

LAWRENCE ZIEMBA,

Petitioner,

vs.

STATE OF NEW JERSEY

OAL DKT. NO.: ADC 12000-13

AGENCY REF. NO.: SADC ID #1354

CAPE MAY COUNTY AGRICULTURE
DEVELOPMENT BOARD and NATALI
VINEYARDS, LLC,

FINAL DECISION

Respondents.

Lawrence Ziemba ("Ziemba"), a resident of Middle Township, Cape May County, appealed to the State Agriculture Development Committee ("SADC" or "Committee") from a resolution of the Cape May County Agriculture Development Board ("CMCADB" or "board") denying his complaint that certain activities conducted on farm property owned by Natali Vineyards, LLC were not entitled to the protections afforded by the Right to Farm Act, N.J.S.A. 4:1C-1, et seq. ("RTFA").

The SADC forwarded the Ziemba appeal to the Office of Administrative Law ("OAL") as a contested case on August 20, 2013. N.J.S.A. 4:1C-10.2; N.J.S.A. 52:14B-1, et seq. The administrative law judge ("ALJ" or "judge") held a hearing on January 14, 2014 and, in his February 28, 2014 Initial Decision, affirmed the CMCADB's resolution. The judge reasoned that because Natali had obtained a site-specific agricultural management practice ("SSAMP") determination from the board in 2009 allowing the activities complained of by Ziemba, those activities were protected by the RTFA and there was an irrebuttable presumption that they did not constitute a public or private nuisance. N.J.S.A. 4:1C-10.

The record in this case is comprised of the exhibits referred to in the Initial Decision, the OAL trial transcript, and the transcripts, minutes and evidentiary materials from the relevant CMCADB hearings. When appropriate, the SADC will also take administrative notice of facts set forth in available public records, in the OAL file transmitted to the agency with the Initial Decision, and on correspondence from the parties in the OAL proceedings of which the SADC received copies. N.J.S.A. 52:14B-10(b); N.J.A.C. 1:1-15.2; N.J.R.E. 101(a)(3); Re New Jersey Bell Telephone Company, 1992 WL 526766 (N.J.Bd.Reg.Com.).

I. Factual background and procedural history

A. *The Natali and Ziemba properties.*

The property upon which the disputed activities occurred, Block 4.01, Lot 37, Middle Township ("the property"), is a 22.26 acre parcel purchased by Alfred D. Natali of _____, East Hanover, NJ, from Menz Restaurant, Inc. in a deed dated March 25, 2000 and recorded March 29, 2000 in the Cape May County Clerk's Office in Deed Book 2850, Page 383. By deed dated August 25, 2006 and recorded November 8, 2006 in the county clerk's Office in Deed Book 3259, Page 623, Mr. Natali conveyed the property for \$1.00 to Natali Vineyards, LLC. The limited liability company was formed on February 25, 2002 by Natali with a business purpose listed as "Farm Winery", and is currently in good standing. Mr. Natali and Natali Vineyards, LLC will collectively be referred to as "Natali".

Ziemba owns an approximate 1-acre residential property with an address of _____ and designated on the Middle Township tax map as Block 4.03, Lot 7. He and his wife purchased the residential property in a deed dated July 31, 2001 and recorded on August 7, 2001 in the Cape May County Clerk's Office in Deed Book 2924, Page 998. The Ziemba residence is located on the north side of _____ a roughly east-west roadway that parallels Natali's northern property line. Residential properties fronting on the south side of _____, across from Ziemba's house, maintain rear property lines common with Natali's northern property line. Ziemba's residence is approximately 475 feet northeast of the Natali winery building, and Ziemba's southwest property corner is, on a straight line, 240 feet from the Natali north property line.

B. *Natali's 2009 SSAMP.*

On August 11, 2009, Natali applied to the CMCADB for an SSAMP for the operation of a "farm market" on the property. In a letter to the board accompanying the SSAMP application, Natali advised that a site plan had been reviewed by Middle Township zoning officials, an agreement with respect to site plan elements had been reached with the municipality, and a question remained as to whether the proposed farm market activities were agricultural. The letter listed Natali's federal and state winemaking and retail sales permits, and stated:

Our farm market practice is to sell the wine through our tasting room, by hosting organizational meetings, and by conducting events of a family, social or civic nature.

Our events are consistent with the festival format of the Garden State Wine Growers Association. Our events feature live music, food vendors paired with our wines, and local artisans (including Beach Plum jellies, jams and plants). It seems obvious to me that these activities are appropriate farm practices in order to cultivate the land in a manner that is economically sustainable.

In support of the proofs necessary for "commercial farm" eligibility required by N.J.S.A. 4:1C-3, Natali provided various documents. A copy of the township's 2009 final/2010 preliminary tax bill was submitted showing that the property had a "Q" farm designation and was 21.26 acres in size. A copy of the 2010 FA-1 form reflected 9.92 acres of cropland harvested, comprised entirely of grapes; 3.99 acres of cropland pastured, comprised entirely of winter rye; 5.31 acres of appurtenant woodland and 2.04 acres devoted to rehabilitation.¹ Farm income submittals included copies of the 2008 IRS Form 1065 (Return of Partnership Income) for Natali Vineyards, LLC listing gross receipts of \$138,054; gross profits of \$83,469; net farm profits of \$20,911; "other income" of \$1,025; and total income of \$105,405. A copy of the 2008 IRS Form Schedule F (Profit or Loss From Farming) recited "[a]gricultural program payments" of \$2,945.

Natali's SSAMP application also contained this certification:

We grow and maintain nearly 10 acres of vinifera grapes and other fruit trees; we harvest the grapes, and ferment them to produce wine. We sell the wine on the farm premises through our Tasting Room. We also host events and functions of a social, civic or family nature whereby the wine selling is part of recreational and educational activities such as vineyard tours, barrel sampling, sensory evaluation of the wine product (including what is distinctive about the terroir of Cape May), rackings, punchdowns of the cap, or other seasonal activities connected to farm life.² We invite other farmers and

¹The remaining one (1) acre was not devoted to agricultural or horticultural activities, according to the 2010 FA-1 form. Middle Township tax records reflected that this one (1) acre area contained an improvement noted as "2S-F-Barn", meaning a two-story frame barn structure. The 21.26 acre portion of the property has maintained its farmland assessment through 2014.

²"Terroir" is the complete natural environment in which a particular wine is produced, including factors such as the soil, topography, and climate; "racking" is the process of separating wine from its sediment and transferring the wine into another container by gravity rather than a pump; "cap" is the mass of grape skins, stems and seeds that floats to the top of the fermenting vessel, and "punching down" is the process by which the cap is broken up and pushed down into the wine so that the cap stays moist during fermentation. www.oxforddictionaries.com, ©2014 Oxford University Press; www.eHow.com; www.grapestompers.com.

local artisans to display and sell their products at our events. We also feature music at these events. The format is consistent with the wine selling festivals of the Garden State Winegrowers [sic] Association.

The application was accompanied by portions of a "Proposed Site Plan" dated June 2009 and prepared by Carmen LaRosa, R.A., P.P., with a zoning schedule setting forth an existing 2-story, 27' high building occupying 0.237% of the property located in Middle Township's RR ("Rural Residential") zone. Permitted uses in the RR zoning district included "[a]griculture, horticulture, silviculture and aquaculture farms on a minimum 10 acre site." Middle Township ordinance, §205-11B(1)(b).³

By letter dated August 14, 2009, the CMCADB administrator provided notice of Natali's SSAMP application to Middle Township and to the SADC in accordance with N.J.A.C. 2:76-2.3(c).

The CMCADB received an August 25, 2009 letter from Gary C. Pavlis, Ph.D., the Rutgers Cooperative Extension agent for Atlantic County, who stated that he had known Natali for more than 10 years, had visited the property's vineyard many times, and had taught wine tasting courses at the Natali winery. Pavlis noted that the Farm Winery Act, N.J.S.A. 33:1-10, "ties wine making to agriculture" by requiring the licensee to cultivate grapes on at least 3 acres on or adjacent to the winery premises. He stated that N.J.S.A. 4:1C-9h. of the RTFA ("section 9h.") allows a commercial farm to engage in agriculture-related educational and farm based recreational activities that would include "vineyard tours, sensory evaluation of the wine, pairing wines and food, music events[,] etc." Finally, Pavlis observed that the New Jersey Department of Agriculture and the New Jersey Wine Growers Association had

developed a festival format for appreciating and selling New Jersey wine. This format includes sampling wines of all the participating wineries, listening to a live band, pairing wine and foods for purchase, and visiting the displays of local artisans. These festivals are held at wineries, state and county parks. This type of event is a practiced selling method of many New Jersey wineries.

Members of the board inspected the property on September 10,

³The RR zone became the RC ("Rural Conservation") zoning district when Middle Township readopted its municipal master plan in 2010. "Agriculture, horticulture, silviculture, and aquaculture farms on a minimum of 10 acres" are permitted uses in the RC zone. Middle Township ordinance, §205-406B(2).

2009.

James Tweed, President of the Cape May County Board of Agriculture (BOA) sent a letter to the CMCADB on September 15, 2009, expressing the BOA's support for the Natali SSAMP request. After advising that Natali "has been an active member of our Board for the past five years and. . .serves as Chairman of the Financial Review Committee which handles tax matters and financial reporting" for the BOA, the letter noted that the organization's charter promotes the "development of the most profitable and most permanent system of agriculture and commercial seafood production for Cape May County." Mr. Tweed stated that "farm wineries represent a novel and growing example of how to keep our farmland intact in a manner that imposes no tax burden on the municipality", and furnished examples of the benefits wineries provide to the economy. In order for wineries to be "economically sustainable", Tweed observed that farm markets were needed, and that events on the property featuring "music, tastings, vineyard tours, wine and food pairings, barrel sampling, punchdowns of the wine cap, and other seasonal activities" promoting wine sales are "educational and farm based recreational activities".

The CMCADB next received a memorandum dated September 28, 2009 from the Rutgers Cooperative Extension agent for Cape May County, Jenny Carleo, who was an *ex officio* member of the board pursuant to N.J.S.A. 4:1C-14a. Ms. Carleo also expressed support for the Natali SSAMP application. She had visited the vineyard farm site "on many occasions over the past 3 years where the managing member (Al Natali) has requested my assistance on such matters as irrigation, soil nutrients, petiole analysis, pest control. . .and canopy management". Carleo stated that the farm followed best management practices, met commercial farm eligibility criteria, and should be afforded RTFA protections. Echoing the conclusions of Dr. Pavlis and Mr. Tweed, Carleo said that "music, food and wine pairings, tasting, barrel samplings, vineyard tours and other seasonal operations represent a skillful use of farm based recreational and educational activities" under section 9h., and that "events and festivals of the entire wine industry in New Jersey are geared toward selling its farm grown product."

The CMCADB conducted a hearing on the Natali SSAMP on September 28, 2009. The minutes do not reflect that any Middle Township officials were present at the board hearing. The board administrator reported on the results of the September 10, 2009 property inspection, confirming that 10 acres were under grape

cultivation and that the property contained a building housing wine processing and storage facilities and a tasting area, several outdoor tables and chairs for customers, and a parking area. The meeting minutes reflect, without detail, that the board found Natali to be operating a "commercial farm" based on the documents submitted in support of the SSAMP application.

The board chairperson specifically asked Natali at the September 28, 2009 hearing "if the music volume is loud enough for neighbors to hear", to which Natali replied "that they do not have metallic bands, only soft music consistent with the type of band playing at other vineyards". Natali also stated that there was "about one [event at the winery] a month[,], usually noon to five, and in the summer from two to seven." He advised that Middle Township officials "have no problem with these issues if the activities approved constitute farm activities", and that "the only issue here today[] is [whether] this [is] considered legitimate farming."

The CMCADB approved the SSAMP application by Resolution 6-09 on September 28, 2009. The resolution determined that Natali had met the "commercial farm" requirements in N.J.S.A. 4:1C-3, as the property was a farm management unit over 5 acres in size, "produce[d] field crops worth \$2,500 or more annually", and satisfied the eligibility criteria for farmland assessment. With respect to the additional criterion for entitlement to an SSAMP set forth in N.J.S.A. 4:1C-9, the board found that the property was located in an area in which, as of December 31, 1997 or thereafter, agriculture is a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan. Resolution 6-09 also granted Natali's request for an SSAMP, incorporating verbatim the statements made in his August 11, 2009 letter transmitting the application to the board, as follows:

. . . the harvesting of wine grapes and production of wines, farm market/tasting bar, barrel room demonstrations and barrel sampling, hosting educational meetings and speakers, vineyard tours, farm-based recreational festivals and events featuring live music, food vendors paired with production wines, and local artisans, including Beach Plum jellies, jams and plants, where the primary purpose is the consumption or sale of the agricultural output of the farm itself is approved and the operation of the winery is approved as a site specific agricultural management practice.

A copy of the resolution was sent to the SADC, Middle Township and Natali on September 30, 2009 in accordance with N.J.A.C.

2:76-2.3(e). No one appealed Natali's 2009 SSAMP to the SADC. See, N.J.S.A. 4:1C-10.2 and N.J.A.C. 2:76-2.3(f).

C. *Natali's 2010 application to the Middle Township planning board.*

Natali appeared before the Middle Township planning board in April 2010 for site plan approval, sign location and height variances, and waivers from the township's curbing, asphalt parking, site lighting, and drainage and stormwater requirements for the property. One of the exhibits presented in support of the application to the planning board was a copy of the CMCADB's Resolution 6-09 approving the Natali SSAMP. The planning board marked that exhibit as "A-1".

Based on Natali's testimony presented in support of his application, the planning board determined, among other things, that Natali's winery operation "is a daytime one. There will be no operation after dusk (the dim part of twilight) and all public vehicles shall be cleared from the site by that time." The other relevant findings were as follows:

h. There was extended review of the "events" held on the premises. Those permitted are listed in Exhibit A-1. If it is desired to expand on those[,] applicant will seek approval of the County Agriculture Development Board for them and shall supply the Township of Middle and Middle Township Planning Board with 20 days advance written notice of the making of such application so as to allow the Township to appear at the hearing and presents its objections and desired conditions of approval, if any. The events are limited to once a month, during daytime hours. The winery itself will be open daily, noon to 5 PM in the winter and 2 PM to 7 PM in the summer. Parking attendants and traffic directors shall be present during the large events.

Amplified music may be presented but shall not exceed legal noise limits.

The planning board granted all of Natali's requests for site plan approval, variances and waivers concluding, *inter alia*, that "[e]vents shall be limited as noted in paragraph [h] above." The approval was memorialized by Resolution #101102 on May 11, 2010.

D. Ziemba's noise complaints.

Ziemba stated that in 2009 Natali began having events on the winery property that produced music loud enough to disturb Ziemba and his family on _____. More specifically, during the 2011 Labor Day weekend, Natali hosted "Wine Stock", a free, two-day festival featuring wine tastings, food, arts and crafts, raffles, and eight (8) bands performing a variety of amplified rock music from 12:00 noon to 8:00 p.m.⁴

On a Wednesday at 8:30 p.m. in September 2011, Ziemba claimed that music from events at the Natali property was of such intensity that one of Mr. Ziemba's children complained that she could not sleep.

On November 3, 2011, the Middle Township zoning officer issued Natali a written notice for violating Chapter 218 of the municipal subdivision and site plan ordinance, stating: "NOTE: This office receiving many calls on noise[,] hours of operation and number of events being held". The zoning officer advised that

THIS NOTICE SHALL APPLY AS A WARNING FOR THE ENTIRE YEAR 2011[.] YOU ARE HEREWITH ORDERED TO CORRECT THIS CONDITION IMMEDIATELY AND MAINTAIN YOUR PROPERTY IN CONTINUOUS COMPLIANCE WITH THE ABOVE ORDINANCE. REGULAR INSPECTIONS WILL BE CONDUCTED BY THIS OFFICE WITHOUT NOTICE. FAILURE TO MAINTAIN YOUR PROPERTY IN CONTINUOUS COMPLIANCE WITH THIS ORDER WILL RESULT IN A SUMMONS FOR YOUR APPEARANCE IN COURT AND/OR FINES.

NO FURTHER NOTICES WILL BE ISSUED.

Ziemba asserted that on November 12, 2011, he could not watch an afternoon football game in his living room due to loud music emanating from the Natali property. As a result, that same day Ziemba filed a noise complaint against Natali returnable before the township municipal court in Summons SC-004847. A neighbor, Mr. Cusick, who resided at _____, filed an identical complaint against Natali on November 12, 2011, Summons SC-004848.

On Saturday, January 14, 2012, Natali hosted the "Kick the

⁴The record does not reflect whether Natali, as required by paragraph h. of the municipal site plan approval pertaining to the expansion of the permitted hours of winery "events", applied to the CMCADB for approval and provided advanced written notice to the Middle Township governing body and planning board.

Winter Blues Festival" from 12:00 noon to 5:00 p.m. with amplified blues music performed in heated tents on the property.

N.J.S.A. 4:1C-10.1a. requires that "[a]ny person aggrieved by the operation of a commercial farm" must file a complaint with the appropriate county agriculture development board, so the municipal court forwarded Ziemba and Cusick's noise complaints to the CMCADB. In addition, Ziemba and Cusick filed separate RTFA complaints with the board on December 21, 2011 and January 30, 2012, respectively, alleging that offensive noise was being generated from the Natali property. Cusick's complaint was accompanied by a request for mediation pursuant to the SADC's agricultural mediation program, N.J.A.C. 2:76-18.1, et seq. The board administrator advised the SADC in a letter dated January 31, 2012 that the complaints, alleging "excessively loud music, rock bands and DJ's playing all day and night" were now pending before the CMCADB.

The board administrator notified Natali of the complaints by letters dated February 1 and 21, 2012, stating that, according to Ziemba and Cusick, the "sound emanating from the live and pre-recorded music at the events scheduled at the winery are excessively loud and disturbing to the quality of life of the complainants". In the February 21 letter, the administrator advised Natali that the board would "need to establish the dBA [sic] level of music generated" by having noise measurements taken by a certified county official at the next event at the winery scheduled on Saturday, March 31, 2012.⁵

E. *March 31, 2012 noise measurements.*

Natali, Cusick, Ziemba and representatives of the CMCADB were present when the noise readings were taken during a 15-minute period between 1:00 p.m., when a band began to play, and 1:40 p.m., when the music stopped. According to the report filed by the county's certified noise measurement technician, live music at the winery event generated noise levels of 41-45 dBA at Cusick's driveway (next door to Ziemba's residence) and, at the Cusick property corner closest to the Natali property, the levels averaged 45-48 dBA. After the band ceased playing at the Natali winery, background noise from birds and from nearby Route 47 was measured at 40-50 dBA.

⁵"dBA" is the decibel, "A-weighted" sound level in the air perceived by the human ear. In the A-weighted system, the decibel values of sounds at low frequencies are reduced, compared with unweighted decibels, in which no correction is made for audio frequency.

No measurements were taken at the Ziembra property because the wind had picked up and it began to drizzle. Ziembra stated that the noise emanating from the Natali property was not comparable to that generated when he filed his complaint in November 2011, as the stage from which the live bands had played had been moved behind the winery building which buffered the sounds.

The county noise technician concluded that on March 31, 2012, sound emanating from the live music performed at the Natali winery did not exceed the state maximum standard set forth in N.J.A.C. 7:29-1.1 et seq. of 65 dBA during the hours of 7:00 a.m. to 10:00 p.m.

F. *Mediation of the Ziembra and Cusick noise complaints.*

At the end of March 2012, Ziembra and Natali joined Cusick in filing a request for mediation, and a mediation session was held at the Rutgers Cooperative Extension Office in Cape May Court House on June 1, 2012. Ziembra and Natali were unable to arrive at a mutually-agreeable resolution of their dispute, but Natali and Cusick entered into a written agreement dated June 1, 2012 in which Natali agreed "to keep all music below 65 dBA" and Cusick agreed to drop the RTFA noise complaint filed on January 30, 2012. Copies of the agreement were provided by the SADC to Natali, Ziembra and Cusick on June 20, 2012. N.J.A.C. 2:76-18.8(h).

In a letter dated June 26, 2012, Ziembra asked the SADC to hear his complaint against Natali, and the SADC responded in a July 3, 2012 letter that the CMCADB had jurisdiction over the complaint because of the board's issuance of the 2009 SSAMP determination. N.J.A.C. 2:76-2.10(b). On July 20, 2012, Ziembra wrote to the CMCADB requesting a hearing, and on August 3, 2012 he filed another RTFA complaint against Natali, alleging unreasonable noise generated from winery activities as well as disputes regarding the "time of events, number of events, alcohol issues, minors working at events, [and] night lighting."

G. *CMCADB proceedings on the August 2012 Ziembra complaint.*

1. October 13, 2012 noise measurements.

Before the CMCADB held a hearing on Ziembra's August 3, 2012 complaint, the board retained the services of a noise engineer, Russell Acoustics, LLC (Russell), to conduct sound samples and readings at an amplified music event at the Natali winery.

On October 13, 2012, Russell set up and synchronized four (4) sound monitors, one on the edge of a tent at the Natali property's music event, and three in the immediate vicinity of the Ziemba residence. From 11:00 a.m. to 5:00 p.m. that day, the music sounds were typically 42 to 44 dBA, below the state's daytime maximum noise limit of 65 dBA.

The record does not reflect the reasons for a delay, but the CMCADB did not hear Ziemba's complaint until April 22, 2013.

2. CMCADB hearings.

Ziemba's testimony in support of his complaint centered on three (3) issues: first, the events at the Natali property, which Ziemba contended were non-agricultural activities generating noise, none of which was protected under the RTFA; second, Natali's compliance with certain provisions of the New Jersey Alcohol Beverage Control (ABC) rules; third, Natali's compliance with the 2010 municipal site plan approval.

Ziemba outlined events in which, in his opinion, "the attendees. . . are present for the event itself and not for the wine and. . . the vineyard is now operating in the atmosphere of a bar or concert venue and not a farm." He stated that the "Kick the Winter Blues" festivals were held on a regular basis and that on one occasion the festival was headlined by a well-known recording artist advertised in local newspapers and on the Natali vineyard website as a big draw for attendance. A Natali employee was quoted in a local newspaper as saying almost 1200 people had attended the festival the previous year. Ziemba reiterated his complaint about "Wine Stock", stating that up to 8 amplified rock bands had competed over a two-day period between 12:00 noon and 8:00 p.m. on Labor Day weekend in 2011.

With respect to ABC compliance, Ziemba claimed that for other amplified musical events, performers at the Natali property were underage and that, again, attendees were present to see the bands, not to drink wine. He stated that ABC rules prohibit individuals under the age of 18 from being employed by or entertaining at a licensed facility for on-premise consumption of alcoholic beverages.

Ziemba also questioned how the activities currently being held at the Natali winery comported with the 2010 site plan approval, including the number of events permitted and hours of operation at the winery.

Ziembra referred to the SADC's Hearing Report In the Matter of Hopewell Valley Vineyards, Hopewell Township, Mercer County (SADC ID #786) ("HVV"), approved on March 24, 2011, in which the SADC determined that ancillary entertainment-based activities are "permitted [as] a sidelight to the consumption of wine" and that "other forms of entertainment, like comedy acts, cross the line from being supplemental to the consumption of [the] agricultural product to becoming a primary nonagricultural activity that cannot enjoy the protections of the [RTFA]" because "the attendees are there for the event itself and not the wine."

In sum, Ziembra said he was not complaining about "traditional farm activities", but was disturbed by "the bass drum and the singing and the bands that I can hear in my house" since the events started at the Natali winery in 2009, and repeated the assertion in his written complaint that his daughter complained about not being able to sleep.

Natali questioned Ziembra about the decibel readings from the county technician and Russell's tests reflecting that the noise emanating from the winery events were some 20 dBA below the maximum permitted by state law. Natali testified that "the right to farm. . . is about attracting people to the farm", and that "the music element is a -- is an accessory. It's -- it's an attempt to bring about a come-hither response. . . This is -- this has to be sustainable agriculture. We have to bring people to the farm. . . [For] sustainable agriculture, you have to have revenue. In order to have revenue, you have to attract people to the farm."

He denied that the winery was a bar or engaged in loud entertainment, and referred to the letters supporting his operation from Dr. Pavlis, Mr. Tweed and Ms. Carleo. Natali also argued that as a result of obtaining the 2009 SSAMP approval, the activities complained of by Ziembra must be considered generally acceptable agricultural practices and are entitled to the irrebuttable presumption that they do not constitute a public or private nuisance.

Natali stated that, after the noise complaints were made, he turned around the stage on which the musical acts perform so that "the volume of the sound [now] goes into the salt marsh rather than into the residential area." He also purchased and installed soundproofing material. Natali questioned why Ziembra was the only complainant, and read a petition signed by other

neighbors along Cardinal Drive who supported the retention of farmland adjacent to their properties, considered Natali a good steward of the land, and had no objection to the "farm practices and marketing activities which enable [Natali] to sell the agricultural output of the farm." Natali clarified that underage performers were present with parental consent and that no one under 21 years of age performed in the area of the winery property he called the "bonded premises" under ABC regulations.

Upon questioning by CMCADB members, Natali stated that no beer or other alcoholic beverages are permitted on the property during the events; the highest amount of cars on the property was 175 and the maximum number of attendees was 600; and that municipal police never issued summonses for noise violations or disorderly activity on the property, only asking Natali, as a matter of courtesy, to lower the volume and redirect the sound.

Public comments were from a local beekeeper who set up demonstration hives at the Natali winery and who stated that the music was not loud and that attendees were present to socialize and drink wine; and from the president of the BOA, who said that ancillary events bringing people to the farm amount to agritourism that goes hand-in-hand with the direct market sale of agricultural products.

The board reconvened on May 20, 2013 to publicly deliberate on the issues raised at the April 22 hearing. The CMCADB's counsel first summarized the testimony and evidence, and instructed the board that if the activities complained of by Ziembra were consistent with the SSAMP previously issued to Natali in 2009, then those activities were entitled to the irrebuttable presumption that they do not constitute a nuisance. According to counsel, even if the noise exceeded state standards, agriculturally-generated noise is exempt from the state noise control regulations at N.J.A.C. 7:29-1.5(a)(1). The board attorney also advised that if the activities were not generally accepted agricultural practices, then Natali would not be entitled to the presumption regarding nuisances, and the disputed activities would be subject to the requirements of applicable local ordinances, regardless whether the decibel measurements were below the maximum permitted by state law. The hearing transcripts reflect that at no time did the CMCADB attorney offer any guidance or advice to the board on the effect of the HVV decision.

Board members observed that the 2009 SSAMP was broad enough to protect the activities complained of by Ziembra. There was

discussion about the pending agricultural management practice (AMP) regulation being drafted by the SADC for on-farm direct marketing facilities, activities and events, and how that AMP had any bearing on the Ziemba-Natali dispute. The board attorney had previously advised that the draft AMP was persuasive, but not binding, authority, and that the board could "consider it for what it's worth" until such time as the regulation was published and became effective as a formal rule.

A board member observed that Natali had done everything possible to correct the noise problem, that music was needed to bring patrons to the winery, and that the noise levels did not exceed state standards. The board unanimously made three (3) determinations regarding the activities complained of by Ziemba at the April 22, 2013 hearing: (1) that the activities were consistent with the 2009 SSAMP and, therefore, were protected by the RTFA; (2) that the activities constituted generally-accepted agricultural practices; and (3) that the activities were protected by the "irrebuttable presumption" of the RTFA---citing N.J.S.A. 4:1C-10---and "are exempt from local control."

3. CMCADB memorializing resolution.

The board approved a resolution at its July 22, 2013 meeting memorializing the action taken at the May 20 meeting. The resolution made several factual findings, including that Natali operated a "commercial farm" based on "the totality of Mr. Natali's testimony and the evidence presented"; that the events depicted by Ziemba "are of the type and nature as described in the [2009] SSAMP and constitute accepted agricultural practices"; that "the sound emanating from the Farm during an event which is typical of and consistent with the events sponsored by the Farm" is "ancillary to the consumption or sale of the agricultural output of the Farm" and does not exceed any governmental noise standards; that there was no proof that Natali was operating in violation of any applicable Federal or state law or regulation; and that Ziemba had provided no credible evidence that the primary purpose of the events at the winery was "[un]related to the agricultural production or output of the" winery.

Based on the factual findings, the resolution concluded that, as a matter of law, the 2009 SSAMP shielded Natali from Ziemba's complaint based on the irrebuttable presumption in N.J.S.A. 4:1C-10 that generally accepted agricultural practices do not constitute a public or private nuisance.

Ziemba appealed the CMCADB resolution to the SADC by letter dated June 6, 2013. The SADC received a copy of the board's July 22, 2013 resolution on August 13, and transmitted Ziemba's appeal to the OAL as a contested case on August 20, 2013.

II. OAL proceedings

A. January 14, 2014 trial.

Ziemba's testimony and evidence were similar to what he presented to the CMCADB at the board's April 22, 2013 hearing. In addition, Ziemba presented copies of Natali website and Facebook-page news for September 2011 events, including announcements of upcoming shows by musical groups with high school-age performers, by other music bands, and initial thoughts for a country music festival at the winery.

Ziemba included September 2011 Facebook postings which included a "thank you" from Victory Baking Services for allowing them to bake a cake for a wedding at the winery and an announcement from Cape May BBQ & Catering Co. that there were "2 Big Weddings Scheduled at Natali Vineyards in October".

Ziemba testified that while the noise levels had dropped, the frequency of events at the Natali winery had not decreased and he was still upset with the amplified music. Since 2011, Ziemba estimated that there was one (1) event per month between October and April. Starting Memorial Day weekend, there were regular events on Mondays and Wednesdays from 4:00 p.m. to 8:00 p.m. or 9:00 p.m., and events each weekend day from 12:00 noon to 9:00 p.m. The frequency and time of Natali winery events starting on Memorial Day weekend, as stated by Ziemba, were inconsistent with the once-a-month events, and 2:00 p.m. to 7:00 p.m. operating hours, imposed in the 2010 site plan approval.

The CMCADB administrator, Barbara Ernst, testified with regard to the action taken by the board on Natali's 2009 SSAMP application and disposition of the 2013 Ziemba complaint. The board attorney presented her with a "Commercial Farm Certification" signed by Natali on October 28, 2013 and documents satisfying commercial farm eligibility criteria set forth in N.J.S.A. 4:1C-3.

In response to questioning by the ALJ, Ernst said that Natali's 2009 application was the first SSAMP the board had ever considered, and that the benefits to the present and future use of the Natali property resulting from granting the SSAMP

outweighed any detriment to the nearby community. The judge and Ernst also engaged in this colloquy regarding the 2009 SSAMP and what the ALJ characterized as "festivals, live music. . . and other events in addition to the farming operation":

Q: Do you recall if the board specifically considered the imposition [of these activities] on the residential neighbors?

A: No. Because we -

Q: No, you don't recall or no, the board didn't consider it?

A: No. No, I don't recall that we considered it, because when we associated live music with a winery, we associated ambient music, you know, soft music, something that was mild. We didn't consider any loud music.

Q: If presented as loud music, would that have --- well, that's a --- that's pretty speculative. But I'll ask you, would loud music, the knowledge of loud music, on the property have impacted the ultimate decision, or would it have just been one of many other factors that you considered?

A: The music --- the impact of loud music was considered, and I said this before, what is considered as loud music to you, may not be loud music to me. And the board is knowledgeable enough and informed enough that they would have required some kind of additional back-up material or data to specifically say that the music that was going to be performed or played at this farm would be in excess of the noise levels.

[01/14/2014 OAL transcript p.55, line 17 to p.57, line 9].

Ernst also testified that:

The purpose of an SSAMP "is for an approval of an agricultural management practice which is outside of [] normal agricultural production" [OAL transcript p.35, lines 10-13]; that Natali's 2009 SSAMP provided protections additional to those afforded by the RTFA [OAL transcript p.51, lines 21-25]; and that when a commercial farm seeks to expand RTFA protections, the governing standard is "the best interest of the community [and] the best interests in continuing the agriculture production of the farm [OAL transcript p.54, lines 13-17].

For Natali's 2009 SSAMP, the board took testimony from Natali concerning how the disputed events "tied into an agricultural practice", "furthered his [Natali's]

agricultural production", and "that the agricultural purpose predominated". [OAL transcript p.39, lines 9-24].

Natali stated that he purchased the winery property in 2000 but does not live on it. From 2000 to 2004 the vineyard grapes were cultivated, he obtained Federal and New Jersey winery licenses in 2004, and started selling wine in 2005. The winery began holding events such as wine tastings, grape stomping, educational tours and some music beginning in 2006 and 2007, and in 2007 or 2008 it was brought to his attention that Middle Township would require site plan approval. Natali stated that municipal officials directed him to the CMCADB for the 2009 SSAMP approval. He repeated the testimony provided to the CMCADB that sound barriers were erected in 2012 and that in 2013 the music stage was reoriented so that it faces the marsh and not Cardinal Drive.

The Natali winery has three (3) full-time employees and eight (8) seasonal, part-time workers. The parking lot on the property can accommodate 125 cars, with room for overflow parking. Parked cars reached a peak of 175, which Natali estimated generated a crowd of 600 people, over a 6-hour period in April 2009, at which event he paid the township police department to control traffic. The most attendees at any event were 1000 over a 2-day period. Natali said that income from festivals and music events account for 26% of total farm income. No other testimony or documentary evidence regarding dollar income from wine sales, either generally or as a component of the disputed activities, was presented by Natali, who only stated that the winery "produces 1,500 cases". [OAL transcript, p.105, lines 5-6].

Natali said that he doesn't "initiate" fundraisers and weddings at the winery but that if customers approach the facility with such a request, then Natali directs them to the municipality for a permit. In response to the judge's questioning, Natali stated that the winery has hosted only two (2) weddings; with respect to income from events, Natali charges venue fees to vendors for setting up their stands. He also charges a license fee to restaurants selling Natali's wines which helps defray his costs associated with placing the wines at off-site outlets permitted by state law. The winery has a gift shop generating a small amount of income. Income from venue fees, license fees, the gift shop and the sale of "bulk fruit wines" is "much less than the minimum threshold that's required by the [RTFA], which is 51 percent." [OAL transcript p.72 lines 9-13].

Natali advised the judge that the SADC's proposed AMP for on-farm direct marketing facilities, activities and events "specifically talk about those types of activities that are going to be allowed, music, face painting, corn mazes, picnicking, all those sorts of things are allowed activities. . . according to the SADC, these activities are permitted from 6 a.m. to 10 a.m. [sic] every day of the year." [OAL transcript p.106, lines 18-24].

The judge concluded the testimonial part of the hearing by expressing his opinion that "the actual noise [from the events] . . . might not have anything to do with whether or not [Natali is] permitted to do it. . . ." [OAL transcript, p.95, lines 3-6].

In closing arguments before the OAL, Natali stated that the HVV case involved a preserved farm subject to additional restrictions, and that festival and music events were necessary to attract customers to the winery. Ziembra quoted from the holding in HVV that special events at wineries must be subordinate and accessory to the consumption of the farm's agricultural output. He stated that the common element to his complaint about Natali winery events was that they all involved amplified music that has adversely affected his lifestyle on Cardinal Drive. The board's counsel argued that since the 2009 SSAMP was not appealed, Natali is entitled to the RTFA protections resulting from that determination; alternately, the CMCADB attorney argued that even without the 2009 SSAMP, the activities at the Natali winery which were the subject of dispute with Ziembra are still entitled to RTFA protection.

B. February 28, 2014 Initial Decision.

After reviewing the testimony of Ziembra, Ernst and Natali, the ALJ found that Natali: operated a commercial farm; obtained the 2009 SSAMP "seeking approval to host events beyond the scope of the RTFA, which afforded the vineyard with an irrefutable presumption that it was engaging in an authorized use of the property"; had taken steps to mitigate noise from events on his property, "although he had no obligation to do so, because he possessed a valid SSAMP"; complied with the SSAMP and was protected by the RTFA.

The judge distinguished the case before him from HVV by noting that "the vineyard owner [there had] failed to obtain a Site Specific Agricultural Management Plan pursuant to N.J.S.A. 4:1C-10." Natali, on the other hand,

sought and received a SSAMP which gave him the authority to host festivals with live music. He did nothing more than the SSAMP permitted. As a matter of law, Ziembra cannot overcome the irrefutable [sic] presumption afforded by the SSAMP.

The ALJ concluded that Natali was permitted to continue to operate the vineyard in compliance with the SSAMP, affirming the CMCADB's July 22, 2013 resolution and denying Ziembra's request for a decision that the disputed activities at the Natali property were beyond the scope and protection of the RTFA.

C. *Exceptions to the Initial Decision.*

Ziembra filed exceptions to the Initial Decision with the SADC on March 7, 2014, reciting relevant portions of the HVV case and repeating his claim that "people are at Natali Vineyards for the event". No other parties filed exceptions.

III. LEGAL DISCUSSION

A commercial farm is entitled to RTFA protection. "Commercial farm" is defined in N.J.S.A. 4:1C-3 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", P.L.1964, c. 48 (C.54:4-23.1 et seq). . .

In order to be eligible for RTFA protection, the commercial farm must also satisfy the location or operational requirements set forth in N.J.S.A. 4:1C-9. The statute requires that the commercial farm be "located in an area in which, as of December 31, 1997 or thereafter, agricultural is a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan, or which commercial farm is in operation as of [July 2, 1998]. . ." Finally, no RTFA protection is available unless the commercial farm is in compliance with applicable state and Federal laws and regulations and does not pose a direct threat to public health and safety. Id.

A. *Commercial Farm Determination.*

The SADC notes that the record of the CMCADB proceedings on Ziembra's complaint in 2013 does not reflect a commercial farm eligibility analysis of Natali's operation, and we remind boards

that the disposition of a farmer-neighbor or farmer-municipality dispute will always entail a determination of N.J.S.A. 4:1C-3 and -9 compliance before the merits of the complaint can be addressed.

The failure of the CMCADB to engage in such an analysis when it dealt with Ziemba's noise complaint in April 2013 was partially addressed by introducing Natali's commercial farm certification and supporting documents dated October 28, 2013---six (6) months after the April 2013 board proceedings---as an exhibit in the OAL case. Those materials reflect farm income on IRS Form Schedule F for 2012 amounting to \$17,689 for "sales of livestock, produce, grains, and other products . . . raised", and a 2013 final/2014 preliminary tax bill showing that the property is farmland assessed and contains 21.25 acres. The property's zone classification was not part of the October 28, 2013 submission, but Middle Township's RC and RR zone classifications that include agriculture as a permitted use were previously cited, *supra*, at page 4 and fn.3. Accordingly, we **AFFIRM** the ALJ's determination that Natali is a "commercial farm" as defined in N.J.S.A. 4:1C-3.

B. *SSAMP Protection.*

The RTFA provides that when an SSAMP is obtained from a county agriculture development board (CADB), the commercial farm is not only protected against municipal and county ordinances that unreasonably interfere with the specific agricultural activities on the farm deemed to be "generally accepted" by the CADB, but also is entitled to an irrebuttable presumption that those activities do not constitute a public or private nuisance. N.J.S.A. 4:1C-9 and 10.

In Township of Franklin v. den Hollander, 338 N.J.Super. 373 (App.Div.2001), *aff'd*, 172 N.J. 147 (2002), the court recognized that preemption of local ordinances was available only after a balance between engaging in legitimate agricultural operations and the municipality's protection of the public interest is struck by the CADB in favor of the farmer. 338 N.J.Super. at 390-91, 172 N.J. at 153. Curzi v. Raub, 415 N.J.Super. 1 (App.Div.2010), expanded the den Hollander "balancing test" by requiring that disputed agricultural activities be weighed against the interests of private property owners who might be adversely affected by the farming operation, warning that "failure to do so is an abuse of discretion." 415 N.J.Super. at 23. The substantial protections the RTFA affords commercial farms who obtain an SSAMP necessitates a careful and broad-

ranging analysis of the commercial farm's SSAMP request, competing public and private interests, and relevant judicial and SADC precedent. These considerations also must inform CADB and SADC decision making when a previously-issued SSAMP is implicated in a subsequent compliance or enforcement dispute between the commercial farmer, a municipality and/or an affected private property owner.

An SSAMP entitles a commercial farmer to engage in the activities listed in N.J.S.A. 4:1C-9 ("section 9") and/or in agricultural practices that relate to one or more of the permitted activities in the statutory list. Final Decision, Bailey v. Hunterdon County Agriculture Development Board, et als., OAL Dkt. Nos. ADC 2759-09, 2788-09 and 8130-09, pp.28-29. An SSAMP can also be sought when the activity for which the commercial farmer is seeking protection is not addressed in an agricultural management practice recommended in SADC regulations. N.J.A.C. 2:76-2.2(d).

The SSAMP process is *not*, as testified in the OAL proceedings, a mechanism "for an approval of an agricultural management practice which is outside of [] normal agricultural production" [OAL transcript p.35, lines 10-13]; or for "protections additional to those afforded by the RTFA [OAL transcript p.51, lines 21-25]. We therefore **REJECT** that portion of the Initial Decision holding that an SSAMP "gives a commercial farmer additional protections, that may not have been originally afforded by the RTFA" (Initial Decision, p.4) Further, we **MODIFY** the Initial Decision by reaffirming the den Hollander and Curzi requirements that SSAMP protection can be provided only after balancing the commercial farmer's interest in engaging in legitimate agricultural operations with the interests of the municipality, as expressed in local ordinances, and those of affected private property owners.

Section 9 activities contain either explicit protection of the methods directed toward growing agricultural commodities or, in the case of a farm market, contain a required agricultural output component. In our findings in HVV, we stated that section 9 emphasizes the "protection of agricultural production activities", and that the protection of agricultural-related educational and farm-based recreational activities must be based on a "direct, primary connection to agricultural production." Id. at pp.14-15. Accordingly, we disagree with the concept that any activity or event attracting customers to a farm winery is entitled to RTFA protection. The SADC previously held that "not every marketing tool employed to get customers to a winery is

recognized in the RTFA". HVV at p.21. Instead, there must be a clear link between the activity or event and the marketing of the farm's wine. Id.

Natali was applying for an SSAMP for a farm market, but the board did not ask for, and Natali did not present, materials showing compliance with the farm market criteria set forth in N.J.S.A. 4:1C-3. Nor was any testimony or evidence presented regarding the kinds of music proposed as part of the SSAMP other than Natali's statement that there would be no "metallic bands, only soft music consistent with the type of band playing at other vineyards". This was consistent with the board administrator's recollection in OAL testimony that when the CMCADB "associated live music with a winery, we associated [it with] ambient music, you know, soft music, something that was mild. We didn't consider any loud music."

The specific practices for which Natali sought SSAMP protection were the harvesting of grapes; the production of wine; selling the wine at the winery's tasting room; barrel room demonstrations; hosting educational and organizational meetings and speakers; and events and festivals, including those featuring live music, which are the focus of Ziemba's RTFA complaints.

In the HVV decision, the SADC recognized that certain components of a winery operation can constitute generally acceptable agricultural practices entitled to RTFA protection under N.J.S.A. 4:1C-9 provided the winery is in compliance with relevant ABC regulations and licenses. As applied to Natali Vineyards, we repeat them here: (1) producing, processing and packaging of wine; (2) wine drinking, sampling or tasting, including at a "tasting bar"; (3) winery tours and wine education classes, including barrel room demonstrations; (4) Garden State Wine Growers Association "Wine Trail" events; (5) the sale of Natali's wine. Consistent with our holding in HVV, the hosting by Natali of educational meetings and speakers is entitled to RTFA protection provided those activities are related to marketing the agricultural output of the winery, as permitted by N.J.S.A. 4:1C-9h. Natali's SSAMP application citing the hosting of "organizational" meetings was not supported by sufficient evidence in the record and, therefore, those activities are not entitled to section 9h. protection.

The SADC determined in the HVV case that the "Wine Trail" days sponsored by the Garden State Wine Growers Association (GSWGA) is a permitted marketing technique on wineries. The GSWGA

selects and promotes several days a year as New Jersey "Wine Trail" days to encourage people to visit and buy wine from our state's wineries. When these events take place, wineries open their shops and tasting areas to market the consumption of their wines.

The SADC's position in the HVV case, and its determination of commonly-accepted marketing techniques, has been reinforced by promulgating, consistent with the RTFA, an agricultural management practice (AMP) protecting on-farm direct marketing events employed to facilitate and provide for direct, farmer-to-consumer sales of the agricultural output of the commercial farm and products that contribute to farm income. N.J.A.C. 2:76-2A.13, et seq.

An "on-farm direct marketing event" must be accessory to, and serve to increase, the direct market sales of the farm's agricultural output "and occur seasonally or periodically". N.J.A.C. 2:76-2A.13(b). The regulation recognizes that "product-based events" can include an "agricultural or horticultural product festival." Id. The AMP also protects "ancillary entertainment-based activities" as "incidental components of on-farm direct marketing activities". Included as an example of such ancillary entertainment is "background live or recorded music". Id.

C. *Required Balancing of Interests.*

The 2009 SSAMP resolution was incomplete in several respects. Despite the clear direction provided in den Hollander, *supra*, the board did not engage in a balancing of municipal and commercial farmer interests. Instead, the CMCADB's Resolution 6-09 provided RTFA protection for totally undefined "events featuring live music", without also making a factual determination how ". . . the primary purpose [of the events] is the consumption or sale of the agricultural output of the farm itself[.]" This blanket approval for all aspects of any type of event at the winery failed to consider any limits on the frequency and size of the events, and failed to articulate the den Hollander balancing of the right to engage in legitimate agricultural activities against the resulting noise, traffic, hours of operation, lighting and other public health and safety concerns expressed in municipal ordinances.

While the 2009 SSAMP resolution was not appealed, the practical effects and legal implications arising from the resolution's deficiencies became evident when Ziembra filed the noise

complaints against the Natali vineyard.⁶

The CMCADB's consideration of Ziemba's 2012 noise complaints at the board hearing in April 2013 was preceded by the 2010 approval of the Natali site plan by the Middle Township planning board, by the SADC's March 2011 findings in HVV, and by Curzi v. Raub. The board's July 22, 2013 resolution denying Ziemba's complaint and upholding the 2009 SSAMP failed to address the relevance of those actions in the context of the Natali-Ziemba dispute.

The planning board approval appears to be inconsistent with the SSAMP sought by Natali from the CMCADB in September 2009 and with the position taken by him when the board heard Ziemba's noise complaint in April 2013. The planning board approval limited the winery's operations to the daytime ("no operation after dusk") and limited the hours of operation from noon to 5:00 p.m. in the winter and from 2:00 p.m. to 7:00 p.m. in the summer. Natali was also required to seek approval from the CMCADB, with advanced notice to Middle Township and the township planning board, if he wished to expand the events set forth in the 2009 SSAMP which, as noted on page 6, *supra*, contained only a general description that "farm-based recreational festivals and events featuring live music" would occur. Since there was no specific list of events, there could arguably be no "expansion" requiring notice to the municipality. We also note that the list did not include the hosting of weddings, yet Natali stated to the ALJ that weddings had occurred on the property.

The CMCADB's disposition of Ziemba's noise complaint did not address whether the winery operations in 2013 were consistent with the site plan approval and how, if necessary, the 2009 SSAMP and the 2010 site plan approval could be harmonized. We **MODIFY** the Initial Decision by holding that the need to address the site plan approval was part of the balancing test required by den Hollander, as the action taken by the township land use board was an expression of the municipal interest in regulating Natali's agricultural activities. Local action pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq., approving agricultural activities is significant because a commercial farm's compliance with a land use board approval will shield the farm from municipal enforcement action and nuisance complaints arising from the terms of the approval. Therefore, we **MODIFY**

⁶ OAL testimony incorrectly indicates that the SADC provided guidance and expressed no particular concerns regarding the 2009 SSAMP. [OAL transcript, p.54, lines 9-12]. We take administrative notice that SADC staff was not asked by the CMCADB to give guidance or express a position on the SSAMP.

the Initial Decision by also determining that if a commercial farmer obtains land use board approval for agricultural activities before obtaining an SSAMP, the commercial farmer cannot ignore the terms of the land use approval and maintain RTFA protection without seeking relief from the land use board or from the applicable county agriculture development board as to specific provisions of the municipal approval.

Further, the appellate division issued the Curzi v. Raub decision on July 30, 2010. Curzi held that the interests of affected private property owners must be considered when a CADB reviews an SSAMP application and that the board must balance the commercial farm and neighbor's interests. By filing the noise complaint in 2012, Ziemba presented genuine issues regarding the validity and meaning of the 2009 SSAMP, and the board was required to engage in a careful weighing of Natali's operation, including whether events and festivals are permitted section 9 activities, and Ziemba's interest in the peaceful enjoyment of his property.

Therefore, in accordance with both den Hollander and Curzi, supra, the CADB needed to address Ziemba's concerns about the frequency and duration of, and the noise generated by, the events, as well as the interplay between the 2009 SSAMP and the 2010 municipal site plan approval.

In March 2011 the SADC issued its HVV report. Contrary to the testimony in the record before the board and the OAL, at the time of the SADC's hearing report Hopewell Valley Vineyards was not located on a preserved farm. We determined that piano and other background music are appropriate accompaniments to wine drinking because they are

complementary and subordinate. . .and intended to promote an appropriate atmosphere for relaxation and enjoyment. . . The reason the Committee finds the musical entertainment. . .to be permitted is that it is a sidelight to the consumption of wine; musical performances that lose their status as a modest supplement to wine drinking turn the winery into a nightclub for which there is no RTFA protection. [SADC Decision, p. 18].

The decision provided an important SADC interpretation of how the RTFA applies to the role of music at wineries.

In this case, testimony and evidence has focused on a few specific types of events involving amplified music at the Natali winery: the "Kick the Winter Blues Festival" held one day each

January from 2009 through 2012 where blues-type music is utilized to attract customers to the winery and is played as an accompaniment to the overall winery experience from noon to 5:00 p.m. and outside food vendors are present; "Wine It Down Wednesdays" whereby visitors are invited to the winery on Wednesday evenings to visit the winery, enjoy wine, and listen to music accompaniment; and the "Wine Stock" event where approximately eight rock-type bands competed with each other over a one or two-day period of time. "Wine Stock" is also the event at which Ziemba alleges underage performers were present. Noise complaints by Ziemba accompanied each of the events.

In keeping with the SADC's position in the HVV case, and consistent with our subsequently issued on-farm direct marketing AMP, we reiterate the HVV finding here, and therefore **MODIFY** the Initial Decision by holding, that *background* music at a winery is eligible for RTFA protection subject to the conditions set forth in the HVV report, that is, that such music meet the proportionality test of being subordinate and accessory to consumption of the farm's agricultural output (wine). HVV, p.18. We find that the music played during "Wine It Down Wednesdays" is background music offered at the winery, as part of its weekly routine to attract customers to the winery; we further find that music offered at the "Kick the Winter Blues Festival" can be reasonably considered as background music, and is similar to generally accepted practices on New Jersey wineries featuring and marketing the farm's agricultural output. "Wine Stock", however, fails to meet the test of providing only background music, and we find that a competition between rock bands over a one or two day period fails to meet the test of being subordinate and accessory to consumption of wine.

Further, unlike the winery in the HVV case, which was located hundreds of yards from the nearest residences other than that of the winery owner's, the Natali winery facilities are located, and events occur, immediately adjacent to a residential subdivision whose occupants can be more directly affected by the noise-generating activities intentionally designed by Natali to attract customers. The CMCADB's July 22, 2013 resolution addressing the Ziemba complaint did not deal with these factual and legal concepts, including the effect of the 2010 site plan approval on Natali's operations.

The OAL's reliance on the 2009 SSAMP in denying the Ziemba complaint and upholding the board's 2013 resolution failed to appreciate the effect of the site plan approval and the HVV and Curzi v. Raub cases. But the judge's placing of exclusive

weight on the 2009 SSAMP appears to suggest that, once issued, an SSAMP is immutable. In essence, the OAL decision insulates Natali from the Ziemba complaint because Natali "did nothing more than the [2009] SSAMP permitted" without, however, analyzing what exactly the SSAMP permitted him to do. We do not expect the judge's holding to mean that a commercial farmer who obtains an SSAMP for a farm market cannot be subject to a later complaint, e.g., for creating new and hazardous traffic conditions on an adjoining roadway or an increase in light spillage from the farm market onto abutting residential property. Accordingly, due to the inadequacies in the 2009 SSAMP resolution and in the handling of Ziemba's complaint in 2013, we **MODIFY** the Initial Decision by concluding that RTFA protection of the Natali winery's activities cannot be based on those CMCADB proceedings and is instead subject to the requirements of this Final Decision; we also **REJECT** the Initial Decision upholding the board's dismissal of Ziemba's complaint.

D. Compliance with State and Federal Law.

The Initial Decision did not address Ziemba's claim that the Natali winery engaged the services of bands featuring underage performers. While there was testimony in the record that teenaged performers were not physically present on the "bonded premises" and that underage performers were entertaining with parental consent, there was no explanation of what the "bonded premises" physically comprised and no evidence presented indicating such consent. The record was also unsettled on whether and how underage individuals are employed at the winery and the employment status, if any, of the band performers. All of these issues implicate New Jersey Alcohol Beverage Control (ABC) laws and regulations that are beyond the expertise of the SADC. For example, the ABC regulation at N.J.A.C. 13:2-14.1(b) prohibits a licensee from allowing an individual under 18 to be employed as an entertainer unless "such minor's employment shall be authorized pursuant to N.J.S.A. 34:2-21.1, et seq." The latter statute, governing employers under the jurisdiction of the New Jersey Department of Labor and Workforce Development, contains various technical requirements for employing individuals under 21. Entertainers at premises licensed by the ABC are considered employees of the licensee (ABC Handbook for Retail Licensees, Revised July, 2011, p.30), but underage individuals can only be employed on the licensed premises if they obtain an ABC employment permit. N.J.A.C. 13:2-14.2(a).

In addition, the SADC lacks the expertise to determine what Natali called the "bonded premises" and what the ABC law calls

the "licensed premises". The "licensed premises" is

The physical place at which a licensee is or may be licensed to conduct and carry on the manufacture, distribution or sale of alcoholic beverages, but not including vehicular transportation. [N.J.S.A. 33:1-1].

Our concerns here rest with the requirement that RTFA protection cannot be given to a commercial farmer operating in violation of applicable state laws and regulations.

IV. CONCLUSION

Given the parties' substantial time and expense in connection with this administrative litigation, the SADC has determined that it will not exercise the option of remanding the case to the OAL in accordance with N.J.A.C. 1:1-18.7(a).

Applying all of the evidence to the legal principles set forth above, the SADC **MODIFIES** the Initial Decision as follows:

Because the CMCADB did not engage in the den Hollander and Curzi balancing of interests in 2013, deference must be given to the 2010 land use board approval. Subject to the limitations below, Natali's winery music events are legitimate marketing activities and are entitled to RTFA protection if the music offered is background music and meets the proportionality test of being subordinate and accessory to consumption of the farm's wine, such as the "Kick the Winter Blues Festival" and "Wine It Down Wednesday", and further provided that such music events are held in compliance with the terms of the 2010 site plan approval including, but not limited to, hours of operation; frequency of events; amplification of music not exceeding "legal noise limits", meaning 65 dBA during the hours of 7:00 a.m. and 10:00 p.m. ("daytime standard"), and 50dBA during the hours of 10:00 p.m. and 7:00 a.m. ("evening standard"); and expansion of such events only with the approval of the CMCADB upon 20 days advanced written notice provided to the municipal governing body and land use board. We further conclude that any such application for expansion(s) must be on notice to all property owners within 200' of the Natali property.

In addition to the municipal site plan approval requirement that the winery operation comply with "legal noise limits", Natali agreed in the mediation with Cusick to abide by the maximum permitted noise limit of 65 dBA between 7:00 a.m. and 10:00 p.m., and that decibel level was not exceeded when the CMCADB took noise measurements in March and October 2012. Therefore,

and due to the proximity of the Natali winery facilities and events to an adjoining residential neighborhood, amplified music at Natali winery may not exceed the maximum daytime and evening noise standards set forth above. Should Natali wish to exceed the noise standards set forth herein, he can seek relief by applying to the CMCADB for an SSAMP in accordance with SADC regulations.

Music events featuring bands whose performers are underage are not entitled to RTFA protection, regardless of the location of the event on or off the "bonded" or "licensed" premises, because it is reasonable to conclude that many attendees are present at the event to see the performance and not to drink wine due to state laws prohibiting consumption of alcoholic beverages by individuals under the age of 21. N.J.S.A. 9:17B-1b.

Weddings are not currently entitled to RTFA protection at the Natali winery property. See, HVV, p.22.

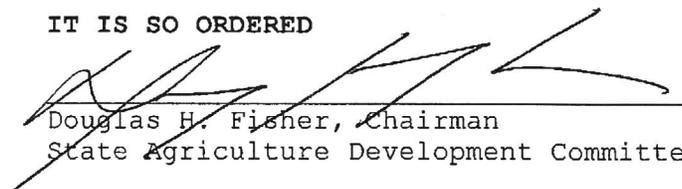
There was nothing in the record regarding Ziemba's complaint about "night-lighting" and the issue was not dealt with in the 2010 site plan approval; accordingly, with respect to lighting, Natali may apply to the CMCADB for an SSAMP or Ziemba can file a complaint with the board on that issue.

Since the record lacks evidence regarding compliance with the "farm market" definition in N.J.S.A. 4:1C-3 and RTFA protection for the operation of a farm market in accordance with N.J.S.A. 4:1C-9c., Natali may reapply to the CMCADB, in accordance with SADC regulations, for an SSAMP to operate a farm market.

We reiterate that Natali, like all eligible commercial farmers, can engage in activities not protected under the RTFA, but municipal and county regulation of those activities will not be preempted.

IT IS SO ORDERED

Dated: July 24, 2014



Douglas H. Fisher, Chairman
State Agriculture Development Committee

S:\RIGHTTOFARM\Cases\CAPEMAY\1354 - Natali\Final Decision fv.doc