

RESOLUTION OF THE BERGEN COUNTY AGRICULTURE DEVELOPMENT BOARD - DECISION ON A COMPLAINT FILED BY SUPER VALUE INC. PURSUANT TO THE NEW JERSEY RIGHT TO FARM ACT.

WHEREAS, pursuant to the Right to Farm Act, N.J.S.A. 4:1C-10.1 and the State Agriculture Development Committee regulations, N.J.A.C. 2:76-2.3 any person aggrieved by the operation of a commercial farm shall file a complaint with the applicable County Agriculture Development Board prior to filing an action in court; and

WHEREAS, Mary Crain (hereafter "Crain") operates the Abram Demaree Homestead (the "Farm"), a fourteen-acre farm a portion of which is located at [redacted], Closter (Block 202 Lot 1); and

WHEREAS, Super Value, Inc. owns property at [redacted], Closter, New Jersey, ("the Super Value Property") that was used for the operation of a Getty service station; and

WHEREAS, Super Value seeks to install monitoring wells pursuant to an NJDEP Remedial Action Workplan ("RAW") on the Farm's property on the west side of Schraalenburgh Road in accordance with the requirements of NJDEP and N.J.S.A 58:10-16B; and

WHEREAS, the Farm has advised that no permanent monitoring wells would be permitted; and

WHEREAS, by letter dated March 20, 2006 Super Value requests a determination whether the BCADB has jurisdiction in this matter under the Right to Farm Act, implicating the threshold question discussed in Township of Franklin v. Hollander, 172. N.J. 147, 152 (2002) "whether an agricultural management practice is at issue".

WHEREAS, a Site Review was conducted on March 29, 2006 ("the Site Visit"), which was attended by BCADB Board members Evelyn Spath-Mercado, Ronald Binaghi Jr., Mark M. Cole and Daryl Secor at a meeting noticed in compliance with the New Jersey Statutes and the Open Public Meetings Act; and

WHEREAS, the Board members present during the site visit made the following observations: four of the five proposed monitoring wells are located along the perimeter of the farm and the fifth monitoring well is located in the Farm's parking lot; and

WHEREAS, the BCADB noticed a meeting for April 18, 2006 in compliance with the Open Public Meetings Act and a quorum of the Board being present at the aforesaid meeting, the BCADB considered the application; and

WHEREAS Crain, represented by Frank Rivellini, Esq., had notice of the Board's April 18, 2006 and authorized her attorney to consent to the form and substance of this resolution, which was circulated prior to the meeting; and

WHEREAS, Super Value, Inc., represented by Christopher Koller Esq., had notice of the Board's April 18, 2006 and authorized its attorney to consent to the form and substance of this resolution, which was circulated prior to the meeting.

NOW THEREFORE BE IT RESOLVED, that the Board makes the following determinations:

PROCEDURAL BACKGROUND

The subject matter of this proceeding is identical to issues that were the subject of an action in the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. C-426-05. In its Complaint in that action, Super Value sought, pursuant to N.J.S.A.58:10B-16, to obtain access for environmental testing and remediation as required by the New Jersey Department of Environmental Protection ("NJDEP"). Crain filed an Answer and Counterclaim alleging that the Complaint was frivolous because the matter is properly before the BCADB pursuant to N.J.S.A. 4:1C-10 et. seq.

Based on the discussion of the primary jurisdiction of the BCADB in Borough of Closter v. Abram Demaree Homestead, Inc., 363 N.J. Super. 338 (App. Div. 2004), Judge Doyno entered a Consent Order to dismiss the action with the right to proceed before the BCADB on the jurisdictional issue of whether agricultural practices were affected by Super Value's proposed actions discussed herein. The Consent Order provides that Super Value could move to restore the case to active status if the BCADB determined it did not have jurisdiction in this matter, or if the BCADB determined it had jurisdiction, only as to certain issues raised by Super Value and Crain.

FACTUAL DISCUSSION

THE FARM

Mary Crain operates the Abram Demaree Homestead, a fourteen-acre farm a portion of which is located at 110 Schraalenburgh Road, Closter (Block 202 Lot 1). She purchased the farm from the Hackensack Water Company in 1992. The land has been continuously farmed for over 200 years. The property is shaped roughly as a rectangle. The northern portion of the farm borders Old Hook Road and has two curb cuts. The eastern portion of the farm borders Schraalenburgh Road. The westerly border, containing two sewer easements, abuts railroad tracks on property owned by CFX (formerly Conrail) railroad. The southerly border of the farm abuts the Harvest restaurant on Lot 2.

The Abram Demaree Homestead is a "commercial farm" as defined by the statute as "a

farm management unit of no less than five acres producing agricultural or horticultural products worth \$2,500 or more annually, and satisfying the eligibility criteria for differential property taxation pursuant to the 'Farmland Assessment Act of 1964,' ... [N.J.S.A.] 54:4-23.1 et seq." N.J.S.A. 4:1C-3; see N.J.S.A. 54:4-23.1 to -23.23.

The Abram Demaree Homestead is located in an area in which, as of December 31, 1997 or thereafter, agriculture has been consistent with the municipal master plan and is a permitted use under the municipal zoning ordinance:

Article IV, District No.1, Residence Area A, Section 200-6(F)
Uses: Farms, nurseries or greenhouses, provided that said uses must reserve on site no less than one acre of open space."

The Abram Demaree Homestead was in operation as of July 2, 1998.

SUPER VALUE INC.

Super Value owns property at [redacted], Closter, New Jersey, ("the Super Value Property") that was used for the operation of a Getty service station.

Super Value's agent, Applied Earth Solutions Inc. ("AES"), has determined that elevated levels of gasoline related compounds exist in two tested locations along the right-of-way adjacent to the Farm property and detectable levels of MTBE in groundwater samples on the Farm property. These levels are in excess of DEP's soil cleanup criteria.

AES prepared and forwarded to NJDEP a Remedial Action Workplan ("RAW") stating that soil samples showed elevated concentrations extending to the west side of Schraalenburgh Road - where the Farm is located, but that the extent of delineation without monitoring wells. The RAW attached a map showing the estimated impacted area which includes a portion of the Farm Property. The RAW proposed the installation of three monitoring wells on the west side of Schraalenburgh Road.

On January 14, 2004, NJDEP issued a letter approving the RAW and requiring that three monitoring wells be installed on the west side of Schraalenburgh Road, one along Old Hook Road and a sentinel well. NJDEP also required the collection of additional soil samples on the Farm property to complete delineation of the contamination.

In accordance with the requirements of NJDEP and N.J.S.A 58:10-16B, by letters dated April 5, 2005 and May 12, 2005, Super Value requested a right of access to the Demaree Property for these purposes, and Super Value submitted to Demaree a proposed Site Access Agreement for the testing and monitoring proposed by AES.

By letter dated May 16, 2005, counsel for Demaree advised that no permanent

monitoring wells would be permitted and that Demaree's environmental expert would have to review the NJDEP file and any proposals for testing.

AES submitted to NJDEP a Remedial Action Progress Update dated July 11, 2005. The Remedial Action Progress Update stated that Demaree refused access to the Demaree Property to install the down gradient monitoring wells.

On August 11, 2005, NJDEP advised Super Value that it was not in compliance with the RAW approval letter because Super Value failed to install monitoring wells on the Demaree Property.

RIGHT TO FARM ACT

The Right to Farm Act (N.J.S.A. 4:1C-1 et seq.), as amended in 1998, renders its provisions *preeminent* to "any municipal or county ordinance, resolution, or regulation to the contrary," N.J.S.A. 4:1C-9. The New Jersey Supreme Court affirmed, in Twp. of Franklin v. Hollander, 172 N.J. 147 (2002), that the Farm Act's provisions are preeminent over a municipality exercising its powers under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -112...and that the Act was designed "to promote to the greatest extent practicable and feasible, the continuation of agriculture in the State of New Jersey while recognizing the potential conflicts among all lawful activities in the State." Senate Natural Res. and Agric. Comm. Statement No. 854- L. 1983, c. 31 (N.J.1998).

The Court cautioned that in the exercise of jurisdiction over agricultural practices, the county agriculture development board is limited by public health and safety concerns. These issues of health and public safety must also be given due consideration by the agricultural agencies citing the appellate court's finding that:

We consider the statutory language in the Act which speaks to conduct that poses a '*direct threat to public health or safety*' must be considered broadly, and not as a narrow limitation in considering complaints of an aggrieved party that local land use or other relevant ordinances are being violated by the conduct of the commercial farm operator. In sum, in exercising its authority under the Act, the CAB or SADC must afford a local agency comity in recognition that the municipality interests must be appropriately acknowledged and considered."

As a result of the Hollander case agricultural boards, such as the BCADB, have primary jurisdiction over municipal/farm disputes but do not have unlimited authority regarding issues that directly affect public health and safety. In other words the BCADB must give appropriate consideration to municipal concerns when they are implicated to assure that the farm operation "does not pose a direct threat to public health and safety." N.J.S.A. 4:1C-10.

For a farm to receive this protection, the appropriate CADB must determine that the activity at issue conforms with agricultural management practices (AMPs) adopted by the SADC pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. or that it constitutes a

generally accepted agricultural operation or practice. Thus, when an agriculture board issues an AMP, on a case-by-case basis, it creates an “irrebuttable presumption” that any activity of a commercial farm that is determined by the CAB “to constitute a generally accepted agricultural operation or practice [cannot]...be deemed to otherwise invade or interfere with the use and enjoyment of any other land or property,” provided the operation or practice “does not pose a direct threat to public health and safety.” N.J.S.A. 4:1C-10.

NJDEP STANDARDS

N.J.S.A. 58:10B-16 provides in part:

a. (1) Any person who undertakes the remediation of suspected or actual contamination and who requires access to conduct such remediation on real or personal property that is not owned by that person, may enter upon the property to conduct the necessary remediation if there is an agreement, in writing, between the person conducting the remediation and the owner of the property authorizing the entry onto the property. *If, after good faith efforts, the person undertaking the remediation and the property owner fail to reach an agreement concerning access to the property, the person undertaking the remediation shall seek an order from the Superior Court directing the property owner to grant reasonable access to the property and the court may proceed in the action in a summary manner.*

b. The court shall promptly issue any access order sought pursuant to this section upon a showing that (1) a reasonable possibility exists that contamination from another site has migrated onto the owner's property, or (2) access to the property is reasonable and necessary to remediate contamination. The presence of an applicable department oversight document or a remediation obligation pursuant to law involving the property for which access is sought shall constitute prima facie evidence sufficient to support the issuance of an order.

LEGAL ANALYSIS

In Township of Franklin v. Hollander, the Supreme Court wrote at page 152 that “as a general rule, the threshold question will be whether an agricultural management practice is at issue... .” In addressing the issue of municipal regulation, the Supreme Court recognized that there will be cases where local ordinances do not affect farming, and cases where the ordinance only has a peripheral effect on farming but does not conflict with farming practices.

Demaree contends that the proposed action affects the operation of the Farm and impacts an agricultural practice. Demaree contends that the installation and removal of the wells would impact its soil, crops, soil tilth and damage its plantings, practices which it claims and protected

by the Act. Demaree's desire is not to prohibit the remediation required to be performed but rather to be sure it is done with as little deleterious effects to the farm management practices of the Farm as reasonably possible.

The Right to Farm Act (N.J.S.A. 4:1C-1 et seq.), as amended in 1998, renders its provisions *preeminent* to "any municipal or county ordinance, resolution, or regulation to the contrary," N.J.S.A. 4:1C-9. See Twp. of Franklin v. Hollander, 172 N.J. 147 (2002). The Court in Hollander cautioned that in the exercise of jurisdiction over agricultural practices is limited by public health and safety concerns to the extent that conduct that poses a '*direct threat to public health or safety*' must be considered broadly, and not as a narrow limitation in considering complaints of an aggrieved party that local land use or other relevant ordinances are being violated by the conduct of the commercial farm operator. In sum, in exercising its authority under the Act, the CAB or SADC must afford a local agency comity in recognition that the municipality interests must be appropriately acknowledged and considered."

As a result of the Hollander case agricultural boards, such as the BCADB, have primary jurisdiction over municipal/farm disputes but do not have unlimited authority regarding issues that directly affect public health and safety. In other words the BCADB must give appropriate consideration to municipal concerns where they are implicated and balance the commercial agricultural operation, activity or structure which conforms to agricultural management practices against the governmental regulation and any direct threats to public health and safety. N.J.S.A. 4:1C-10.

In this matter the Super Value and the NJDEP have raised issues concerning direct threats to public safety. Pursuant to N.J.S.A. 58:10B-16(b) there is more than a "reasonable possibility" that contamination has migrated onto the Demaree property. It seems clear that access to the Demaree property is reasonable and necessary to remediate contamination. The January 14, 2004 DEP letter constitutes evidence sufficient to support the need for monitoring wells.

FINDS OF FACT AND CONCLUSIONS

The testimony and proofs given by the Applicant at the aforementioned public hearings and the Board's finding of fact and conclusions of law as set forth above are incorporated herein by reference and form the basis of this Board's determination.

A. In the event of any material deviation or change from the testimony, representations or findings of fact the Board reserves the right and option to modify, alter, change or revoke the within approval.

B. If terms and conditions agreed to on the record below are omitted from this resolution the Applicant is nevertheless bound to abide by same pursuant to Fieramosca v. Barnegat Tp., 335 N.J.Super, 526, 533-534 (Law Div.2000)).

In this case, Super Value is not aggrieved by the agricultural practices of the Demaree

Farm. There is no agricultural management practice that allegedly violates zoning or constitutes a nuisance that Super Value seeks to limit. Rather, this case involves Demaree's concern that the intrusion of heavy equipment and the installation of monitoring wells on its property will interfere with its crops and farming practices.

The Right to Farm Act is only preeminent over municipal and county, not state regulations involving health and safety. Furthermore nothing in the Right to Farm Act makes it preeminent over the State's NJDEP rules and regulations.

Based on the above the BCADB determines that while it has threshold jurisdiction over commercial farms such as the Abram Demaree Homestead it does not have jurisdiction over these specific health and safety issues when there is minimal impact on the farm operation so that jurisdiction, under these facts and circumstances, rests with the Superior Court because under N.J.S.A. 58:10B-16 access can only be ordered by the Superior Court.

NOW, THEREFORE, BE IT FURTHER RESOLVED that, based on the aforesaid findings of fact and conclusions of law, the Bergen County Agriculture Development Board finds that the Abram Demaree Homestead is a commercial farm but that jurisdiction over the aforementioned health and safety matters rests with the Superior Court of New Jersey.

YES: James Alan Abma Sr., Ronald Binaghi Jr., Mark M Cole, Chris G. James, Daryl Secor, Evelyn Spath-Mercado
NO: None
ABSTAIN: None
ABSENT: None

I certify that the foregoing is a true copy of the Resolution of the Bergen County Agriculture Development Board, duly adopted at a regular meeting of the Board on April 18, 2006.

Dated: April 18, 2006

Evelyn Spath-Mercado, Chairperson