State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ADC 15171-12
AGENCY DKT. NO. SADC ID#1033
(ON REMAND OAL DKT. NO. ADC 4217-11)

FRANK CIUFO,
Petitioner,
v.
SOMERSET COUNTY AGRICULTURAL DEVELOPMENT BOARD,
Respondent,
and
TOWNSHIP OF BRANCHBURG,
Intervenor.

Timothy P. McKeown, Esq., for petitioner (Morris, McLaughlin & Marcus, attorneys)

John M. Lore, Deputy Counsel, for respondent (DeMarco & Lore, attorneys)

Mark Anderson, Township Attorney, for Intervenor (Woolson, Sutphen Anderson, attorneys)

Record Closed: January 22, 2016 Decided: May 19, 2016

BEFORE **JEFF S. MASIN**, ALJ t/a:

This contested case arises from the issuance on May 29, 2010, by the Township of Branchburg's Zoning Officer, of a summons to Frank Ciufo, charging that commercial vehicles were kept on property located in a residential zone in violation of Township Zoning Ordinance 4-3B2(b), which specifies limitations for the parking, storage and garaging overnight of commercial vehicles in residential districts, with some exception for a vehicle kept on the premises of a farm and "used in the farming operation."[1] As described in a "Final Decision" issued by the State Agriculture Development Committee (SADC) on July 26, 2012, following the issuance of the summons, litigation ensued that led first to a decision of the Somerset County Agriculture Development Board (SCADB), then to a hearing before an administrative law judge at the Office of Administrative Law (OAL) and then to the aforementioned Final Decision of the SADC, which in reality did not result in a final resolution of the disputed issue, but instead in a remand of the contested case to the OAL for further proceedings. Frank Ciufo v. Somerset County Agriculture Development Board, ADC 4217-11 (Order of Remand and Final Decision, July 26, 2012). The original OAL decision, issued on May 29, 2012, by Administrative Law Judge John F. Russo, Jr., concluded that procedural irregularities had occurred involving the SCADB and granted Ciufo's motion for summary decision, ordering that the SCADB forward the matter to the SADC for a public hearing and a determination of the issue of whether the storing of commercial vehicles on the Ciufo farm is a protected activity under the Right to Farm Act, N.J.S.A. 4:1C-1 to - 55. In its decision remanding the case, the SADC rejected Judge Russo's analysis and determined that the hearing at the OAL should proceed, for the express purpose of determining whether "the storage of commercial vehicles on the Petitioner's property, Block 80, Lot 10.02, Branchburg Township, Somerset County, NJ, is a protected activity under the Right to Farm Act, N.J.S.A. 4:1C-1, et seq." After receiving the remanded file, Judge Russo conducted a hearing on March 11, 2014. During that hearing, the judge permitted Branchburg

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[1] The Ordinance reads:

"2. Commercial vehicles. Each dwelling shall be restricted to not more than one (1) commercial vehicle to be parked, stored or garaged overnight, providing the following conditions are met:

a) No commercial vehicle exceeding one ton rated capacity shall be parked or maintained on any premises in the residential districts other than in an enclosed building.

b) No such commercial vehicle shall be kept or maintained on any premises or on any street in a residential zone or district except on the premises of an operating farm where such vehicle is used in the farming operation."

Township to intervene in the proceedings, but limited the Township role to that of cross-examination of Mr. Anthony Ciufo, the sole witness called at the hearing.[2,3] After the hearing, briefs were filed by Ciufo and Branchburg Township. No brief was filed by the SCADB. The last brief was received on July 24, 2014. For unknown reasons, no initial decision was issued by Judge Russo prior to his appointment to the Superior Court in December 2015. The contested case was re-assigned to this judge, serving on recall, on January 22, 2016. I have read the transcript of the hearing, the briefs and exhibits, the SADC decision, the several cases cited by counsel, and have determined, as required by N.J.A.C. 1:1-14 (b)2, that the case can now be decided by a newly-assigned judge without prejudice to any party. In making this determination, I have taken into account the concerns raised by counsel for Ciufo, which are be addressed below.

It is first necessary to be very clear what issue this initial decision focuses upon. In the brief offered by Ciufo, counsel argues that the trial judge improperly determined that zoning was not pertinent to this hearing. Review of the case history reveals that the order to Judge Russo on remand was that he was to determine whether the RTFA protected the storage of commercial vehicles on this commercial farm property. That ruling is dependent upon an understanding of the RTFA and its provisions. If that Act does protect such storage in this particular situation, the municipal zoning ordinance must in nearly all cases, yield to this protection, as the RTFA provides that the approval of certain permitted agricultural activities conducted on a commercial farm preempts the effect of municipal ordinances and that these practices shall not be considered to create a public or private nuisance, so long as the activity does not directly threaten the public health or safety. N.J.S.A. 4:1C-9 and -10. Thus, it is not the task of this decision to

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[2] In the post-hearing brief, Ciufo argues that Branchburg Township should not have been admitted as a party to the case. Judge Russo permitted the Township's intervention, and that is the law of the case, which I will not revisit. It is of course within the SADC's power to review the determinations of the trial judge when it determines whether to accept, reject or modify the initial decision.

[3] Anthony Ciufo testified that he currently lives in South Carolina, but that he, his son Frank, and their wives, are the owners of Simple Cuts LLC, a business that provides landscaping and lawn services, as well as operating the farm on which the vehicles in question are stored. Frank Ciufo and his wife operate the company on a daily basis; Anthony and his wife come to New Jersey several times a year. The Zoning Officer issued the Municipal summons to Frank Ciufo, but Frank did not appear at the hearing. Anthony appeared and testified regarding the operations of the farm, on which trees are grown, as well as the landscaping business.

determine whether the ordinance is otherwise lawful, or arbitrary, or unreasonable. While the case did arise because of the Zoning Officer's citation of the Ciufo operation for a violation of the ordinance, the question before this tribunal of whether the RTFA protects storage of commercial vehicles on this commercial farm property is not dependent upon the terms of the ordinance. Presumably, if any prosecution of the Ciufo operation for violation of the ordinance were to be attempted after a ruling by the SACB that storage was a protected activity, the Board's ruling would stand as an affirmative defense, perhaps a claim of preemption, but conceivably there could be claims made that, despite such a ruling, public health and safety issues still needed to be considered. That would seem to be a determination, at least initially, for the municipal court to make after considering relevant legal and factual issues. But here, the sole task is to deal with the legal question as defined on remand, with consideration of facts relevant to that issue, which are in any case site-specific and directly related to the nature of the farming operation on this property and, as it is relevant, to the other operations conducted by the owner which involve the very trucks whose storage is at issue.

Initially, I **FIND** that there is no issue here as to the qualification of the Ciufo farm as a commercial farm doing sufficient monetary business as to qualify for that definition under the RTFA. N.J.S.A. 4:1C-3 defines a commercial farm 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," P.L.1964, c.48 (C.54:4-23.1 et seq.)," No one has disputed Mr. Ciufo's testimony that the property in question is over five acres and produces relevant products worth over $2,500.

Mr. Ciufo testified that the farm is the location upon which the LLC grows trees, farms fish in a pond that are sold commercially, and stores five trucks, four of which bear commercial plates and one which bears a farm plate.[4] There is also a truck that is identified as Frank Ciufo's personal vehicle. The five trucks carry the following wording:

[4] The trucks are described as a "small low-body dump truck and four pick-up trucks, one of which is "kept in reserve."

"SIMPLE CUTS Tree Farm Landscaping" with a dot between the words "Tree Farm" and "Landscaping" and then a telephone number and finally, "Branchburg, N.J." Ciufo described the use of the trucks on the farm itself: to move plants around the farm, move equipment, deliver parts and tools needed on the farm, and "maybe seeding and mulching," to move trees, to carry on to the farm equipment and other goods needed on the farm, to bring in hay used for horses that are kept on the farm property. They also are used to travel to a fish hatchery to pick up fish to be placed in the pond on the farm, fish that are then later available for sale. However, these trucks are also utilized for the lawn and landscaping business. Ciufo explained that they bring supplies used in the nursery business to the farm site, take purchased nursery stock to the purchaser's location, take items grown on the farm off of that property to purchaser's homes or other locations where landscaping activities are conducted and proceed from the farm to sites where lawn services are provided. The trucks are stored on the farm year round. During the winter months, they are "most of the time . . . sitting there." During the proceedings before the SCADC, Mr. Ciufo produced R-2, a purported analysis of their usage of the trucks, with specific percentages of time indicated for when these are used on the farm, as opposed to when they are utilized for the landscaping and lawn business. However, during the hearing before Judge Russo, Ciufo testified that the document was largely hypothetical in nature, at least in its presentation of these percentages of usage, as the business, meaning both the farm and landscaping operations, do not maintain such records that would have allowed for this sort of analysis. As a result of this admission, the Township now objects to its admission in evidence, but Judge Russo admitted the exhibit and I am persuaded that, despite its obvious limitations, it has some value as evidence in the case. While the written analysis, which states that 73.2 percent of the usage of the four trucks is in the landscaping business, is apparently an unreliable number, it seems apparent that a considerable percentage of their use is indeed for that end of the Ciufo enterprise. I have no doubt that Mr. Ciufo understands how the business operates, even though at this time he spends the majority of his time in South Carolina. There is no reason to discredit the basic premise of his presentation in this analysis, that is, the significant majority of usage of the commercially licensed vehicles is by the landscaping and lawn service end of the company's business, and not by the tree-growing, farm-located part of the business. While there is no question that these trucks are used on the farm for direct farm-sited work, the credible evidence is that this

on-site usage is not the primary use to which the commercially-tagged vehicles are generally put.

In enacting The Right To Farm Act (Act), the Legislature intended to protect agricultural activities while balancing that interest with other legitimate public interests that on occasion conflict with that goal.

> The Legislature finds and declares that:
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> a. The retention of agricultural activities would serve the best interest of all citizens of this State by insuring the numerous social, economic and environmental benefits which accrue from one of the largest industries in the Garden State;
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> b. Several factors have combined to create a situation wherein the regulations of various State agencies and the ordinances of individual municipalities may unnecessarily constrain essential farm practices;
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> c. It is necessary to establish a systematic and continuing effort to examine the effect of governmental regulation on the agricultural industry;
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> d. All State departments and agencies thereof should encourage the maintenance of agricultural production and a positive agricultural business climate;
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> e. It is the express intention of this act to establish as the policy of this State the protection of commercial farm operations from nuisance action, where recognized methods and techniques of agricultural production are applied, while, at the same time, acknowledging the need to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in New Jersey.

The Act provides that farming operations utilizing "recognized methods and techniques of agricultural production" should be protected from nuisance actions and unreasonable local government regulations that may interfere with the use of these methods and techniques. N.J.S.A. 4:1C2a; N.J.S.A. 4:1C-10.[5] Several such permitted agricultural

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[5] N.J.S.A. 4:1C-10 reads: "In all relevant actions filed subsequent to the effective date of P.L.1998, c. 48 (C.4:1C-10.1 et al.), there shall exist an irrebuttable presumption that no commercial agricultural operation, activity or structure which conforms to agricultural management practices recommended by the committee and adopted pursuant to the provisions of the 'Administrative Procedure Act,' P.L.1968, c. 410 (C.52:14B-1 et seq.), or whose specific operation or practice has been determined by the appropriate county board, or in a county where no county board exists, the committee, to constitute a generally accepted agricultural operation or practice, and all relevant federal or State statutes or rules and regulations adopted pursuant thereto and which does not pose a direct threat to public health and safety, shall constitute a public or private nuisance, nor shall any such operation, activity or structure be deemed to otherwise invade or interfere with the use and enjoyment of any other land or property."

activities conducted on commercial farms are specifically recognized in the Act as permitted, and thus their approval preempts local attempts to interfere with their use, except where the public safety or health is directly threatened in a specific context. N.J.S.A. 4:1C-9 and 10.[6] The statute also provides for a process for determining

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[6] N.J.S.A. 4:1C-9 provides, "Notwithstanding the provisions of any municipal or county ordinance, resolution, or regulation to the contrary, the owner or operator of a commercial farm, 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, or which commercial farm is in operation as of the effective date of P.L.1998, c.48 (C.4:1C-10.1 et al.), and the operation of which conforms to agricultural management practices recommended by the committee and adopted pursuant to the provisions of the 'Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), or whose specific operation or practice has been determined by the appropriate county board, or in a county where no county board exists, the committee, to constitute a generally accepted agricultural operation or practice, and all relevant federal or State statutes or rules and regulations adopted pursuant thereto, and which does not pose a direct threat to public health and safety may:

a. Produce agricultural and horticultural crops, trees and forest products, livestock, and poultry and other commodities as described in the Standard Industrial Classification for agriculture, forestry, fishing and trapping or, after the operative date of the regulations adopted pursuant to section 5 of P.L.2003, c.157 (C.4:1C-9.1), included under the corresponding classification under the North American Industry Classification System;

b. Process and package the agricultural output of the commercial farm;

c. Provide for the operation of a farm market, including the construction of building and parking areas in conformance with municipal standards;

d. Replenish soil nutrients and improve soil tilth;

e. Control pests, predators and diseases of plants and animals;

f. Clear woodlands using open burning and other techniques, install and maintain vegetative and terrain alterations and other physical facilities for water and soil conservation and surface water control in wetland areas;

g. Conduct on-site disposal of organic agricultural wastes;

h. Conduct agriculture-related educational and farm-based recreational activities provided that the activities are related to marketing the agricultural or horticultural output of the commercial farm;

i. Engage in the generation of power or heat from biomass, solar, or wind energy, provided that the energy generation is consistent with the provisions of P.L.2009, c.213 (C.4:1C-32.4 et al.), as applicable, and the rules and regulations adopted therefor and pursuant to section 3 of P.L.2009, c.213 (C.4:1C-9.2); and

j. Engage in any other agricultural activity as determined by the State Agriculture Development Committee and adopted by rule or regulation pursuant to the provisions of the 'Administrative Procedure Act,' P.L.1968, c.410 (C.52:14B-1 et seq.)."

whether a commercial farm is employing a generally accepted Agricultural Management Practice ("AMP") which is protected by the Act.[7] In the present matter, while there have previously been disputes about the exact procedural path required for reaching a determination as to the specific question posed here as to the storage of commercial vehicles on a commercial farm, the present state of the case is such that the SADC has ordered that the question be determined by this forum, subject of course, to the SADC's statutory review authority under the Administrative Procedure Act, N.J.S.A. 52:14B-10(c).

In support of its position that the on-site storage of commercial vehicles used at least in part on the property of a commercial farm, but also employed for commercial purposes off-site, although at least in part in activities that are related to the on-site farming activity, Ciufo cites to several decisions of various County Agricultural Development Boards. However, a review of these decisions shows that they have not directly answered the question at hand, although they offer some guidance to its outcome.

In Matter of Wendall and Leslie Nanson (Monmouth County Agricultural Board, Resolution 2001-11-02), the Board considered the operations of a commercial farm located in Howell Township. The business, WLN Farm and Grounds Maintenance ("WLN"), provided landscaping services at Newark Liberty and Kennedy Airports. It grew plants, trees and shrubs used in these off-site operations on the farm. Objections were raised to its activities, including "that product grown on the farm is used in WLN's off-site grounds maintenance operations, that most farms in Howell grow product for on-site sales and WLN does not, that product grown on the Property is taken for sale outside of Howell and often outside Monmouth County, that vehicles are sometimes taken from the Property and used in connection with the Montrose Farm operation, and that WLN 'co-mingles' its farm and grounds maintenance operations." The Board

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[7] Agricultural management practices" means practices which have been recommended by the State Agriculture Development Committee, and adopted pursuant to the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., which shall include, but not necessarily be limited to, air and water quality control, noise control, pesticide control, fertilizer application, integrated pest management and labor practices.

determined that the activities of the farm were appropriate and recommended the proposed improvements and uses as set forth in the site plan/plat filed in connection with the Nansons' application as accepted agricultural management practices within the meaning of the New Jersey Right to Farm Act. However, as to the issue presented in the present matter, the Board's approval cannot be read to authorize the storage on-site of commercial vehicles used for the most part for the off-site landscaping and lawn service business. In Nanson, while the Board found that "WLN's use of equipment, both in the farming operations at the Property and in conjunction with the off-site grounds maintenance operations, is an efficient use of capital that benefits the farming operation," the Board also noted that:

> "[T]he equipment used in support of WLN's ground maintenance at Newark and Kennedy airports is stored at those facilities, although, in order to make efficient and economical use of the equipment owned by WLN, equipment from the airport operations is, when it is needed and available, often used in connection with the farming operations at the Property."

As the equipment generally, but not exclusively, used in WLN's ground maintenance business operations was stored off-site at the airports and was brought to the farm when needed, the decision does not address whether storage on-site of this equipment would have been found acceptable.

In Great Swamp Greenhouse (Morris County Agriculture Development Board, Resolution 2005-3), the Board certainly approved the storage on-site of vehicles used in the agricultural business. "It is a generally accepted practice for farmers to store equipment outdoors. Great Swamp Greenhouses may store outside vehicles and equipment utilized by the agricultural operation." However, the Resolution does not identify any business conducted by Great Swamp Greenhouse off-site in which the commercially-tagged vehicles are primarily used, such as a lawn service. It does not indicate if these vehicles were tagged as farm vehicles or as commercial vehicles. The Resolution is not sufficiently detailed to serve as a guide to the question now before the SADC. Similarly, in the Burlington County Agriculture Development Board's Resolution 2006-39, Matter of Albanesi, the Board approved storage of equipment necessary for the production of products of the farm, themselves not detailed in the Resolution. While

this approval presumably included vehicles, the Resolution does not mention any off-site commercial business or any off-site use of the approved "equipment." Again, this does not address the circumstances under review. Nor does the resolution issued by the Middlesex County Agriculture Development Board in Barton Nursery, May 17, 2006, which refers to parking of vehicles. Again, the facts presented do not identify the sort of off-site operations and vehicle usage therein as are presented in the present case. In Matter of Sepers Nursery, the State Agriculture Development Committee and the Cumberland County Agriculture Development Board approved as an accepted management agricultural the early morning use of trucks that delivered the commercial farm's horticultural products to customers. But the Hearing Officer's Report does not indicate if these trucks were stored on-site and also identifies no off-site business such as the landscaping and lawn service that Simple Cuts, LLC operates. Finally, in Cipriano Farms, Resolution 2008-01, issued by the Bergen County Agriculture Development Board, the decision notes that besides its farm operation, Cipriano Farms, LLC's owner, Chris Cipriano, also conducted a landscaping business, Cipriano Landscaping, run from another business office located off of the farm site. The landscaping equipment and trucks had been relocated to a commercially-zoned site away from the farm. The decision notes that Mahwah Township and local residents were concerned that the Farm was being utilized to support commercial landscaping and construction activities not protected by the Act. The decision advises that during mediation, Cipriano relocated the landscaping equipment and trucks to a commercially-zoned site away from the farm. In approving activities protected by the Act, the Board specifically conditioned that approval upon, among other conditions, that no landscaping service company is operated from the Farm and "[A]ll equipment related to other business entities, including but not limited to Cipriano Landscaping, L.L.C., will be located and stored off site."

None of the cited cases relied upon by Ciufo settle the question presented here. If these commercial-tagged vehicles were used exclusively on and by the farm for the purpose of its commercial business of growing trees and other ancillary farm uses, the cases suggest strongly that parking, storage and maintenance of these vehicles on the farm site would be well within the realm of accepted agriculture management practice. But the evidence from Mr. Ciufo, even given its admitted limitations, presents a very

different picture. Much like the Nanson operation, the off-site activities for which these trucks are used significantly predominate over their use on the farm itself, and while in Simple Cuts' case, the on-site use may well be greater than it was for the Nanson operation, there is no demonstrated need for the trucks used so much for the off-site business to be stored on-site. And clearly, the Cipriano case shows that the division of the farming operation, with its protections under the Right to Farm Act, from the landscaping business, was deemed to be an appropriate condition to assure that the farm operation was protected without allowing that protection to justify other non-farm operations at the site. That the Cipriano companies were apparently legally separate, while here Simple Cuts, LLC seems to be both the farming and the landscaping entity, is of no significance in this analysis. Here no expert evidence has been offered, and no real financial justification affecting the viability of the farm operation has been presented, to explain why these vehicles must be stored on-site for the farm operation to be viable. The issue here is not the presence of these trucks on the farm as farm-use trucks, it is their storage and overnight presence when they are so generally used for the non-farm business that appears to be problematic.

Counsel for Ciufo note that the ordinance does not specify whether the trucks that it purports to regulate are exclusively used in the farming operation. That may be so, but again, the issue here, as directed in the Order of Remand, is only to determine whether the Ciufo/Simple Cuts' vehicles "storage . . . is a protected activity under the Right to Farm Act." Based upon the evidence, I **CONCLUDE** that to the extent that these commercial trucks are used for the lawn and landscaping portion of Simple Cuts' business, there is no ground to consider their "storage" on the farm property as an accepted "agricultural management practice." Therefore, such storage is not protected by the Right to Farm Act. There is no basis for concluding on this record that the inability to store these commercial vehicles on-site poses a threat to "the retention of agricultural activities" or that such will "unnecessarily constrain essential farm practices." N.J.S.A. 4:1C-2 a. and b. Indeed, while not the focus here, it is noted that by its terms the ordinance protects the storage of one farm vehicle. To the extent that it may seek to limit the number of such vehicles "used in the farming operation," quite possibly such a limitation would run afoul of the Right to Farm Act, but that issue is not before this forum.

I hereby **FILE** my initial decision with the **STATE AGRICULTURE DEVELOPMENT COMMITTEE** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE AGRICULTURE DEVELOPMENT COMMITTEE**, which by law is authorized to make a final decision in this matter. If the State Agriculture Development Committee does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE STATE AGRICULTURE DEVELOPMENT COMMITTEE, Health/Agriculture Building, PO Box 330, Trenton, New Jersey 08625-0330**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 19, 2016
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

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WITNESSES:

For petitioner:

Anthony Ciufo

For respondent:

None

For intervenor:

None

EXHIBITS:

Joint Exhibits:

J-1 Board Resolution
J-2 Survey of Property

For petitioner:

P-1 Branchburg Summons
P-2 Five photographs

For respondent:

R-1 County Agriculture Board Meeting Minutes 2/14/11 and 3/14/11
R-2 Supplemental Information given to Agriculture Board

For intervenor:

None