

June 29, 2007

(via email and regular mail)

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Re: Right to Farm
in re Brickyard, LLC
SADC ID# 649

Dear Gentlemen:

Enclosed please find a copy of the hearing report in the above-captioned matter. The State Agriculture Development Committee (SADC) adopted the report and the recommendations set forth therein at its meeting on June 28, 2006.

By copy of this letter, and pursuant to N.J.S.A. 4:1C-10.1c, the SADC is forwarding a copy of the hearing report to the Monmouth County Agriculture Development Board (CADB). The CADB is required to hold a public hearing and issue its findings and recommendations within 60 days of receipt.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Marci D. Green
Chief of Legal Affairs

Encl.

c: Harriet Honigfeld, Monmouth CADB

State Agriculture Development Committee
Right to Farm Conflict Resolution

Hearing Report

Complainants: Susan and Russell Bohlin
Township of Howell

Respondent: Brickyard, L.L.C.

Hearing Dates: April 12, June 14, August 2, August 4, September 26,
September 27, December 8, 2006

I. Background

Brickyard, LLC (hereafter “Brickyard”) owns approximately 161 acres in Howell Township, Monmouth County (Block 224, Lots 17,17.01, 17.02, 28-32, hereinafter “the property”). Brickyard purchased the majority of the property in 2003 and an additional lot in 2005. Eighty of the 161 acres are deemed appurtenant woodlands. Prior to Brickyard’s purchase, the property was used as a horse farm.

Kevin Skudera is the General Partner of the partnership that is the sole member of Brickyard, LLC.

After Brickyard’s purchase, it leased portions of the property to tenants that board horses and utilize land for pasturing. Additional agricultural activities included renting land to a farmer who kept 40 goats, 200 chickens, 10 beef cattle and four calves during 2003-2004. These animals were removed in 2004 or 2005. Brickyard has also cut and processed trees grown on the property.

In June 2005, Brickyard applied for subdivision approval to the Township of Howell (Township). The subdivision plan originally called for 40 housing units and was revised a few times over the course of the application. In June 2006, the Township granted final subdivision approval for 18 houses.

In November 2005, Russell F. Bohlin, an adjacent landowner, submitted a right-to-farm complaint to the Monmouth County Agriculture Development Board (CADB) on behalf of 62 local residents, including himself and his wife, Susan. The complaint asked the CADB to “investigate the clearing of approximately +/- 30 acres of 30 to 40 year old trees and the importation of 1000+ tandem dump truck loads of soil of unknown origin.” The complaint alleged that these activities were all “conducted in furtherance” of residential development of the property.

The Township joined the Bohlin complaint in December 2005 and also informed the CADB that it had issued a Stop Work Order against Brickyard regarding any further clearing or improvement of the land. The Township alleged that Brickyard’s application for right-to-farm protection was a “subterfuge which allowed site improvements and clearing related to the development of the property under the guise of agricultural practices.” During the course of the hearing, the Township alleged that Brickyard’s tree cutting, soil disposal and re-grading of land violated Township ordinances.

The CADB forwarded the complaints to the SADC pursuant to the Right to Farm Act, N.J.S.A. 4:1C-10.1c, as the activities that are the subject of the complaints are not addressed in any promulgated agricultural management practices.

A hearing was conducted over seven days from April through December 2006. The parties submitted briefs in February 2007.

II. Qualification as a Commercial Farm

To receive the protections of the Right to Farm Act (Act), a farm must qualify as a “commercial farm.” N.J.S.A. 4:1C-3. Commercial farm is defined as

- (1) 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” (citations omitted), or
- (2) a farm management unit less than five acres,

producing agricultural or horticultural products worth \$50,000 or more annually and otherwise satisfying the eligibility criteria for differential property taxation pursuant to the Farmland Assessment Act of 1964” (citations omitted). N.J.S.A. 4:1C-3.

Brickyard submitted a “Supplemental Certification” to establish that it meets the definition of commercial farm. This certification asserts that Brickyard meets the annual production requirements from the sale of wood from trees harvested on the property, and imputed income from pasturing of horses.* Receipts, farmland assessment forms, and letters from the Howell Township Tax Assessor were submitted to corroborate the certification. The property has been assessed as farmland since Brickyard acquired it in 2003 (and prior to the acquisition as well). According to the farmland assessment forms, 35 acres is deemed permanent pasture. The Report of the State Farmland Advisory Committee for tax years 2003 through 2006 show a value range for permanent pasture in Monmouth County from \$94 per acre to \$185 per acre, depending upon the soil rating and tax year. The record does not include the soil rating of the property, but even at the lowest soil rating, the property would meet the minimal annual production requirement of \$2,500 set forth in the Right to Farm Act through the imputed income from the permanent pasture.

III. Issues

The issues before the SADC are:

* The Right to Farm Act does not currently protect horse boarding, although a rule proposal has been submitted to the Office of Administrative Law that would extend right-to-farm protections to horse boarding. Because pasturing and the growth of pasture grasses are deemed agricultural production, however, they are recognized as protected activities. Accordingly, the imputed income from pasturing can be used to satisfy the production requirements. Although horse boarding is not currently protected, it is not a disputed activity in this matter and accordingly, this decision does not address the boarding operation.

1. Whether Brickyard's cutting of trees, depositing of fill material from off-site sources, and re-grading of land meet the eligibility criteria of the Right to Farm Act. N.J.S.A 4:1C-1 et seq.
2. Whether the activities listed in #1 above were conducted for agricultural purposes.
3. Whether the Right to Farm Act preempts the Township's ordinances if the disputed activities are deemed agricultural and meet the eligibility criteria of the Act.

IV. Summary of Relevant Facts

A hearing was held at the New Jersey Department of Agriculture on April 12, June 14, August 2, August 4, September 26, September 27, and December 8, 2006.

The following witnesses testified:

On behalf of the complainants:

Susan and Russell Bohlin, Complainants
James R. Strych, P.E., Planning Board Review Engineer
Zig Panek, Certified Tree Expert
William Nunziato, P.E., Township Engineer
Vito Marinaccio, Director of Zoning and Code Enforcement
Betty Lou Textor, Assistant Zoning Code Enforcement Officer
Alex Birzin, Engineering Inspector
Christopher Jackson, Code Enforcement Officer
John Costigan, neighbor
Deborah and Mark Conners

On behalf of Brickyard LLC

Kevin Skudera, General Partner
Janet Miller, Tenant Horse Boarder
James Durr, Farmer
Tom Orgo, Farmer
John Perry, Certified Forester

Physical features of the property include a horse track that existed on the property prior to Brickyard purchasing it. The horse track was in a state of disrepair and the interior of the track area was re-vegetated and overgrown when Brickyard acquired the property. There is a Category One stream on the property called Pree Swamp Brook, located south of the horse track.

The cutting of trees, soil importation and re-grading (“disputed activities”) occurred on: the horse track area; “Samantha Lane”^{*} area; the area between the horse track and Pree Swamp Brook; and the area immediately south of Pree Swamp Brook.

A. Testimony of Susan and Russell Bohlin and Township of Howell

Susan and Russell Bohlin contend that Brickyard conducted the disputed activities in furtherance of its plans to develop the property and hence should not be entitled to the protections of the Right to Farm Act. They presented extensive testimony and documentation on the following: the history of the property since Brickyard acquired it; information regarding Kevin Skudera’s other property acquisitions and development projects in the area; photographs depicting the property before and after Brickyard undertook the disputed activities; and public documents regarding Brickyard’s subdivision applications. (Bohlin 1, consisting of a binder containing numerous documents; Bohlin 2, June 2005 subdivision plan; Bohlin 3, and “before and after” aerial photographs. The Bohlins relied on the subdivision plat and the aerial photographs to show that Brickyard was preparing the land for development, and not conducting agricultural activities.

^{*} Samantha Lane is a proposed road in the subdivision plan submitted by Brickyard, addressed in further detail on Page 9 herein.

Throughout the hearing, the Bohlins expressed safety concerns about the material deposited on the horse track area. They also contend that Brickyard should be subject to municipal ordinances related to development activities, as they believe the disputed activities were done under the guise of farming to subvert the Township's ordinances.

The Township presented testimony regarding the subdivision application, provided observations and opinions regarding the disputed activities, and discussed the various ordinances that it alleges Brickyard violated. James R. Strych, Planning Board Review Engineer testified regarding the history of the subdivision application, noting that the Samantha Lane area was clear cut prior to the application.

Zig Panek, a certified tree expert, testified regarding the tree removal on the property. He presented extensive photographs and testimony showing the clear-cutting and estimated that approximately 30 acres of trees had been recently cut. Mr. Panek also stated that he saw no evidence of farming activity in the areas that were cleared.

The Township presented two engineers employed by the Township who recounted their observations and provided photographs depicting the tree clearing. They believe that the disputed activities violated the following Township Ordinances and Regulations: Woodlands Management Ordinances (Chapter 269 of the Township of Howell Code); Riparian Buffer Ordinances (Chapter 188-34); Soil Removal Ordinances (Chapter 269 and 188-b); Grading Without Permit (Chapter 188-23) Preservation of Natural Resources (Chapter 188-21).

William Nunziato, Township Engineer, stated that he met with Mr. Skudera in the spring of 2003 to discuss future plans for the farm, but Mr. Skudera did not mention his plans to subdivide the property and develop it for residential use. The Township issued a

Stop Work Order in 2004 for violations of some of the ordinances listed above, but the Township withdrew the order based on Mr. Skudera's representations that the activities were related to farming and his assertion that he was protected by the Right to Farm Act. Mr. Skudera had informed the Township engineers that the importation of soil and clearing of trees and brush on the horse track were for the purpose of restoring the track and interior of the track for pasture.

The Township issued another Stop Work Order in 2005 because it believed that Brickyard's subdivision plans contradicted Mr. Skudera's representations that the areas in dispute were actively engaged in agriculture. As of the conclusion of the hearing, the order was still in effect.

Employees of the Zoning and Code Enforcement Department testified regarding the Stop Work Orders and they too described their observations of the disputed activities -- clear cutting, importation of a large amount of soil, distribution of the soil and re-grading of large areas. There was testimony that these activities violated the ordinances listed above and that the clearing and grading of the track area was not consistent with Mr. Skudera's representations that he was restoring the track area for farming purposes.

The Township also provided testimony regarding the change in land around the track area. Christopher Jackson testified that prior to Brickyard's purchase of the property, and after the purchase -- in 2003 and 2004 -- the track area and the area between the track and the brook were very wet. In 2005, after Mr. Skudera imported the soil, he noticed that those areas were "high and dry."

Mr. Jackson concluded that approximately 25 acres had been clear-cut.

Many witnesses who testified on behalf of the complainants stated that they never saw any horses grazing in the track area and that the area was not fenced in.

B. Testimony of Brickyard, LLC

Kevin Skudera* testified on behalf of Brickyard. Mr. Skudera is a self-proclaimed land developer with an interest in farming. He testified that Brickyard purchased the majority of the property in 2003 and an additional lot in 2005. Mr. Skudera explained that he learned in late 2004 that the Township was planning to revise its master plan, which would result in downzoning his property from three to six acres. Claiming that he had a fiduciary responsibility to protect the value of the property, he submitted a subdivision plan in late 2005 to preserve his right to develop the property at three-acre zoning.

A number of subdivision plats were submitted into evidence: “Preliminary and Final Subdivision Overall Site Plan for Farmingdale Estates” prepared by Kenderian-Zilinski, dated June 7, 2005 (Bohlin Exhibit 1); “Preliminary Major Subdivision Plans Subdivision Plan for Farmingdale Estates” prepared by Kenderian-Zilinski, revision date of December 9, 2005 (Joint Exhibit 2); “Preliminary Major Subdivision Plans Overall Subdivision Plan for Farmingdale Estates” prepared by Kenderian-Zilinski with a lot configuration revision date of March 17, 2006 (Joint Exhibit 1).

The subdivision plan dated June 2005 appears to be the first one submitted by Brickyard, and involves a clustering scheme whereby 40 units were proposed. (Bohlin

* Brickyard, LLC is a New Jersey limited liability company whose sole member is KGS Family Limited Partnership. KGS Family Limited Partnership is a New Jersey limited partnership whose partners include Kevin Skudera as General Partner and Mr. Skudera’s three minor children as equal limited partners.

Exhibit 2)* Fourteen of the 40 lots were proposed to be located in the track area (Lot 17). In December 2005 the plan was revised to show 40 units, 13 of which were on a road proposed as “Samantha Lane.” (Joint Exhibit 2). Some of those 13 units extended into the existing track area.

In March 2006, Brickyard revised the lot configuration. (Joint Exhibit 1). The number of proposed lots in the Samantha Lane area was reduced from 13 to seven. A portion of the Samantha Lane development proposal overlaps with the horse track area.

The Township granted final subdivision approval in June 2006 for 18 homes located below the horse track and creek area. The Samantha Lane portion of the development proposal was not approved because the Planning Board denied a waiver request to allow Samantha Lane to be built less than 50 feet from an adjacent landowner.

Brickyard twice applied for approval to put in a sewer line for his proposed development, but the Township denied the applications.

1. Tree-Cutting

Mr. Skudera testified that he clear-cut less than 11 acres of the property – not 25 to 30 acres as alleged by the Township. He explained that in 2004 he cut down all of the trees in a 1.5-acre area because the Township required him to dig test pits to assess the septic suitability and foundation stability of the proposed development sites. Mr. Skudera contends that he cut those trees to comply with the Township’s request. He explained that the trees in the interior of the horse track comprised approximately 11 acres and were mostly smaller growth and brush material of no more than 20 years growth.

* Mr. Skudera testified at the hearing that the original plan proposed 39 units, but the subdivision plat to which he was referring shows 40 units.

According to a letter sent by Brickyard's attorney to the Township, Brickyard began clearing the interior of the horse track and in the "immediate vicinity of the existing structures" in May 2003. (R-9, Exhibit 17).

Mr. Skudera explained that he constructed a logging road in the area of the proposed Samantha Lane to facilitate removal of the cut trees.*

In December 2005, after he had already cut a significant number of trees, Mr. Skudera retained John Perry, a certified forester, to prepare a Forest Management Plan. (R-9, Exhibit 19). The forester tagged additional trees that could be harvested, but Brickyard has not cut the trees because of the Stop Work Order issued by the Township. With respect to the trees cut prior to the preparation of the Forest Management Plan, Mr. Perry testified that "thinning and slashing of existing trees in wooded areas constituted a generally accepted management practice for silviculture." (Brickyard Reply Brief, p. 4).

Mr. Skudera asserted at the hearing that he was not required to have a woodlands management plan. The forest area on the property is deemed appurtenant woodlands and pursuant to the Farmland Assessment Act of 1964, such a plan is not required for the wooded area to receive farmland assessment. (R-9, Exhibit 21).

Mr. Skudera testified that although he intended to restore riding trails outside the track area, he did not clear trees to the edge of Pree Swamp Brook, as alleged by the Township. He stated that he went with DEP to flag areas outside of the 300-foot riparian buffer area and did not clear trees within the buffer.

2. Soil Importation

* In November and December 2004, the Department of Environmental Protection inspected the road in response to a request from Mr. Skudera, after the Township issued a Stop Work Order. The Bureau of Coastal and Land Use Compliance and Enforcement of DEP deemed it a farm road and concluded that the road was not under the "regulatory purview of the Bureau." (Brickyard 25).

Mr. Skudera testified that in 2004-2005 he imported fill onto the track area and re-graded the area to “improve the future value of the track area” so that there would never be an issue of the quality of the area. (Testimony from September 27, 2006). The track area is approximately 14 acres and Brickyard restored approximately 11 acres. Mr. Skudera testified that approximately seven acres inside the track are used as riding and grazing land. Mr. Skudera asserts that he needed to clear tree growth inside and outside the track, which had been growing since 1980, to restore the riding and grazing areas. (Brickyard R1). The interior of the track was root raked, disked, top-dressed, over-seeded with rye and pasture mix, mowed and maintained. Mr. Skudera was not able to finish restoring the actual track because of the Stop Work Order issued by the Township in 2005. Mr. Skudera presented an aerial photograph of the site taken in 1980 to show how the farm once looked, with the track area cleared. (R-4).

Mr. Skudera asserted that it was necessary to import material into the track area to restore it to a riding/grazing area. Between December 2004 and January 2005, he imported approximately 1,000 loads of organic dredge spoils, topsoil and sand to the farm. The imported fill material was stored on Lot 30, allegedly with the knowledge and approval of the Township, New Jersey Department of Environmental Protection and Freehold Soil Conservation District. The source of the imported soils included the Brick Reservoir (350 loads of fresh water dredge spoils); Buck Sand Pit (250 loads of sand); Monmouth County Reclamation Center (275 loads of “general fill material”); and Plaza Grand (50 loads of top soil).

Brickyard provided a letter from the Division of Responsible Party Site Remediation and the Bureau of Environmental Evaluation and Risk Assessment of the

New Jersey Department of Environmental Protection (DEP) to the Brick Township Municipal Utilities Authority, dated June 17, 2002. Based on a review of sampling of dredge spoils remaining on “the site,” the Division determined that the material was “appropriate for unrestricted use.” (Skudera Certification dated February 7, 2006). In Brickyard’s testimony, Mr. Skudera provided a summary of the fill material and explained that it received a “re-use letter” from DEP. Presumably the site referenced in the letter is the site from which Brickyard obtained the 350 loads of fresh water dredge spoils. (R-9, Exhibit 4; R-3)

During the course of depositing fill in the track area, DEP inspected the property. The staff person noted that on December 29, 2004

while in the field, dump trucks with fill were entering a site with known wetlands and flood hazard area. An investigation found that fill was not being placed in any regulated areas. . . I also spoke to Kevin Skudera . . . at the time of inspection. He is well aware of the regulated areas on his property and assured me that they will not encroach on any wetlands or near the stream. (R-9, Exhibit 25).

In March 2006, Brickyard retained an environmental consulting firm to test the soil in the test pit area. The testing did not reveal levels of arsenic, lead, pesticide compounds or metals exceeding the Soil Cleanup Criteria for Unrestricted Use promulgated by the New Jersey Department of Environmental Protection (DEP). (Brickyard 13). In 2005, Brickyard requested Rutgers Cooperative Research and Extension (Rutgers) to test the soil in the horse track area for a determination as to whether the soil was sufficient for growing mixed annual flowers, new hay/pasture/cover and new perennial flowers. (R-9, Exhibit 34). Rutgers found the soil sufficient for those crops.

Mr. Skudera also requested Rutgers to address the Township's concerns about the top-dressing of materials on the property. In January and March 2006, Rutgers sent a letter to Mr. Skudera stating:

Top-dressing is an acceptable management practice. Besides manure, materials such as leaves, grass clippings, yard waste, even processed sludge or biosolids can be used as soil amendments. . . The material in question on your farm may also be acceptable for land application. The Bureau of Environmental Evaluation and Risk Assessment, a division of the new Jersey Department of Environmental Protection has determined that it is acceptable for unrestricted use. In addition, according to the Rutgers University soil-testing laboratory, soil on which the above-referenced material was applied is low in phosphorous and potassium, and has an acceptable pH. I have also examined the information about the pesticide and heavy metal content of soils. All of these levels, measured in 13 different locations on your farm, are significantly below acceptable levels. . .” (R-9, Exhibit 15).

Some time before February 2005, Mr. Skudera contacted the Freehold Soil Conservation District (SCD) and inquired as to whether the disputed activities were exempt from the Soil Erosion and Sediment Control Act of New Jersey. It is unclear from the evidence when Mr. Skudera contacted the SCD, but the SCD responded to Mr. Skudera's inquiry in February 2005 -- after Mr. Skudera had begun clearing the interior of the track and at least one month after he imported the fill into the interior of the track. The SCD advised that the “activity under way on your property falls in the category of miscellaneous non-tillage agriculture. Examples of this activity may include road rehabilitation, grading, and soil transfer.” (R-9, Exhibit 23). The SCD advised Mr. Skudera that this is a regulated activity, subject to the Soil Erosion and Sediment Control Act if the activity exceeds 5,000 square feet of soil disturbance. The SCD further advised

that the State Soil Conservation Committee may waive the requirement of submittal of a soil erosion and sediment control application if Mr. Skudera obtains a “cooperator’s agreement” through the NRCS. (R-9, Exhibit 23).

In January 2006, Brickyard obtained a Farm Conservation Plan from the United States Department of Agriculture, Natural Resources Conservation Service (NRCS). (R-9, Exhibit 23). Although noting that the field in “tract 730,” which encompasses the track area, stream area, and Samantha Lane area, was recently cleared, the plan does not address the disputed activities. It addresses future farming activities on the property, stating that the farm is “an operation in transition.” The plan acknowledges that the property is to be managed as one unit with “39 houses, horse and sheep boarding and breeding facilities, as well as pastures. . . proposed to be constructed and installed over the next several years.” The plan addresses: conservation cover, nutrient management, pasture and hay planting, pest management, the pond, prescribed grazing on three tracts on the property.

In January 2006, the SCD sent a letter to Mr. Skudera advising him that it had waived the requirement for a certified soil erosion and sediment control plan for road repair, clearing and grading and stockpiling because NRCS issued a farm conservation plan. (R-9, Exhibit 24). This letter and the farm conservation plan were issued after Brickyard had deposited fill material on the track area and had cleared and re-graded the area.

In April 2006, Nicole Ciccaglione of the NRCS sent an email to David Kimmel of the SADC stating that Mr. Skudera has made changes to the development plans that he previously provided to NRCS, on which NRCS based the farm conservation plan.

(SADC 2). Ms. Ciccaglione noted that the two development plans are “quite different,” and recommended that Mr. Skudera update his conservation plan “because tract 730, field un1 (6.9 acres) aka the track, is planned with ‘conservation cover awaiting houses.’ If there are in fact more of the cleared acres intended for agriculture than originally stated and planned then that should be updated.” (SADC 2).

In January 2006, an agent of Rutgers Cooperative Research and Extension, NRCS, and the Freehold Conservation District conducted an inspection of the property. The agricultural agent sent a letter to the State Board of Agriculture stating that in his opinion,

Mr. Skudera has appropriately cleared the small brush from the riding area and successfully planted an overwintering crop of rye to stabilize the soil, build organic material and prevent erosion. These are typical agricultural management practices. (SADC 1).

The agent also stated:

In terms of his lumbering operations, the construction of an access route was observed, appears needed and was sited appropriately. The timber removal that we observed was mostly young four to eight inch caliper trees and did not involve the larger growth trees on the periphery. (SADC Exhibit 1).

Mr. Skudera stated that if the Township approved the Samantha Lane development, he would have moved the track area to the left of the existing track.

Brickyard also presented evidence, through photographs and the testimony of Janet Miller, that the interior of the track is currently used for horseback riding.

Jimmy Durr, who has been a farmer for his entire adult life, testified on behalf of Mr. Skudera. Mr. Durr stated that the manner in which Mr. Skudera restored the interior

of the track area is consistent with generally accepted practices of enriching soil. He testified that the soils in that area are very coarse, drain rapidly, and are not high quality agricultural soils. Mr. Durr noted that farming is an interim use of land in New Jersey and that it is important for land to remain in agricultural production as long as it can. He stated that development approvals can take two to three years, and that it is common for a landowner to continue farming until the approvals are granted.

V. Whether the Disputed Activities Are Eligible for the Protections of the Right to Farm Act

The complainants assert that Brickyard should not receive the protections of the Right to Farm Act because the disputed activities were conducted “under the guise of farming” and in furtherance of Brickyard’s plan to develop the property into a residential subdivision.

The fact that Brickyard engaged in clear cutting, filling and re-grading at the same time it was seeking development approvals on the exact areas in which those activities were taking place begs the question of whether its true intention was to restore the land for equine use or to prepare the land for residential development. The construction of a logging road in the exact location of proposed Samantha Lane, and the tree-cutting, filling and re-grading of areas he was hoping to develop, certainly make one question Brickyard’s intent.

As discussed in detail above, Brickyard contends that it cut trees to restore and create pasture and horse riding areas. The clearing, importation of fill, and re-grading of the track area, Brickyard asserts, was done to restore the interior of the track for pasture and riding areas as well.

Despite the questionable timing of the activities, Brickyard introduced substantial evidence to show that the disputed activities were agricultural in nature. No evidence was presented to show that the harvesting of trees and the clearing, filling and re-grading of areas to plant crops for harvest or pasture are not agricultural activities. Mr. Skudera testified that he foresees farming the land until he puts up a bond for development.

I conclude that the disputed activities are agricultural and hence eligible for right-to-farm protection if they meet the eligibility criteria of the Act discussed herein.

Although this conclusion leaves open the potential for abuse of the Right to Farm Act, I find no legal basis for deciding that agricultural activities conducted while a landowner is seeking subdivision approval are not entitled to the protections of the Act. In the absence of a rule or statutory provision that specifically precludes granting right-to-farm protection to landowners who are seeking or have obtained subdivision approval, I cannot impose such a limitation.

VI. Whether Activities Conform to Generally Accepted Agricultural Management Practices

A. Harvesting Trees

Mr. Skudera began cutting trees in 2003 -- the year he purchased the property. The three areas where he cleared trees include: Samantha Lane area, the interior of the horse track, and the area around Pree Swamp Brook. Mr. Skudera did not obtain a Forest Management Plan until December 2005.

The Right to Farm Act protects the production of trees and forest products, the processing of the agricultural output of the farm, and clearing woodlands using open burning and other techniques. N.J.S.A. 4:1C-9. Based on the evidence submitted and

the testimony provided at the hearing, I find that the clearing of the interior of the track area was done in conformance with generally accepted practices. Despite the fact that Mr. Skudera did not obtain a forest management plan until after he cleared the interior of the track, it is doubtful that a plan would have been useful in this area, as it does not appear that Mr. Skudera's intent in this area is to manage a forest. Rather, it appears that his intention was to clear growth in the track area to establish riding areas and grow pasture grasses, cover crops and possibly flowers. Furthermore, it appears that this area was filled mostly with brush and other vegetative overgrowth, which lessens the possibility that Mr. Skudera removed trees in an irresponsible manner.

Mr. Skudera asserted throughout the hearing that he was not required to prepare a forest management plan because his forest areas are deemed appurtenant woodlands. While it is true that such a plan is not necessary to qualify for farmland assessment under the Farmland Assessment Act of 1964, a forest management plan is the most reliable method for determining whether trees are being cut in a responsible manner and in conformance with generally accepted practices. A forest management plan ensures the proper care and cultivation of forest trees.

Although Brickyard asserts that the cutting of trees cut outside the track was done in accordance with generally accepted silviculture practices, no evidence was submitted to demonstrate this. Webster's Dictionary defines silviculture as "care and cultivation of forest trees."^{*} Mr. Skudera testified that trees were removed to clear the area to grow pasture grass, enable horseback riding, or to satisfy the Township's requirement to

^{*} Silviculture is not defined in the New Jersey Statutes or the North American Industry Classification System.

perform septic suitability soil testing. Brickyard presented insufficient testimony to establish that it cut trees for the purpose of caring and cultivating forest trees.

I therefore find that the cutting of trees outside the track area was not done in conformance with generally accepted practices, as there was not sufficient evidence to establish otherwise. This decision is consistent with a prior right-to-farm decision where the SADC required a forest management plan to establish that there were sufficient trees ready to be harvested to meet the production requirements of the Right to Farm Act. See Joseph P. Arno (Appeal of Resolution Issued by the Monmouth County Agriculture Development Board), SADC ID # 1328-02, OAL Docket No. ADC 4748-03 (February 25, 2004).

B. Importation of Fill, Re-Grading of Interior of Track

The Right to Farm Act protects replenishment of soil nutrients, improving soil tilth, and installing and maintaining vegetative and terrain alterations for water and soil conservation and surface water control in wetland areas. N.J.S.A. 4:1C-9. Although the importation of fill and re-grading of land is eligible for the protections of the Right to Farm Act, **I find** that Brickyard failed to establish that it conducted these activities in conformance with generally accepted practices.

In late 2004, Mr. Skudera began restoring the track area. He did not obtain a farm conservation plan until February 2006. In response to Mr. Skudera's request for guidance regarding his restoration of the track area, the Freehold Soil Conservation District (SCD) notified Mr. Skudera that this work was subject to the Soil Erosion and Sediment Control Act. The SCD informed him that it could waive the requirement of submittal of a soil erosion and sediment control application if Mr. Skudera obtained a

“cooperator’s agreement” through the Natural Resources Conservation Service. This notification came one month after Mr. Skudera had imported the fill on the property.

The record is not clear as to when Mr. Skudera contacted the Freehold Soil Conservation District (SCD) regarding his plans for restoration of the track area, but it appears that he proceeded with the restoration work knowing there was a possibility that he needed some kind of approval from the SCD. As noted in the discussion above, Mr. Skudera obtained a farm conservation plan in 2006, which did not address any of the restoration work. The SCD nonetheless notified Mr. Skudera that it had waived the requirement for a certified soil erosion and sediment control plan. This waiver came more than one year after Mr. Skudera imported the fill and had re-graded the property.

Filling a seven to 11 acre area with various materials and re-grading the area to restore the land for the growth of pasture grasses, cover crops, and flowers certainly can be deemed agricultural activities. Without a farm conservation plan addressing the restoration work, however, I cannot conclude that the disputed activities conform with generally accepted practices. Indeed, Rutgers Cooperative Research and Extension was unwilling to conclude that the material placed on the track area is acceptable for land application (“The material in question on your farm **may** also be acceptable for land application.” R-9, Exhibit 15, emphasis added).

VIII. Compliance With Relevant State and Federal Law

There is no indication that Brickyard is in violation of any relevant State or federal law. In March 2004, the New Jersey Department of Environmental Protection issued a notice of violation against Brickyard for various violations of the Freshwater Wetlands Act, but those violations were resolved by May 17, 2004. The Bureau of

Coastal and Land Use Compliance and Enforcement of DEP inspected the property on November 29, December 16, 2004, December 24, 2004, January 5, 2005, January 10, 2005, October 20, 2005, and November 16, 2005 and found “no activities under the regulatory purview of this Bureau.” (R-9, Exhibit 25).

IX. Threat to Public Health and Safety

There is nothing in the record to suggest that the cutting of trees or importation of fill and re-grading of land pose a direct threat to public health and safety. As discussed above, the testing of the fill material did not reveal levels of contaminants above their respective DEP Soil Cleanup Criteria for Unrestricted Use. In addition, DEP issued a letter authorizing use of the dredge spoils. Although the complainants have contested that the material poses a threat to public health and safety, no evidence was introduced to support this claim.

With regard to the clearing of trees within the riparian buffer areas, see discussion below.

X. Preemption of Municipal Ordinances

Pursuant to the Right to Farm Act, agricultural activities may preempt municipal ordinances if they meet the eligibility criteria of the Act. N.J.S.A. 4:1C-10. In Township of Franklin v. den Hollander, 172 N.J. 147 (2002), the New Jersey Supreme Court upheld the municipal preemption provisions of the Act but found that the Act does not provide for automatic preemption. Rather, the SADC and county agriculture development boards must consider the impact of the agricultural activity on public health and safety “and temper their determinations with these standards in mind.” Id. at 151, citing Township of Franklin v. den Hollander, 338 N.J. Super. 373, 392 (App. Div. 2001). Where there is a

conflict between an agricultural activity and an ordinance, the Court held that a farmer may not have to comply with the ordinance if he can demonstrate a “legitimate farm-based reason” for not complying. Id. at 153.

It is clear that the Township does not view any of the disputed activities as agricultural and that it would not be alleging ordinance violations against Brickyard if Brickyard was not pursuing development of the property. In light of my earlier findings that agricultural activities are entitled to the protections of the Act regardless of a landowner’s simultaneous pursuit of subdivision applications, however, I must determine whether the agricultural activities that are entitled to the protections of the Act may preempt the Township’s ordinances. The following discussion is therefore limited to the only activity that I have deemed entitled to the protections of the Act: cutting of trees within the interior of the track.

A. Woodlands Management Ordinance

With respect to the tree cutting activities inside the track area, I conclude that the activities may preempt the Woodlands Ordinance (Chapter XXII) cited by the Township. While I recognize that the purpose of the ordinance is to reduce air pollution in the Township, the Township did not provide any compelling testimony to establish a direct impact of the removal of trees in the track area on public health and safety. Because the trees in the track area were young and small, it is unclear whether they would have been subject to the ordinance – and doubtful that they contributed to the reduction of air pollution. Furthermore, Brickyard has demonstrated a legitimate farm-based reason (restoring the track to pasture and riding area, and growing of grasses and flowers) for not having to comply with the ordinance.

B. Riparian Buffers

This section addresses only those activities in the interior of the horse track, as I have found that activities outside the track are not entitled to preempt municipal ordinances. It is not clear, however, whether the Township is alleging that some of the tree-cutting within the horse track also occurred within the riparian buffer ordinance. This section is applicable only if activities inside the track area also fall within the riparian buffer.

Further, there is clearly a dispute of fact as to whether Mr. Skudera cut trees in the riparian buffer areas, but it is not my role to determine whether the ordinance was violated. My role is solely to determine whether the ordinance can be preempted.

The Township's Stream and Waterway Protection Ordinance in effect prior to September 21, 2004 (188-34) prohibited activity within 100 feet adjacent "on either side to permanent or intermittent stream corridors, lakes, ponds and areas with ground water recharge measured as a line extending perpendicularly from the top of bank or 100-year floodplain delineation." In September 2004, the Township amended the ordinance to increase the buffer to 300 feet and renamed it "Riparian buffers" (188-34).

The Township sent a letter to Brickyard's attorney in April 2004 (prior to amending its ordinance), stating

[t]his office has determined that there has been no indication of clearing of wetlands or buffers and all recent clearing and grading are related to a farming activity as certified in your clients correspondence. (R-9, Exhibit 30).

In March 2004, DEP adopted Stormwater Management rules that established riparian buffers of 300 feet for Category One waters. N.J.A.C. 7:8-5.5(h). The rules required municipalities to adopt stormwater management ordinances that conform to the

requirements set forth in DEP's rules. N.J.A.C. 7:8-3.9. Howell Township presumably revised its riparian buffer ordinance in response to this requirement.

The DEP rules contain an exemption to allow a 150-foot buffer where previous development or disturbance has occurred, such as active agricultural use. N.J.A.C. 7:8-5.5(h)1ii. The Township ordinance does not appear to have a similar exemption.

The Bureau of Coastal and Land Use Compliance and Enforcement inspected the property eight times after the adoption of the Stormwater Management rules and found "no activity within the regulatory purview of this Bureau." This appears to indicate that there was no violation of the Stormwater Management rules, although it is not entirely clear whether DEP inspected the riparian buffer areas. (Mr. Skudera testified that DEP inspected his activities and found that the tree removal was all occurring outside the wetlands buffer.)

I find that if the disputed activities occurred within the horse track prior to the amendment of the Township's Riparian Buffer Ordinance and prior to DEP's adoption of the Stormwater Management rules, they do not preempt the then-existing Township Ordinance. Although I make no finding as to whether Brickyard violated the ordinance, I do find that clearing trees within 150 feet of a Category One stream poses a direct threat to public health and welfare and that there is no legitimate agriculturally-based reason for clearing such areas.

If any of the disputed activities within the horse track occurred after adoption of the Stormwater Management rules, I find that the activities must comply with the rules, rather than the ordinance. The basis for this is that the municipal ordinance appears to be more stringent than the State rule, as it does not contain an exemption for prior agricultural use. (Even if Brickyard does not qualify for an exemption under the Stormwater Management Rules, the disputed activities must comply with the 300-foot buffer contained in both the Riparian Buffer Ordinance and the Stormwater Management

Rules, as farms must comply with relevant State rules to receive the protections of the Act.)

C. Soil and Soil Removal

The Howell Township Soil Removal Ordinance (Chapter 269), in addition to the soil removal provision of Chapter 188-26, addresses only soil removal and not soil importation. Because the Township failed to present sufficient testimony or evidence to show that soil was removed from the property, I find this ordinance is applicable to the matter at hand.

D. Grading

The Township's Grading Ordinance states that grading shall be limited to areas shown on an approved site plan, Chapter 188-23. The Township alleges that Brickyard violated the ordinance, as it failed to obtain a permit for grading of the property. I find that this ordinance does not apply to the disputed activities, as Brickyard has established a legitimate agricultural reason for the grading of the horse track area and the Township has failed to show how the grading of the horse track poses a direct threat to public health and safety.

E. Miscellaneous provisions of the Development/Land Use Ordinance

As the Township failed to present sufficient testimony to show how these ordinances are relevant to agricultural activities, I find that the disputed activities in the interior of the horse track are exempt from these ordinances.

XI. Conclusion

I find that the cutting of trees in the interior of the horse track is entitled to the protections of the Right to Farm Act and may preempt the Township's Woodlands Management Ordinance. I find the Soil Removal Ordinance inapplicable to the disputed activities.

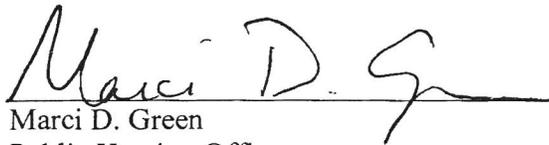
If the tree-cutting in the horse track occurred within a riparian buffer and prior to DEP's adoption of the Stormwater Management rules, I find that the activities are subject to the then-existing Township ordinance and do not preempt the ordinance.

If the tree-cutting in the horse track occurred within a riparian buffer, but after adoption of the Stormwater Management rules, I find that Brickyard needs to comply with the Stormwater Management Rules, N.J.A.C. 7:8, rather than the Township's Riparian Buffer Ordinance.

I find that the importation of fill materials, re-grading the interior of the horse track, and the cutting of trees outside the horse track are not entitled to the protections of the Right to Farm Act, as there was insufficient evidence presented to show that these activities conformed with generally accepted practices. These activities are subject to, and do not preempt applicable municipal ordinances, including the Woodlands Management Ordinance and Riparian Buffer Ordinance.

Lastly, I find that in the absence of a rule or statutory provision prohibiting right-to-farm protection to landowners who have obtained subdivision approvals or who have pending subdivision applications, I cannot find that Brickyard's subdivision plans and subdivision approval automatically disqualify it from receiving such protections.

Date: 6/25/07


Marci D. Green
Public Hearing Officer
State Agriculture Development Committee