STATE AGRICULTURE DEVELOPMENT COMMITTEE

IN THE MATTER OF CLC, LLC

OAL DOCKET NO. ADC 20659-15
AGENCY DKT. NO. SADC #1580

FINAL DECISION

Overview

This case arises from a May 2014 application to the Monmouth County Agriculture Development Board (MCADB or board) by CLC, LLC (CLC) for a site specific agricultural management practice (SSAMP) determination for the operation of a proposed nursery and farm market, also referred to in the record as a "sales center", on CLC's property in Wall Township. CLC proposed the wholesale and retail sale of ornamental trees, shrubs, plants and ornamentals to its affiliated home construction and landscape companies; to other wholesale nurseries; and to landscape architects.

According to the testimony, site plan drawings and other materials submitted to the board, the 2-story farm market/sales center building, each floor of which measured 1,500 square feet, was to be devoted on the first floor to selling agricultural products, administrative and office space, and meetings with customers; and on the second floor for storage of farm marketing materials. An 864-sq. ft. garage for additional equipment storage was proposed for attachment to, and 15 parking spaces were designed for, the farm market/sales center. Four (4) other parking spaces were set aside for employees in the rear of the property. The SSAMP sought the expansion of an existing barn to accommodate farm-related vehicles and equipment, construction of an attached lean-to for shading of nursery stock prior to planting, and the installation of concrete bins to hold mulch, sand, subsoil and topsoil for the horticultural operation. CLC also proposed the installation of three (3) diesel fuel tanks and permanent deer fencing, and the restoration of four (4) existing hoop houses. The company indicated during the MCADB proceedings that it might undertake educational and recreational activities on the farm property, but CLC provided no further details in testimony or documents.

The application was opposed by the township and by residents in proximity to the CLC parcel. The MCADB, after several hearings in 2014 and 2015: (1) concluded that CLC operated a commercial farm on the Wall Township property (Resolution 2014-10-1), and (2) granted CLC an SSAMP, subject to various conditions (Resolution 2015-08-1). The township and residents appealed both resolutions to the State Agriculture Development Committee (SADC). CLC did not appeal either

resolution. The SADC transmitted the township and resident appeals as a contested case to the Office of Administrative Law (OAL) in December 2015.

The SADC has reviewed the April 2, 2018 Initial Decision by the administrative law judge (ALJ or judge), the voluminous exhibits accompanying that decision, the extensive legal briefs and memoranda filed by the parties, and approximately 1000 pages of transcripts of proceedings before the MCADB. The ALJ did not conduct a hearing; instead, the judge relied on the same materials in preparing the Initial Decision that the SADC reviewed in preparing this Final Decision. No exceptions to the Initial Decision were filed by any party. We appreciate the hard work of the MCADB and ALJ in this matter.

This Final Decision will not repeat the testimony and exhibits before the MCADB, as the Initial Decision provided a detailed recital of the parties' contentions. The "Background" sections of the Final Decision summarize the facts existing when the SSAMP was being considered by the board and are included to provide context to the discussion of relevant legal issues. We **ADOPT**, **MODIFY** and **REJECT** the Initial Decision as set forth in more detail below.

Commercial farm eligibility

Background.

In January 2014 CLC purchased a farmland-assessed, approximately 10-acre lot designated as Block 742, Lot 22 in Wall Township. The principals of CLC were Kevin Kloberg and his wife. The property was previously a fruit-and-vegetable farm, and a residence was located on the parcel.

Chatham Landscape Contractors (Chatham), a business entity owned and operated by Mr. and Mrs. Kloberg, purchased and brought to the farm property, beginning in late February 2014, some 5,500 rare and expensive species of trees, shrubs, plants and ornamentals. Most of the plant materials were brought to the site in a balled-and-burlapped condition. CLC planted and nurtured these horticultural products, some of which were valued at several hundred to a few thousand dollars each, by periodic watering, pruning and fertilizing.

Some of the cultivated plants were transported for landscaping jobs performed by Chatham and to construction firms operated by Mr. and Mrs. Kloberg under other business names, including CLC Construction Co., Inc. (CLC Construction).

Initial Decision.

N.J.S.A. 4:1C-3 ("section 3") of the Right to Farm Act (RTFA or Act) is the initial jurisdictional predicate to the availability of RTFA protection: the farm must be a "commercial farm" in order for the agricultural or horticultural operations conducted on the property to benefit from the protections afforded by the Act. For the purpose of the CLC case, "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", P.L.1964, c. 48 (C.54:4-23.1 et seq) . . .

The judge quoted section 3 of the RTFA (Initial Decision, p. 15) but did not make an affirmative finding that CLC operated a farm management unit of at least 5 acres in size and satisfied farmland assessment criteria. As noted in this Final Decision, *infra*, page 2, the record reflects that the CLC farm property was 10 acres in size and was farmland assessed in 2014. Therefore, we **MODIFY** the Initial Decision with the findings that CLC satisfied the commercial farm eligibility criteria of farm-size acreage and entitlement to farmland assessment.

The ALJ, who found that the 5,500 plants, trees, shrubs and ornamentals were not owned by CLC but were owned by Chatham at the time of the SSAMP application (Initial Decision, p. 21), concluded that those horticultural materials were produced on the farm property because they were being nurtured and were growing as a result of CLC's on-farm activities. The judge also stated that "'value' is not necessarily measured by money actually received, but instead by what the 'value' of the produce [sic] is. . ." (Initial Decision, p. 22). However, he focused instead on three (3) CLC invoices and cancelled checks for payment in support of a showing that section 3 of the Act required proof of at least $2,500 in farm *income*: (1) a June 12, 2014 sale of 90 yards of double-shredded mulch by CLC to Chatham at $15.00 per yard for a total price of $1,350, the mulch having been produced from grinding debris and trees from the orchard abandoned by the prior owner of the farm; (2) an April 30, 2014 sale by CLC of 20 trees, 118 plants, 150 assorted perennials and 150 ornamental grasses to CLC Construction, for a total sale price of $8,583 and a downpayment check from CLC Construction for $1,725, related to the latter company's home building project in Spring Lake, NJ scheduled in Fall 2014; (3) a June 25, 2014 sale by CLC, for immediate removal from the farm property, of 15 trees and plants to Chatham for $2,390.

The judge found that the sale of mulch to Chatham ($1,350), and

the sale to CLC Construction ($1,725) of various trees, plants, perennials and ornamentals nurtured on the site from February to late September/early October 2014, were commercial farm income sufficient to satisfy the $2,500 threshold requirement in RTFA section 3. The ALJ found the plant sale to CLC Construction valid because the various plant materials would be nurtured on the CLC farm for a growing season, thus constituting "production". The ALJ did not count the sale of trees and plants to Chatham ($2,390) because those materials were "short-term 'occupants'", having been nurtured on-site for about 3 months and, therefore, not amounting to an appropriate level of farm production.

The judge's conclusions regarding plant sales to CLC Construction and to Chatham were informed by In re Cipriano, a June 2008 Bergen County Agriculture Development Board (BCADB) decision determining that trees and shrubs which are balled-and-burlapped, grown on a farm for a period of time "(i.e., a growing season or healed over the winter) and which also receive significant watering, nurturing, pruning, etc. clearly qualify as agricultural production". The Bergen CADB also found that trees and shrubs "which are delivered in a balled and burlapped state and which are sold within a growing season do not necessarily constitute 'production' but qualify for protection in the totality of the Farm's operation, as a permitted, 'related' activity in connection with the usage of the Farm as a wholesale farm market. . ." The Bergen CADB decision was not appealed to the SADC.

SADC determination.

A plain reading of N.J.S.A. 4:1C-3 reflects that commercial farm status is based, in addition to farm size acreage and eligibility for farmland assessment, on at least $2,500 *worth* of annual agricultural or horticultural production for farms 5 or more acres in size. The Merriam-Webster dictionary (2016 ed.) defines "worth" as "the value equivalent to that of someone or something under consideration; the level at which someone or something deserves to be valued or rated." It is not unreasonable to interpret, and we so **FIND**, that the statutory term "worth" connotes "value" under the Act.

The SADC is mindful that in the overwhelming majority of cases before a county agriculture development board (CADB) and the SADC, farm owners and operators present written proof of income in the form of cancelled checks or cash receipts for the pick-up by or delivery to the public of farm-grown agricultural or horticultural products for consumption or use. But the typical income proof under RTFA section 3 was inappropriate in this particular case for the reasons that follow.

It is important to note that CLC did not own the products on its

farm, yet the receipts reflected that CLC "sold" those items to affiliated entities controlled and operated by Mr. and Mrs. Kloberg. This self-dealing cast serious doubt on the real value of the products, and the CLC invoices and cancelled checks should not have been given the weight accorded by the board and the ALJ as proof of commercial farm income.

Further, CLC was a "start-up" operation at the time it filed the SSAMP application. The Wall Township property was purchased by CLC in January 2014 with the intention of substantially changing a former fruit-and-vegetable farm to a high-end horticultural operation; plantings began in February 2014 and the SSAMP application was filed in May 2014. It is apparent from the record that there was insufficient time to effectuate sales of the on-farm products CLC was responsible for growing to end-users like other wholesale nurseries, landscape architects or other wholesale or retail customers, as CLC contemplated in its SSAMP application, until the horticultural materials were adequately cultivated. Thus, it was necessary to seek alternative evidence of production value to determine commercial farm status.

According to the record, CLC would be nurturing and growing over 430 plants associated with the April 30, 2014 invoice for a period of 7 to 8 months (February through September or October 2014), and the remaining 5,000+ plants evidently continued to grow for the remainder of the 2014 growing season.

We take administrative notice of the approximate growing season in the Wall Township area based on two (2) government authorities. See, N.J.S.A. 52:14B-10(b); N.J.A.C. 1:1-15.2(b); N.J.R.E. 101(a)(3); and Re New Jersey Bell Telephone Company, 1992 WL 526766 (N.J.Bd.Reg.Com.).

The United States Environmental Protection Agency (EPA) bases, in part, the length of a typical growing season on the final Spring and first Fall frost, https://www.epa.gov/sites/production/files/2016-08/documents/print_growing-season-2016.pdf. The National Oceanic and Atmospheric Administration (NOAA) has published a "Freeze/Frost Occurrence Data" chart at https://www.ncdc.noaa.gov/climatenormals/clim20suppl/states/NJ.pdf. Using temperature data from the NOAA weather stations closest to Wall Township in Freehold and Toms River, the publications allow us to reasonably deduce that the typical growing season at the CLC Farm location was either April 22 to Oct 22 (Freehold) or April 25 to Oct 18 (Toms River).[1] The SADC understands that there is some

[1] The NOAA chart contains percentage probabilities (90%, 50% and 10%) that the last Spring frost will occur later, and the first Fall frost will occur earlier, than each of the listed date ranges. The dates above are based on the mid-range, or 50%, probability.

variability in these growing season dates based, as the EPA notes, on air temperatures, rainfall and daylight hours. There is also testimony in the CLC case record that horticultural growth varies depending on particular plant species. Our administrative notice is taken not to establish a standard but merely to provide a general basis upon which to arrive at a reasonable expectation of the horticultural growth season at CLC's location in 2014.

Given that October signifies the end of the growing season at the CLC site, all of the plants there, except for the 15 trees and plants transferred to Chatham in June 2014, were being nurtured and would be in production for nearly the entire growing season. Since there were over 5,000 trees and plants located on the site, it is readily evident that the horticultural production occurring on the CLC farm during the 2014 growing season -- that is, the collective increased value of the plants -- had an imputed monetary value, or "worth", of at least $2,500 during the year 2014. We therefore **FIND** that, relevant to CLC's operation at the time it filed the SSAMP application, horticultural nurturing for nearly the entire 2014 growing season increased the value of the plant materials and, therefore, constituted production for the purposes of the Act.

The record amply demonstrates that the horticultural products on the CLC farm were extremely valuable, and that each of the approximate 150 different species of trees, plants, shrubs and ornamentals possessed a readily-ascertainable, commercial market value an end-user other than CLC affiliates would be willing to pay. The SADC is confident, based on the testimony that certain of the 5,500 individual trees and plants had a value of several hundred to several thousand dollars, that CLC easily conformed with the section 3 requirement that the horticultural products being grown on the farm were "worth $2,500 or more annually".

Based on the above analysis, the case of I/M/O Joseph P. Arno (OAL Dkt. No. ADC 4748-03, SADC ID #1328), noted in the Initial Decision at p. 24, has limited applicability in the context of CLC's commercial farm eligibility.

Arno sought RTFA protection to construct a barn on his 7-acre property, 3.77 acres of which were non-appurtenant woodland and 1.28 acres of which were pasture. He claimed that firewood generated from the woodland area was agricultural or horticultural production worth at least $2,500 and, therefore, sufficient to satisfy that part of the section 3 "commercial farm" definition. The SADC's Final Decision (February 27, 2004) conditioned commercial farm eligibility on a written contract between Arno and a purchaser for a specified amount of firewood for delivery within a specified timeframe. Significantly, the agency also held that harvesting the woodland area could only be deemed production if there was active cultivation

reflected in a woodland management plan prepared by a certified forester and a signed statement from the forester that there was a sufficient number of trees ready to harvest for delivery to the purchaser.

The ALJ appeared to place more reliance in Arno on the need for a written contract for future delivery of firewood than on how non-appurtenant woodland, an otherwise passive resource, could legitimately generate production for commercial farm eligibility purposes. Our holding in Arno, and the determination set forth above in this case, recognizes that there needs to be active cultivation over a sufficient period of time in order to satisfy the section 3 requirement of production, hence generating the worth, of an agricultural or horticultural product.

In re Tavalario, 386 N.J.Super. 435 (App.Div. 2006), referred to in the Initial Decision at pp. 16 and 25, also had limited relevance to the CLC case. The appellate court observed that it was proper for the SADC to distinguish between the keeping of horses for private use and the care of the animals required to achieve a level of production necessary to satisfy commercial farm and RTFA eligibility. The Tavalario court, at pp. 446-47, and the ALJ (Initial Decision, p. 25) equated, as commercial farm production pending a future sale, the maturation of a horse under proper animal husbandry with the appropriate cultivation of a horticultural product.

The ALJ, however, did not consider that, two years after the Tavalario decision was issued, the SADC promulgated N.J.A.C. 2:76-2B.3, the agricultural management practice (AMP) for "Eligibility of equine activities for right to farm protection". The regulation clarified the more subjective inquiry posed by Tavalario regarding what constitutes equine production activities under the Act by identifying more specific income criteria which "may be used to satisfy the production requirements in the definition of 'commercial farm' set forth in N.J.S.A. 4:1C-3". N.J.A.C. 2:76-2B.3(e). Two of the criteria incorporate an appropriate equine maturation period, "income from the sale of a horse that was trained or raised on the commercial farm for at least 120 days prior to the time of sale" and "income from fees associated with raising a horse on the commercial farm for at least 120 days." N.J.A.C. 2:76-2B.3(e)3 and (e)4. We expect that analogous reliance on the equine AMP, rather than on Tavalario, would have led to the conclusion that the proper growth of an agricultural or horticultural product, whether animal or plant, constitutes production having an imputed value or worth that may be considered for commercial farm eligibility purposes.

Accordingly, we **MODIFY** the Initial Decision by disregarding the two (2) sales of plant materials by CLC to the CLC-affiliated construction and landscape companies, and instead **FIND** that CLC

operated a commercial farm producing horticultural products worth at least $2,500 or more annually in 2014 based on the nurturing and growing of 5,500 rare, specialty trees, plants, shrubs and ornamentals during that year's entire, or nearly entire, growing season.

Finally, we **REJECT** the Initial Decision by determining that the sale of mulch by CLC to Chatham did not count toward annual agricultural or horticultural production value under section 3 of the RTFA.[2] The Act lists, as permitted activities in N.J.S.A. 4:1C-9a., the production of

> agricultural and horticultural crops, trees, 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[.]

The Standard Industrial Classification for agriculture, forestry, fishing and trapping does not consider mulch an agricultural product. The SADC has not yet promulgated regulations, in consultation with the Department of Labor, in accordance with N.J.S.A. 4:1C-9.1, but it should be noted that mulch is not listed as an agricultural product under the North American Industry Classification System.

Mulch production from the grinding of on-farm tree stumps and branches might be considered the processing of the agricultural output of the commercial farm permitted in N.J.S.A. 4:1C-9b. Depending on the scale, intensity and ultimate use or purpose of the activity, a determination of commercial farm and RTFA eligibility for such processing could implicate compliance with the woodland management plan requirements in regulations promulgated by the Department of Treasury pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1, et seq. (FAA). See, N.J.A.C. 18:15-2.7. As noted in the "Overview" section, *supra*, p. 1, CLC produced mulch not as part of a woodland management plan but as a result of the grinding-up of an orchard abandoned by the prior farm owner.

Mulch production from the on-farm grinding of tree stumps and branches, to the extent it results in a compost material, would also be a permitted activity if undertaken in accordance with the on-farm composting AMP. See, N.J.S.A. 4:1C-9d. and g., and N.J.A.C. 2:76-2A.8. However, one of the requirements of the AMP is that the composted material cannot be distributed or sold to off-farm users

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[2] Consideration of the mulch sale to Chatham was also inappropriate because of the objectionable self-dealing noted, *supra*, at pp. 4-5.

except for manure composted on equine farms. See, N.J.A.C. 2:76-2A.8(a)2 and N.J.A.C. 2:76-2B.3(b)3. Accordingly, the sale of mulched trees and branches to an off-farm user as a compost product would not count toward commercial farm eligibility. As noted in the "Commercial farm eligibility" section, *supra*, p. 3, CLC sold the mulch to Chatham for off-farm use.

SSAMP eligibility

Background.

The CLC farm property was located in a zone in which agriculture was a permitted use under the Wall Township zoning ordinance as of December 31, 1997 or thereafter and was consistent with the municipal master plan. No evidence was introduced that the CLC operations violated federal or state laws or regulations. The main dispute in the case was whether CLC posed a direct threat to public health and safety. The township and neighbors objected to CLC's SSAMP request because the farm's only ingress and egress was via a cul-de-sac in a neighborhood of single-family dwellings with a road system that, in their view, was unsuited for the vehicles and traffic associated with CLC's proposed commercial use.

Initial Decision.

The introductory portion of N.J.S.A. 4:1C-9 ("section 9") of the RTFA, which the ALJ recited at p. 6 of the Initial Decision, provides as follows:

> 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,[3] 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 [engage in permitted activities listed in subparagraphs a.

[3]The cited portion "or whose specific operation. . ." to ". . .generally accepted agricultural operation or practice," was omitted from the Initial Decision.

through j. of section 9].

The judge found that CLC's proposed farm operation did not pose a direct threat to public health and safety (Initial Decision, p. 43), observing that the township and neighbors presented "a generalized concern [that] does not rise to the level of the particularized 'direct' threat necessary to defeat an otherwise lawful activity." (Initial Decision, pp. 45-46).

SADC determination.

Section 9 is a second, multi-pronged jurisdictional hurdle for eligibility for RTFA protection: once a farm is deemed a commercial farm, then the farming operation at issue is required to provide satisfactory proof of several other criteria before it may engage, free of unreasonable municipal ordinances and public or private nuisance claims, in the permitted activities set forth in sections 9a. through 9j.

The commercial farm must show, as required by the introductory paragraph of section 9, agricultural zoning of the property as of December 31, 1997 or thereafter and that agriculture is consistent with the town master plan or, alternatively, that the farm was in operation as of July 2, 1998; conformance with agricultural management practices adopted by the SADC in regulations or, alternatively, conformance on the farm property with a site-specific, generally accepted agricultural management practice recognized by a CADB or the SADC; that it is not in violation of relevant federal or state laws and regulations; and that it does not pose a direct threat to public health and safety.

The burden of proof for each of the above-noted conditions is on the commercial farm and, once those criteria are met, a CADB must still "balance the interests" of the farmer, the municipality and affected persons when considering the SSAMP request. Township of Franklin v. den Hollander, 172 N.J. 147, 151-53 (2002); Curzi v. Raub, 415 N.J.Super. 1, 22 (App.Div.2010).

The record is clear that the CLC farm property was located in Wall Township's RR-6 zone in which agriculture is a permitted use and was consistent with the municipal master plan. The ALJ did not tie those facts to SSAMP eligibility under the RTFA, so the SADC **MODIFIES** the Initial Decision by determining that CLC satisfied those specific section 9 requirements.

The SADC also **ADOPTS**, based on the record below, the finding that CLC's operation did not pose a direct threat to public health and safety; however, the ALJ's above-quoted formulation regarding a "particularized 'direct' threat" does not comport with the RTFA.

Therefore, we **MODIFY** and, with respect to use of "particularized", **REJECT** that portion of the Initial Decision for the reasons set forth below.

First, the direct-threat criterion is jurisdictional. A direct threat, if proven, cannot result in the "defeat [of] an otherwise lawful [agricultural or horticultural] activity"; rather, it divests a CADB of authority to issue an approval of an SSAMP application. Put another way, the conditions set forth in the introductory paragraph of section 9, including proof that there is no direct threat to public and health and safety, are requirements that the commercial farmer must satisfy in order to be eligible for RTFA protection through the CADB's grant of an SSAMP determination.

Second, the judge's use of "particularized" improperly grafted another condition on the criterion in N.J.S.A. 4:1C-9 that the commercial farm not pose a direct threat to public health and safety. Jablonowska v. Suther, 195 N.J. 91, 105 (2008).

Third, by citing Dunkin Donuts of New Jersey v. Township of North Brunswick, 193 N.J.Super. 513 (App. Div. 1984), the ALJ appeared to deviate from the "balancing of interests" standard and to adopt a bright-line test that off-farm traffic issues need not be addressed because the CLC parcel was located in a land use zone permitting agriculture and CLC was engaging in legitimate farming activities on its property.

While the ALJ's conclusion that there was no direct threat was unaccompanied by a clearly-enunciated "balancing of interests", the SADC is satisfied that the Initial Decision, taken as a whole, did recognize and sought to balance the competing interests of the commercial farmer, the township, and the non-farming public residing in the immediate vicinity of CLC's horticultural operation. For example, we note the judge's observations regarding the potential for municipal traffic-control measures in the immediate vicinity of the CLC farm that "balanc[es] the legitimate [public health and safety] concerns with the farming interest" (Initial Decision, p. 46) and that "[i]n the absence of. . .proof [of a direct threat to public health and safety], the [M]CADB, in determining to grant the SSAMP, was perfectly within its right to establish what it saw as reasonable time frames for the operation of the farm and sales center." (Initial Decision, p. 61).

MCADB Resolution 2015-08-1 and Initial Decision

The board's resolution granting the SSAMP to CLC included twenty-three (23) separately-numbered conditions on the operation of the proposed horticultural activities. The MCADB's enumerated conditions are recited first, followed by their review in the Initial

Decision, and concluding with the agency's determinations:

1. through 3.: The *MCADB* recited the basic facts about property address, location, zoning, farmland assessment and the prior finding that CLC operated a commercial farm. Those basic facts were recited in the *Initial Decision*, but the finding of commercial farm eligibility is **MODIFIED** as set forth in pages 4-8 of this Final Decision.

4. *MCADB*: CLC's site plan drawings were approved by the MCADB subject to the conditions listed in the board's resolution. The *Initial Decision* did not address the MCADB's approval of the site plans, so the SADC **MODIFIES** the Initial Decision by concluding that the drawings are approved subject to the conditions of this Final Decision.

5. *MCADB*: Deer fence installation proposed in a site plan drawing was approved as an acceptable agricultural management practice and "should be installed" pursuant to the SADC's fencing installation AMP, N.J.A.C. 2:76-2A.9. The ALJ "incorporated" this condition in the *Initial Decision* (p. 64). We **MODIFY** the deer fence installation condition by determining that it shall be accomplished in accordance with the agency's AMP.

6. *MCADB*: The hours of operation for the farm market/sales center shall be consistent with the SADC's regulations governing On-Farm Direct Marketing Facilities, Activities and Events, N.J.A.C. 2:76-2A.13(c)3 (OFDM-AMP): 6:00 a.m. to 10:00 p.m. Monday through Sunday, with closing extended to 11:00 p.m. for seasonal events. The *Initial Decision* (p. 64) approved those hours of operation, and the SADC **ADOPTS** them as well.

7. *MCADB*: The farm's operating hours shall be from 5:00 a.m. to 10:00 p.m. Monday through Saturday, and 7:00 a.m. to 9:00 p.m. on Sundays. Deliveries to the farm shall occur between 7:00 a.m. and 5:00 p.m. Monday through Saturday, with no deliveries on Sundays. The limitations would not apply to private use of vehicles by residents of the farm and to deliveries associated with the on-farm residence. On-farm equipment with back-up beepers and on-farm vehicles making excessive noise shall operate between 7:00 a.m. to 5:00 p.m. Monday through Saturday and 9:00 a.m. through 5:00 p.m. on Sundays "unless the noisemaking features are disabled or turned off". The *Initial Decision* (p. 64) approved the board's conditions related to farm operating hours, deliveries, and hours of equipment operation, but did not address the provision regarding the turning-off of noisemaking features. Instead, the ALJ stated that all vehicles be operated in accordance with Occupational Health and Safety Act (OSHA) regulations and all other applicable federal and state laws. The SADC **ADOPTS** the

ALJ's determinations, including compliance with OSHA and other applicable federal and state laws, as RTFA protection is conditioned on commercial farm conformance with relevant federal and state laws and regulations.

8. *MCADB*: The production of trees, plants, shrubs and ornamentals, including the use of irrigation, pesticides and fertilizers, is a generally-accepted agricultural management practice. The *Initial Decision* (p. 18) approved, without further legal citation, the finding that CLC engaged in production activities, so the SADC **ADOPTS** but also **MODIFIES** the judge's determination by finding that those on-farm activities are permitted pursuant to N.J.S.A. 4:1C-9a. (production of horticultural products) and 9e. (controlling pests and diseases of plants).

9. *MCADB*: Mulch produced from the agricultural output of the farm is a protected activity under the RTFA, but mulch produced from off-farm sources is not protected. The *Initial Decision* only found that the sale of mulch generated from on-farm sources could be counted toward commercial farm income. We agree that mulch production from off-site sources is not a protected activity because the mulch is not the agricultural output of the commercial farm. We **MODIFY** the Initial Decision with regard to commercial farm and RTFA eligibility in respect to mulch production as set forth in this Final Decision, *supra*, pp. 6-7.

10. *MCADB*: Storage bins depicted on the site plan are approved so long as they contain materials for on-farm agricultural or horticultural use (topsoil, mulch, sand and subsoil) and do not contain materials for nonagricultural use. The *Initial Decision* (p. 64) generally approved the bin storage requirements. The SADC **ADOPTS** but also **MODIFIES** the Initial Decision by determining that bin storage materials must be used for on-farm agricultural or horticultural activities.

11. *MCADB*: The proposed barn addition and lean-to are approved for the agricultural and horticultural purposes described in the SSAMP application for equipment storage and shading nursery stock, respectively. The *Initial Decision* (p. 64) also approved those structures, but concluded that the barn could not be used for the storage of any non-farm-related equipment, vehicles or other property. The SADC **ADOPTS** the judge's conditional approval set forth in the Initial Decision.

12. *MCADB*: Retail sales of on-farm nursery products from the farm market/sales center are a permitted activity pursuant to the OFDM-AMP, but no nonagricultural businesses can be conducted from that building. In addition, the location of the farm market/sales center was found to be in compliance with the OFDM-AMP and,

therefore, the facility would not be in violation of the township's prohibition on structures within a front yard.

The *Initial Decision* (p. 63) determined that the farm market: must operate in accordance with the OFDM-AMP; cannot be utilized for any business or company other than CLC Farms; cannot be utilized for the business interests of any other CLC- or Kloberg-related business unless for transactions involving the products produced at the farm or sold from the farm market pursuant to the OFDM-AMP; and cannot be utilized for any landscape design-related businesses other than CLC Farms in connection with the products produced on the farm. The SADC **ADOPTS** these findings in the Initial Decision.

The *Initial Decision* (p. 55) also concluded that the location of the farm market was acceptable because it was not in the front yard of the CLC property or, alternatively, could be viewed as a "principal use" of the lot in conformity with the township land use ordinance. The SADC **ADOPTS** these findings in the Initial Decision.

13. *MCADB*: The location and proposed renovation of the four (4) existing hoop houses, as depicted on the site plan, were approved. The MCADB approval was incorporated in the *Initial Decision* (p. 64), and the SADC **ADOPTS** that finding in the Initial Decision.

14. *MCADB*: Buffering to certain neighboring properties, as shown on the site plan, was approved, with additional conditions regarding survival rates in accordance with the OFDM-AMP; buffer widths; number of plantings; tree species; tree height; retention and removal of existing tree buffers; and the location of deer fencing vis-à-vis the buffer areas. The MCADB's conditional approval was incorporated in the *Initial Decision* (p. 64), and the SADC **ADOPTS** that finding in the Initial Decision.

15. *MCADB*: The location, construction, and number of parking spaces for the market/sales center (15 spaces for retail purposes; 4 spaces for employees at the rear of the property) were consistent with the OFDM-AMP and the township's parking ratio for retail facilities. The MCADB's approval was incorporated in the *Initial Decision* (p. 64), and the SADC **ADOPTS** that finding in the Initial Decision.

16. and 17. *MCADB*: Vehicles and equipment, as set forth in a list submitted by CLC, can be stored on the CLC farm property but must be primarily used for farming activities, and CLC was prohibited from using the property as a staging area for work on other properties. Vehicles and equipment can be temporarily stored on the property while being actively used for agricultural or horticultural purposes, but removed as soon as the on-farm work

is completed; if removed from the farm property to conduct off-site work, the vehicles or equipment cannot be returned to the farm for storage. The *Initial Decision* (p. 63) approved the board's findings except for the last condition prohibiting storage of vehicles or equipment. The SADC **ADOPTS** but also **MODIFIES** the Initial Decision by determining that all of the board's conditions are appropriate.

18. *MCADB*: Erosion control and stormwater management measures depicted on the site plan were acceptable provided they are undertaken in conformance with Department of Environmental Protection (DEP) regulations. The MCADB approval was incorporated in the *Initial Decision* (p. 64), and the SADC **ADOPTS** that finding in the Initial Decision.

19. *MCADB*: Facility lighting as proposed on the site plan was consistent with the OFDM-AMP and approved. The MCADB approval was incorporated in the *Initial Decision* (p. 64), and the SADC **ADOPTS** that finding in the Initial Decision.

20. *MCADB*: The construction and location of proposed diesel fuel storage tanks were approved, but conditioned on compliance with DEP regulations and on exclusive use of the fuel for vehicles and equipment primarily used for on-farm purposes. The MCADB approval was incorporated in the *Initial Decision* (p. 64), and the SADC **ADOPTS** that finding in the Initial Decision.

21. *MCADB*: Educational activities are permitted on the CLC farm property provided they are related to the agricultural output of the farm. The *Initial Decision* (p. 63) modified the board approval by determining that educational activities are limited to and shall be in accordance with the OFDM-AMP. The SADC **ADOPTS** that finding in the Initial Decision, and more specifically draws attention to compliance with "agriculture-related educational activities" defined in N.J.A.C. 2:76-2A.13(b).

22. *MCADB*: Recreational activities are permitted on the CLC farm provided they are "uniquely suited to the agricultural use of the farm" and "cannot be detrimental to the agricultural output". The *Initial Decision* (p. 63) modified the board approval by determining that recreational activities are limited to and shall be in accordance with the OFDM-AMP. The SADC **ADOPTS** that finding in the Initial Decision, and more specifically draws attention to compliance with "farm-based recreational activities" defined in N.J.A.C. 2:76-2A.13(b).

23. MCADB: The production of nursery stock posed no negative effect on the health and safety of the surrounding neighborhood. The Initial Decision determination on that issue, and the SADC's

conclusions, are discussed, *supra*, at pp. 9-11.

Other findings and conclusions in the Initial Decision

The SADC **ADOPTS**, for the reasons stated by the ALJ, the determinations that:

- there was no evidence of bias on the part of the MCADB due to CLC counsel's ownership of farm property in the county (Initial Decision, p. 5);

- Mr. Troutman, on behalf of CLC, and Mr. Kataryniak, on behalf of the township, were qualified to provide expert testimony (Initial Decision, pages 34 and 37, respectively);

- the judge would not consider CLC's objections to MCADB Resolution 2015-08-01 because the company failed to file a timely appeal with the SADC (Initial Decision, p. 60).

As to the procedure employed by the MCADB in this case, the SADC **MODIFIES** the judge's statement that bifurcating the issues of commercial farm and SSAMP eligibility is not required. (Initial Decision, p. 9). N.J.A.C. 2:76-2.7(b) and (c) do require that commercial farm status be established prior to the CADB proceeding on the merits of an SSAMP application in accordance with N.J.A.C. 2:76-2.7(d). In addition, the SADC takes administrative notice that it is the conventional practice of CADBs throughout the state to bifurcate the issues in order to save the board's and litigants' time and expense. We defer to each board's sound judgment as to whether the bifurcated issues can be dealt with at one or more public meetings.

Finally, the judge advised, in the Initial Decision "Conclusion" section (p. 64), that complaints against CLC for violating the SSAMP could be brought to the attention of the MCADB. The SADC has not received copies of any complaints from the MCADB about the CLC farm operation since the issuance of the board's 2015 resolution granting the SSAMP. See, N.J.A.C. 2:76-2.8(d)1.

IT IS SO ORDERED.

Dated: July 26, 2018

Monique Purcell

Monique Purcell, Acting Chairperson
State Agriculture Development Committee

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