Preliminary Memorandum of Decision on Motion

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State of New Jersey, et al.
v.
Quaker Valley Farms, et al.

Docket No. C-14007-08

Motion for Summary Judgment and Cross-Motion for Summary Judgment

Opposed

Argued: July 26, 2012
Decided: August 8, 2012
The Honorable Peter A. Buchsbaum, J.S.C.

Facts and Procedural Posture:

The present case brought by the State of New Jersey and Plaintiff-Intervenor Hunterdon County ("plaintiffs") against Quaker Valley Farms and David Den Hollander ("defendants") stems from defendants' excavating and ground leveling efforts on preserved farmland they own. Plaintiffs seek summary judgment as to liability only on the basis that defendants' actions violated the restrictive deed covenant and caused serious harm to the nature of the preserved farmland. Defendants cross-move for summary judgment on the grounds their activity was farming related and thus not in violation of the deed restriction.

The land owned by defendants is located in Franklin Township, New Jersey. The prior owners of the land, Mr. and Mrs. Mathews ("Mathews") sold their non-agricultural development rights to Hunterdon County in 1993. Hunterdon County was able to purchase the land via a grant from the State of New Jersey, pursuant to the Open Space Preservation Bond Act of 1989. As part of the land preservation process, the State Agriculture Development Committee ("SADC") assessed the value of the land based on its use as a farm. This inquiry included a soil assessment which revealed a soil rating of 28.21 out of 30 possible points, making it prime farmland. Pl. Statement of Facts ¶11. This score indicates the land is likely capable of

supporting field crops such as corn, wheat, oats, barley, hay, and soy beans. Id.

The authority for the SADC to preserve farmland comes from an express grant of power in the Agriculture Retention and Development Act ("ARDA"). N.J.S.A. 4:1C-11, *et seq*. The ARDA gives the SADC the ability to promulgate rules and regulations in order to carry out the intent of the ARDA. SADC rules and the deed of easement restriction on the land state the land shall be used in accordance with the ARDA. The ARDA states preserved farmland shall be retained in perpetuity for agricultural use which is defined as:

> Common farmsite activity including but not limited to: production, harvesting, storage, grading, packaging, processing and the wholesale and retail marketing of crops, plants, animals, and other related commodities **and the use and application of techniques and methods of soil preparation and management**, fertilization, weed, disease and pest control, disposal of farm waste, irrigation, drainage and water management and grazing.

N.J.S.A. 4:1C-13(b)(emphasis added).

Moreover, the SADC's generally promulgated rules and the deed easement restriction for the Mathews land contain identical language which states "no activity shall be permitted which would be detrimental to drainage, flood control, water conservation, erosion control, or **soil conservation**, **nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises**." N.J.A.C. 2:76-6.15(a)(7)(emphasis added); Pl. Br. Exh. A-1 at ¶7.

In 1997, Mathews sold the property with the use restrictions, as indicated above, to defendants. Defendants are a commercial grower of horticulture and use both outdoor growing methods and indoor greenhouses. Since the land purchase in 1997, defendants have made two changes to the land. The first occurred in 1999 when defendants entered into a soil erosion and sediment control plan ("C.251 Plan") with Hunterdon County which required large basins dug into the ground to collect water run-off as part of their greenhouse construction. Def. Statement of Facts ¶27. These basins were constructed in 2002 and required seven foot deep cuts into the land. Id. In 2007, defendant

suffered a major loss of their mums crop which prompted them to convert 20 acres of land from open planting to heated greenhouses. However, since the slope of the land was not conducive for such structures, defendant undertook an effort to reduce the slope through an earth moving project which began in October 2007. This project was done under the pretext of the C.251 Plan.

The SADC became aware of defendant's earth leveling project in November 2007 via an email received from a concerned citizen. See Pl. Response Exh. E, Hunterdon County Agriculture Development Board Minutes of November 29, 2007. SADC then decided to convene a team made up of representatives from the Hunterdon County Agricultural Development Board ("ADB"), the National Resource of Conservation Services ("NRCS"), the New Jersey Department of Agriculture, and the Rutgers School of Environmental and Biological Sciences to assess the land impacts caused by the earth moving project. This assessment team visited defendant's property on February 1, 2008. During this visit, the assessment team found an extensive cutting and filling operation had been conducted. Pl. Statement of Facts ¶17. It found that the soil had been removed to bedrock in some places, naturally formed layers of topsoil and subsoil were blended, and the depth of the cuts into the land in some areas was ten to twelve feet. Id. Reports prepared for the SADC note the characteristics of the land which made it ideal for farming have been stripped away. These qualities took 20,000 years to naturally form through geologic events and now require remediation to return the land to its prior state. Id.

After this discovery, plaintiffs petitioned for and were granted a temporary restraining order on February 28, 2008 which prevented further earth moving activities and halted any ongoing construction of greenhouses on the disturbed lands. A preliminary injunction was entered on April 10, 2008 on the basis the entire project was detrimental to soil conservation and implicated enforcement of the ARDA. This preliminary relief is still in effect, over four years later.

Plaintiffs now seek summary judgment. Plaintiffs contend the material facts are not in dispute and there is only one legal outcome that can be reached. Both plaintiffs and defendants admit the land owned by defendant was preserved farmland with a deed restriction in place. The land was preserved via the ARDA and SADC rules. The SADC rules and the restrictive deed contain language which specifically states the ARDA controls and no actions detrimental to soil conservation

shall be taken. Further, there is no dispute that defendant conducted an earth moving project on the land. According to plaintiffs, this project significantly impacted the future farming productivity of the land as it disrupted the essence of the soil. Therefore, argue plaintiffs, even giving defendants every favorable inference, the ARDA, SADC rules, and the deed restriction were all violated.

Defendants oppose plaintiffs' motion and cross move for summary judgment. Defendants contend they followed the C.251 Plan in place and **it** allowed defendant to conduct the ground leveling project. Moreover, defendants contend the construction of greenhouses is a recognized agricultural use and thus not prohibited under the deed restriction. Defendants support this inference by noting land under greenhouses is considered farmland for the purpose of the Farmland Assessment Act. It then follows that defendants' land is being used as it was intended under the deed – as preserved farmland. To find otherwise would not promote the "free alienability and unrestricted use" of the agricultural rights purchased by defendants. See Def. Br. at 30. Further, defendants put forth there is no evidence that the land is less capable of producing any crop yield because the land has not been farmed in such a manner. It is merely speculation on the part of the SADC, relying on soil tests from only one part of the entire land owned by defendant. In fact, defendants' expert asserts that 40 to 60 percent of the soils were not of the quality described by plaintiffs. See Rpt. of Laurel Mueller, July 23, 2010 at 6-7. Lastly, defendants contend that grading of the land is an authorized use under the ARDA. It notes the word "grading" is specifically contained in the statute. N.J.S.A. 4:1C-13(b).

In their reply, plaintiffs contend defendants have misplaced reliance on both the soil erosion project and the allowance of greenhouse farmland. First, plaintiffs note the land modifications performed under the C.251 Plan in 2002 were designed to further the goals of farmland preservation by preventing soil erosion. Defendants current actions go beyond the scope of what is allowed under the C.251 Plan. Second, even though greenhouses can be considered an agricultural use, this permission does not give defendant the ability to modify the underlying land. Any landowner, including defendant, must still abide by the deed restrictions, the ARDA, and the SADC rules. Moreover, plaintiffs note defendants' suggestion that "grading" is authorized under the ARDA is a misinterpretation of the word. They contend grading, as used in the statute, actually means the score or marking of items to be sold based upon their quality.

Defendants, in their reply, note that soil excavation is typically done prior to greenhouse construction. The deed restriction does not prevent the placement of buildings, such as greenhouses. It then must logically follow that if greenhouses are not prohibited, and soil excavation is a typical prerequisite to building a greenhouse, and greenhouses are a noted agricultural use, then the project undertaken by defendant cannot be a violation.

Analysis:

Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 75 (1954) (citation omitted).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co.,* 142 N.J. 520, 540 (1995). Accordingly, "when the evidence is 'so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (citation omitted).

For the purpose of deciding this motion, the Court takes the facts in a light most favorable to defendants. Many facts are not disputed. There is no dispute that the land owned by defendants was farmland preserved under the ARDA and was subject to restrictions contained in the deed of easement. There is also no dispute that defendants obtained a C.251 Plan in order to address soil erosion and that as part of the C.251 Plan, basins were constructed on the land in 2002. There is also agreement that the construction of greenhouses or hoop houses is a permitted use of the preserved land. Moreover, both parties agree defendants began a large scale excavation project on

roughly thirty acres of land in November of 2007. This project, which is the source of the litigation, was examined by experts for both sides, and clearly the soil quality and land contours were affected. Defendants, in oral argument, even admitted as much.

Nonetheless, defendants contend that the excavation project was not a violation of the ARDA or the easement because the easement allows construction of greenhouses, and that the action was approved under the C.251 Plan. To determine whether defendants' or plaintiffs' arguments should prevail, the Court will analyze the easement language, the statutory framework, and the C.251 Plan.

The Easement Provisions

The deed easement contains several key provisions which control the use of the land. Four of them are critical to this case:

> ¶2 – "The premises shall be retained for agricultural use and production in compliance with N.J.S.A. 4:1C-11 [the ARDA] and all other rules promulgated by the State Agricultural Development Committee."
>
> ¶5 - "No sand, gravel, loam, rock or other minerals shall be deposited on or removed from the Premises excepting only those materials required for the agricultural purpose for which the land is being used."
>
> ¶7 – "No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation, erosion control, or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises."
>
> ¶14 - "Grantor may construct any new buildings for agricultural purposes."

Def. Exh. H.

With regards to whether greenhouses are allowed, section 14 of the easement establishes that the construction of greenhouses is a permitted use on the land. Additionally, "The Farmland Preservation Act of 1964" permits lands to be used for horticultural purposes when it is growing, "nursery, floral, ornamental and greenhouse products." N.J.S.A. 54:4-23.4. Thus, at oral argument, both parties conceded that ¶7 is the critical item of these four restrictions. Its ban on activities which detriment "soil conservation" or the continued agricultural use of the premises are the only provisions that would limit an otherwise permitted greenhouse use. However, the easement specifically cites the ARDA and the SADC rules as controlling the easement in ¶2. Therefore, there can be no dispute **that** the ARDA is clearly applicable to construction of the term "soil conservation" in ¶7 and must factor into the decision since the easement language derives from the statutes.

The ARDA and SADC

The ARDA is the main statute from which farmland preservation stems. Its stated intent is to strengthen the agricultural industry and the preservation of farmland. "Farmland" and "farmland preservation" have statutory definitions which provide clarity as to the intent. Under the Open Space Preservation Act of 1989, which provided the funding to purchase the land in question, "farmland" is defined as:

> land identified as prime, unique or of Statewide importance according to criteria adopted by the New Jersey State Soil Conservation Committee, and land of local importance as identified by local agricultural preservation agencies established by law in cooperation with local soil conservation districts, and which qualifies for lower property taxation, pursuant to the "Farmland Assessment Act of 1964" and any other land on the farm which is necessary to accommodate farm practices as determined by the Department of Agriculture.

N.J.S.A. 13-8C-1.

For the purposes of the Garden State Preservation Act, "farmland" is further defined as:

> Land identified as having prime or unique soils as classified by the Natural Resources Conservation Service in the United States Department of Agriculture, having soils of Statewide importance according to criteria adopted by the State Soil Conservation Committee, established pursuant to R.S.4:24-3, or having soils of local importance as identified by local soil conservation districts, and which land qualifies for differential property taxation pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c. 48 (C.54:4-23.1 et seq.), and any other land on the farm that is necessary to accommodate farm practices as determined by the State Agriculture Development Committee.

N.J.S.A. 13:8C-3.

The Garden State Preservation Trust Act also defines farmland preservation as:

> The permanent preservation of farmland to support agricultural or horticultural production as the first priority use of that land.

N.J.S.A. 13:8C-3.

From these definitions, the plain language makes clear the content of the soil, the soil's ability to support agriculture, and the ability of the land to have agriculture production as its first priority use are at the core of farmland preservation.

The ARDA is also the statute from which the SADC receives its authority to promulgate rules and regulations to promote the goals of farmland preservation under the ARDA. The ARDA states that soil preparation and management is an agricultural use. It is also clear that soil quality is a determining factor in land being considered farmland for the purpose of farmland preservation. N.J.S.A. 4:1C-13(b); N.J.S.A. 13-8C-1; N.J.S.A. 13-8C-3.

Accordingly, the SADC has a rule which prohibits activity that undermines soil conservation or "would be detrimental to the continued agricultural use of the Premises." N.J.A.C. 2:76-

6.15(a)(7). The exact language of this rule appears as ¶7 in the deed easement quoted supra. Having such a rule connects the deed to the fundamental purpose for which the statute was enacted. *See Valazquez ex. rel. Velazquez v. Jiminez,* 172 N.J. 240, 257 (2002). Per the statute, farming relies heavily on the type and quality of soil on the land. The connection between the agriculture and soil is not an accident, but rather the planned byproduct of statutory farmland preservation.

Soil Conservation as Part of SADC Rules

The SADC rules for evaluating farmland preservation applications state a factor to be considered is soil identification as provided by the Soil Conservation Service, known today at the National Resource of Conservation Services. N.J.A.C. 2:76-6.16(a). This was done during the 1993 application process to certify the land in question and was a determining factor to grant farmland preservation status to the land.

The SADC "scorecard" consists of roughly 137 points which a potential preserved farm can receive. Thirty of those points, or 22%, come from soil quality, which is the largest possible point total out of all the categories. Def. Exh. E. The land in question received a total of 94.21 points out of the 137 possible points. Id. Of those 94.21 points, 24.8 or 26% came from soil quality. Id. In other words, while soil counts for less than a quarter of all points in the general score system, the high grade of soil actually gave the land more than one-fourth of the total points it received. This is because 99.8% of the soil on the property was rated either prime (76.4%) or of statewide importance (23.4%). Cert. of Robert Baumley, Feb. 26, 2008, at ¶10. As noted above, for land to be farmland for the purpose of preservation, it must be either prime or of statewide importance, and this land meets that criteria. Supra. at 12.[1]

Therefore, when considering the easement in conjunction with the ARDA and SADC Rules, there is no doubt the content of the soil to be protected played a critical factor in this land gaining preserved farmland status.

[1] The facts as to the application process are uncontested. Defendant's parole evidence objection to certain historical facts is rejected given that the referenced facts are historical in nature and are not proferred to vary the terms of the easement but only provide the historical setting for it. *Conway v. Rte. 287 Corporate Center Assoc.,* 187 N.J. 259 (2006). See, e.g., Plaintiff's Statement of Facts ¶¶ 29, 30, 31, 35, 36, 38 and 39 and responses thereto.

Defendants' Impact on Soil

From both an undisputed scientific standpoint and mere common knowledge, the earth moving project engaged by defendant indisputably affected the very goals of soil conservation and protecting land for continued agricultural use as stated in the ARDA and further codified by the SADC. Since the SADC relies heavily on the studies done by the NRCS in order to decide which farmland to purchase, it is fair to rely on the same to determine what harm has been done. Plaintiffs are correct to point out that because the SADC has the necessary expertise to properly decide if the NRCS findings are accurate, deference should be given to them under *New Jersey League of Municipalities v. Dept. of Community Affairs,* 158 N.J. 211, 222 (1999)(judicial deference to administrative agencies stems from the recognition that agencies have the specialized expertise necessary to enact regulations dealing with technical matters). Further, defendants were the beneficiary of the prior SADC decision relying on NRCS soil samples because without their input, defendants might not have been able to purchase this land in the first place at the approximate $4700 per acre price. Defendants cannot seek to reject the same studies which it once *de facto* accepted when it purchased the land at an agricultural use price. In other words, if the soils were as poor to the extent of 40% to 60%, as defendants now claim, the lot never would have gotten the 28.91 of 30 rating which facilitated the preservation. Then it never would have become available for any agricultural purchaser.

When defendants began the earth moving project in 2007, the makeup of the soil drastically changed if, as defendants' experts certify, it was not stripped to bedrock. There is no dispute from either party that topsoil and subsoil were blended together. Rocks from the underlying substructure became embedded in that soil. The soil went from a prime rating capable of producing a wide crop yield to being considered a soil designation of "udorthents," which is unsuitable for crop production. See Pl. Br., Exh. F, at 14. Even in the areas where the subsoil remains intact, the removal of topsoil can reduce future crop yield by fifteen to twenty-five percent. Id. Moreover, the SADC expert found that this was one of the most expansive earth moving project he has ever seen and that, "even large confined feedlots of far greater acreage in Kansas and Colorado do not involve the destruction of the underlying soil, ripping of the bedrock and mixing the fragments into fill to the extent that has occurred here." See Pl. Br. Exh. I, Smith Rpt. at 10.

Even if defendants are correct that the land in its pre-altered form might not have been able to produce the wide variety of crops the SADC maintains, that was not the standard used for preservation assessment. The SADC noted that with its prime score, the land was merely capable of production; whether it actually would is a different matter altogether and not for this Court to decide. Further, while the Court must take as true for the purposes of the motion the defendants' expert's claim that 40-60% of the soil on the site was not of the quality claimed by plaintiffs, Def. Exh. M, Rpt. of Laurel Mueller, at 7, that still leaves a minimum of 40% to a maximum of 60% of the soil that is of the quality attested to by the SADC which deserves protection under the easement, the ARDA, and the SADC Rules.

However, what is most notable is that defendants' own expert completely accepts the testimony raised about the ability of the land to produce and the quality of the soil. While the report submitted states that the land still has agricultural productivity for greenhouse use, defendants' expert agreed the soil characteristics have been drastically altered at the site and are now not fit for usual agricultural production. Id. at 5. Her certification also states she "cannot dispute the collective opinion that soil profiles on the graded portion of this project's landscape have been permanently altered." Def. Exh. N at ¶3. Additionally, her report notes:

> I share the personal and professional opinions of [plaintiffs' experts] that deep well drained soils in good condition are precious, difficult to replace or restore, and should be protected and preserved for out future production of food and fiber. However, it is my professional opinion that, the "Deed of Easement" on this tract, which allows construction of structures and intensive agricultural uses such as greenhouses, pig farming, feed lots, sod farms ... to name a few, is inadequate to guarantee this protection for land in private agribusiness ownership.

Def. Exh. M. at 7.

Ms. Mueller makes what amounts to a legal conclusion at the end of her report when she seeks to construe the deed of easement. The Court finds that opinion of no moment. It is the

role of this Court to determine if the deed easement specifically prevented the ability of defendants to take the action they did. While Ms. Mueller can opine as to whether the soil is damaged or can be rehabilitated, she crossed the line as an expert with her legal statements on how the case should be decided.

Critically, her factual statements in the passage quoted above do nothing to bolster the contentions of defendants. They only show that defendants in fact destroyed the quality of the soil through their earth moving project. Thus, Mueller's factual findings actually support a conclusion that soil conservation was not protected by defendants, and that normal agricultural use has been disrupted by them.

This Court also does not find merit in the novel contention put forth by defendants that "grading" is authorized under the ARDA, SADC Rules or the easement. The paragraph at issue defining agricultural uses permits "common farmsite activities, including but not limited to 'production, harvesting, storage, grading, packaging, processing and the wholesale and retail marketing of crops ...'" Since, per the doctrine of *noscitur a sociis,* a word is known by the company it keeps, grading in the context would have nothing to do with landforms. *Herzog v. Township of Fairfield,* 349 N.J. Super. 607-08 (App. Div. 2002). Rather, it can only refer to the grading of agricultural produce in connection with marketing of crops, which is the point of the whole passage.[2]

Further, this paragraph, in a separate phrase, does reference soil preparation and management, language which does bear on the physical treatment of soils. But that language does not even hint that the wholesale displacement of soils with 8 foot cuts is a permitted agricultural use.

However, even assuming grading under the ARDA means leveling the land, for the purpose of summary judgment, and under **a** very generous reading, defendants still went too far in that authorization. Even if defendant had to ability to "grade" the land, it did not have the authority to permanently change

[2] The word "grading" is specifically contained in the definition of agriculture under ¶2 of the easement and under the SADC Rules. See N.J.A.C. 2:76-6.15(a)(2) and N.J.S.A. 4:1C-13(b). Given that the word "grading" is used prior to "production, harvesting, storage," then followed by, "packaging, processing," the only logical reading of "grading" is that it means determining the quality of a product for sale.

the unique soil structure through a major earth moving project. That is in direct violation of the deed restriction language preventing action which disrupts soil conservation or future agricultural use.

Some grading of the land may be appropriate at times, especially for the construction of certain buildings. See Pl. Exh. H, Dep. of Peter Melick, 46:2-18. Greenhouses are an agricultural use and permitted under section 14 of the easement. So it naturally follows that some grading of the land for greenhouse construction might be needed. It is conceded that greenhouses are a permitted use, or grading might be done, as in the C.251 Plan here, to prevent erosion of prime soils.

But what is truly at issue is whether the construction of the greenhouses would allow defendant to change the composition of the soil so drastically. Here, the deed is clear in that no action can be taken which destroys the conservation of the extant soils, which was a key basis for the desirability of the land for purchase. Def. Exh. H at ¶7. Because action taken by the defendant did damage to both soil conservation and future agricultural use, it violated the restrictions. The soil is not of the same quality it was when the County purchased the non-agricultural development rights, and requires at least 14 acres of remediation. See Defendants' Response to Pl. Statement of Material Facts ¶42.

The Court cannot accept defendants' contention that they may undertake such excavation **on** a farm purchased at a bargain price for $4,179/acre because its good soils resulted in preservation in order to carry on a use to which soil is irrelevant. Defendants should not expect the benefit of a deed restricted price without accepting the restriction. Once the soil was so detrimentally impacted, as both plaintiffs and defendants admit, defendants were in violation of the deed restriction.

Based upon the already established context for the easement, the ARDA and the SADC intent to protect the soil, and the fact that both experts freely admit the soil is damaged from defendants' actions, only one legal conclusion can be reached on this record: Defendants violated the provisions of the easement, the ARDA and SADC Rules.

The C.251 Plan

Defendants contend that the C.251 Plan entered into supersedes the easement and actually permits the excavations on the land. Even construing all the material facts in a light most favorable to defendants' assertion, it cannot support this legal conclusion.

A C.251 Plan addresses the prevention of soil erosion and is necessary when building impervious surfaces, pursuant to the "Soil Erosion and Sediment Control Act." N.J.S.A. 4:24-40. As far back as 1996, when Mathews began renting space to defendants and before defendants purchased the land from Mathews, there had been concerns that the use of greenhouses on the land was causing soil erosion and sediment deposits. See Def. Reply Br., Exh D, SADC Meeting Minutes of May 23, 1996 at 4-5. In 1999, the Hunterdon County Agriculture Development Board determined that defendants violated section 7 of the deed easement, which provides that "no activity shall be permitted on the Premises which would be detrimental to **drainage**, flood control, water conservation, **erosion control** ..." Def. Exh. Q, HCADB Memo, Jan. 19, 1999 (emphasis added); Def. Exh. H at ¶7. This determination was reached because defendants' operation was causing excessive erosion and drainage into the Lockatong Creek. Def. Exh. Q. As such, it is uncontroverted that defendants entered into a C.251 Plan in order to address the erosion and drainage issues while continuing their agriculture practices. This resulted in 18,000 cubic yards of ground being impacted.

It is critical to note that the C.251 Plan was agreed upon to prevent soil erosion and control drainage, which is a provision of the easement. Nowhere in the supporting documents related to the C.251 Plan does it authorize ground leveling specifically for the construction of greenhouses, nor does it authorize the destruction of the quality of the soil as part of greenhouse construction. The C.251 Plan's only aim is to prevent further erosion and improve drainage on the property. Too, defendants admitted during oral argument that the 18,000 cubic yard land excavation for the C.251 Plan previously conducted was far less than the land excavation conducted for building of the current greenhouses. Moreover, defendants concede the reasoning for leveling the land in the instant case was to decrease the slope so that the plants inside the greenhouses would grow and heat evenly, not to ensure adequate protection against soil erosion and so defendants' employees would not be walking uphill during cultivation. See Def. Exh. B, Cert. of David Den Hollander, March 6, 2008, at ¶¶3-7. In all, the excavation in question was far larger and unrelated **to** the intent of the C.251 Plan.

In addition, the Hunterdon County Soil Conservation District ("the District"), which monitors the C.251 Plan and the stewardship of the land for easement violations, provides information to the Hunterdon County Agriculture Board, but not to the SADC. See Dep. of Kevin Milz, 26:9-17; Dep. of William Engisch 95:14-25, 98:12-15. While the District provides monitoring, it is the County Agriculture Development Board which has the affirmative obligation to ensure compliance with the easement provisions. Engisch Dep. 118:18-22. The District did give C.251 authorization to the project and knew that topsoil was being stripped as part of the construction. Id. 139:14-17; Milz Dep. 95:14-25. However, this authorization related only to erosion and sediment control and not the impact on the quality of the soil.

There are two uncontroverted facts which support this contention. First, the District's approved revision of the C.251 Plan to accommodate the construction of greenhouses in October of 2007 stated, "**This approval is limited to the soil erosion, sedimentation, and related storm water management controls specified in this plan**." See (emphasis added) Cert. of Den Hollander, Exh. E. The plain language of the approval does not address soil excavation or greenhouse construction as it related to soil quality. Second, it is admitted by the District it did not look at the impact on the soil quality for agricultural purposes when providing the C.251 authorization; it simply looked at the impact on the C.251 Plan dealing with soil erosion and sediments. Dep. of Mark Symaneck 37:7-25. While defendants rely on the perceived authorization of the Soil Conservation District for this project, this reliance is misplaced. There was in fact no authorization as it related to soil excavation. There is no other way to interpret the factual information other than one may be in compliance with the C.251 Plan but be out of compliance with other parts of the easement provision, as occurred here.

Defendants' Claims Under New Jersey Civil Rights Act

Defendants claim that the lack of uniform standards related to soil disturbance, land grading, and construction on agricultural lands is a violation of their constitutional rights under Article I, Section 1 of the New Jersey Constitution. See N.J. Const. Art I., §1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness"). As support,

defendants point to the fact that there were no SADC guidelines provided to Hunterdon County, nor is there any training provided to those individuals who are charged with enforcing the terms of the easements. Engisch Dep. 147:4-13; Milz Dep. 27:1-25, 28:1-1-20.

A claim that state constitutional rights were violated can be brought through the New Jersey Civil Rights Act ("NJCRA"), codified at N.J.S.A. §10:6-1. The NJCRA is to be interpreted as one would analyze the Federal Civil Rights Act ("FCRA"), 42 U.S.C. §1983. The NJCRA and the FCRA provide nearly identical language in that an individual private claim may be brought against a "person" acting under the color of law or statute who deprives another of their "substantive due process or equal protection rights" as described in NJCRA or their "rights, privileges, or immunities" as listed in FCRA. N.J.S.A. §10:6-2(c); 42 U.S.C. §1983. For there to be a violation under the NJCRA, there needs to be evidence that there is an "egregious" governmental action that "shocks the conscience." *Rivkin v. Dover Township Rent Leveling Board,* 143 N.J. 352, 366 (1996). Moreover, the New Jersey Supreme Court in *Rivkin* noted that substantive due process does not protect persons from all government actions that infringe on liberty or injure property and that courts should be hesitant to extend an overly broad reading of due process violations. Id. at 365-66.

Here, there is no action done by any governmental body which is so egregious that the conscience of this Court is shocked.[3] There is no evidence that the State, County, or local units of governments in any way threatened defendants property or infringed upon its rights. In fact, defendants willingly purchased land which they knew came with restrictions on its use. Moreover, the State and County are simply acting within the statutory guidelines that have been provided by the Legislature pursuant to the ARDA and the State Administrative Procedure Act, under which the SADC promulgated its rules and regulations. While defendants may claim that a lack of guidance on the matter of soil conservation and agricultural building is shocking and egregious, the conscience of the court is not so easily shocked. *Rivkin,* 143 N.J. at 366 (citing *Irvine v. California,* 347 U.S. 128, 133 (1954)). Moreover, plaintiffs point out that several other states including California, Delaware, Vermont, and Maryland have similar provisions as New

[3] Since the issue is raised by defendants herein in response to a lawsuit, the Court will assume, without deciding, that their claims are ripe for judicial resolution. Compare *Rezem Family Asso. v. Borough of Millstone,* 423 N.J. Super. 103 (App. Div.), certif. denied, 208 N.J. 366, 368 (2011).

Jersey. See Pl. Reply at 23. This is further evidence that the general conscience should not be shocked, nor are the policies of the government egregious.

Conclusion:

Based on the foregoing, plaintiffs' motion for summary judgment, on the issue of liability only, is **GRANTED.** Defendants' crossmotion for summary judgment is **DENIED.** Defendants' claim under the NJCRA is **DISMISSED.** The parties shall appear at a case management conference to discuss remedy, which appears to be the sole remaining issue, because the complaint does not seek damages.