ORDER PREPARED BY THE COURT

Filed At Chambers

JUN 25 2013

Judge P. Buchsbaum

STATE OF NEW JERSEY, STATE AGRICULTURE DEVELOPMENT COMMITTEE, COUNTY OF HUNTERDON, TOWNSHIP OF FRANKLIN,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION HUNTERDON COUNTY DOCKET NO. HNT-C-14007-08
Plaintiffs,	:	**CIVIL ACTION** **FINAL ORDER**
v.	:	
QUAKER VALLEY FARMS, LLC and DAVID DEN HOLLANDER,	:	
Defendants.	:	

CERTIFIED TO BE A TRUE COPY

IT IS on this 25 day of June, 2013, for the reasons set forth in the opinion filed herewith;

ORDERED:

That a Judgment is entered in favor of plaintiffs and against defendants for remediation of the unlawful soil removal as found by this Court on August 8, 2012. A remediation plan shall be submitted by the defendants to the plaintiffs and the Court within 30 days, and;

IT IS FURTHER **ORDERED**

that the terms, timing, financial provisions and other contents of such remediation plan, and any review thereof by the plaintiffs shall be in accordance with the requirements set forth in the Opinion accompanying this order, all of which are incorporated by reference to become fully part of this Order and enforceable as same; and

IT IS **FURTHER ORDERED**

That the Hunterdon County Soil conservation District shall serve in the role of Master if it is willing, and if not, the Court shall appoint a master to supervise and administer the remediation required hereby; and

COPY SENT 6/25/13 to all attys w/opinion.

IT IS FURTHER **ORDERED**

That the Court retains jurisdiction over the matter for the purposes of enforcement of requirements of the above referenced opinion pursuant to R,. 1:10-3 or otherwise, but that any and all other prayers for relief are hereby **DENIED.**

PETER A. BUCHSBAUM, J.S.C.

Opinion

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

State of New Jersey, State Agriculture Development Committee, County of Hunterdon, Township of Franklin

v.

Quaker Valley Farms, LLC and David den Hollander

Docket No. HNT-C-14007-08

Decided: June 25, 2013

The Honorable Peter A. Buchsbaum, J,S.C.

Last year, on August 8, 2012, the Court decided that Defendants had violated the Agricultural Deed of Easement restricting the use of their farm in Franklin Township since their excavation activities had destroyed much of the soils on the 25 acres; these soils had led to the whole 119 acre property owned by defendants being the subject of a deed restriction to farm uses which easement was purchased with public moneys. The issue of remedy for the violation and restoration was left open at the time.

That issue was tried before the Court on April 29 and 30 and May 1 and 2, 2013. On behalf of the State Agricultural Development Committee ("SADC"), represented by the Attorney General, appeared Larry Young, an engineer, and William E. Palkovics, an agronomist. The defendants, represented by Robert Merenich, presented testimony from Defendant Den Hollander and a soils expert, Laurel Mueller.[1] The only issue was remediation since there was no prayer for damages by the plaintiff or the intervener.

[1] Hunterdon County and Franklin Township relied on the SDAC's witnesses testimony.

The parties agreed on the three separate areas on the site. They differed sharply on the appropriate degree of remediation of the soils on each to address the violation of the easement. Mr. Palkovics testified that all of the 25 acres at issue had been subject to soil alteration, and that the site originally had 12" of top soil underlain by several feet of subsoil. More specifically, he delineated on P-25 one area, Area 1[2], which had only topsoil stripped, a second area, Area 3, which had been cut, and Area 2 on which the soil from the cut had been placed as fill. He recommended a substantial amount of subsoil, up to five feet, be placed in the cut area, and removal and replacement of some of the fill on the filled area. He also recommended restoring the slopes as nearly as possible to the prior grades. He also testified that 12" of topsoil was required for the entire 25 acres.

Mueller on the other hand found only 8" of topsoil needed with none being stripped from Area 1. She also testified that 16" of subsoil would sufficiently replicate the crop bearing characteristics of the original Quakertown soils on which the designation of the property for farmland preservation was based.

There was also a disagreement on the extent of intrusion of non-prime soils on the 25 acres. While both experts agreed that there could be exception areas of less fertility than Quakertown (QukB) soils, Mueller asserted based on test pits that a significant part of the 25 acres did not fit the full profile of such soils for the approximately 4 to 5 feet column suggested for classifying such soils as high quality.

The parties also disagreed on the import of the Soil Manual, P-97, as used for a specific site. There was no dispute however, that the Manual was used in determining that the soils on this site were worthy of

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[2] The Court in discussing Area 1, is referencing the bulk of the yellow on the right side of P.25. The narrow strip of yellow shall be treated in any remediation plan, depending on what management techniques work best for these stripes.

being protected with public money used in the Farmland Preservation program. However, the field testing appeared to indicate that there were variations in the actual soil profiles.

AREA 1 AND TOP SOIL

The Court will first address the topsoil issue and Area 1.

Mueller took samples from Area 1 showing about 8" of topsoil. D-17. She found from staples left over from the plastic weed strips from the prior chrysanthemum growing operation and from clover that this area had been undisturbed. Defendant Den Hollander asserted that this area had not yet been touched when the injunction was entered. His chrysanthemum growing operation involved roadways and equipment which had packed down the soil. Also, Palkovics' samples 24 and 25 outside the 25 acres had 8 to 10" of topsoil.

The Court also heard calculations by Engineer Young and Mr. Palkowics of 4" of topsoil lost in Area 1. These were based on aerial mapping from 2003. See P-6, Part III. These were not field checked, although they were compared to field checked post disturbance elevations. This comparison showed that Area 1 was at an average 4" lower than before.

The Court finds that the 8" estimate is more credible. The 2003 Gilmore aerials were never field checked. The testimony as to them as represented in the Gilmore report on which Young relied was rather pro forma. The Court has little to go on as to the precision of the 2003 mapping. That the aerials might have been off by 4" is certainly plausible.

Further, the testimony as to the prior use of the site for mums with access by equipment as possibly tamping it down is persuasive. The Court itself observed some staples and plastic confirming the testimony that the last activity on Area 1 was in fact

the mums operation, not soil stripping. The clover, and the physical difference in Area 1 from the fill and stripping obvious elsewhere in both the diagrams, and test pits all combine to persuade the Court that the lower estimate of original topsoil is the more plausible one. Further, some of the photos, such as P-21, show the dramatic difference in character between Area 1, and the other two areas which were all the parties agreed were subject to cut and fill.

Further, that Den Hollander used the Gilmore elevations in preparing an application for soil conservation approval is not persuasive as an admission. The issue there did not relate to and was not affected by the prospect of having to add the 4 inches of topsoil now in dispute.

These same considerations plus Den Hollander's testimony that the area was not excavated persuade the Court that Area 1 was not stripped and does not need to be remediated. While the plaintiff argues that Den Hollander cannot be sure his crews stopped where they were supposed to, that potential gap does not affirmatively persuade the Court in the absence of other evidence that in fact soil stripping took place in Area 1.

The Court does agree with Plaintiff that Area 1 is not virgin territory. The aerial P-70 shows as much. Still, the Court cannot find that this Area was the subject of the unlawful activity found by the Court in its 2012 opinion. The evidence suggests that it was planted with the chrysanthemums crop as was much of the 119 acres. This planting according to the trestimony of both Den Hollander and Mueller involved some pathways for access, and some compacting of soil due to equipment preparing the area for the flowers. Thus, the proof that the soil was actually stripped is lacking. The Court therefore finds that the 8" to 9" suggested by Mueller from her test pits do represent more fairly the pre-excavation condition of the tract

as a whole. The Court thus also agrees that Area 1 was not stripped and does not have to be remediated.

As a result it also appears that 8' to 9" of top soil would replicate the pre-disturbance condition not just in Area 1, but throughout the site. It must be supplied. However, there would also seem to be no reason why the existing soil stockpiles could not be used. Mueller said they were fine, as did Palkovics who opined they were fine with some care and treatment. What degree of treatment should be used will be addressed during the actual remediation process as set forth below.

AREAS 2 AND 3

As to Areas 2 and 3, both parties found test pits had intrusions of other soil types. Mueller related them to concave features in which water would collect, which also involve redoximorphic (water intrusive) features showing high water tables in the rock. However, her 40 to 60% intrusion estimate is not fully borne out by her test pits. In fact, some of the deviations she pointed to were minor -- 38" rather than 42" to bedrock in one soil sample -- and seem rather technical. It is also inconsistent with the mapping which, despite the Soil Manual warnings about its lack of site specific clarity, was used as making the decision to rate this land as prime farmland suitable for public purchase of an agricultural easement. In this vein, the purchase price of $500,000 for 119 acres of the Mathews farm had to be related to the deed restriction which resulted from the soils estimate quality.

Further, these warnings may be most applicable to very site specific issues like locating a house or a septic system, but would appear less applicable to broader planning decisions covering 119 acres where the manual was used. Therefore, given the normal limit of 25% on intrusions on which the parties agreed, and crediting some additional amount of intrusion based on

the soil samples cited above, showing significant amounts of Chalfont or Lehigh or other type soils, the soil should be restored to the yield capacity of 70% prime- Land Capability Class 2 in Quakertown (QukB) - and 30% soils of statewide importance, category 3.

These categories of soil fertility received a great deal of attention in defendants' testimony. The Court is satisfied that based on the testimony Mueller accurately categorized QukB Quakertown soils as being prime farmland with a Land Capability Class 2 productivity, while some of the other soils such as Chalfont or Lehigh were in a less productive soils of statewide importance category. None of the soils were poor for agricultural purposes.

This determination would recognize that class 2 had formed the basis for the easement and the acknowledged presence of a substantial amount of QukB soils on the site. It would treat the site realistically based on what is there, and not attempt to restore a status quo that did not exist, without rewarding defendants for their unlawful excavations. In sum, while some flexibility is appropriate for a Court of equity such as this one, it would be an abuse of discretion to treat a whole or even most of an area as being inferior agricultural when its soil is stripped when those same soils had been the subject of a government purchase based on their high quality. The maxim he who seeks equity must do equity guides this Court into respecting the soil characteristic which led to the preservation of this property.

This conclusion, more than estimates of the amount or volume of soil to be replaced suggests how remediation should occur. There was no dispute about cut and fill on the site in Areas 2 and 3. The issue was what to do about them, assuming the 8" or 9" of top soil, and further assuming the soil class determination made by the court above.

The soil borings showed enough variation that it is impossible to know exactly what the soil column was throughout the excavated and filled areas. No one testified that the soil would have completely matched the standard QukB profile. There is no agronomical reason for restoring something that never existed. Soil is, as Palkovics said, a living organism, not a uniform factory product and this land was not uniform. Further, even Palkovics only suggested a surrogate for the prior subsoil which has, at least in the stripped area, been destroyed. Thus, neither expert opined that Humpty Dumpty can be put back in its shell again.

The issue is thus using soil remediation in restoring the land to its prior productive use as 70% prime farmland with essentially only 2 to 6% slopes. Both parties made some compelling arguments as to each others' plans. The 100% grade shown on Mueller's concept posits an area that is utterly useless for farming and does not mirror anything that was there before and is not acceptable in terms of what the easement was supposed to accomplish. It also poses erosion hazards which were testified to as to even 6% to 12% slopes, these being more eroded types of Quakertown soil.

Per both experts, the function of subsoil is to hold enough water for growth, but not too much, while providing enough footspace for more deeply rooted crops like alfalfa which cannot flourish in too stiff subsoil. So a combination of firm subsoil and drainage tiling as proposed by Mueller appears to be sufficient to restore the prior productivity.

However, the Court cannot be certain that 16" of subsoil as proposed by Mueller is enough or what the composition of the subsoil should be and how it should be placed on the land, especially in the stripped area, Area 3. Plaintiff argued for total reconstruction to a depth of up to 5 feet, but its expert did not address a scenario in which the prior productivity of the soil

as a whole could be achieved by substitution rather than uniform replacement with a Quakertown type soil column, given the admitted existence of pre-excavation intrusions of other soil types. In fact, Palkovics never specifically opined that the remedy proposed by Mueller would not provide sufficient rooting depth and water retention capacity to restore soil productivity. Plaintiff may characterize Mueller's recommendation as for a "mere" 16 inches, but that epithet does not mean it will not work, and it will involve a substantial effort by defendants given the significant size of the cut areas they excavated. However, given that Palkovics does advocate considerably more, up to 4' of remediation, and it is impossible to know what was originally on this site, the Court will require that 24" of subsoil be used rather than 16" in Area 3 where there was soil stripping and thus greater impact on the existing subsoils than in Area 2 were they were basically in the main simply overlain with fill. These depths may be modified if the parties find that rock or other soil characteristics warrant something different in particular access, or that productivity does not rise to the performance levels required in this opinion.

This dilemma as to degree of subsoil replacement and treatment can only be resolved by a set of performance standards for remediation whose implementation would be supervised by an appropriate agency, such as the Hunterdon County Soil Conservation Disrict ("HCSCD") which typically reviews soil conservation plans under N.J.S.A. Title 4. The standards would be making the land viable for a crop yield of representative crops which were testified to, in particular corn, hay, alfalfa and soy beans. The target yield would be what would be expected from soils consisting of 70% class 2 and 30% class 3 using with the same level of agronomical management that would normally be expected for soils in that productivity category. Slopes could vary up to 6% but could not exceed it. Just as the soil cannot be

completely restored to its prior character and chemistry, so neither can the slopes, and the prior overall rating of 2 to 6% appears to provide the parameter that best balances preserving the prior character of the land and keeping it productive. The Court recognizes that some slopes were more, per Mueller, but overall the resulting land should stay within this QukB parameter.

This measure also recognizes that defendants did unalterably change the land with their violation of the easement, and cannot be expected to be able to replicate precisely the prior slopes when they remediate it. However, this solution also rejects defendants' proposal for a uniform 1% slope so it can install hoop houses throughout the property. Clearly, the present post-excavation 100% slope at the edge of the property has to be regarded consistent with the 6% limit. Also, a flat topography with a uniform 6% slope in one area would not be an acceptable result since the land was obviously not so configured before the excavation. In fact, the prior rolling grades shall be re-established by uniform slopes and adequate drainage. However, if some area for hoop houses can be maintained consistent with the above, it may be proposed in the remediation plan. This permission is subject to a qualification. The Court Master or HCSCD, as described below, shall be empowered to eliminate any area whatsoever for hoop houses, subject to review by the Court, if it is found that the remediation plan proposed by defendants does not comply with the general standards, including retention of reasonable rolling slopes, set forth above in this opinion. The Court is concerned that its effort to give defendants some leeway in the use of their land not turn into a tug of war in which defendants seek in effect to maintain the present post-excavation status quo.

Based on the above, the defendants shall prepare a remediation plan meeting the above criteria within 30 days. Plaintiff shall have 30 days to respond.

The remediation plan shall include a cost estimate to provide a bond in favor of the SADC to secure performance of all the work. It shall address and explain standards for soil stabilization, nutrient content, installation techniques, moisture content, and permissible weather conditions and temperature conditions for installation. If there is disagreement, the matter shall be referred to the Hunterdon County Soil Conservation District (HCSCD) or a master to be appointed by the Court for recommendations and further action by the Court. Mr. Palkowics and Ms. Mueller shall be free to confer directly with each other and with HCSCD or any Court master to try to reach agreement on a proper remediation for the easement violations which were enjoined by the Court. The Court notes that the experts are far better qualified than a judicial officer to formulate a soil restoration program.

The Court expects that if the matter is presented to the HCSCD as a grading or soil disturbance plan, it may examine it as part of its normal review authority under Title 4 of the NJ Statutes. If the HCSCD is unable or unwilling to participate, the Court shall appoint an expert master at the expense of the defendants since they have violated the easement.

The Court further envisions that all remediation work shall be done under the direct supervision of the HCSCD or the master. Further, during such remediation and afterwards, the 4.9 acres Area 1 shall be farmed to provide a productivity baseline. Such land shall be farmed in order to achieve the pre-existing yield criteria. Another reasonable portion of land, o be determined by the parties and the Master, in each of the cut and fill area shall be farmed in each area to determine if the criteria are being met in the remediated areas.

The existing topsoil from the stockpiles may be used in the remediation. The master shall monitor the

quality of the top soil to assure that it functions as such, either without enrichment, as defendants advocate, or with enhancements and shredding, as Mr. Palkowics recommends. If there is a deficit of topsoil, defendants shall bring it on to the site subject to similar control and review. Further, the Master shall likewise monitor the installation of the subsoil to ensure it functions as intended as to root growth and water retention.

The Master shall be authorized to inspect all materials, approve their use, take measurements and/or take any further action to confirm defendants' compliance with all provisions of this order as set forth herein, including the ability to issue a stop work order if restoration is not being conducted in a manner consistent with this order. All costs and fees of the Master shall be borne solely by defendants.

Finally, it may take several years of farming to determine if the Court's performance criteria have been met. The parties shall report to the Court annually on July 1, beginning in 2014 and continuing while remediation is in progress on the status of implementing this decree set forth above. These reports shall be over and above any other reporting necessitated by the supervision of remediation described above.

Under the circumstances, the Court finds no basis for imposing a solution utilizing other lands either owned or to be acquired by the defendants. The remediation process set forth above should be sufficient to address the easement violations. While the parties remain free to negotiate such an arrangement, the Court finds no rationale for imposing it on them.

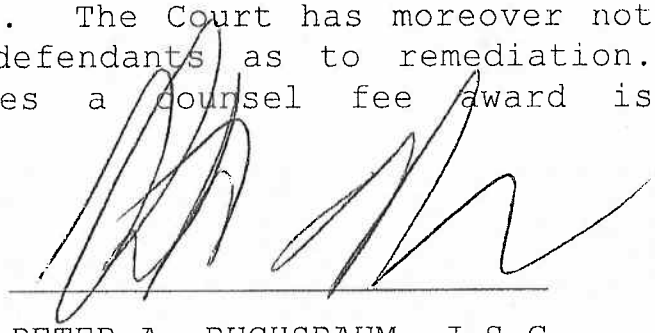
Other Issues

The Court rejects any notion that Den Hollander individually is not responsible. The remediation task

is the joint and several responsibility of all the defendants who violated the easement.

Nor can the Court approve Mueller's proposal for an indefinite delay in getting the work done. Equity requires that a remedy for a wrong be undertaken with reasonable dispatch.

However, the Court does reject the request for counsel fees under the NJ Civil Rights Act. It is a new statute. Its parameters are largely untested. Further, this case presented unique problems in the interpretation of the state's Deed of Easement for agricultural preservation. The Court has moreover not totally disagreed with defendants as to remediation. Under these circumstances a counsel fee award is unwarranted.



PETER A. BUCHSBAUM, J.S.C.