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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ADC03446-07

AGENCY DKT. NO. SADC ID # 695

TOWNSHIP OF LOPATCONG,

Petitioner,

v.

RAYMOND L. RAUB AND GAIL A. RAUB,

Respondents.

John M. Carbone, Esq., for petitioner (Carbone & Faase, attorneys)

William L. Handler, Esq., for respondents

Richard R. Keiling, Esq., for the Warren County Agriculture Development Board

Record Closed: June 13, 2012 Decided: July 30, 2012

BEFORE **RICHARD McGILL**, ALJ:

This matter originally involved a dispute between the Township of Lopatcong ("petitioner") and Raymond L. Raub and Gail A. Raub ("respondents") concerning respondents' operation of a farm. Specifically, petitioner issued summonses to

respondents for various zoning violations including placement of trailers along the property line with several residences. After initially filing in municipal court, the summonses were transferred to the Warren County Agriculture Development Board ("WCADB") for disposition.

After all summonses but one were voluntarily withdrawn, the WCADB issued its determination entitled "Findings of Fact and Resolution" in which it dismissed the last remaining summons and allowed respondents to continue the existing use and placement of seven trailers along the boundary line in Lopatcong Township conditioned upon evergreen trees being planted at least three feet tall and six feet on center. Both parties filed appeals with the State Agriculture Development Committee ("Committee"). Prior to hearing, petitioner withdrew its appeal. The remaining appeal relates to respondents' challenge to the requirement to plant evergreen trees as screening.

PROCEDURAL HISTORY

The WCADB issued its Findings of Fact and Resolution on January 18, 2007, and petitioner appealed by letter dated February 1, 2007. Thereafter, respondents filed their appeal by letter dated February 14, 2007.

The matter was transmitted to the Office of Administrative Law on March 22, 2007, for determination as a contested case. After several adjournments, a hearing was scheduled for May 2, 2012. By letter dated May 1, 2012, petitioner withdrew its appeal in this matter. The hearing was conducted on May 2, 2012, at the Office of Administrative Law in Newark, New Jersey, solely in regard to respondents' appeal. The record closed on June 13, 2012, upon receipt of the WCADB's brief.

ISSUES

The first issue relates to a Right to Farm Resolution issued by the WCADB on October 25, 2004, approving respondent's application for a site specific determination of accepted agricultural management practice. This Resolution did not contain a requirement related to evergreen trees. Respondents maintain that relitigation of this determination is barred by the doctrine of res judicata. Additionally, respondents argue that the WCADB's decision was binding pursuant to N.J.S.A. 4:1C-10.1(e) with the implication that it cannot be changed in a subsequent proceeding. The WCADB contends that it is required to conduct a public hearing and issue findings of fact in this type of situation. Thus, the issue is whether the 2004 Resolution prohibits the WCADB from requiring the planting of evergreen trees in its 2007 Resolution.

The WCADB contends that respondents failed to file their appeal within ten days as required by N.J.S.A. 4:1C-10.1(d). The issue is whether respondents' appeal should be

dismissed because it was not filed in a timely manner.

The third issue is whether respondents should be required to plant evergreen trees as required by the WCADB. Respondents maintain that there is no basis for this condition and that it would create a hardship. The WCADB contends that it must consider the impact of farming on neighbors and create a balance with other lawful practices.

FACTS

1. Summary of Evidence

The parties presented Right to Farm Resolution No. 05-04 dated October 25, 2004, and the Findings of Fact and Resolution dated January 18, 2007, as joint exhibits in this proceeding. Aside from the condition related to the planting of evergreen trees, which is at issue in this proceeding, the contents of these resolutions are not in dispute and are accepted as true.

Both respondents testified in this proceeding. Their testimony addressed the general course of events in this matter and, to the extent that it did not lapse into legal argument, is accepted as true.

B. Findings

Based upon the evidence presented at the hearing, I **FIND** as follows: In 1997, respondents purchased a thirty-four acre farm located in Harmony and Lopatcong Townships in Warren County. Respondents also conducted farming operations on approximately 120 contiguous acres leased from the State.

3 As of 2004, respondents had approximately fourteen beef cattle on the property. The farm produced primarily hay and soybeans along with grains and corn. After 2004, respondents converted most of the thirty-four acres to pasture for the beef operation.

Along the perimeter of the property, respondents have approximately fourteen trailers that are used to store hay and straw which are used for feed for the cattle as well as for resale. All trailers are on wheels and are licensed to be on the road. Use of the trailers for storage is less costly than construction of a barn on the property. The trailers have

been parked along the property line in Lopatcong and have been used for storage of hay since respondents started farming the land, which was prior to 2004.

On the opposite side of the property line in Lopatcong are residential neighbors living on individual lots. These neighbors objected to the respondents' practice of parking the trailers along the property line.

Respondents decided to go to the WCADB for a determination as to whether their operation was a commercial farm and whether their practices were appropriate. In 2004, respondents sought from the WCADB approval of a site specific determination that their property was operated under an acceptable agricultural management practice.

After site visits and a hearing, the WCADB determined that respondents operate a commercial farm in accordance with the requirements of N.J.S.A. 4:1C-9 and that they are engaged in a generally accepted agricultural operation or practice. The WCADB approved an agriculture management plan, which was followed by respondents.

3 On October 25, 2004, the WCADB issued a Resolution, which set forth the above determinations. There were no recommendations for any changes. The WCADB retained jurisdiction of the matter.

3 In 2006, the neighbors were still seeking relief with respect to the trailers and other concerns, and they filed a civil suit in Superior Court. After an appeal to the Appellate Division of Superior Court, the dispute was referred to the WCADB. This other dispute is not part of this appeal.

The neighbors also urged the authorities in Lopatcong to issue summonses to respondents for various violations. The authorities did so, and a proceeding initiated in municipal court was referred to the WCADB. At the hearing before the WCADB, all summonses were dismissed voluntarily except for one related to a requirement of a 40' setback in Lopatcong. In 2006, the farm operation was the same as it was in 2004. Testimony was taken from various individuals.

In its Resolution dated January 18, 2007, the WCADB repeated its findings from 2004 that respondents operate a commercial farm and that respondents are engaged in a generally accepted agricultural practice or operation. With respect to the summons concerning the 40' setback requirement, the WCADB made a finding of not guilty. Additionally, the WCADB allowed respondents to continue the existing use and placement of seven trailers along the boundary line in Lopatcong Township conditioned upon evergreen trees being planted at least three feet tall and six feet on center. Respondent filed their appeal on February 14, 2007.

LAW AND ANALYSIS

1. Legal Framework

This appeal arises under the Right to Farm Act ("Act"), N.J.S.A. 4:1C-1 to -10.4. The purpose of the Act is to establish as the policy of this State the protection of commercial farm operations from nuisance actions, 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. N.J.S.A. 4:1C-2(e). The Act has been construed to apply to private nuisance claims, Curzi v. Raub, 415 N.J. Super. 1 (App. Div. 2010), as well as actions under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -129, Twp. of Franklin v. den Hollander, 172 N.J. 147 (2002). The county agriculture development board has primary jurisdiction in these types of disputes. Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 346 (App. Div. 2004).

One applicable statute is N.J.S.A. 4:1C-10, which provides as follows:

> 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," L. 1968, c. 410 (C.52:14B-1 et seq.), or whose specific operation or practice has been determined by the appropratie 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. (Emphasis added.)

Any person aggrieved by the operation of a commercial farm shall file a complaint with the applicable county agriculture development board prior to filing an action in court. N.J.S.A. 4:1C-10.1(a). In disputes between municipalities and commercial farms, a county board must consider relevant municipal standards in rendering its ultimate decision. Twp. of Franklin v. den Hollander, 172 N.J. at 152. A fact-sensitive inquiry will be essential in virtually every case. Id., at 153.

2. Timeliness of Appeal

The first issue concerns the WCADB's contention that respondents did not file their appeal in a timely manner. The applicable statue is N.J.S.A. 4:1C-10.1(d), which provides as follows: "Any person aggrieved by the decision of the county board shall appeal the decision to the committee within 10 days." The applicable regulation is N.J.A.C. 2:76-2.10(b)2ii, which provides as follows: "Any person aggrieved by the decision of the board shall appeal the decision to the Committee within 10 days of receipt of the board's decision." Thus, receipt of the board's decision begins the ten-day period in which to file an appeal.

Here, there is no proof as to the date on which respondents received of the WCADB's decision. Likewise, there is no proof as to the date of mailing of the WCADB's decision. Further, no inference can be drawn from the reference in respondents' letter of appeal dated February 14, 2007, to petitioner's letter of appeal dated February 1, 2007, because there is no proof as to the date on which respondents received petitioner's letter. It follows that the WCADB has not established a factual basis for its argument. Therefore, I **CONCLUDE** that the WCADB's argument is without merit.

3. Res Judicata

The next issue concerns respondents' contention that the doctrine of res judicata prohibits any changes relative to the WCADB's 2004 Resolution. Specifically, according to respondents, the addition of a requirement to plant evergreen trees is prohibited by the doctrine of res judicata.

Judicially-created principles related to issue preclusion such as collateral estoppel and res judicata may be applied in the administrive law setting. Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005). But application of doctrines such as res judicata in administrative proceedings must be accomplished in a prudent and selective manner so as to advance the agency's efforts to carry out its responsibilities. Hackensack v. Winner, 82 N.J. 1 (1980). There is no obligation to apply the doctrine of res judicata in this type of proceeding, if so doing would hamper the agency in carrying out its responsibilities.

The term "res judicata" pertains to a common-law doctrine barring relitigation of claims or issues that have already been adjudicated. Velasquez v. Franz, 123 N.J. 498, 505 (1991). In accordance with the doctrine of res judicata, a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding. Ibid.

The doctrine of res judicata should not be applied to this proceeding for several reasons. The first reason relates to the causes of action. In the 2004 proceeding, respondents were seeking a site specific determination of accepted agricultural management practice. In this proceeding, petitioner was charging respondents with various zoning violations

including one related to a 40' setback requirement. It is evident that the two proceedings do not involve the same cause of action.

Second, it is well established that the WCADB is required to consider relevant municipal standards in rendering its decision. There is no indication in the WCADB's 2004 Resolution that it considered the impact of its decision on respondents' neighbors. Thus, it cannot be said that the matter was fully litigated in the prior proceeding.

Third, it is noteworthy that the WCADB concluded its 2004 Resolution as follows: "the Board retains jurisdiction in this matter." This language implies that the WCADB was considering further action in this matter. This is another indication that the 2004 matter was not fully and finally litigated. Lastly, the parties were not identical in the two proceedings. Under the circumstances, I **CONCLUDE** that the doctrine of res judicata should not be applied in this proceeding.

4. N.J.A.C. 2:76-2.10(b)2ii(2)

Respondents offer a similar argument based upon N.J.A.C. 2:76-2.10(b)2ii(2), which provides as follows: "Any decision of the board that is not appealed shall be binding." According to respondents, the 2004 Resolution was not appealed and is therefore binding on the parties to this proceeding.

This arugment is unpersuasive for two reasons. First, the WCADB did not change any of the two actual determinations in the 2004 proceeding. The two determinations were that respondents operate a commercial farm and that respondents engage in a generally accepted agricultural operation or practice. These determinations were not disturbed in the Findings of Fact and Resolution from January 2007.

Second, N.J.S.A. 4:1C-10.1 porvides in part as follows:

> 1. Any person aggrieved by the operation of a commercial farm shall file a complaint with the applicable county agriculture development board . . . prior to filing an action in court.
>
> 2. In the event the dispute concerns activities that are addressed by an agricultural management practice 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.), the county board shall hold a public hearing and issue findings and recommendations within 60 days of the receipt of the complaint.

In view of this statute, it is evident that there may be complaints and hearings in situations where a commercial farm has an approved agricultural management practice. Therefore, I **CONCLUDE** that respondents' argument is without merit.

Finally, respondents argue that the requirement to plant evergreen trees is defective in several respects. First, respondents claim that planting of evergreen trees would create a hardship. One consideration is that the planting of evergreen trees along a property line 368.75' long would be costly. Another consideration is that respondents' property along that line already accommodates an electrified fence for the maintenance of their cattle. Respondents are concerned that the planting of evergreens and their eventual growth will short out the electrical fence unless it is moved substantially to the north in which event it would then impede upon a roadway which exists at the base of a hill and would render the roadway unusable for vehicles.

The difficulty with respondents' argument is that there is nothing in the record of this proceeding about the cost of the evergreens, the electrified fence, the possibility of it shorting out or any problems with moving it. Without any factual support in the record, respondents' argument is without merit.

Respondents also contend that there is no basis for a condition requiring the planting of evergreen trees. This argument is also unpersuasive. The WCADB is obligated to consider the impact of its decision on respondents' neighbors. The problem with the trailers relates to their impact on the views of respondents' neighbors. The requirement of a visual screen in the form of evergreen trees is a reasonable response which may be inferred from the problem itself. Presumably, the screening will mitigate the adverse impact of the trailers. Therefore, I **CONCLUDE** that respondents' argument is unpersuasive.

Based upon the above, I **CONCLUDE** that respondents' appeal is without merit. Accordingly, it is **ORDERED** that respondents' appeal in this matter be dismissed.

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.

3 July 30, 2012

Date **RICHARD McGILL**, ALJ

Date Received at Agency:

Date Mailed to Parties:

ljb

APPENDIX

WITNESS LIST

For respondents:

Raymond L. Raub

Gail A. Raub

EXHIBIT LIST

None