

**RESOLUTION OF THE ATLANTIC COUNTY
AGRICULTURAL DEVELOPMENT BOARD**

Re: Right to Farm Act Hearing and Decision
Complainants: Kenneth McHale & Luis Giordillo
Commercial Farm: Molinelli Farms, LLC
Farm Location: Block 6001, Lot 12 (and other lands)
Tuckahoe Road, Buena Vista Township, Atlantic County
Hearing & Decision Date: October 9, 2012

The Parties In Attendance:

Complainants: Kenneth McHale and Luis Gordillo, represented by Justin White, Esquire

Commercial Farm: Karl Molinelli, represented by Elizabeth Dalberth, Esquire, along with Clay Emerson, Ph.D.

Procedural Background:

This matter has been presented to the Atlantic County Agricultural Development Board (the "ACADB") based upon a complaint filed on or about January 31, 2011 in the Superior Court of New Jersey, Atlantic County, captioned *Kenneth McHale and Luis Gordillo vs Karl E. Molinelli, et als*, Docket No ATL-L-590-11, wherein the plaintiff sought damages, counsel fees and restraints against the defendants. The complaint in general alleged that the defendants caused flooding damages to the plaintiffs' residences, due to actions or omissions in the defendant's operations of its nearby farm property that were negligent or which constituted a private nuisance.

In a decision filed on September 22, 2011, the Hon. Nelson Johnson, J.S.C., determined that the "... Plaintiffs' claims arise out of a farm practice (installing and maintaining terrain alterations for water conservation and surface water control) explicitly contemplated under the Farm Act, therefore primary jurisdiction rests with the ACADB." Accordingly, the Court transferred the matter to the ACADB for review under the provisions of the Right to Farm Act.

Upon transfer of this matter to the ACADB, the matter was the subject of several preliminary actions, including a jurisdictional determination and a request for guidance from the State Agricultural Development Board. In a letter dated March 7, 2012 the SADC determined that Molinelli's farm is subject to a farm conservation plan which constitutes a "generally accepted agricultural management practice, N.J.A.C. 2:76-2A.7, and that the ACADB should proceed with review of the matter. After a site inspection, the matter was heard and a decision was rendered by the ACADB on October 9, 2012.

Issues:

The Complainants generally allege that storm water flooding generated on the Molinelli Farm, and specifically on property identified as Lot 12, Block 6001, was directed by Molinelli onto the Complainants' properties, located nearby on properties identified as lot 24 (McHale) and lot 23 (Gordillo). Complainants allege that Molinelli was negligent and/or created a private nuisance, by changing the grade of his property and/or breaching an earthen berm along the edge of his property, which allowed a storm water flood to exit the Molinelli property, travel across a vacant wooded property (lot 13, the Sneathen property*) and then onto the Complainants' properties, causing damage to their homes and personal property. Complainants also allege that the flooding constituted a trespass by Molinelli.

Molinelli generally denies the complainants' allegations. Molinelli asserts that his farm conforms to established agricultural management practices and that his operations do not constitute a threat to public health or safety. As such Molinelli contends that he is immune from the Complainants' claims pursuant to N.J.S.A. 4:1C-10.

Facts & Decision:

Based upon all of the testimony, reports, records and photographs presented by the parties to the ACADB, and based upon the observation of conditions at the farm observed by ACADB members during the site inspection of October 9, 2012, the ACADB finds as follows:

1. Molinelli is a commercial farm operator entitled to protections established by the Right to Farm Act. The matters in dispute are properly referred to the ACADB for review and decision.
2. The property in question is actively farmed by Molinelli, and has been in agricultural production for many years.
3. Molinelli testified that he has regularly plowed and maintained this field in accordance with a farm conservation plan that had been developed years before.
4. The farm is plowed in rows in a manner that is consistent with generally accepted agricultural management practices, and consistent with the farmland conservation plan developed for this property.
5. Complainants assert that the Right to Farm Act does not protect Molinelli for damages caused by storm water that migrated off of the farm property and onto the Complainants' property after a March 13, 2010 storm event. Complainants allege that Molinelli excavated a breach in a berm

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- The owners of the Sneathen property, lot 13, are not a party to the litigation and have not participated in these proceedings,

along the edge of his property that allowed flood water to migrate, through the adjacent wooded lot (lot 13) and then onto the Complainants' properties along Chestnut Avenue.

6. The March 13, 2010 flooding was caused by intense rains that caused flooding throughout the region, including closure of the adjacent section of Chestnut Avenue for up to three days, as storm water flooding dissipated.

7. FEMA declared this storm event to be a natural disaster due to widespread flooding and property damage.

8. During this extreme flooding event, Molinelli's farm was inundated by flood water, up to a depth of several feet.

9. There was no evidence offered to suggest that flooding of this magnitude is a regular or recurrent problem.

10. There was no evidence offered to prove that the flooding at issue was not part of a singular natural disaster event caused by the extreme March 13, 2010 storm.

11. Complainants failed to offer any reliable expert testimony or facts regarding the natural flow of storm water, or to demonstrate that Molinelli's farm operations caused the flooding.

12. Molinelli offered an expert who testified on storm water flows, natural flow paths, topography, elevations, weather records, soil conditions, the alleged berm and other issues related to this matter.

13. Molinelli's expert testified that in his opinion Molinelli's farm operations did not cause the flooding at issue. Instead, the flooding was the result of natural topographic conditions in the general vicinity of these properties, combined with the extreme impacts of the March 13th storm and other natural conditions.

14. The March 13th storm water flood was generally following its natural flow pathways from lands with higher elevations (ie, the Molinelli farm and all other upland parcels in the vicinity) through lower elevations (ie, the wooded lot, the Complainants' lands, and other lots along this section of Chestnut Avenue) as water made its way to a downstream natural wetland/stream corridor.

15. Complainants failed to offer facts to prove allegations that Molinelli caused flooding by excavating an earthen berm along the edge of the farm field.

16. There is no "berm" between the Molinelli farm and the adjacent wooded lot (lot 13) as alleged by the Complainants. Instead, plowing over the years has created a furrow or depressed area along the edge of the farm field that is lower than the natural apparent elevation of the wooded parcel.

17. During the site inspection, Complainants pointed to what appeared to be a shallow backhoe cut, extending from the farm field into the woods for a short distance. However, Complainants offered no evidence to address the elevation of this cut in relation to their properties (which are located on the other side of the wooded lot) or how this single backhoe cut significantly impacted the natural flow of storm water in relation to the massive volumes that had accumulated due to the March 13th storm event. The relevance of this backhoe cut was discounted by the expert's testimony.

18. It was also noted that it would have been impossible to use mechanical equipment at this location during the flood as suggested by Complainants, because the entire area was submerged to a depth of 2 or more feet which would have rendered equipment operation physically impossible.

19. Molinelli denied taking any action to create a berm, or taking any action to excavate a backhoe cut or other excavation to divert flood waters during the flood.

20. Complainants failed to offer facts to prove that Molinelli was required to construct and maintain a berm upon his farm, or otherwise construct and maintain improvements that would prevent the movement of storm water through these properties along the general path of natural storm water flow.

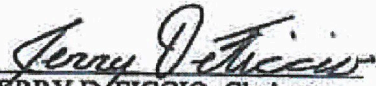
21. Expert testimony also demonstrated that due to unusually high precipitation in the months preceding the March 13th storm, groundwater levels were elevated and could not absorb significant storm water events.

22. Expert testimony supported Board member observations that the crest of Chestnut Avenue was slightly higher than the surface elevation of properties in the vicinity of the Complainants' property, thereby indicating that Chestnut Avenue may have served as a "berm" that retained storm water on the Complainants' side of the street. Complainants offered no evidence regarding the impact of Chestnut Avenue on the retention of storm water, or regarding the sufficiency of storm water drainage improvements in this vicinity of Chestnut Avenue.

23. Considering testimony offered by the parties and by Molinelli's expert, and further considering the extreme and unusual storm water flooding that occurred throughout the region on and around March 13, 2010 and other facts and evidence in this matter, Complainant failed to demonstrate any reasons why Molinelli is not entitled to the immunities and presumptions of the Right to Farm Act. In addition, there is no evidence to indicate that Molinelli's operation created a nuisance, a trespass or otherwise amounted to activities that pose a direct threat to the public.

NOW, THEREFORE, THE ATLANTIC COUNTY AGRICULTURAL DEVELOPMENT BOARD RESOLVES AS FOLLOWS:

1. Molinelli is a commercial farmer who is entitled to the protections and immunities provided by the Right to Farm Act in this matter.
2. Molinelli appears to be following generally accepted agricultural management practices, N.J.A.C. 2:76-2A.7, in connection with plowing and maintaining his field.
3. Molinelli's agricultural management practices related to plowing his field and controlling surface water did not create a risk of harm to the community, or a risk of harm to the Complainants.
4. The Complainants' damages appear to have been caused by natural conditions, including the March 13th storm event, which caused flooding and damage to many properties in the region, and the natural topography and flow of storm water in the vicinity of these properties.
5. In accordance with the Right to Farm Act, Mr. Molinelli is immune from the Complainants' claims based upon the Act's irrebuttable presumption that his operations are not responsible for causing an actionable damage claim.


JERRY DEFICCIO, Chairman,
Atlantic County Agricultural Development
Board