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## REAL ESTATE LAW

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### Right to Farm Act Resolves Disputes in Most Densely Populated State

Conflicts between farmers, their nonfarming neighbors and local government entities are common — and increasing

**F**armer Smith operates a dairy farm in Warren County on land his family has farmed for four generations. Last year, a developer constructed 30 new houses surrounding the farm. Farmer Smith's new neighbors enjoy looking out their windows and seeing open fields and grazing cows. When summer arrives, however, the pungent odor of cow manure pervades their homes. The neighbors can no longer tolerate the odor and believe the farm is interfering with the enjoyment of their new homes.

Farmer Jones, a vegetable farmer in Gloucester County, needs a new barn. She wants to construct the barn 15 feet from the property line, but a municipal ordinance requires a 25-foot setback. Farmer Jones applies for a variance, but is doubtful the municipality will grant it.

Do Farmer Smith's neighbors have a valid nuisance claim? Does the

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municipality have the right to tell Farmer Jones where to build her barn? Do Farmers Smith and Jones have the right to farm?

In the most densely populated state in the country, conflicts between farmers, their nonfarming neighbors and local government entities are common — and increasing. The Right to Farm Act, N.J.S.A. 4:1C-1 et seq., affords responsible farmers protections against public and private nuisance actions and against municipal regulations that constrain farming. If a farmer satisfies the eligibility criteria in the act, he is entitled to an irrefutable presumption that his agricultural practices or operation do not constitute a nuisance. His agricultural activities may also pre-empt local municipal regulation of those activities.

The New Jersey Legislature first responded to such conflicts in 1983 when it enacted the Right to Farm Act. The act was companion legislation to the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq., which established New Jersey's Farmland Preservation Program. The acts were designed to work together to

preserve New Jersey's agricultural industry — by keeping land in agriculture and by protecting the ability to farm.

The two acts also established the county agriculture development boards (CADBs) and the State Agriculture Development Committee (SADC), a state agency in, but not of, the Department of Agriculture. The SADC administers the Right to Farm and Farmland Preservation Programs and the CADBs administer the same programs on a local level.

In 1998, the act was amended to strengthen the protections for farmers. P.L. 1998, c.48. One of the most significant changes was to provide for pre-emption of municipal ordinances that seek to regulate specific agricultural activities as long as the agricultural operation meets the eligibility standards in the act. The act lists a series of protected agricultural activities, all of which may pre-empt municipal ordinances. The list stipulates, however, that farm market buildings and parking areas must be in conformance with municipal standards.

The New Jersey Supreme Court

upheld the act's municipal pre-emption provision, finding that farmers may conduct certain agricultural activities despite municipal regulations to the contrary. *Township of Franklin v. den Hollander*, 172 N.J. 147, 151 (2002). Although it recognized that agricultural activities may pre-empt municipal regulations, the Court cautioned that the SADC and CADBs do not have "carte blanche" right to impose their views, and directed the agencies to consider local ordinances and regulations that may affect the agricultural activity. *Id.* at 151-152. The Court also held that the SADC and CADBs 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 agriculturally-based reason" for not complying. *Id.* at 153.

For a specific agricultural activity to pre-empt a municipal ordinance, the act requires that agriculture be a permitted use on the farm under the municipal zoning ordinance, or be consistent with the municipal master plan as of Dec. 31, 1997. If the commercial farm was in operation on the effective date of the amendments to the Right to Farm Act (July 2, 1998), however, the zoning ordinance/master plan requirement does not need to be met.

There are two types of right-to-farm actions. A farmer may initiate an action to arm himself with the protections of the act — before anyone has filed a complaint against him or before a municipality has denied him approvals for an agricultural use of his land. This action involves a farmer applying to his local CADB for a "site-specific agricultural management practice recommendation."

The other type of action is when an individual or municipality is aggrieved by a commercial farm oper-

ation. The act requires such persons to file a complaint with the applicable CADB prior to filing an action in court. This requirement applies to a municipality that wants to issue a summons against a farmer for a violation of its ordinance or regulations. The SADC or CADB then holds a public hearing to determine whether the farmer is entitled to the protections of the act.

In *den Hollander*, the Court recognized that the SADC and CADBs have primary jurisdiction over right-to-farm matters. *Id.* at 151. Expanding upon this further, the Appellate Division recently held that a farmer did not waive the primary jurisdiction of the CADB in a nuisance action brought in Superior Court, despite failing to raise a jurisdictional defense in his pleadings or during the trial. *Borough of Closter v. Abram Demaree Homestead, Inc.*, 365 N.J. Super. 338 (App. Div. 2004).

The initial inquiry in a right-to-farm matter is whether the agricultural operation meets the definition of "commercial farm" set forth in the act. If an operation is larger than five acres, it must annually engage in agricultural or horticultural production worth at least \$2,500 and be eligible for differential property taxation pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1. For farms smaller than five acres, the annual production requirement is a minimum of \$50,000 and the farm must satisfy the eligibility requirements for farmland assessment, other than the farm-size requirement.

The *Demaree* court held that whether an agricultural operation meets the definition of commercial farm should be determined first by the SADC or CADBs. *Id.* at 349-350. It based this holding on the SADC's rules and to ensure consistent application of the Act. *Id.*

Once the operation has been deemed a "commercial farm," the inquiry then shifts to whether the farmer is conducting his operation in a responsible manner. The first test of responsible farming is whether the farmer is conducting an agricultural

activity in compliance with the standards contained in agricultural management practices (AMPs) that have been promulgated by the SADC, or with generally accepted agricultural practices. The SADC and CADBs rely upon agricultural and soil experts to make this determination.

Under the act, the SADC has the authority to promulgate AMPs, which contain standards for specific agricultural activities, through the rulemaking procedure. To date, the SADC has adopted AMPs for apiaries, poultry manure application, food processing byproduct application, commercial vegetable and tree fruit production, natural resource conservation, on-farm compost operations, fencing installation and aquaculture. It is currently drafting AMPs for equine operations, farm markets, greenhouses and agritourism.

The final tests of responsible farming are whether the operation is in compliance with relevant state and federal statutes and rules, and whether it poses a direct threat to public health and safety. If the operation is not in compliance with relevant laws or it poses a direct threat to public health and safety, it is not eligible for the protections of the act.

Farmers can opt to mediate their conflicts through a free service offered by the SADC. Mediators are trained and certified by the SADC. This service has been a successful alternative to the hearing process.

The SADC and CADBs have ruled upon a variety of right to farm conflicts. The following are a few examples of activities found to be in conformance with generally accepted agricultural practices or promulgated AMPs:

- a liquid propane cannon used to scare birds from a sweet corn crop, which generated a noise complaint (currently on appeal in the Appellate Division);
- soil-mixing and truck activity on a nursery operation, which generated a noise and dust complaint;

- manure management on a cattle farm, alleged to cause a fly problem on neighbors' properties.

The SADC found that the 24-hour lighting of a Christmas tree farm shining into a neighbor's house did not conform with generally accepted prac-

tices. It has also denied right-to-farm protection in many matters based upon the farmer's inability to meet the definition of commercial farm or because the disputed activity was not protected by the act.

The Right to Farm Act was designed to "provide a proper balance among the varied and sometimes con-

flicting interests of all lawful activities in New Jersey." N.J.S.A. 4:1C-2e. As housing developments increase, and more and more farms are permanently preserved, the Right to Farm program will continue to be a tool for sorting out the respective rights of farmers, their neighbors and municipalities. ■