J.A.C. 2:76-25.5(b) is Arbitrary and Unfair

The soil disturbance limit is determined as of July 1, 2023, and an additional 2 percent or 1 acre of relief is based upon the conditions as of July 1, 2023. However, preliminary maps are based upon 2020 aerial photography. Farmers did not receive their maps until after July 1, 2023, and those maps contained errors. Farmers were not on notice that they required aerial photography or other proofs of their farm's land use as of July 1, 2023 for the purpose of establishing accurate, existing conditions. Upon information and belief, such aerial mapping as of July 1, 2023 is not publicly available, and even if it were, it would not be field verified.

Between 2020, the date of aerial images used for mapping, and passage of the regulation, additional improvements and disturbance may have occurred without adequate notice of the 4 acre/ 12 percent restriction. As of July 1, 2023, additional improvements or disturbance might be funded, planned, and approved in accordance with local land use or county SSAMP applications but not constructed. So as to not effect a taking, such approved disturbance must be deemed exempt as a prior nonconformity, even if not yet constructed.

Given the errors in maps distributed to farmers, farmers may further not be aware of their actual disturbance calculations. Any calculation of disturbance should not be considered final until ground verified by SADC after an opportunity for input from the farmer. The SADC has required review of ground conditions during the annual monitoring program. Time limits on any and all relief that is available to farmers, including the 2 percent/1 acre relief, should not commence until a map is field verified and reviewed with the farmer. The burden of field verification of all maps must be on the SADC as the regulations are too complicated with buried conditions of exemptions. This makes it unfair and prejudicial to shift the burden of confirming map accuracy onto the farmer. It is also unfair and prejudicial to impose an arbitrary acceptance of the maps onto the farmer even if they are not field verified by the SADC.

Proposed N.J.A.C. 2:76-25.6, Waivers

Proposed N.J.A.C. 2:76-25.6(l), Waivers are Revocable

All approved waivers are revocable as per proposed N.J.A.C. 2:76-25.6(l) and, therefore, references to waivers throughout the proposed rule should be clarified to indicate that they are "revocable" waivers. Identifying whether a property right is revocable or not is a fundamental premise of real estate law.

Proposed N.J.A.C. 2:76-25.6(b), Compliance with Deed of Easement

Deed of easement compliance is a prerequisite to granting waivers. Therefore, farms with disturbance that exceeds 4 acres or 12%, whichever is greater, as of the effective date will be out of compliance with the deed of easement as per proposed N.J.A.C. 2:76-25.2, which states:

> Exceeding the soil disturbance limitation established in this subchapter shall constitute a violation of the deed of easement, which prohibits activities detrimental to soil conservation and detrimental to the continued agricultural use of the premises in accordance with N.J.A.C. 2:76-6.15(a)(7).

Therefore, the production and innovation waivers are only available to farmers whose disturbance as of the effective date is less than the greater of 4 acres or 12 %. Preserved farms which exceed disturbance

limits as of the effective date should be deemed prior nonconforming farms which are not in violation of the deed of easement as a result of the pre-existing disturbance. Additionally, proposed N.J.A.C. 2:76-25.6(b) should be clarified to allow farmers with greater than 4 acres/12 % disturbance to apply for innovation and revocable production waivers.

Proposed N.J.A.C. 2:76-25.6(c) – No feasible alternative

Clarification of the "no feasible alternative" language is needed to indicate if denial of the project, including denials in favor of less disturbing forms of agricultural production, will be considered feasible alternatives that avoids soil disturbance. For example, if a farmer proposes to construct "livestock training areas" as defined in proposed N.J.A.C. 2:76-25.3, will these be considered production areas eligible for a revocable production waiver which may be approved despite other forms of production resulting in less soil disturbance? Clarify if the consideration of feasible alternatives is isolated to the specific form of agricultural infrastructure and production proposed by the farmer.

Further, confirm that aggregation and consolidation pursuant to Proposed N.J.A.C. 2:76-25.7 will not be required as a feasible alternative. Any provisions in the proposed rules which have the effect of forcing aggregation or consolidation should be eliminated. The lot configuration which exists at the time of preservation was a material consideration in appraised value of the farm(s) and reducing the property rights and benefits of multiple farm parcels cannot occur without just compensation.

Proposed N.J.A.C. 2:76-25.6(c) – Revocable Production Waivers Biased to Plant Production

Proposed N.J.A.C. 2:76-25.6(c)(3)(ii) requires that, as a condition of issuing a revocable production waiver, the project must have a positive impact on agricultural productivity. Yet, the SADC proposes to define agricultural productivity as limited to "the capacity of a soil to produce a specific plant….." Proposed N.J.A.C. 2:76-25.3. The SADC should clarify whether it intends to make revocable production waivers available only to projects that promote plant production and not available to projects that promote other forms of agricultural production. If the latter, the SADC should clarify that proposed revocable production waivers are limited in their availability to plant production.

More importantly, the SADC should amend this provision to eliminate the bias and develop waiver provisions that are accessible to all forms of agricultural production. If the bias is intended, the SADC should provide a rational basis for same and reconcile the bias inconsistency with its mission and the deed of easement objectives of promoting a wide variety of agricultural production.

Proposed N.J.A.C. 2:76-25.6(c)(4) exceeds the compliance mechanism of a farm conservation plan which was previously determined by the SADC to be the appropriate measure of compliance. Instead, as a condition of receiving a revocable production waiver, a farmer must have a stewardship conservation plan for the entire preserved farm premises, not just the area of development. See, proposed N.J.A.C. 2:76-25.3, definitions, "stewardship conservation plan," means a farm conservation plan that meets or exceeds the planning criteria for all soil and water resources identified on the premises (emphasis added)(premises are all areas covered by the deed of easement)." Also, the farmer must "maintain the functional integrity" of riparian vegetation in the plan. If there is forested land, the farmer must also obtain a forest stewardship plan, with a woodland management plan presumably inadequate for compliance. Therefore, the SADC appears to leverage its granting of revocable production waivers with the requirement of supervised, planned management of all soil, water, and woodland resources on the preserved farm in a manner that

exceeds that which would be necessary to ensure soil and water conservation for the proposed production activities. This is overreaching.

Proposed N.J.A.C. 2:76-25.6(e) – Revocable Innovation Waivers Biased to Plant Production

Proposed N.J.A.C. 2:76-25.6(e) requires that, as a condition of issuing a revocable innovation waiver, the project must have a positive impact on agricultural productivity (Proposed N.J.A.C. 2:76-25.6(c)(3)(ii)) and must maintain minimum vegetative cover. The SADC proposes to define agricultural productivity as limited to "the capacity of a soil to produce a specific plant….." Proposed N.J.A.C. 2:76-25.3. Minimum vegetative cover requires 70% plant cover over 9 months, not inclusive of weeds. Proposed N.J.A.C. 2:76-25.3. The SADC should clarify whether it intends to make revocable innovation waivers available only to projects that promote increased plant production and not available to projects that promote other forms of agricultural production. If the latter, the SADC should clarify that revocable production waivers are limited in their availability to plant production. More importantly, the SADC should amend this provision to eliminate the bias and develop waiver provisions that are accessible to all forms of agricultural production. If the bias is intended, the SADC should provide a rational basis for same and reconcile the bias inconsistency with its mission and the deed of easement objectives of promoting a wide variety of agricultural production.

See also, the above comments on Proposed N.J.A.C. 2:76-25.6(c)(4) with respect to revocable production waivers, which are also relevant to revocable innovation waivers. The SADC appears to leverage its granting of revocable innovation waivers with the requirement of supervised, planned management of all soil, water, and woodland resources on the preserved farm in a manner that exceeds that which would be necessary to ensure soil conservation for the proposed activities.

Proposed N.J.A.C. 2:76-25.6 – Application Notice

Proposed N.J.A.C. 2:76-25.6(g) requires that waiver applications be heard upon notice to the clerk and land use board secretary of the municipality in which the premises is located. This notice requirement should be eliminated. If the notice requirement remains, please clarify whether an application requires notice to both a planning board and a zoning board of adjustment in municipalities without a combined board, and set forth the rational basis for same.

The preservation deed of easement is a contract between the farm owner and the grantee under the jurisdiction of the SADC and, therefore, the municipality is not a party to the matter. Further, the farmland preservation program is not a zoning protection program and, therefore, it is unclear why a municipality is entitled to notice of a farmers' application to engage in agricultural production.

Notice is also required to all 200-foot abutters. This notice requirement should be eliminated as it is unduly burdensome and involves non-farm neighbors in all matters of the farm's agricultural production, including the required farm-wide soil, water, and forest resource management required as per proposed N.J.A.C. 2:76-25.6(c)(4), which management exceeds that which is required for farm conservation planning.

Municipal and abutter notice is further problematic when one considers the proposed requirement that a waiver application proposing to construct improvements include "zoning, building and development plans, site plan, relevant permits, and, if applicable, stormwater management plans and calculations." Proposed N.J.A.C. 2:76-25.6(i)(2). A claim of preemption from local zoning and site planning requirements is disregarded as an option available to farmers seeking waivers, and at a minimum, right to farm

permissions and agricultural management practice compliance should be incorporated as an alternative basis to a complete and approvable waiver application. Municipalities and objectors are continuously seeking end-runs around Right to Farm protections, and the waiver application and notice procedures invite such interference. The provisions of proposed N.J.A.C. 2:76-25.6(c)(4) and proposed N.J.A.C. 2:76-25.6(i)(2) seem certain to invite municipal and public opposition to farming projects regardless of any reasonable or rational basis for objection, which is a known issue amongst the farming community. It is unprecedented to require public notice for farm applications made solely under the farmland preservation program.

Proposed N.J.A.C. 2:76-25.6(j) – "actions or inaction"

Proposed N.J.A.C. 2:76-25.6(j) allows the SADC to deny a waiver upon consideration of the grantor's "actions or inactions" which caused or contributed to the need to submit a request for a waiver. All waiver requests will arise to some extent out of the grantor's "actions or inactions." If the SADC means "actions or inactions which caused deed of easement violations necessitating the waiver application," then the provision should be clarified to reflect same. Otherwise, the provision is too vague and broad to guide readers.

Proposed N.J.A.C. 2:76-25.6(j) – recording resolutions approving waivers

Proposed N.J.A.C. 2:76-25.6(j)(5) requires that any resolution approving a waiver be recorded. The burden of recording and paying associated fees for same should be clarified to indicate if it is born by the farmer or the SADC.

Also, proposed N.J.A.C. 2:76-25.6(j)(5) is the first reference in the proposed rules to putting a purchaser on notice that a soil disturbance limitation exists. Review of the preservation deeds of easement, alone, will not give the typical farm purchaser notice that the deed of easement has been retroactively interpreted to also restrict agricultural and residential development rights. The SADC should clarify how it expects the average purchaser of a preserved farm to be aware of the soil disturbance limit and its expansion of restrictions beyond the terms of the deed of easement to include an arbitrary cap on agricultural and residential development rights, regardless of the implementation of a farm conservation plan.

Proposed N.J.A.C. 2:76-25.9 – Soil Rehabilitation

Proposed N.J.A.C. 2:76-25.9(b)(2) allows the SADC to develop templates for rehabilitation of common soil disturbances that may be followed to meet the requirements at Proposed N.J.A.C. 2:76-25A.9. Development of such templates for a wide variety of typical disturbance in advance of promulgating rules would be a substantial improvement that is more consistent with the SADC's objectives and the New Jersey Supreme Court' directive in Quaker Valley Farms.

Proposed N.J.A.C. 2:76-25.10 – Soil protection mapping and monitoring requirements

Using a Fixed and Retroactive Soil Disturbance Date is Arbitrary and Unfair

See comments on proposed N.J.A.C. 2:76-25.5(b), above.

Reconsideration

The language of proposed N.J.A.C. 2:76-25.5(b)(3), (4), and (5) is confusing as written and should be clarified to indicate the sixty (60) day deadline for reconsideration applies only to farmers who seek to avail themselves of the 1 acre/2 % of disturbance increase. A minimum of 180 days should be afforded for making application to increase the disturbance limit so that farmers may have adequate time to review their maps, especially if the effective date coincides with the busiest months of the farming season. Limiting such requests to sixty (60) days after the effective date of the regulation is unreasonable and cannot reasonably be deemed "consent" to mapping errors as proposed in N.J.A.C. 2:76-10(c). Field verification and correcting errors in maps should be the SADC's burden and competed prior to the commencement of any time limits.

Monitoring

Burdens on the farmland preservation monitoring programs should be carefully considered, as additional time and budget allocations for farmland preservation staff will be needed to carry out the annual review and reporting of soil disturbance on each farm, including provision of all farm monitoring staff with the requisite training and GPS units. Substantial weight is placed on the ability of monitoring staff to ascertain and calculate changes from year to year, and to photograph and report same to county boards and the SADC. The SADC should discuss how it intends to support such staff in carrying out the requirements of the rules to an extent that maintains adequate reliability, accuracy, transparency, and good faith within the farming community. Local CADBs and their staff should be concerned about blame for errors given the apparent difficulties involved in confirming compliance and reporting on new disturbance during annual monitoring. Errors seem certain to occur, and in no event should this prejudice the farmer or purchaser who relies on the mapping.

Proposed N.J.A.C. 2:76-25A.2, Purpose of Supplemental Soil Disturbance Standards

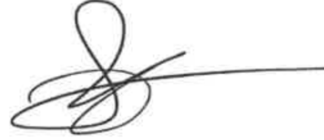
The purpose of subchapter 25A is not only limited to standards for revocable waivers and soil rehabilitation, but also includes standards for certain exemptions, such as on farm utilities, solar, and temporary overflow parking. The purpose statement should be corrected to alert readers to the wider reach of the Subchapter 25A technical requirements.

Conclusion

The proposed rules are a giant leap from the concept of permissible agricultural development balanced against reasonable soil and water conservation practices to the much more stringent concept of arbitrary limits on agricultural development and soil disturbance regardless of soil and water conservation practices. A cap on soil disturbance, and exemptions that only support a limited variety of agricultural production, are arbitrary and capricious, exceed the SADC's delegated authorities, take property rights without just compensation, discriminate economically without a rational basis, and interfere with ARDA's Legislative findings and declarations, which require that the SADC encourage the maintenance of agricultural production and a positive agricultural business climate and make available to preserved farm owners financial, administrative and regulatory benefits in exchange for participation in the farmland preservation program. N.J.S.A. 4:1C-12. The proposed rules will have a chilling effect on not only agricultural development, but also farmland preservation, and they should be withdrawn. Compliance with the deed of easement and the directives of Quaker Valley Farm are already provided for through farm conservation planning.

Thank you for your attention to these comments.

Very truly yours,



Nicole L. Voigt

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New Jersey State Board of Agriculture, Linda Walker, Executive Assistant
New Jersey Farm Bureau, Allen Carter, President
Farm Credit East, Stephen Makarevich, Branch Manager
John Showler, State Erosion Control Engineer, New Jersey Department of Agriculture
Frank Pinto, Farmland Preservation Consultant, Pinto Consulting
Atlantic County Agriculture Development Board, Ranae Fehr, Administrator
Bergen County Agriculture Development Board, Nancy Witkowski, Administrator
Burlington County Agriculture Development Board, Brian Wilson, Administrator
Camden County Agriculture Development Board, Janina Robinson, Administrator
Cape May County Agriculture Development Board, Barbara Ernst, Administrator
Cumberland County Agriculture Development Board, Matthew Pisarski, Administrator
Gloucester County Agriculture Development Board, Eric Agren, Administrator
Hunterdon County Agricultural Development Board, Bob Hornby, Administrator
Mercer County Agricultural Development Board, Leslie R. Floyd, Administrator
Middlesex County Agriculture Development Board, Laurie Sobel, Administrator
Middlesex County Agriculture Development Board, Brady Smith, Administrator
Monmouth County Agriculture Development Board, Amber Mallm, Administrator
Morris County Agriculture Development Board, Katherine Coyle, Administrator
Ocean County Agriculture Development Board, Timothy Gleason, Administrator
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Salem County Agriculture Development Board, Kris Alexander, Administrator
Somerset County Agriculture Development Board, Katelyn Katzer, Administrator
Sussex County Agriculture Development Board, Maggie Faselt, Administrator
Warren County Agriculture Development Board, Corey Tierney, Administrator

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January 16, 2023

BY EMAIL AND PRIORITY MAIL EXPRESS
New Jersey State Agriculture Development Committee
Susan E. Payne, Executive Director
State Agriculture Development Committee
PO Box 330
Trenton, NJ 08625-0330
susan.payne@ag.nj.gov
SADC@ag.state.nj.us

CC: Brian D. Smith, Esq., Chief of Legal Affairs
brian.smith@ag.nj.gov

RE: SUBMISSION OF ADDITIONAL COMMENTS ON PROPOSED NEW RULES: PROPOSED N.J.A.C. 2:76-25 AND 25A, SOIL DISTURBANCE ON PRESERVED FARMLAND AND SUPPLEMENTAL SOIL DISTURBANCE STANDARDS.

Dear Ms. Payne:

Please recall that I previously provided comments dated September 29, 2023, and October 10, 2023, to the State Agriculture Development Committee regarding the S.A.D.C.'s proposed new rules N.J.A.C. 2:76-25 and 25A which propose to regulate Soil Disturbance on Preserved Farmland and Supplemental Soil Disturbance Standards. 55 N.J.R. 8(1), August 7, 2023. The purpose of this letter is to provide supplemental comments.

In its summary of the proposed rules, the S.A.D.C. advised that the New Jersey Supreme Court , in State of New Jersey, State Agriculture Development Committee v. Quaker Valley Farms, LLC, 235 N.J. 37 (2018), "cautioned the State Agriculture Development Committee ("Committee" or "S.A.D.C.") to adopt regulatory standards balancing the nature and extent of soil disturbance with permissible agricultural development on preserved farms." (See, Summary of proposed rules, 55 N.J.R. 8(1), August 7, 2023). Respectfully, I believe this reiterates a common misperception that the New Jersey Supreme Court mandated the S.A.D.C. to adopt such standards, which is not accurate. Instead:

1) The S.A.D.C. has no such mandate or authority to develop a retroactive soil disturbance limit pursuant to the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq. ("A.R.D.A.") or the Quaker Valley Farms decision.

2) The New Jersey Supreme Court comments regarding the adequacy of regulatory standards to reconcile the deed of easement in Quaker Valley Farms is entirely distinguishable because it evaluated a 1993 preservation deed of easement. The 1993 preservation deed of easement did not require farm conservation planning. The S.A.D.C. added the farm conservation planning requirement to deeds of easement in 1994, and its rulemaking comments stated: "The [farm conservation] plan contains the soil and water conservation practices which are needed for the

specific type of agricultural operation. * * * Ultimately, the measure of compliance is the Grantor's conformance with the farm conservation plan."26 N.J.R., at 3161. Quaker Valley Farms was not required to have a farm conservation plan because deed of easement amendments are not retroactive.

3) Overlooked in Quaker Valley Farms is the New Jersey Supreme Court cautionary guidance to the S.A.D.C. stating that it would not uphold S.A.D.C. enforcement actions against farmers engaging in otherwise permissible development if the alleged soil conservation violations would not have been understood by a reasonable person at the time the parties agreed to the deed of easement (i.e. retroactively imposed new expectations that would not have been reasonably expected at the time of preservation would be unenforceable)

4) The Quaker Valley Farms holding is merely that, while a preserved farm owner is permitted to construct new structures for agricultural purposes and those structures may disturb soil, the permanent destruction of soil, whereby the soil is no longer available for a variety of future agricultural production, violates the preservation deed of easement if it exceeds the limit that a reasonable person would have understood at the time of preservation.

5) In Quaker Valley Farms, the New Jersey Supreme Court did in fact caution the S.A.D.C. to guide farmers in balancing agricultural development against soil conservation. Legally, these comments were not necessary to decide the case, did not make law, and are therefore merely *in dicta* statements having no legal bearing on the case before the Court.

6) In analyzing Quaker Valley Farms, it is critically important to understand that farm conservation planning and the Natural Resource Conservation Agricultural Management Practice was not utilized by Quaker Valley Farms yet would have allowed a site specific determination of Quaker Valley Farm's soil disturbance activities. Given these facts, the materials filed by the parties with the New Jersey Supreme Court did not raise issues or brief the Court regarding farm conservation planning and the Natural Resource Conservation Agricultural Management Practice.

7) If the adequacy of existing regulations was not an issue before the New Jersey Supreme Court, the Quaker Valley Farms *in dicta* comments can by no means be construed as a mandate to promulgate additional regulations.

The facts and law reviewed in Quaker Valley Farms litigation did not include 1994 amendments to the preservation deed of easement and current conservation agricultural management practices promulgated by the State Agriculture Development Committee for soil and water conservation.

In Quaker Valley Farms, the New Jersey Supreme Court was reviewing an outdated preservation deed of easement. Quaker Valley Farm's preservation deed of easement was executed in 1993, before the S.A.D.C. amended its regulations to add farm conservation planning as the compliance mechanism for soil disturbance. See, enclosed herewith, the September 22, 1993, Deed of Easement, State of New Jersey Agriculture Retention and Development Program, Harold F. Mathews and Rosalie Lilian J. Mathews, Grantor, and the County of Hunterdon, Grantee (Mathews being the predecessor in title to Quaker Valley Farms)("Mathews DOE").

After the 1993 Mathews DOE, the S.A.D.C. amended the standard form deed of easement to add farm conservation planning requirements (N.J.A.C. 2:76-6.15(a)(7)(i) and (ii)) as per rules proposed on April

4, 1994 (26 N.J.R. 1419(a)). Therefore, The Mathews DOE reviewed by the New Jersey Supreme Court did not include the below underlined amendments which address soil and water conservation:

> "No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation, erosion control, or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises.
>
> > i. Grantor shall obtain within one year of the date of this Deed of Easement, a farm conservation plan approved by the local soil conservation district.
> >
> > ii. Grantor's long-term objectives shall conform with the provisions of the farm conservation plan."

N.J.A.C. 2:76-6.15(a)(7)(emphasis added).

As stated in the S.A.D.C. rulemaking comments:

> "The SADC's amendment requires that the grantor's long term objectives shall conform with the provisions of the farm conservation plan. Most importantly, the Grantor's long term objectives as they pertain to a particular agricultural operation must be reflected in revisions to the farm conservation plan. The plan contains the soil and water conservation practices which are needed for the specific type of agricultural operation. * * * Ultimately, the measure of compliance is the Grantor's conformance with the farm conservation plan."

26 N.J.R., at 3161 (emphasis added).

Thereafter, on December 6, 1999 the SADC proposed the Natural Resource Conservation Agricultural Management Practice (31 N.J.R. 3881(a))(codified as N.J.A.C. 2:76-2A.7). As a result, there already exists a generally accepted agricultural management practice for site-specific implementation of a farm conservation plan for the development of a soil, water, and natural resource conservation plan on farmland. Specifically, N.J.A.C. 2:76-2A.7, sets forth the following natural resource conservation agricultural management practice, restated here in its entirety:

> (a) The purpose of this section is to establish a generally accepted agricultural management practice for the implementation of a farm conservation plan for the conservation and development of soil, water and related natural resources on farmland.
>
> (b) The following terms, as used in this section, shall have the following meanings:
>
> > "District" or "Soil Conservation District" (SCD) means a governmental subdivision of this State, organized in accordance with the provisions of N.J.S.A. 4:24-1 et seq.

> > "Farm conservation plan" means a site specific plan developed by the landowner and approved by the local soil conservation district which prescribes needed land treatment and related conservation and natural resource management measures including forest management practices that are determined practical and reasonable to conserve, protect and develop natural resources, to maintain and enhance agricultural productivity and to control and prevent nonpoint source pollution.
> >
> > "United States Department of Agriculture, Natural Resources Conservation Service, (NRCS) Field Office Technical Guide" means a composite of national, regional, State and local data and standards derived primarily from local universities, NRCS and conservation district offices and cooperating conservation agencies which administer natural resource conservation programs.
>
> (c) The implementation of a farm conservation plan on farmland shall be a generally accepted agricultural management practice recommended by the Committee.
>
> > 1. A farm conservation plan on farmland shall be prepared in conformance with the following:
> >
> > > i. United States of Agriculture, Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG), revised April 20, 1998, incorporated herein by reference, as amended and supplemented; and
> > >
> > > ii. Forest management practices shall be in accordance with standards and specifications adopted by the New Jersey Department of Environmental Protection, Bureau of Forest Management where such standards and specifications are not included in the NRCS FOTG.
>
> 2. For purposes of this recommended agricultural management practice, a farm conservation plan which includes recommendations concerning land application of sewage sludge-derived products is not recommended as a generally accepted agricultural management practice by the Committee.

N.J.A.C. 2:76-2A.7 (emphasis added).

When proposing N.J.A.C. 2:76-2A.7, the Natural Resource Conservation Agricultural Management Practice, the S.A.D.C. advised:

> The purpose of the proposed new rule is to establish the implementation of a farm conservation plan as the agricultural management practice (AMP) for the conservation of soil, water and related natural resources on individual commercial farms. Commercial farm operators whose

operations are in conformance with this agricultural management practice will be afforded protections under the Right to Farm Act for activities related to the plan.

* * *

There is a significant social benefit to commercial farm operators utilizing the adopted agricultural management practice in that the potential for conflicts arising with neighbors of the commercial farm operation is minimized. The adopted agricultural management practice will be utilized in an attempt to resolve conflicts between commercial farm operators and any person or municipality aggrieved by the operation of same. The commercial farm operation is protected from private and public nuisance lawsuits and municipal regulations, pursuant to the Right to Farm Act, if it is found to be in conformance with the adopted agricultural management practice as well as the other prerequisites of the Right to Farm Act.

* * *

The proposed new rule will have a positive impact on the State economy by promoting the continuation of agriculture in New Jersey through the implementation of effective natural resource conservation agricultural management practices.

* * *

Conformance to the adopted agricultural management practice via the development and adherence to a farm conservation plan will provide commercial farm operators with a tool for planning and applying natural resource conservation techniques. Generally, development of the farm conservation plan, with technical assistance provided by NRCS staff is at no cost to the commercial farm operator.

* * *

The proposed natural resource conservation agricultural management practice at N.J.A.C. 2:76-2A.7 does not require the commercial farm operator to incur any costs in terms of reporting or recordkeeping when complying with the proposed rule. The capital costs associated with compliance with the farm conservation plan aspect of the natural resource conservation agricultural management practice vary from low, to moderate and high depending on the recommendations of the farm conservation plan. Often, financial assistance may be available to eligible commercial farm operators from sources such as the USDA Sustainable Agriculture Research and Education (SARE) Program, the State Agriculture Development Committee, Soil and Water Conservation Cost Share Program, and the State Soil Conservation Committee, Conservation Cost Share Program.

31 N.J.R. 3881(a)(December 6, 1999) (emphasis added).

Neither farm conservation planning nor the Natural Resource Conservation Agricultural Management Practice, which allows site specific implementation of agricultural specific conservation practices, were considered by the New Jersey Supreme Court in the Quaker Valley Farms decision. In the Quaker Valley Farms case, the S.A.D.C. alleged permanent damage to prime soil and compared such destruction to a soil conservation practice whereby soil is carefully stockpiled. Id., at 41. Under a proactive approach, such stockpiling could be reviewed using a farm conservation plan prior to greenhouse construction. In the absence of a farm conservation planning requirement in the Mathews DOE or use of the Natural Resource Conservation Agricultural Management Practice, the New Jersey Supreme Court had to balance two extremes. Yet, in effect, it recited a *de facto* lack of conservation practices when reasoning in favor of the S.A.D.C.

In reaching its decision, the New Jersey Supreme Court noted that the S.A.D.C.'s experts "determined that Quaker Valley's excavation activities had destroyed a large amount of prime soil for a variety of agricultural uses." Quaker Valley Farms, at 46. The S.A.D.C.'s expert, a State Resource Conservationist with the United States Department of Agriculture, Natural Resources Conservation Service, compared the extent of destruction at Quaker Valley Farms with presumably permissible grading activities, stating, "he was familiar with "other large-scale farmland cut[-]and[-]fill grading activities" where "the soil was carefully removed in layers and then stockpiled to the side" so that the land could be restored to its natural state (emphasis added). Id. At Quaker Valley Farms, Smith found "a cut-and-fill operation in which little soil was separated by layer, except some topsoil, and instead the layers of soil appeared to have mixed together (emphasis added)." Id. The Court reported that the State's expert determined that it would be "impossible for all practical purposes to ever separate the component soil layers, or horizons, and reapply them to recreate the highly productive Prime soils which had previously existed (emphasis added)." Id., at 46-47. The New Jersey Supreme Court discussed the testimony of an expert in soil science and agronomy, detailing his testimony about whether or not disrupted soil was managed in a planned manner that it could be restored to its agricultural productivity. Id., at 47 and 48.

The Quaker Valley Farms case did not involve a disturbance limit. It involved a lack of proper conservation planning. Quaker Valley Farms involved a preservation deed of easement that did not require farm conservation planning. And Quaker Valley Farms did not take advantage of the Natural Resource Conservation Agricultural Management Practice and instead submitted a much more limited soil erosion and sediment control plan.

When cautioning the S.A.D.C. to address its lack of guidance for the extent of permissible soil disturbance, the New Jersey Supreme Court did not have before it any facts questioning the adequacy of the farm conservation planning compliance mechanism. In its opinion, the New Jersey Supreme Court noted that the S.A.D.C. advised during oral argument that it had undertaken an "internal review process" of parameters regarding soil disturbance on preserved properties, but "held off doing anything pending resolution of this case." Id., at 62.

Therefore, we do not know what guidance the Supreme Court would have provided to the S.A.D.C. if the Court was reviewing the current form of preservation deed of easement (N.J.A.C. 2:76-6.15(a)(7)(i) and (ii)) and/or advised of the guideposts put in place after preservation of the Quaker Valley Farms property. For these reasons, I find nothing in the Quaker Valley Farms opinion that mandates a new regulatory scheme which retroactively curtails agricultural development rights.

New structures for agricultural purposes may disturb soil to the extent that a reasonable person would have understood at the time of preservation. Since the S.A.D.C.'s 1994 amendments, a reasonable person is apprised of the farm conservation planning requirements via the amended deed of easement.

The New Jersey Supreme Court only determined "whether Quaker Valley's grading and leveling of the twenty-acre field violated the deed of easement and ARDA...." Id. at 55. In determining if a deed of easement violation occurred, the New Jersey Supreme Court framed the legal issue by stating that "paragraph seven of the deed of easement which prohibits activities detrimental to erosion control or soil conservation must coexist with paragraph fourteen, which states that landowners "may construct any new building for agricultural purposes (emphasis added)."" Id., at 45, citing, N.J.A.C. 2:76-6.15(a)(7) and (14). Quaker Valley Farms unsuccessfully argued that its soil erosion and sediment control plan should have been adequate to obtain regulatory compliance. *I.e.,* Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 et seq., and regulations at N.J.A.C. 2:90-1.1 et seq. See, Quaker Valley Farms, at 60 ("Nor do we find merit in Quaker Valley's argument that their adherence to the C.251 Plan is evidence that their activities were not detrimental to soil conservation. * * * The purpose of a C.251 Plan is, in part, to protect the land from storm water runoff and conserve the soil from erosion.").

It is further misconceived to believe the New Jersey Supreme Court's decision permits the S.A.D.C.'s proposed bias against livestock, dairy, equine, greenhouse, and similar agricultural development in favor of soil conservation. The New Jersey Supreme Court further reasoned that:

> "Structures are certainly a crucial component of agricultural operations, such as livestock, dairy, equine, or greenhouse operations. Some degree of soil disturbance will be incidental to the construction of such structures. Thus, while the S.A.D.C. regulation categorically prohibits activities that "would be detrimental" to soil conservation, N.J.A.C. 2:76-6:15(a)(7), the regulation also authorizes owners of preserved farms to undertake activities that, in effect, may alter the soil."

Quaker Valley Farms, at 63.

The New Jersey Supreme Court stated that agricultural development must "coexist" with soil conservation. Id., at 45. The New Jersey Supreme Court noted that reconciliation of the deed of easement terms must be such that a reasonable person would have understood the term at the time the parties agreed to the deed of easement. Id. at 59. It follows that the S.A.D.C. is not authorized to retroactively sacrifice agricultural development for soil conservation:

> The deed's terms must be read reasonably to achieve their aims, so that one is not sacrificed for another. That requires that the terms be reconciled in a manner that a reasonable person would have understood at the time the parties agreed to the deed of easement.

Id., at 59 (emphasis added). Again, the New Jersey Supreme Court had to reconcile conflicting terms which did not include the 1994 solution of farm conservation planning.

The New Jersey Supreme Court explained that it would have been unable to rule in favor of the S.A.D.C. if it were not for its finding that the degree of "permanent" soil destruction was extreme enough to put a reasonable person on notice that the deed of easement would be violated. Id., at 60. In other words, the New Jersey Supreme Court also cautioned the S.A.D.C. that it would not uphold S.A.D.C. enforcement actions against farmers engaging in otherwise permissible activities if the alleged violations would not have been understood by a reasonable person at the time the parties agreed to the deed of easement.

On these facts, the Quaker Valley Farms holding is narrow: while a preserved farm owner is permitted to construct new structures for agricultural purposes and those structures may disturb soil, the permanent destruction of soil, whereby the soil is no longer available for a variety of future agricultural production, violates the preservation deed of easement if it exceeds the limit that a reasonable person would have understood at the time of preservation. *See*, Quaker Valley Farms, at 41, 59 ("Although Quaker Valley had the right to erect hoop houses, it did not have the authority to permanently damage a wide swath of premier quality soil in doing so (emphasis added))("While the use of preserved farmland for nursery production is plainly a permitted use under the deed.... While Quaker Valley had a right to construct hoop houses, it did not have the right to needlessly destroy so much prime soil."(emphasis added)). Destruction and disturbance are not the same.

If the adequacy of existing regulations were not squarely before the New Jersey Supreme Court, its *in dicta* comments can by no means be construed as a mandate to promulgate additional regulations. Existing soil and water conservation practices through farm conservation planning are adequate.

There already exists an extensive body of technical guidance for soil and water conservation projects and methods of conserving soil during agricultural development. In its 2023 soil disturbance proposed rulemaking summary, the S.A.D.C. noted that it:

> "consulted best management practices and standards issued by the United States Department of Agriculture (USDA), Natural Resources Conservation Service, on topsoiling, land grading, earth fill and gravel fill specifications, geotextiles, and land reclamation. * * * Other technical resources that informed these regulations are applicable provisions in the New Jersey Soil Erosion and Sediment Control Act standards, N.J.A.C. 2:90; the New Jersey Department of Environmental Protection's New Jersey Stormwater Best Management Practice Manual, available at dep.nj.gov/stormwater/bmp-manual/; the S.A.D.C.'s agricultural management practices, N.J.A.C. 2:76-2A and 2B; the New Jersey Uniform Construction Code, N.J.A.C. 5:23...."

All such sources of technical expertise for soil conservation may already be relied upon to develop a farm conservation plan. Farm conservation planning is also an alternate compliance tool under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 and its regulations at N.J.A.C. 2:90-1.1, which are implemented by the Soil Conservation District. The Soil Conservation District is also responsible for reviewing major agricultural development under the Stormwater Management Rules, N.J.A.C. 7:8-5.2(k). Farm conservation plans are also the planning tool for agricultural development in the Highlands Preservation Area when the new impervious cover increases cumulatively by at least three percent (3 %) percent and not more than nine percent (percent 9 %), and resource management systems plans are the planning tool for new impervious cover that cumulatively increases by over nine percent (9 %). N.J.S.A. 13:20-31; N.J.A.C. 2:92-1.1 et seq. Both farm conservation plans and resource management system plans are developed with the assistance of the Natural Resource Conservation Service local field office. These plans must conform with the June 1, 2005 N.R.C.S. New Jersey Field Office Technical Guide (NJ-FOTG). A.R.D.A. requires that the local soil conservation district approve soil and water conservation projects which receive grants. N.J.S.A. 4:1C-24. The S.A.D.C. already utilizes farm conservation planning as a preserved farm compliance mechanism in some cases of alleged deed of easement violations.

The interests of farmers, the farmland preservation program, and conserving soil for a variety of future agricultural uses would be better served by advocating for adequate grants and human resources to

assist farmers and soil conservation districts with developing and updating farm conservation plans in accordance with best management practices. Today, any preserved farm owner may use these tools to confirm deed of easement compliance when developing more intensive agricultural infrastructure. Yet, without such adequate resources, the effectiveness and fairness of the farm conservation planning requirement is compromised. However, the lack of such grants and resources, and arguable underutilization of farm conservation planning in some cases, does not legally authorize retroactive revisions to the deed of easement contract or development of new regulations that place even more burdens on the farmers, boards, agency, and staff that must implement them.

In response to the Quaker Valley Farms decision, the State has demonstrated its ability to map all New Jersey preserved farms, send notices to all New Jersey preserved farm owners, schedule visits to all preserved farms with greater disturbance, and engage in extensive dedication of time and resources to workshop soil conservation. Yet, it appears preserved farm owners continue to operate without an equally promoted knowledge or fascilitated understanding of site-specific guideposts and regulatory compliance across multiple programs to be achieved using the farm conservation planning tool. And, these plans might have the added benefit of qualifying preserved farm owners for grant programs. There appears to be a missed opportunity, here.

The Quaker Valley Farms decision does not mandate that the S.A.D.C. retroactively place an arbitrary limit on the extent of otherwise permissible agricultural development or require the development of new and retroactive limitations. The Quaker Valley Farms decision cautions the S.A.D.C. to not enforce the deed of easement in a manner that would not have been understood by a reasonable person at the time of preservation. The proposed rules should be rescinded and a more farm-friendly approach to balancing agricultural development and enabling farm conservation planning should be pursued with careful consideration of the reasonable expectations of the farm owner at the time of preservation. This is the site-specific conservation planning which the majority of farmers agreed to at the time of preservation. Again, the state's lack of support and investments in promoting conservation practices through existing compliance mechanisms does not justify a retroactively applicable and unduly burdensome disturbance limit which arbitrarily restricts agricultural development rights.

Thank you for your attention to these comments.

Very truly yours,

Nicole L. Voigt

Encl: (1) Matthews DOE

Cc: BY EMAIL ONLY
Voigt Law, LLC, Preserved Farm Clients and Colleagues
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New Jersey Farm Bureau, Allen Carter, President
Farm Credit East, Stephen Makarevich, Branch Manager
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Warren County Agriculture Development Board, Corey Tierney, Administrator

DEED OF EASEMENT

BOOK 1096 PAGE 0679

STATE OF NEW JERSEY
AGRICULTURE RETENTION AND DEVELOPMENT PROGRAM

COUNTY OF HUNTERDON
CONSIDERATION 402,680.07
REALTY TRANSFER FEE ———
DATE 9-24-93 BY [illegible]

This Deed is made September 22, 1993

BETWEEN HAROLD F. MATHEWS AND ROSALIE LILLIAN J. MATHEWS, Tenants in Common
Whose address is P.O. Box 113, Pittstown, New Jersey 08867
and is referred to as the "Grantor";

AND THE COUNTY OF HUNTERDON
Whose address is Attn: Board of Chosen Freeholders, Administration Building, Flemington, New Jersey 08822
and is referred to as the "Grantee" and/or "Board".

The Grantor, Grantor's heirs, executors, administrators, personal or legal representatives, successors and assigns grants and conveys to the Grantee a development easement on the Premises, located in the Township of Franklin County of Hunterdon described in the attached Schedule A, incorporated by reference in this Deed of Easement, for and in consideration of the sum of Four Hundred Two Thousand Six Hundred Eighty Dollars and 07/100 ($402,680.07) Dollars. Any reference in this Deed of Easement to "Premises" refers to the property described in Schedule A.

The tax map reference for the Premises is:

Township of Franklin

Block(s) 37 Lot(s) 42

81931

WHEREAS, the legislature of the State of New Jersey has declared that the development of agriculture and the retention of farmlands are important to the present and future economy of the State and the welfare of the citizens of the State.

NOW THEREFORE, THE GRANTOR, GRANTOR'S HEIRS, EXECUTORS, ADMINISTRATORS, PERSONAL OR LEGAL REPRESENTATIVES, SUCCESSORS AND ASSIGNS PROMISES that the Premises will be owned, used and conveyed subject to, and not in violation of the following restrictions:

1. Any development of the Premises for nonagricultural purposes is expressly prohibited.

2. The premises shall be retained for agricultural use and production in compliance with N.J.S.A. 4:1C-11 et seq., P.L. 1983, c.32, and all other rules promulgated by the State Agriculture Development Committee, (hereinafter "Committee"). Agricultural use shall mean the use of the Premises for common farmsite activities including, but not limited to: production, harvesting, storage, grading, packaging, processing and the wholesale and retail marketing of crops, plants, animals and other related commodities and the use and application of techniques and methods of soil preparation and management, fertilization, weed, disease and pest control, disposal of farm waste, irrigation, drainage and water management and grazing.

3. Grantor certifies that at the time of the application to sell the development easement to the Grantee the following nonagricultural uses indicated on attached Schedule (B) existed on the Premises. All other nonagricultural uses are prohibited except as expressly provided in this Deed of Easement.

4. All nonagricultural uses, if any, existing on the Premises at the time of the landowner's application to the Grantee as set forth in Section 3 above may be continued and any structure may be restored or repaired in the event of partial destruction thereof, subject to the following:

i. No new structures or the expansion of pre-existing structures for nonagricultural use are permitted;

ii. No change in the pre-existing nonagricultural use is permitted;

iii. No expansion of the pre-existing nonagricultural use is permitted; and

Prepared by: [signature]
GAETANO M. DE SAPIO, ESQ.
HUNTERDON COUNTY COUNSEL

Revised 7/92

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iv. In the event that the Grantor abandons the pre-existing nonagricultural use, the right of the Grantor to continue the use is extinguished.

5. No sand, gravel, loam, rock, or other minerals shall be deposited on or removed from the Premises excepting only those materials required for the agricultural purpose for which the land is being used. Grantor retains and reserves all oil, gas, and other mineral rights to the land underlying the Premises, provided that any prospective drilling and/or mining will be done by slant from adjacent property or in any other manner which will not materially affect the agricultural operation.

6. No dumping or placing of trash or waste material shall be permitted on the Premises unless expressly recommended by the Committee as an agricultural management practice.

7. No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation, erosion control, or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises.

8. Grantee and Committee and their agents shall be permitted access to, and to enter upon, the Premises at all reasonable times, but solely for the purpose of inspection in order to enforce and assure compliance with the terms and conditions of this Deed of Easement. Grantee agrees to give Grantor, at least 24 hours advance notice of its intention to enter the Premises, and further, to limit such times of entry to the daylight hours on regular business days of the week.

9. Grantor may use the Premises to derive income from certain recreational activities such as hunting, fishing, cross country skiing and ecological tours, only if such activities do not interfere with the actual use of the land for agricultural production and that the activities only utilize the Premises in its existing condition. Other recreational activities from which income is derived and which alter the Premises, such as golf courses and athletic fields, are prohibited.

10. Nothing shall be construed to convey a right to the public of access to or use of the Premises except as stated in this Deed of Easement or as otherwise provided by law.

11. Nothing shall impose upon the Grantor any duty to maintain the Premises in any particular state, or condition, except as provided for in this Deed of Easement.

12. Nothing in this Deed of Easement shall be deemed to restrict the right of Grantor, to maintain all roads and trails existing upon the Premises as of the date of this Deed of Easement. Grantor shall be permitted to construct, improve or reconstruct any roadway necessary to service crops, bogs, agricultural buildings, or reservoirs as may be necessary.

13. At the time of this conveyance, Grantor has (one (1)) existing single family residential buildings on the Premises and (one (1)) residential buildings used for agricultural labor purposes. Grantor may use, maintain, and improve existing buildings on the Premises for agricultural, residential and recreational uses subject to the following conditions:

i. Improvements to agricultural buildings shall be consistent with agricultural uses;

ii. Improvements to residential buildings shall be consistent with agricultural or single and extended family residential uses. Improvements to residential buildings for the purpose of housing agricultural labor are permitted only if the housed agricultural labor is employed on the Premises; and

iii. Improvements to recreational buildings shall be consistent with agricultural or recreational uses.

14. Grantor may construct any new buildings for agricultural purposes. The construction of any new buildings for residential use, regardless of its purpose, shall be prohibited except as follows:

i. To provide structures for housing of agricultural labor employed on the Premises but only with the approval of the Grantee and the Committee. If Grantee and the Committee grant approval for the construction of agricultural labor housing, such housing shall not be used as a residence for Grantor; and

ii. To construct a single family residential building anywhere in the Premises in order to replace any single family residential building in existence at the time of conveyance of this Deed of Easement but only with the approval of the Grantee and Committee.

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iii. One (1) residual dwelling site opportunity(ies) have been allocated to the Premises pursuant to the provisions of N.J.A.C. 2:76-6.17. Upon the intent of the Grantor to exercise a residual dwelling site opportunity, the Grantee shall be notified of the intent to exercise a residual dwelling site opportunity and the proposed location of the residual dwelling site. The Grantee may review the proposed location and submit comments to the Grantor and the municipal planning review body regarding the impact of the operation. Approval of the location of the residual dwelling site shall be made by the municipal planning review body and meet the following standards established by the Committee:

1. The boundaries and configuration of the residual dwelling site shall minimize the adverse impact on the agricultural operation;

2. The location of the residential unit within the residual dwelling site shall provide for a minimum of 100 foot setback from land currently under agricultural production; and

3. The construction and use of a residential unit shall not be permitted unless the Grantee and the Committee certify that the construction and use of the residential unit shall be for agricultural purposes. No other residences shall be permitted.

Upon approval of the location of the residual dwelling site by the municipal planning board review body, the landowner shall:

1. Prepare or cause to be prepared, a legal metes and bounds description of the location of the residual dwelling site; and

2. Submit a copy of the legal metes and bounds description to the Grantee and the Committee for general recordkeeping purposes.

In the event a subdivision of the premises occurs in compliance with deed restriction No. 15 below, any unexercised residual dwelling site opportunities shall be reallocated to the subdivided tracts as determined by the Grantor.

iv. For the purpose of this Deed of Easement, a "residual dwelling site" means a contiguous area, two acres in size and identified by a legal metes and bounds description, within which a residential unit and other appurtenant structures may be constructed.

v. For the purpose of this Deed of Easement, "residential unit" means the residential building located within the residual dwelling site to be used for single family residential housing and its appurtenant uses. The construction and use of the unit shall be for agricultural purposes.

15. The land and its buildings which are affected may be sold collectively or individually for continued agricultural use as defined in Section 2 of this Deed of Easement. However, no subdivision of the land shall be permitted without the joint approval in writing of the Grantee and the Committee. In order for the Grantor to receive approval, the Grantee and Committee must find that the subdivision shall be for an agricultural purpose and result in agriculturally viable parcels. Subdivision means any division of the Premises, for any purpose, subsequent to the effective date of this Deed of Easement.

16. In the event of any violation of the terms and conditions of this Deed of Easement, Grantee or the Committee may institute, in the name of the State of New Jersey, any proceedings to enforce these terms and conditions including the institution of suit to enjoin such violations and to require restoration of the Premises to its prior condition. Grantee or the Committee do not waive or forfeit the right to take any other legal action necessary to insure compliance with the terms, conditions, and purpose of this Deed of Easement by a prior failure to act.

17. This Deed of Easement imposes no obligation or restriction on the Grantor's use of the Premises except as specifically set forth in this Deed of Easement.

18. This Deed of Easement is binding upon the Grantor, the Grantor's heirs, executors, administrators, personal or legal representatives, successors and assigns and the Grantee; it shall be construed as a restriction running with the land and shall be binding upon any person on whom title to the Premises is transferred as well as upon the heirs, executors, administrators, personal or legal representatives, successors, and assigns of all such persons.

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19. Throughout this Deed of Easement, the singular shall include the plural, and the masculine shall include the feminine, unless the text indicates otherwise.

20. The word 'Grantor' shall mean any and all persons who lawfully succeed to the rights and responsibilities of the Grantor, including but not limited to the Grantor's heirs, executors, administrators, personal or legal representatives, successors and assigns.

21. Wherever in this Deed of Easement any party shall be designated or referred to by name or general reference, such designation shall have the same effect as if the words, heirs, executors, administrators, personal or legal representatives, successors and assigns have been inserted after each and every designation.

22. Grantor, Grantor's heirs, executors, administrators, personal or legal representatives, successors and assigns further transfer and convey to Grantee all of the nonagricultural development rights and development credits appurtenant to the lands and Premises described herein. Nothing contained herein shall preclude the conveyance or retention of said rights by the Grantee as may be permitted by the laws of the State of New Jersey in the future. In the event that the law permits the conveyance of said development rights, Grantee agrees to reimburse the Committee (60%) percent of the value of the development rights as determined at the time of the subsequent conveyance.

The Grantor signs this Deed of Easement as of the date of the top of the first page. If the Grantor is a corporation, this Deed of Easement is signed and attested to by its proper corporate officers, and its corporate seal, if any, is affixed.

Witness:

Harold F. Mathews (L.S.)
HAROLD F. MATHEWS

Rosalie Lillian J. Mathews (L.S.)
ROSALIE LILLIAN J. MATHEWS

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SCHEDULE A

Description of Tract of Land for
Harold Mathews
Block 37, Lot 42
situated in
Franklin Township, Hunterdon County, New Jersey

Beginning at an old stone found for a corner, as recorded in Deed Book 690, Page 480, in line of land of Helen Neave, Lot 41.03, corner to land of Shirley Rueter and Geary Wolven, Lot 40; and running thence (1) along said Rueter and Wolven and also along land of Roger Warr, Lot 39, North 01°05'30" West, a distance of five hundred eighty-three and thirty-five one-hundredths feet (583.35') to an iron pin set for a corner, in line of said Warr, corner to land of Thomas Stryker, Lot 51; thence (2) along said Stryker, South 88°25'48" West, a distance of eight hundred thirty and seventy-six one-hundredths feet (830.76') to an iron pipe found for a corner to the same, corner to land of David Weston, Lot 31.02; thence (3) along said Weston, South 88°24'07" West, a distance of five hundred twelve and twenty-five one-hundredths feet (512.25') to an iron pipe found for a corner to the same; thence (4) along the same, South 00°06'02" West, a distance of one hundred thirty-two feet (132.00') to an iron pipe found for a corner to the same; thence (5) along the same, South 86°06'17" West, a distance of ninety-three and eighty-seven one-hundredths feet (93.87') to an iron pipe found for a corner to the same; thence (6) still along the same, North 00°15'17" East, a distance of five hundred forty-eight and eighty-eight one-hundredths feet (548.88') to an iron pin set for a corner in line of the same, corner to land of David Den Hollander, Lot 35; thence (7) along said Den Hollander, North 89°16'46" West, a distance of nine hundred twenty-five and sixteen one-hundredths feet (925.16') to an iron pin found for a corner to the same, corner to land of Orville Barrick, Lot 47.10, and corner to other land of Orville Barrick, Lot 47; thence (8) along said other land of Orville Barrick, Lot 47, South 00°18'23" West, a distance of two hundred fifty-eight and forty-three one-hundredths feet (258.43') to an iron pipe found for a corner to the same, corner to land of Stephen Limpert, Lot 46; thence (9) along said Limpert and also along said other land of Orville Barrick, Lot 47, and also along land of Dale Harding, Lot 46.01, South 00°19'05" West, a distance of three thousand one hundred five and sixty-two one-hundredths feet (3,105.62') to an iron pipe found for a

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corner in line of said Harding, corner to land of Irvin Taylor, Jr., Lot 42.01; thence (10) along said Taylor, Jr., North 88°49'08" East, a distance of five hundred seventy-seven and sixty-three one-hundredths feet (577.63') to an iron pin set for a corner to the same; thence (11) along the same, South 01°19'17" East, a distance of three hundred seventy-nine and eighty-two one-hundredths feet (379.82') to a railroad spike set for a corner to the same in the public road known locally as Old Franklin School Road; thence (12) along said Old Franklin School Road, North 88°44'21" East, a distance of three hundred and fifteen one-hundredths feet (300.15') to a railroad spike found for a corner in the same, corner to land of Peter Demicco, Lot 41.01; thence (13) along said Demicco, North 01°19'15" West, a distance of eight hundred thirty-six and twenty one-hundredths feet (836.20') to an iron pin set for a corner to the same; thence (14) along the same and also along land of Peter Quartel, Lot 41.06, North 88°49'10" East, a distance of seven hundred thirty-six and fifty-six one-hundredths feet (736.56') to an old stone found for a corner to said Quartel; thence (15) along said Quartel, land of John Sendelsky, Lot 41, land of Alfredo Cruz, Jr. and Maria Almerinda, Lot 41.08, land of Elliot Greenbaum, Lot 41.05, and land of the aforementioned Helen Neave, Lot 41.03, North 01°22'00" West, a distance of one thousand nine hundred forty and ten one-hundredths feet (1,940.10') to an old stone found for a corner to said Neave; thence (16) along said Neave, North 78°28'20" East, a distance of one hundred ninety-seven and eighteen one-hundredths feet (197.18') to an iron pin found for a corner to the same; thence (17) along the same, South 04°02'10" East, a distance of eighty-one and sixty-two one-hundredths feet (81.62') to an old stone found for a corner to the same; thence (18) still along the same, North 89°15'30" East, a distance of six hundred thirty-two and sixty-eight one-hundredths feet (632.68') to the place of beginning and containing one hundred nineteen and eight thousand one hundred sixteen ten-thousandths acres (119.8116 Ac.) being the same more or less as surveyed and described by Bohren and Bohren Engineering Associates, Inc., in December, 1992.

All bearings herein refer to Course #3 of Tract #1 in Deed Book 690, Page 479.

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Together with the rights granted to Frank Mathews, his heirs and assigns to use the lane from Locust Grove Road for ingress and egress as recorded in Deed Book 403, Page 440.

Together with and subject to the rights in the lane from Old Franklin School Road as recorded in Deed Book 403, Page 439 and Deed Book 847, Page 615.

Subject to the following exceptions:

Excepting and reserving the rights of the public as the same now exist in the use of Old Franklin School Road running along Course #12 in the above described lot and more fully detailed as follows:

Beginning at a point in the common property line of Irvin Taylor, Jr., Block 37, Lot 42.01 and Harold Mathews, Block 37, Lot 42, said point being 25' measured at right angles to the centerline of pavement of Old Franklin School Road as it now exists, and this new easement line shall run parallel to the existing roadway centerline and 25' distant therefrom for a total length of approximately three hundred and fifteen one-hundredths feet (300.15') to the common property line of Harold Mathews, Block 37, Lot 42 and Peter Demicco, Block 37, Lot 41.01 and containing an area of one thousand six hundred fifty-four ten-thousandths acres (0.1654 Ac.±) leaving a net tract area of one hundred nineteen and six thousand four hundred sixty-two ten-thousandths acres (119.6462 Ac.).

Subject to any and all easements of record.

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BOOK 1096 PAGE 0686

SCHEDULE B

Grantor certifies that at the time of the application to sell the development easement to the grantee no non-agricultural uses existed. Grantor further certifies that at the time of the execution of this deed of easement, no non-agricultural uses exist.

Harold F Mathews
HAROLD F. MATHEWS

Rosalie Lillian J. Mathews
ROSALIE LILLIAN J. MATHEWS

Dated: September 22, 1993

R.L.M
HM

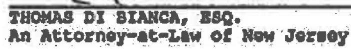
(INDIVIDUAL ACKNOWLEDGEMENT)

STATE OF NEW JERSEY, COUNTY OF HUNTERDON SS.:

I CERTIFY that on September 22, 19 93,

HAROLD F. MATHEWS and ROSALIE LILLIAN J. MATHEWS personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this DEED OF EASEMENT;
(b) signed, sealed and delivered this DEED OF EASEMENT as his or her act and deed;
(c) made this DEED OF EASEMENT for and in consideration of mutual obligations and benefits to each party; and
(d) the actual and true consideration paid for this instrument was $ 402,680.07.



THOMAS DI BIANCA, ESQ.
An Attorney-at-Law of New Jersey

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HFM

(COUNTY AGRICULTURE DEVELOPMENT BOARD)

THE UNDERSIGNED, being Secretary of the Hunterdon County Agriculture Development Board, hereby accepts and approves the foregoing restrictions, benefits and covenants.

ACCEPTED AND APPROVED this 22nd day of September, 19 93.

JOHN W. KELLOGG Secretary
Hunterdon County Agriculture Development Board

STATE OF NEW JERSEY, COUNTY OF HUNTERDON SS.:

I CERTIFY that on September 22, 19 93,

JOHN W. KELLOGG personally came before me and acknowledged under oath, to my satisfaction that this person:

- (a) is named in and personally signed this DEED OF EASEMENT,
- (b) signed, sealed and delivered this DEED OF EASEMENT as the Board's act and deed; and
- (c) is the Secretary of the Hunterdon County Agriculture Development Board.

GAETANO M. DE SAPIO, ESQ.
An Attorney-at-Law of New Jersey

(STATE AGRICULTURE DEVELOPMENT COMMITTEE)

The State Agriculture Development Committee has approved the purchase of the development easement on the Premises pursuant to the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq., P.L. 1983, c.32, and has authorized a grant of 60 % of the purchase price of the development easement to Hunterdon County in the amount of $ 241,608.04.

Donald D. Applegate, Executive Director
State Agriculture Development Committee

September 22, 1993
Date

RECORDED
SEP 24 12 15 PM '93
HUNTERDON COUNTY
DOROTHY K. TIRPOK
CLERK

STATE OF NEW JERSEY, COUNTY OF HUNTERDON SS.:

I CERTIFY that on September 22, 19 93,

DONALD D. APPLEGATE personally came before me and acknowledged under oath, to my satisfaction, that this person:

- (a) is named in and personally signed this DEED OF EASEMENT,
- (b) signed, sealed and delivered this DEED OF EASEMENT as the Committee's act and deed, and
- (c) is the Executive Director of the State Agriculture Development Committee.

GREGORY ROMANO, ESQUIRE
Deputy Attorney General
An Attorney-at-Law of New Jersey

R. S. M
RSM

END OF DOCUMENT

Nicole L. Voigt, Esq.
Main: (908)801-5434
Direct: (908)210-0402

VOIGT LAW, LLC

nicole@nlvlegal.com
www.voigtlawoffice.com

February 13, 2024

BY EMAIL AND PRIORITY MAIL EXPRESS
New Jersey State Agriculture Development Committee
Susan E. Payne, Executive Director
State Agriculture Development Committee
PO Box 330
Trenton, NJ 08625-0330
susan.payne@ag.nj.gov
SADC@ag.state.nj.us

CC: Brian D. Smith, Esq., Chief of Legal Affairs
brian.smith@ag.nj.gov

RE: Public Comment submitted on behalf of Mr. and Mrs. Eggenberg regarding Centrest Farm, LLC Regarding preserved farmland located at:
Block 48, Lot 5, Township of Tewksbury, Hunterdon County
Block 12.01, Lot 15, Township of Readington, Hunterdon County
Proposed Soil Disturbance on Preserved Farmland and Supplemental Soil Disturbance Standards, N.J.A.C. 2:76-25 and 25A

Dear Ms. Payne:

Please be advised that I represent CS Land Holdings, LLC and Centrest Farm, LLC, the respective owner and operator of the above identified preserved farm, care of Michael Eggenberg and Miki Ortiz Eggenberg. On behalf of Mr. and Mrs. Eggenberg, I am submitting the within comments on the State Agriculture Development Committee (SADC) proposed new rules N.J.A.C. 2:76-25 and 25A which propose to regulate Soil Disturbance on Preserved Farmland and Supplemental Soil Disturbance Standards. 55 N.J.R. 8(1), August 7, 2023.

Mr. and Mrs. Eggenberg purchased this preserved equine farm in June of 2022. The farm is subject to two (2) non-severable residential exception areas in which the majority of the residential and equine development occurs. Of the 123.38 preserved acres, the SADC has identified 1.36 disturbed acres which equates to 1.10% disturbance. Upon review, this calculation of disturbance is objectionable in the following areas:

1) An area of farm lane. The area of farm lane widens as it splits in order to access 3 different fields and a run-un shed. The shape and size of this farm lane serves as a junction and results from the practically necessary path of equipment travel in these 4 directions and is devoted entirely to agricultural use. Presumably, this lane is not counted as exempt because it is within 300 feet of another lane and/or wider than the allowance. Much of this area was already disturbed prior to the date of preservation as indicated in an earlier aerial photograph (e.g., 1995), and the balance was already disturbed prior to my client's acquisition. Schedule B to the deed of easement identifies no non-agricultural uses occurring on the property. The intent

of the parties at the time of the dealmaking reflects that the pre-existing farmlane is a permitted agricultural use in compliance with the preservation deed of easement.

2) An area of disturbance associated with a forest management plan. In addition to being associated with forest management, much of this area was already disturbed prior to the date of preservation as indicated in an earlier aerial photograph (e.g., 1995), and the balance was already disturbed prior to my client's acquisition. Schedule B to the deed of easement identifies no non-agricultural uses occurring on the property. The intent of the parties at the time of the dealmaking reflects that the pre-existing disturbance in this area is a permitted agricultural use in compliance with the preservation deed of easement.

3) Run-in sheds which are counted as disturbance despite being devoted to agricultural production. These areas were already improved with equine infrastructure prior to the date of preservation. Review of an earlier aerial photograph (e.g., 1995) demonstrates that the farm was preserved with this equine infrastructure intentionally left outside of the residential exception area. Schedule B to the deed of easement identifies no non-agricultural uses occurring on the property. The intent of the parties at the time of the dealmaking reflects that these areas are permitted agricultural uses in compliance with the preservation deed of easement.

4) Driveway. Recorded with my client's preservation deed of easement is Policy P-41, effective July 25, 2022, the SADC Policy on Access to Exception Areas. This policy states:

   > "...access to the exception area does not need to be included within the exception area if the lane or driveway provides access to any portion of the farm used for agricultural production or to an agricultural use on the exception area..."

   The driveway provides access to portions of the farm used for agricultural production that occur both within and outside of the non-severable exception area. Accordingly, the driveway is considered an agricultural use. Review of an earlier aerial photograph (e.g., 1995) demonstrates that the farm was preserved with this driveway intentionally left outside of the residential exception area. Schedule B to the deed of easement identifies no non-agricultural uses occurring on the property. The intent of the parties at the time of the dealmaking reflects that the driveway is a permitted agricultural use in compliance with the preservation deed of easement.

Prior to my client closing on the purchase of this preserved farm in 2022, my client obtained an appraisal and carefully reviewed the terms of the January 19, 2007, Deed of Easement, State of New Jersey, Agriculture Retention and Development Program which expressly permits agricultural use and production subject to the existing rules of the State Agriculture Development Committee. My client's review included review of Section 17 of the deed of easement, which states:

> "This Deed of Easement imposes no obligation or restriction on the Grantor's use of the Premises except as specifically set forth in this Deed of Easement."

I confirmed that the farm was in good standing under the preservation deed of easement with the most recent annual inspection identifying no known issues. Closing then occurred subject to a Farm Credit East mortgage, and my client began making further investments in the property. After this due diligence, no reasonable person would expect a re-trade on the preservation deal where the most basic of agricultural production, agricultural infrastructure, and forest management activities would be used as a basis to limit future agricultural development.

Next in my client's plans is the installation of fencing within paddocks to make smaller paddocks where a larger paddock exists. This is more appropriate for my client's equine production. Yet, fencing is not an exception identified in proposed N.J.S.A. 2:76-25.4. Adequate provisions for equine and similar livestock-based agricultural development do not exist anywhere in the proposed rules. As a result, equine production will be disproportionately and arbitrarily limited by the soil disturbance limit. Who would imagine equine fencing for protected production would be restricted under a program and contract that expressly permits agricultural development? No one, and certainly not my client.

As per the proposed rules, only "unimproved livestock areas" are exempt, which are livestock training areas or livestock confinement areas that have *not been surfaced or subjected to soil alteration*. "Livestock training area" means an uncovered, outdoor area of the premises used for riding, racing, training, showing, or rehabilitating livestock. Examples include, but are not limited to, arenas, tracks, and training rings. "Soil alteration" means human-altered and human-transported soils and includes soil movement, grading, leveling, importation, exportation, cut, and fill, but does not include normal tillage or deep tillage.

Therefore, the only containment area, arena, or training ring which is exempt is one which has not been subject to any human-alteration including any movement, grading, or leveling of the soil and which is not subject to any amendment to secure footing or fencing to actually contain the horses. While tillage for plants would be allowed without restriction, grading, sanding, and fencing to make an equine area that is safe and appropriate for otherwise permissible equine activities is restricted. The proposed rules include an inherent bias towards plant production and discriminate against equine production despite the express language of the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq. ("ARDA") and the preservation deeds of easement which acknowledge the right to such agricultural development, which is further protected farming under the Right to Farm Act, N.J.S.A. 4:1C-1 et seq.

My client does not agree that the SADC has authority or jurisdiction to place a ceiling on agricultural use and development which otherwise complies with all other terms of the deed of easement. It is unfathomable that farm lanes and run-in-sheds *that pre-dated the preservation deal* would now be imprecisely calculated using an outdated aerial photograph and counted against the landowner's future agricultural development rights. Without any valid basis in law or contract, the proposed rules reduce agricultural development rights that have been expressly reserved to my client as the successor in interest. Quite simply, a deal is a deal, and my client relied upon the SADC's representations and deed of easement terms which permit agricultural development, including use and development in furtherance of equine development. The SADC may not retroactively change the deal.

> The deed's terms must be read reasonably .... That requires that the terms be reconciled in a manner that a reasonable person would have understood **at the time the parties agreed to the deed of easement**.

State of New Jersey, State Agriculture Development Committee v. Quaker Valley Farms, LLC, 235 N.J. 37, 59 (2018)(emphasis added).

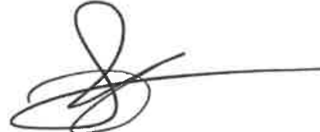
The New Jersey Supreme Court has made it clear that an easement holder may not expand the scope of its right in a manner than unreasonably interferes with the rights of the landowner. A restrictive covenant is regarded in New Jersey as a contract, and enforcement of the easement constitutes a contract right. Cooper River Plaza East LLC v. The Braid Group, 359 N.J.Super. 519, at 527 (App. Div. 2003). When determining the scope of the preservation deed of easement and the permissible reach of the SADC thereunder, *the Court will look to the intent of the parties at the time of the deal making*, which is the contract and its closing as memorialized in execution of the preservation deed of easement. Tide-Water Pipe Co., v. Blair Holding Co., 42 N.J. 591, 603 (1964); Leach, at 28; *citing*, Sergi v. Carew, 18 N.J.Super. 307, 311 (Ch.Div. 1952) . In ascertaining the intent of the farmer and the SADC, the Court will consider the situation which existed at the time the deed of easement was granted. Sergi, at 311. *The SADC must exercise its rights in such reasonable manner as to avoid unnecessary increases in the burden upon the farm owner beyond that expressly dictated by the deed of easement*. Tide-Water Pipe Co., at 604 - 605; citing, Lidgerwood Estates, Inc. v. Public Service Electric and Gas Co., 113 N.J.Eq. 403 (Ch. 1933). Where *the language in the grant is plain*, as derived from the language read as an entirety and in light of the surrounding circumstances, the language of the deed of easement will control, without resort to artificial rules of construction. Tide-Water Pipe Co., at 605; citing, Hammet v. Rosensohn, 26 N.J. 4115 (1958).

Here, the SADC has penalized forest management and categorized a farm lane, driveway, and run-in-sheds that preexisted the farmland preservation deal as restricted disturbance. Yet, schedule B to the deed of easement identifies no non-agricultural uses occurring on the property. The intent of the parties at the time of the dealmaking reflects that these areas are permitted agricultural uses in compliance with the preservation deed of easement. Yet, the SADC now re-trades the deal. This is entirely inconsistent with the intent of the parties at the time of the dealmaking. This is an unnecessary increase in the burden on the farm owner beyond what is expressly dictated by the plain language of the deed of easement and the circumstances surrounding the preservation deal.

For the reasons stated herein, Mr. and Mrs. Eggenberg request that the proposed rules be withdrawn.

Thank you for your attention to these comments.

Very truly yours,



Nicole L. Voigt

Cc: **BY EMAIL ONLY**
Hunterdon County Agricultural Development Board, Bob Hornby, Administrator, BY EMAIL ONLY
Farm Credit East, BY EMAIL ONLY