
TODD and STEPHANIE HOLLYWOOD,

STATE AGRICULTURE DEVELOPMENT COMMITTEE
SADC ID #1440

Complainants,

v.

WALKER BROTHERS, INC.,

HEARING OFFICER'S REPORT

Respondent.

PROCEDURAL HISTORY

Todd and Stephanie Hollywood (Hollywood) filed a complaint in October 2015 under the Right to Farm Act, N.J.S.A. 4:1C-1, et seq. (RTFA), with the Salem County Agriculture Development Board (SCADB or board) against Walker Brothers, Inc. (Walker). The complaint alleged that significant flooding from the vegetable operation on a Walker farm field had occurred, resulting in damage to Hollywood's nearby, residential property.

The SCADB, in a February 24, 2016 resolution, determined that Walker operated a "commercial farm" as defined in the RTFA and concluded that the Hollywood-Walker dispute implicated activities not addressed by an agricultural management practice in regulations adopted by the State Agriculture Development Committee (SADC). The board transferred the complaint to the SADC for a hearing in accordance with RTFA procedures set forth in agency regulations.

The SADC held a hearing on February 14, 2017, at which time testimony was presented and evidence introduced by Stephanie Hollywood and Scott Walker, a principal of the Walker Brothers, Inc. farming operation. Both parties were represented by counsel. The record in this matter is also comprised of the voluminous materials submitted in connection with the SCADB's consideration of the 2015 RTFA complaint. Administrative notice is taken of SADC inspections of the Walker farm property. N.J.S.A. 52:14B-10(b); N.J.R.E. 101(a)(3); Re New Jersey Bell Telephone Company, 1992 WL526766 (N.J.Bd.Reg.Com.)

This Hearing Report concludes that Walker satisfies statutory "commercial farm" eligibility criteria. The report also determines that Walker's implementation of a farm conservation plan on the farm property is a generally accepted

agricultural management practice to control flooding, soil erosion and runoff from the farm property's vegetable operations onto adjoining properties. Accordingly, pursuant to RTFA regulations, the SADC remands the matter to the SCADB to consider the merits of Hollywood's complaint.

STATEMENT OF FACTS

Walker owns Block 301, Lot 32 which, according to the most recent (2017) FA-1 form admitted into evidence, is a 92.42 acre property in Pittsgrove Township with 33.74 acres of cropland harvested for snap beans and 58.68 acres of appurtenant woodland.¹ Mr. Walker testified that Lot 38 is part of a farm management unit of several parcels totaling approximately 150 acres owned by his company and collectively generating annual agricultural production worth over \$200,000 according to 2016 and 2017 paid invoices introduced into evidence at the SADC hearing. Lot 38 production over the past several years has been comprised of snap beans, winter wheat, soybeans, corn and asparagus.

Agriculture is a permitted use in all zones in Pittsgrove Township pursuant to §60-3B.(2) of the municipality's "Land Use and Development" ordinance.

Lot 38 and other Walker farmland was preserved pursuant to the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11, et seq. (ARDA), by deed of easement to the SADC dated August 14, 2001 and recorded August 16, 2001 in the Salem County Clerk's Office in Deed Book 1078, Page 171. Lot 38 was inspected by SADC stewardship staff for compliance with the deed of easement in conjunction with the agency's monitoring responsibilities under ARDA and in response to the conditions giving rise to the RTFA complaint.

The SADC advised Walker by letter dated August 29, 2012, of complaints that stormwater runoff from Lot 38 was impacting adjoining residential properties. SADC stewardship staff assisted in convening a meeting at the Pittsgrove municipal building in September 2012 to examine possible solutions to the

¹ Scott Walker testified at the hearing that the farm parcel at issue in this case is Lot 38, which he stated is 17 acres and "sits inside" Lot 32. SADC inspection reports refer to the subject property as Lot 38. In any event, the lot designations are not relevant to these proceedings because the subject matter of the RTFA complaint exists regardless of the farm's lot number. The Walker farm property will be referred to as Lot 38 in this report based on Walker's testimony and SADC inspection records.

problem. The meeting was attended by Walker; county and municipal officials; representatives of the New Jersey Department of Agriculture; and staff from the United States Department of Agriculture, Natural Resources Conservation Service (NRCS).

In December 2012 Walker obtained an NRCS-approved farm conservation plan (FCP or plan), prepared in conformance with NRCS's field office technical guide (FOTG), for several parcels of the farm management unit including Lot 38. The FCP recommended the following conservation measures, and with the general results of implementation described, relevant to the management of flooding, runoff and soil erosion from the vegetable operation on Lot 38:

Conservation Crop Rotation to provide adequate amounts of organic material for erosion reduction.

Cover Crop to improve water infiltration and reduce soil erosion.

Filter Strip to reduce sediment, organics, nutrients, pesticides and other contaminants from runoff; improve water quality; slow the velocity of water; filter suspended soil particles; and increase infiltration of runoff and soluble pollutants.

Irrigation Water Management to control the rate, amount and timing of irrigation water to minimize soil erosion and control water loss from runoff and deep percolation.

The FCP was signed by Walker and by the NRCS official who prepared the plan. It was also signed in January 2013 by a representative of the Cumberland-Salem Soil Conservation District.

Hollywood purchased their residential property (Block 301, Lot 36.01) in February 2010. Three adjoining residential parcels in Block 301 southwest of Lot 38 and fronting Porchtown Road (Salem County Route 553), including Hollywood's, are each situated at progressively lower elevations than the Walker farm lot and are owned by the following individuals: Penn (Lot 37); Quering (Lot 36.02), which is next to Penn; and the Hollywood parcel, which adjoins Quering. Due to the varying depths of the three lots and the irregular shape of Lot 38, each of these residential properties shares a border with the Walker farm parcel's southwestern boundary line.

A 2012 U. S. Geological Survey quadrangle map of the Walker farm and residential properties, prepared by SADC staff and used at the hearing, indicates that Lot 38 is generally at an elevation of 120 feet and, about 500 feet from that contour interval, the elevation slopes down to almost 110 feet at the rear of the Hollywood lot. A manmade feature in the immediate area is -- -- -- -- --, which not only is higher than the Penn, Quering and Hollywood properties fronting it, but also conveys surface water and runoff in a southwesterly direction to those lots as well as to areas near the intersection of Porchtown Road and Harris Road.

Hollywood's presentation at the SADC hearing included videos of rainstorm events on January 18 and July 14, 2015 showing widespread flooding of Porchtown Road, of Hollywood's and other residential properties in the immediate vicinity of Lot 38, and of the Harris Road area further southwest and downgradient of Walker's farm lot. This report takes administrative notice of various undated photographs introduced by Hollywood at the SCADB hearing showing the severe flooding of Hollywood's and neighboring residential lots as well as flooding of Porchtown and Harris roads.

On August 13, 2013, in connection with agency monitoring for deed of easement compliance, SADC stewardship staff and the NRCS inspected Lot 38 immediately after a thunderstorm. Staff's observations and conclusions were set forth in a September 30, 2014 memorandum, a copy of which is attached to this report as Exhibit A.² Rain gauges near the site had recorded rainfall totals of 1.24" - 3.65" over a 3-hour period. The farm field was planted for late soybeans which were approximately 3" tall, with the crop oriented across the length of the field, generally up and down the slope and parallel to -- -- -- -- --. Runoff from the field was clear, meaning that detached sediment in the runoff was minimal. Walker had left winter crop residue in the field, protecting the soil from the full force of rainfall by dissipating energy before contact with the soil. Staff calculated allowable soil loss tolerance, or "T", from Lot 38 at 3T/acre, and staff calculated the predicted soil loss at 2.4T/acre. As a result, SADC staff concluded that Lot 38 was in compliance with deed of easement paragraph 7, which provides:

7. No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation, erosion control,

² Seven (7) attachments referred to in the September 30, 2014 memorandum total 155 pages and are available upon request.

or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises.

While agency staff considered Walker's agricultural operations on Lot 38 to be in compliance with the deed as a result of the August 2013 site inspection, additional conservation practices were recommended in the memorandum, including installing a field border/filter strip to reduce off-site sediment deposition.

A routine inspection of the preserved Walker farm properties was conducted by SADC staff on June 24, 2014 and, aside from the inspector's confirmation that an FCP had been developed for all of the lots, there were no areas of concern such as unnecessary soil disturbance, dumping or impairment of natural resources on the farm parcels, including Lot 38. A copy of the June 24, 2014 field inspection report is attached to the Hearing Report as Exhibit B.

SADC staff inspected Lot 38 on February 24, 2016, after about 1" of rain had fallen during a storm starting before the site visit. A staff memorandum dated April 12, 2016 is attached to this report as Exhibit C. Green beans had been planted in 2015 as a row crop for harvest and, following the green beans, the field was disked twice and winter wheat was planted. While some surface runoff was present in the winter wheat crop field planted parallel to Porchtown Road, and runoff was not as clear as that observed in August 2013, no ponding or evidence of previous ponding was seen, and soil loss from the lot was again calculated at or below "T" over the length of the crop rotation. Staff concluded that Lot 38 farm field operations were in compliance with the FCP and with paragraph 7 of the deed of easement. While SADC stewardship personnel noted that additional conservation measures such as a filter strip could be installed, staff opined that such a measure would be beyond what was required in the deed of easement.

In October 2016 Walker installed a filter strip in the south-southwest portion of Lot 38. The farm conservation plan called for a 30' wide filter strip but Walker installed one that was 35' wide. SADC stewardship staff, accompanied by the local NRCS representative who had assisted in the drafting of and signed Walker's 2012 FCP, inspected the filter strip on May 9, 2017. The inspection was performed at that time in order to allow a sufficient growing period for the prior Fall planting of the filter strip. SADC and NRCS staff concluded that the project had been properly installed and was fit for its intended

purposes of reducing erosion and runoff, reducing dissolved contaminants, and trapping sediments and nutrients. These conclusions were set forth in a staff memorandum dated May 26, 2017, a copy of which was transmitted to the parties on June 13, 2017, and which is attached to this Hearing Report as Exhibit D.³

There was no dispute at the hearing that Walker had followed all of the other recommended FCP practices applicable to Lot 38, including conservation crop rotation, cover crop, and irrigation water management practices specifically addressing flooding, soil erosion and runoff from the vegetable field operations.

Hollywood testified at the hearing that, in the summer of 2016, they installed a berm running across the front of their lot and down the edge of their property next to its boundary with the Quering parcel. According to Hollywood, the berm has helped ameliorate flooding of their property.

LEGAL DISCUSSION

N.J.S.A. 4:1C-10.1a. of the RTFA requires that any person aggrieved by the operation of a commercial farm must file a complaint with the applicable county agriculture development board (CADB) prior to filing an action in court. Section 10.1 provides the CADB with two options after it receives a complaint: (1) the board retains the case, holds a public hearing and issues a decision on the merits of the dispute if the complaint implicates activities addressed by an agricultural management practice (AMP) promulgated through rulemaking by the SADC; or (2) the board refers the complaint to the SADC if no promulgated AMP addresses the disputed agricultural activities, in which case the SADC determines "whether the disputed agricultural operation constitutes a generally accepted agricultural operation or practice." See, generally, N.J.A.C. 4:1C-10.1b. and 10.1c., respectively.

N.J.A.C. 2:76-2.7(e) and (h) clarify that when no promulgated AMP addresses the agricultural activity in dispute, there can be no referral of the complaint to the SADC unless the CADB first determines that the farm is a "commercial farm" as defined in the RTFA and that the activity giving rise to the complaint is included in the list of permitted agricultural

³ The NRCS representative signed a "Practice Checkout" sheet dated May 9, 2017 evidencing her concurrence with SADC's conclusion that the filter strip had been installed in accordance with NRCS standards (see Exhibit D).

activities in N.J.S.A. 4:1C-9 ("section 9"). When those findings are affirmatively made by the CADB, the board refers the complaint to the SADC for a determination "whether the disputed agricultural operation constitutes a generally accepted agricultural operation or practice." N.J.A.C. 2:76-2.7(h).

The SADC's role is limited after it receives a referral of a complaint by a CADB. The SADC reviews the board's determinations that the farm is an RTFA-defined "commercial farm" and that the activity giving rise to the complaint is included in section 9. N.J.A.C. 2:76-2.7(h)2. When those findings are made by the SADC, it holds a hearing "limited to consideration of whether or not the disputed agricultural operation constitutes a generally accepted agricultural operation or practice." N.J.A.C. 2:76-2.7(i).

If the disputed agricultural activity is determined by the SADC to constitute a generally accepted agricultural operation or practice, then the case is remanded to the CADB "for a public hearing on the allegations of the complaint filed by the aggrieved person against the commercial farm." N.J.A.C. 2:76-2.7(i)1. The SADC dismisses the complaint if it cannot make such a determination. N.J.A.C. 2:76-2.7(i)2. In sum, when a CADB forwards an RTFA complaint to the SADC due to the absence of an AMP promulgated through rulemaking, the agency hearing is limited to the issue of whether or not a generally accepted agricultural management practice exists for the farming operation giving rise to the dispute. The factual and legal merits of the complaint, the factual and legal positions that may be asserted by the commercial farmer, and all other relevant surrounding circumstances bearing on the dispute, are not litigated before the SADC.

The SCADB's February 24, 2016 resolution found, and this Hearing Report agrees, that Walker operates a "commercial farm" as defined in the RTFA because the farm management unit of which Lot 38 is a part comprises more than 5 acres of property eligible for farmland assessment and annually produces agricultural products worth \$2,500 or more. This report concurs with the board's finding that the Walker farm property is located in a zone in Pittsgrove Township in which agriculture is a permitted use. The SCADB resolution did not articulate, as required by SADC regulations, whether the activity generating the RTFA complaint --- the vegetable farming operation on Lot 38 --- was included in section 9. This Hearing Report concludes that Walker was engaged in agricultural production on that property, a permitted activity set forth in N.J.S.A. 4:1C-9a.

The board resolution, at p.2, stated that the "Natural resource conservation" AMP, promulgated by the SADC at N.J.A.C. 2:76-2A.7, was "implicated" by the complaint, but concluded that "stormwater runoff is not addressed in AMP 2:76-A.7 [sic] and, accordingly, there is no AMP that governs" the Hollywood-Walker dispute. The SCADB noted, at p.3 of the resolution, that while Walker possessed an NRCS-approved farm conservation plan,⁴ the natural resource conservation AMP "[did] not fully, completely, or otherwise satisfactorily, address the disputed activities in the. . .[c]omplaint." The resolution reiterated, *passim* at pp.4-5, the board's conclusion that "there are no existing AMPs that provide guidance to the CADB on the issues of flooding, drainage, and stormwater management", and that the SADC, not the SCADB, had "jurisdiction to determine whether the disputed activities set forth in the. . .[c]omplaint constitute generally accepted agricultural practices entitled to Right to Farm protection."

N.J.A.C. 2:76-2A.7(a) explains that the purpose of the natural resource conservation AMP 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." Such implementation "shall be a generally accepted agricultural management practice recommended by the [SADC]" provided the plan is prepared in accordance with the NRCS-FOTG.

By letter dated May 2, 2016, a copy of which was provided to the parties in this dispute, the SADC advised the board that

[a]lthough the SCADB resolution did not address whether and to what extent implementation of Walker's farm conservation plan addressed or could address soil erosion and water runoff from the farm property, the SADC acknowledges that the applicability of N.J.A.C. 2:76-2A.7 to the RTF[A] dispute in this case is unclear. Accordingly, the SADC will conduct a hearing pursuant to N.J.S.A. 4:1C-10.1(c) and . . . if appropriate, return the complaint to the SCADB as set forth in N.J.A.C. 2:76-2.7(i) and (j).

This Hearing Report concludes, based on the evidence presented at the hearing, that Walker has implemented relevant provisions of the 2012 FCP for Lot 38, including conservation

⁴ A copy of Walker's FCP was part of the record before the SCADB.

crop rotation, cover crop, filter strip and irrigation water management practices. In particular, the filter strip was inspected and approved by SADC and NRCS staff in May 2017, at which time it was determined that the project was properly installed. All of the FCP measures implemented by Walker are designed to reduce erosion and water runoff, reduce dissolved contaminants in any runoff that occurs, and trap on-site sediments and nutrients from any runoff caused by the Lot 38 farm field. Accordingly, Walker's implementation of the 2012 FCP is a generally accepted agricultural management practice for the vegetable operation on Lot 38 to help prevent and mitigate adverse impacts from the farm field that may occur on Hollywood's residential property.

The case is returned to the SCADB for a public hearing on the allegations of Hollywood's complaint filed against Walker. See, generally, N.J.A.C. 2:76-2.7(i)1 and (j).

Dated: July 27, 2017

Brian D. Smith

Brian D. Smith, Esq.
Chief of Legal Affairs
Hearing Officer