BOROUGH OF GLASSBORO,
a municipal corporation
of the State of New Jersey,

Petitioner,

vs.

GLOUCESTER COUNTY AGRICULTURE DEVELOPMENT BOARD; LEWIS D. DeEUGENIO, JR. and SUMMIT CITY FARMS,

Respondents.

STATE AGRICULTURE DEVELOPMENT COMMITTEE
OAL DKT. NO. ADC 18801-2016
AGENCY REF. NO. SADC ID #1787

FINAL DECISION

I. OVERVIEW

The issue in this case is whether an ordinance restricting parking on various public streets within a municipality can be preempted by the Right to Farm Act, N.J.S.A. 4:1C-1, et seq. (RTFA) in respect to a street fronting a commercial farm. The Initial Decision issued by the administrative law judge (ALJ or judge), upon a motion for summary decision, concluded that the RTFA is limited to protecting agricultural activities occurring on the commercial farm property itself, relying primarily on the State Agriculture Development Committee (SADC or Committee) decision in Frank Bottone, Jr., t/a Bottone Farm, Inc. (Site Specific Agricultural Management Practice recommendation dated September 22, 2005) (Bottone).

Because a key legal conclusion underlying the Bottone holding was flawed, and for other reasons more particularly described below, the SADC now **HOLDS** that farm-related, non-customer vehicle parking along a public street fronting a commercial farm may be eligible for RTFA protection. Accordingly, we **REJECT** that part of the Initial Decision which concluded to the contrary and, in accordance with N.J.A.C. 1:1-18.7, **REMAND** the case to the Office of Administrative Law (OAL) for a hearing on the merits of the parties' dispute consistent with the guidance set forth at the conclusion of this Final Decision. An Order of Remand is attached. We also **ADOPT**, **MODIFY** and **REJECT** other parts of the Initial Decision where necessary in furtherance of this Final Decision.

An ALJ's factual findings and legal conclusions are not binding upon an agency head, and we will decide *de novo* whether the Initial Decision granting the motion for summary decision was correct as a matter of law based on the record before the judge. See, In re Parlow, 192 N.J.Super. 247, 248 (App.Div.1983); City of Atlantic City

v. Trupos, 201 N.J. 447, 463 (2010); Estate of Hanges v. Metropolitan Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010); N.J.A.C. 1:1-18.1(d) and 18.6(b). In order for the Final Decision to provide a more complete understanding of important legal issues in this matter, the SADC will take administrative notice of relevant agency documents on-file and of the parties' prior proceedings before the SADC referenced below. N.J.S.A. 52:14B-10(b); N.J.A.C. 1:1-15.2; N.J.R.E. 101(a)(3); Re New Jersey Bell Telephone Company, 1992 WL 526766 (N.J.Bd.Reg.Com.).

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Summit City Farms, LLC (Summit) owns Block 360, Lot 2 (Summit or farm property) in the Borough of Glassboro (Glassboro or borough). The record before the ALJ indicates that the Summit property contains a winery, agricultural retail facilities, orchards and pastures.

In May 2016 Glassboro enacted Ordinance #16-26 which, *inter alia*, restricted nonresidential parking without a permit between Labor Day and Memorial Day on certain borough streets, including University Boulevard fronting the farm property. According to testimony by a borough official at a hearing on the ordinance, in response to a question by a member of the public about the location of the permit-only parking:

> . . .[I]t's basically in the neighborhood -- streets and neighborhood surrounding Rowan University. We had previously adopted several streets over time because of complaints from residents that they couldn't park in front of their own house. They put trash-cans out and students, the commuters, were parking in front and their trash couldn't be collected. They were so close -- parking so close to the driveways that they have no sight line when they were trying to pull out. And so we implemented this, the police department implemented this slowly over time in certain streets and area [sic].
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> And as it was getting worse as the University was growing, we had the police department go out to every neighborhood twice and hand out to each property owner information on the possible changes. We said if you can't make the public meetings to please email or call us with your comments or thoughts and so basically those are the streets surrounding the University where this will be impacted.
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> [*Exhibit "F", Glassboro motion for summary decision, testimony of Joseph A. Brigandi, Jr., Borough Administrator, Glassboro Borough Council Meeting,*

May 24, 2016, transcript p. 3, line 20 to p.4, line 14].

Summit, pursuant to N.J.S.A. 4:1C-9 and N.J.A.C. 2:76-2.3, filed an application with the Gloucester County Agriculture Development Board (GCADB or board) in August 2016 seeking approval from the board that the parking of commercial vehicles on University Boulevard in connection with the operation of the farm property, and the parking of vehicles and equipment of farm customers and visitors, was a site-specific agricultural management practice (SSAMP). The application also sought a board directive that the borough's parking sign(s) along the farm's frontage be physically modified to reflect that such vehicles were exempt from the ordinance. One of the exhibits accompanying the application was a copy of a Glassboro tax map showing that University Boulevard is a dead-end street with a length of about 1500', and that the Summit property is approximately six (6) acres and is located on the south side of, and has approximately 825' of frontage along, University Boulevard.

The board held a public hearing on the SSAMP application on September 15, 2016, including testimony by Summit's principal and the arguments of Summit's counsel, and admitting into evidence various supporting documents. Summit's principal claimed that commercial vehicle parking along University Boulevard was needed to support the company's agricultural operations. Glassboro did not appear at the hearing but submitted a letter objecting to the board's jurisdiction to entertain an SSAMP application for activities occurring off of the farm property.

The GCADB determined that Summit was a "commercial farm" as defined in N.J.S.A. 4:1C-3 because the farm property exceeded five (5) acres in size and annually generated agricultural or horticultural products worth at least $2,500. The board also concluded that Summit's farm operation at the Glassboro property had existed as of July 2, 1998 as required by N.J.S.A. 4:1C-9 (section 9).

The finding that Summit satisfied commercial farm eligibility criteria was based on documentation it had submitted in three (3) prior cases heard and approved by the board at which Summit sought SSAMPs for winery and retail facilities and activities (May 2013), for winery signage (November 2013), and for structural expansion to the winery and retail facilities (August 2015) on the farm property. In each of those cases, Summit provided copies of its then-current FA-1 forms approved by the local tax assessor showing various company lands located in Glassboro devoted to peach production. There was also testimony from Summit's principal in the prior SSAMP cases that farm operations in Glassboro had existed since 1922.[1]

[1] Evidentiary exhibits and resolutions in all of the GCADB cases involving Summit

For the 2016 SSAMP application at issue in this case, Summit provided the board with a copy of the approved 2017 FA-1 form which also reflected peach production acreage on its farm property.

Summit, in all four (4) SSAMP applications, provided the GCADB with a copy of a 2012 IRS Schedule F showing gross farm income exceeding $1 million in 2011.

The board granted Summit's SSAMP request by resolution dated October 20, 2016. First, the GCADB, relying on the evidence submitted in Summit's prior SSAMP requests, as well as on the 2017 FA-1 form and testimony from the company's principal, found that Summit satisfied commercial farm eligibility criteria [*GCADB Resolution*, pp. 1 and 5].

Second, as to Summit's request for approval of parking on University Boulevard, the GCADB concluded:

> [Summit's] proposal that use of the portion of University Boulevard that extends west from Lehigh Road for farm-related on-street parking (e.g., [Summit's] farm vehicles and equipment, farm employee and contractor vehicles and equipment, vehicles and equipment used to transport farm produce and other farm-related materials to and from the farm, and the vehicles and equipment of farm [non-winery] customers and visitors) conforms with applicable Right to Farm Act regulations and constitutes a generally-accepted agricultural operation or practice pursuant to N.J.A.C. 2:76-2.3 and N.J.A.C. 2:76-2.5c.
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> [*GCADB Resolution*, p. 12].

Glassboro appealed the board's decision to the SADC in December 2016. The appeal contained six (6) "counts", summarized as follows: Count 1 - the GCADB lacked jurisdiction to hear and grant Summit's SSAMP application because, based on the text of the RTFA and as construed by Bottone, the RTFA provides protection only to agricultural activities on the farm property itself and cannot be extended to the parking of farm-related vehicles and equipment on an abutting public road; Count 2 - the GCADB erred in not recognizing Glassboro's determination that parking on University Boulevard "poses a threat to public health, safety and welfare", that the ordinance had not been challenged by Summit in court, and that the ordinance was, therefore, not arbitrary or capricious; Count 3 - Summit's off-farm parking of vehicles and equipment was not a permitted agricultural activity listed in N.J.S.A. 4:1C-9 of the RTFA and in SADC regulations, and Bottone held that parking is subject to

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were provided to the SADC pursuant to N.J.A.C. 2:76-2.3(*1*).

municipal regulation; Count 4 - the GCADB had no legal authority to require Glassboro to modify "no parking" signage on University Boulevard exempting farm-related vehicles and equipment; Count 5 - the GCADB resolution failed to set forth adequate findings of fact and conclusions of law; Count 6 - the GCADB acted arbitrarily in granting Summit's SSAMP request. The borough's appeal was forwarded to the OAL as a contested case on December 14, 2016. N.J.S.A. 4:1C-10.2; N.J.S.A. 52:14B-2(b).

In February 2017 Summit filed an application with the Committee for emergency relief pursuant to N.J.A.C. 1:1-12.6. The application asserted that the borough intended to enforce the ordinance, violations of which included fines and imprisonment. Accordingly, Summit sought an order confirming that Glassboro had to abide by the GCADB's October 2016 resolution pending the outcome of the OAL case. The borough filed written opposition to the application.

The Committee heard the testimony of Summit's principal and the arguments of Summit and the borough's attorneys at its meeting on March 23, 2017. The SADC entered an order in accordance with N.J.A.C. 1:1-12.6(g) providing that

> . . .until the GCADB's October 20, 2016 [resolution] is stayed, or until a final, non-appealable judgment or order is entered. . ., [Glassboro] Ordinance #16-26 is preempted as applied to the parking, on that portion of University Boulevard extending west from Lehigh Road and abutting [Summit's] farm property . . ., of [Summit's]:
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> a. Farm vehicles and equipment;
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> b. Employees and contractors' vehicles and equipment;
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> c. Vehicles and equipment used to transport farm produce and other farm-related materials to and from the. . .farm property. . .

Glassboro appealed the March 23, 2017 order to the Superior Court, Appellate Division, on May 4, 2017.

While the appellate division case was pending, the SADC amplified its emergency order by resolution dated October 26, 2017 in response to procedural objections raised by Glassboro in respect to the March 23, 2017 meeting. The resolution provided, in pertinent part, as follows:

> 1. SADC finds that any facts to be determined

should be adduced at the adjudicatory hearing in the OAL, Docket No. [ADC] 18801-2016S; and

2. SADC finds that there is a threat of imminent injury to [Summit,] as Ordinance No. 16-26(J)(2) provides for fines and possible incarceration if any section of the ordinance is violated; and

3. SADC finds the GCADB resolution granted [Summit] an SSAMP preempting Ordinance No. 16-26 as applied to [Summit's] farming operation; and

4. SADC finds that the GCADB's decision should remain in effect unless and until the GCADB's October 20, 2016 decision is stayed, or until a final non-appealable judgment is entered in the matter presently pending before the OAL.

On November 17, 2017, the appellate division granted an SADC motion to supplement the record to include the October 2017 amplification resolution. In December 2017 the attorney general's office wrote a letter to the Appellate Division requesting that Glassboro's May 2017 appeal be dismissed on the grounds that it was interlocutory and time-barred, and the court dismissed the appeal by order dated January 2, 2018.

The SADC held a *de novo* rehearing of Summit's emergency application at its regular meeting on March 22, 2018. The Committee heard testimony from Summit's principal and the arguments of counsel for the Borough and for Summit. The result of the SADC's public deliberations at that meeting was an order dated April 27, 2018 that again granted emergency relief to Summit. The April 27, 2018 order incorporated verbatim subparagraphs (a), (b) and (c) of the March 23, 2017 order, and the Committee found that

> [Summit has] shown, pursuant to N.J.A.C. 1:1-12.6(a), that the disruption of [Summit's] agricultural business operations arising from the enforcement, or threat of enforcement, of [Glassboro's] Ordinance #16-26 despite the preemptive effect of the site specific agricultural management practice determination issued to [Summit] by the GCADB in accordance with N.J.S.A. 4:1C-9, constitutes irreparable harm[.]

III. OAL PROCEEDINGS

A. *Motion for Summary Decision*

In February 2018 Glassboro filed a motion for summary decision. N.J.A.C. 1:1-12.5. Attached to the motion was a brief with exhibits

and an affidavit from borough counsel certifying to the exhibits' accuracy. The exhibits were comprised of copies of Glassboro's discovery demands and Summit's responses; the borough's appeal filed with the SADC; the parking ordinance; transcripts of borough public hearings on the ordinance; Summit's SSAMP application; Glassboro's written objection to the application; the GCADB resolution; the SADC's OAL transmittal; and RTFA decisions deemed by the borough to be relevant to the Summit matter. Glassboro submitted no affidavits from any municipal officials regarding the town's need to enforce the ordinance on University Boulevard fronting the Summit property. Summit filed a brief in opposition to the motion, but no affidavits from company representatives regarding the need to park on University Boulevard, in March 2018, and in April 2019 Glassboro and Summit filed reply briefs.[2] The salient legal positions of the parties follow.

Glassboro reasserted Counts 1 (RTFA does not protect off-farm activities), 3 (Summit's vehicle parking is not a permitted activity under RTFA) and 4 (GCADB had no authority to order modification of parking signs) in its December 2016 petition of appeal. Procedural History, *supra*, pp. 2-3.

Summit contended that: (1) the RTFA and relevant case law make no distinction between on-farm and off-farm commercial agricultural activities, N.J.S.A. 4:1C-9 provides that "any" municipal ordinance may be subject to preemption, and SADC regulations governing SSAMP applications state that a CADB retains jurisdiction over any or all municipal ordinances as they apply to a commercial farm operation unless the ordinance effectuates a delegation of state regulatory standards; (2) the facts in Bottone were distinguishable from those existing with regard to Summit; (3) the Legislature did not intend the list of permitted activities in N.J.S.A. 4:1C-9 to be exclusive; (4) since the parking ordinance can be preempted and the "no-parking" signage is a component of the ordinance, physical modification of the signs to exempt farm-related vehicles and equipment was justified.

The ***GCADB*** argued that it properly determined that the commercial farm operation on Summit's property, including the parking of vehicles associated with the commercial farm, constituted a

[2] The absence of responding affidavits does not necessarily result in the automatic grant of a summary decision motion. N.J.A.C. 1:1-12.5(b) provides that the party against whom the motion is made can prevail if a "responding affidavit [is filed] set[ting] forth specific facts showing there is a genuine issue which can only be determined in an evidentiary proceeding. . . If the adverse party [to the motion] does not so respond, a summary decision, *if appropriate*, shall be entered." [Emphasis added]. This Final Decision reviews whether the grant of the motion was legally appropriate based on the OAL record, the RTFA and relevant agency regulations and case law.

generally-accepted agricultural management practice consistent with the RTFA and SADC regulations.

B. *Initial Decision*

In an Initial Decision dated July 2, 2019, the ALJ granted summary decision to the borough.

The judge reviewed the statutory criteria for commercial farm eligibility, which is the jurisdictional requirement enabling the farm, subject to other RTFA provisions, to engage in section 9 activities despite the enactment of municipal or county ordinances, resolutions or regulations to the contrary. (*Initial Decision*, pp. 8-9).

The judge summarized relevant parts of the regulatory procedure for obtaining an SSAMP, concluding that if a county agriculture development board (CADB) determines that a farm is a commercial farm proposing to engage in section 9 activities, then "the farm owner must provide the CADB with relevant data and materials about the proposed operation," citing N.J.A.C. 2:76-2.3(h), the "Board Checklist" provision in the SADC's procedural rules governing SSAMP cases. The ALJ stated that the CADB must consider the farm's site-specific elements such as its settings and surroundings, the proposed operation's scale and intensity, the type and use of the public road abutting the farm operation, and the minimum improvements needed to protect public health and safety. Id. (*Initial Decision*, p. 9).

The ALJ concluded the procedural review by observing that while a CADB resolution granting an SSAMP is presumed valid on appeal, with the burden on the objecting party to show that the approval should not have been granted, the OAL hearing is *de novo*. See, Hampton Twp. v. Sussex Cnty. Agric. Dev. Bd., 2014 N.J. AGEN LEXIS 1351 (February 27, 2014), aff'd 2016 WL 6152002 (App.Div. 2016).

Finally, the judge cited Township of Franklin v. den Hollander, 172 N.J. 147 (2002), as requiring a CADB to balance the interests of a commercial farmer to engage in legitimate agricultural activities with the municipality's interests expressed in its land use ordinances. (*Initial Decision*, p.10). With regard to whether Summit's proposed parking on University Boulevard could be protected under the RTFA, the judge noted that while "a commercial farm owner may park his farm-related vehicles on his farm", as recognized in Ciufo v. Somerset Cnty. Agric. Dev. Bd., 2016 N.J. AGEN LEXIS 930 (July 28, 2016), the agency's 2005 decision in Bottone

> suggests that the GCADB should have dismissed [Summit's] SSAMP determination request because the RTFA does not

> protect off-site agricultural activities such as parking farm-related vehicles on a street on which such parking is forbidden by a municipal ordinance. (*Initial Decision*, pp. 11-12).

The ALJ distinguished Bottone from the Bergen County Agriculture Development Board's (Bergen CADB) 2017 resolution issued in the Demarest Farms case, in which the BCADB granted an SSAMP on a temporary basis for customer parking on residential streets adjoining and near Demarest's farm offering direct marketing facilities, activities and events. (*Initial Decision*, pp. 12-13).

The judge, relying heavily on Bottone, granted Glassboro's motion for summary decision based on findings that there were no disputed factual issues and that, while Summit's proposed on-street parking was related to its commercial farm operations, "it appears that the RTFA does not protect off-the-farm agricultural activities such as parking farm-related vehicles on a public street in contravention of a municipal ordinance." (*Initial Decision*, p. 14). Accordingly, the ALJ ordered that the GCADB's October 20, 2016 resolution "is hereby reversed." Id.

C. *Exceptions; Reply*

Summit and the GCADB filed exceptions on July 12, 2019, and Glassboro filed a reply to the exceptions on July 17, 2019. N.J.A.C. 1:1-18.4(a) and (d). The exceptions and reply reiterated substantially the same positions the parties' expressed in connection with the summary decision motion and will not be repeated here.

The Initial Decision and legal positions of the parties were discussed by the Committee at its public meeting on July 25, 2019. Counsel for Glassboro, Summit and the GCADB were provided advanced notice of the meeting, attended it, and during a public portion of the meeting presented the SADC with oral summaries of their clients' legal arguments set forth in the exceptions and reply.

IV. LEGAL DISCUSSION

A. *Commercial farm criteria*

In order for a farm operation to receive the protections of the RTFA, the threshold jurisdictional question is whether it is a "commercial farm" as defined in N.J.S.A. 4:1C-3 and satisfies other requirements set forth in the introductory paragraph to N.J.S.A. 4:1C-9. Here, the ALJ analyzed the legal issue of RTFA protection for on-street parking without considering whether Summit was a commercial farm. Accordingly, the SADC **MODIFIES** the Initial Decision

by holding that commercial farm eligibility, not the potential RTFA protection of Summit's on-street parking, was the threshold jurisdictional issue.

N.J.S.A. 4:1C-3 defines "Commercial farm" 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.), or (2) a farm management unit less than five acres, producing agricultural or horticultural products worth $50,000 or more annually and otherwise 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.).

A "farm management unit" is defined in N.J.S.A. 4:1C-3 as

> a parcel or parcels of land, whether contiguous or noncontiguous, together with agricultural or horticultural buildings, structures and facilities, producing agricultural or horticultural products, and operated as a single enterprise.

The introductory paragraph of N.J.S.A. 4:1C-9 provides that a commercial farm can enjoy the benefits of RTFA protection so long as the commercial farm

> is 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 [July 2, 1998]. . .

The existing record is not definitive as to whether the Summit property fronting University Boulevard is its own farm management unit or is part of other contiguous or noncontiguous parcels operated as a single enterprise. The record is unclear as to what agricultural or horticultural products are produced on, and the acreage of, the parcels identified in the documents Summit submitted to the GCADB in support of its 2016 SSAMP application.

The 2017 FA-1 form signed by the Glassboro tax assessor on August 4, 2016 and submitted to the GCADB by Summit in its SSAMP application lists four (4) properties: Block 360, Lots 1.01 (5.41 acres), 2 (6.02 acres), 9 (7.45 acres) and 11 (4.0 acres) all producing peaches. The "Commercial Farm Certification" form, also

part of the 2016 SSAMP application, was signed by Summit's principal on March 20, **2013.** It contains a grid showing various lot numbers in Glassboro Borough, not all of which match the 2017 FA-1 form and with some lines crossed-out, of farm parcels totaling approximately 50 acres, but also lists properties in the townships of Elk, Upper Pittsgrove, Harrison, Clayton and Monroe totaling approximately 500 acres and producing various fruits, sweet corn and pumpkins. To add to the somewhat muddled record regarding commercial farm eligibility, Summit's earlier SSAMP applications were accompanied by as many as ten (10) farm properties in Glassboro constituting the commercial farm (April 2013, for the winery/farm market), but only Block 360, Lot 2 for the other SSAMP applications (October 2013, for the illuminated winery/farm market sign; and July 2015, for expansion of winery and retail facilities).

The annual value of Summit's agricultural or horticultural products in 2016 cannot be gleaned from the evidentiary record, as only the IRS Schedule F for 2012, showing gross farm income for 2011, was provided to the GCADB.

Finally, there is a copy of a 1967 farmland assessment document for Summit's Glassboro property identified as Block 360, Lot 3, which was not the lot identified in the 2016 SSAMP application, and testimony from the company's principal at hearings on prior SSAMP applications that the farm has been in operation since 1922. These proofs appear to have been presented because the land use zone in which the Summit properties are located do not recognize agriculture as a permitted use.

The record in this case generally indicates that Summit owns and operates some 500 acres of farmland in several New Jersey municipalities, including Glassboro, generating a variety of agricultural products. Nevertheless, on remand, Summit will need to more clearly identify the farm management unit, and the value of its 2016 agricultural and/or horticultural production, comprising the commercial farm associated with the company's SSAMP request for parking on the Block 360, Lot 2 frontage along University Boulevard. For the foregoing reasons, the Committee **MODIFIES** the Initial Decision by holding that since there was no evidence requested by or presented to the ALJ on commercial farm eligibility, Summit, on remand, shall provide the OAL with sufficient credible evidence that, in 2016, it was a "commercial farm" as defined in N.J.S.A. 4:1C-3 and satisfied the section 9 requirement that the farm was in operation as of July 2, 1998.

B. *RTFA procedures*

(1) Permitted activities under N.J.S.A. 4:1C-9.

The judge concluded that once "commercial farm" eligibility is established, the commercial farm may be able to engage in activities set forth in section 9 despite the enactment of municipal ordinances to the contrary. (*Initial Decision*, p. 8). The ALJ broadened that statement by correctly observing that N.J.A.C. 2:76-2.3(a) provides a commercial farm owner with the opportunity to apply to a CADB "to determine if his or her operation constitutes a generally accepted agricultural operation or practice included in any of the permitted activities set forth in" section 9. Id. The judge did not address Glassboro's contention in the summary decision motion that only the specifically-identified activities listed in section 9 are eligible for RTFA protection, so an analysis of section 9 and relevant agency regulations and case law is warranted.

Section 9 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. [sic]), *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,* 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:
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> > a. Produce agricultural and horticultural crops, trees and 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;
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> > b. Process and package the agricultural output of the commercial farm;
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> > c. Provide for the operation of a farm market,

including the construction of building and parking areas in conformance with municipal standards;

d. Replenish soil nutrients and improve soil tilth;

e. Control pests, predators and diseases of plants and animals;

f. Clear woodlands using open burning and other techniques, install and maintain vegetative and terrain alterations and other physical facilities for water and soil conservation and surface water control in wetland areas;

g. Conduct on-site disposal of organic agricultural wastes;

h. Conduct agriculture-related educational and farm-based recreational activities provided that the activities are related to marketing the agricultural or horticultural output of the commercial farm;

i. Engage in the generation of power or heat from biomass, solar, or wind energy, provided that the energy generation is consistent with the provisions of P.L.2009, c.213 (C.4:1C-32.4 et al.), as applicable, and the rules and regulations adopted therefor and pursuant to section 3 of P.L.2009, c.213 (C.4:1C-9.2); and

j. Engage in any other agricultural activity as determined by the State Agriculture Development Committee and adopted by rule or regulation pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

[N.J.S.A. 4:1C-9; emphasis added].

A plain reading of the introductory paragraph of section 9 is that a commercial farmer may be entitled to engage in the permitted activities listed in subparagraphs (a) through (j), free from any contrary municipal ordinances, provided the farm's operation conforms with agricultural management practices (AMPs) promulgated by the SADC through rulemaking or conforms with an SSAMP approved by a CADB or by the SADC in counties having no CADB.[3] In addition, section 9

[3] "Any", the modifier of "municipal or county ordinance" in section 9, is defined as "one or some indiscriminately of whatever kind" and "unmeasured or unlimited in amount, number, or extent" (https://www.merriam-webster.com/dictionary/any). We cannot "presume that the Legislature intended something other than that expressed by way of the plain language"

requires that the activities listed in subparagraphs (a) through (j) may be engaged in by a commercial farm if the farm operation is in compliance with relevant state and federal laws and does not pose a direct threat to public health and safety. Id.

We have made clear that the list of activities in section 9 contains a general description of agricultural or horticultural activities that may be protected by the RTFA. It is readily apparent that the list cannot be an explicit, all-encompassing inventory of every conceivable farming activity or practice that may be found to be eligible for RTFA protection.

SADC regulations provide that a commercial farmer can submit an application to a CADB "to determine if his or her operation constitutes a generally accepted operation or practice *included in* any of the permitted activities set forth in N.J.S.A. 4:1C-9." N.J.A.C. 2:76-2.3(a). [Emphasis added]. An analogous provision appears in the regulations governing complaints against commercial farmers. N.J.A.C. 2:76-2.7(c)1 requires a CADB to "determine "commercial farm eligibility and/or determine whether the operation or practice is *included in* one or more of the permitted activities in N.J.S.A. 4:1C-9." [Emphasis added]. "Included" is defined as "to take in or comprise as a part of a whole or group"; "to contain between or within." (https://www.merriam-webster.com/dictionary/include).

SADC rulings in RTFA cases reinforce the agency's interpretation of section 9, such as In the Matter of Karen Wilkin and James Urbano, Jr., 2005 WL 1805681 (N.J. Adm. June 2, 2005), aff'd 2006 WL 3018047 (App. Div. 2006), where the SADC noted that eligibility for RTFA protection could be afforded to "activities *within* these [section 9] categories". Id. at 3. [Emphasis added]. See also, Ciufo, *supra*, at p. 9, where the SADC determined that only when a CADB finds a "nexus" between the commercial farm activities and those listed in section 9 can it proceed with the handling of the RTFA dispute.

In Ziemba vs. Cape May County Agriculture Development Board, et al., OAL Dkt. No. ADC 12000-13, SADC ID# 1354 (Final Decision July 24, 2014), we held that

> An SSAMP entitles a commercial farmer to engage in the activities listed in N.J.S.A. 4:1C-9 ("section 9") *and/or in agricultural practices that relate to one or more of the permitted activities*

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used in N.J.S.A. 4:1C-9. In the Matter of the Veto by Governor Chris Christie of the Minutes of the New Jersey Racing Commission from the June 29, 2001 Meeting, 429 N.J.Super. 277, 285 (App.Div. 2012). Accordingly, while the overwhelming majority of RTFA cases involving SSAMP applications implicates municipal zoning ordinances, section 9 also applies to the parking ordinance enacted by the borough.

in the statutory list. Final Decision, Bailey v. Hunterdon County Agriculture Development Board, et als., OAL Dkt. Nos. ADC 2759-09, 2788-09 and 8130-09, pp.28-29.

[*Final Decision* (Ziemba), p. 21; Emphasis added].

Our conclusion that section 9 should be reasonably interpreted to describe general activities that may be protected is informed by the legislative findings accompanying the 1983 enactment of the RTFA. The Legislature determined that "[t]he retention of agricultural activities. . .serve[s] the best interest of all citizens of th[e] State by insuring numerous social, economic and environmental benefits which accrue from one of the largest industries in the Garden State", N.J.S.A. 4:1C-2a.; expressed concern that "ordinances of individual municipalities may unnecessarily constrain essential farm practices", N.J.S.A. 4:1C-2b.; and that state agencies "should encourage the maintenance of agricultural production and a positive agricultural business climate", N.J.S.A. 4:1C-2d.

The Legislature effectuated the above findings by linking the broad descriptions of section 9 activities to the requirement that a commercial farmer must either operate in compliance with agricultural AMPs promulgated by the SADC through rulemaking or tailor the operation on the farmer's property to an agricultural practice determined by the CADB or the SADC to be generally-accepted. Put another way, section 9 was logically drafted to establish general descriptions of agricultural activities in which a commercial farmer may engage [subparagraphs (a) through (j)] while also recognizing acceptable site-specific methods in which the farmer can accomplish those general activities. Clearly, the manner of operations or practices that can be engaged in by a commercial farmer in furtherance of any of the section 9 activities are too numerous to be included in a statutory list. The existence of section 9j., a broad grant of authority to the SADC to identify through rulemaking other RTFA-eligible agricultural activities, is further support for our understanding that section 9 is not an exclusive list of permitted activities.

Accordingly, we **MODIFY** the Initial Decision to hold that a commercial farmer may engage in an SSAMP that is directly related to or is included in subparagraphs (a) through (j) of section 9, or conforms with an AMP promulgated by the Committee through rulemaking. We stress that this Final Decision only concludes that section 9 sets forth generalized categories of agricultural activities within which an SSAMP can potentially be approved. On remand, Summit will need to provide sufficient, credible evidence to the OAL that, consistent with this Final Decision, the proposed parking is included in or relates to any one or more section 9 activities.

(2) Board checklist provisions at N.J.A.C. 2:76-2.3.

The ALJ stated that if a CADB determines that a farm is a commercial farm and that the farm proposes to engage in any of the generally-accepted agricultural activities included in section 9, then the commercial farm *must* provide the CADB with information described in the "Board Checklist" set forth in N.J.A.C. 2:76-2.3(h). (*Infra*, p. 6; *Initial Decision*, p. 9; emphasis added). The Initial Decision also stated that, after a CADB concludes that the "farm. . .engages in any of the generally accepted agricultural activities listed under N.J.S.A. 4:1C-9, the farm owner must provide the CADB with relevant data and materials about the proposed operation and the CADB must also consider several 'site-specific elements'" listed in N.J.A.C. 2:76-2.3(h).

First, the SADC **MODIFIES** the Initial Decision by reiterating that section 9 is a list of "permitted activities" and not, as the judge stated, a list of generally accepted agricultural activities. Generally accepted agricultural activities can be approved on a farm site-specific basis by the CADB or the SADC provided those activities are directly related to or are included in the section 9 list. (*see*, Legal Discussion, *supra*, pp. 13-14).

N.J.A.C. 2:76-2.3(h) was promulgated by the SADC in 2013 to address the increase in RTFA cases involving farm markets and other more intensive customer-based retail activities on farm properties, and to assist CADBs in the handling of related site plan issues. 45 N.J.R. 1449(a). The provisions listed in the regulation were elements of a site plan checklist which boards could, but were not required to, adopt to help organize their review of SSAMP cases concerning such activities. The Committee **MODIFIES** the Initial Decision by concluding that, while section 2.3(h) requirements could be helpful to CADBs in appropriate cases, and might be of assistance to the OAL and the parties upon remand, they are not to be construed as mandatory submittals to the CADB by a commercial farm landowner.

(3) *De novo* OAL hearing and burden of proof.

We **ADOPT** the determination in the Initial Decision that an appeal of a board decision in an SSAMP case is transmitted to the OAL for a *de novo* hearing, with a presumption of validity attaching to the board's resolution and the objecting party bearing the burden of proving that the commercial farmer was not entitled to the SSAMP. (*Initial Decision*, p. 9, quoting the SADC's final decision in Hampton Twp. v. Sussex Cnty. Agric. Dev. Bd., 2014 N.J. AGEN LEXIS 1351, 40-41 [Feb. 27, 2014]). But our ruling in Hampton only established the presumed validity of a CADB decision and the allocation of the burden of proof in order to clarify our earlier holding in Casola v. Monmouth County Agriculture Development Board, OAL Dkt. No. ADC

06462-00, SADC ID #1318-01. In Casola, the SADC concluded that the presumption of validity attaching to a CADB determination approving an SSAMP was based on the board's agricultural expertise. After an appeal of the CADB decision is filed and transmitted to the OAL, "[w]hat continues is the quasi-judicial [OAL] review of the allegations of the objector, namely[,] that the site-specific determination was improperly issued." (Casola Interlocutory Order, September 26, 2001, p. 7).

Neither Casola nor Hampton created, nor were they intended to create, an appellate framework in the OAL similar to the judicial branch's consideration of land use board appeals or prerogative writ cases in which government action is measured by the "arbitrary, capricious or unreasonable" standard. Consistent with our rulings in Casola and Hampton that an OAL case in the RTFA context is heard *de novo*, an ALJ is to consider all relevant and admissible evidence to arrive at the judge's own factual and legal conclusions whether the issuance or denial of an SSAMP by a board accorded with the RTFA and agency regulations. Therefore, the SADC **MODIFIES** the Initial Decision by holding that the role of an ALJ in a *de novo* hearing of an SSAMP appeal is to make independent findings of fact and conclusions of law regarding whether the commercial farmer was entitled to an SSAMP, and not, as the ALJ did here, rule that "[t]he decision of the [CADB] is hereby reversed." (*Initial Decision*, p. 14].

C. Den Hollander *and the balancing test*

A commercial farmer who demonstrates that the proposed agricultural or horticultural activity is included in or is directly related to section 9 permitted activities or an AMP is not automatically entitled to RTFA protection. The commercial farmer must "demonstrate a legitimate, agriculturally-based reason" for preempting a municipal ordinance that restricts the agricultural or horticultural activity. Township of Franklin v. den Hollander, 172 N.J. 147, 153 (2002).

The balancing test emanates from the findings forming the basis of the RTFA, where the Legislature stated that

> It is the express intention of this act to establish as the policy of this State the protection of commercial farm operations from nuisance action, where recognized methods and techniques of agricultural production are applied, while, at the same time, acknowledging the need to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in New Jersey.
>
> [N.J.S.A. 4:1C-2e.]

The legislative pronouncement in section 2e. of the RTFA recognizing the need to balance interests was applied, in both the appellate division and Supreme Court den Hollander decisions, to SSAMP cases in which municipal ordinances could be preempted by section 9 activities. CADBs, and the SADC in cases arising from a county without a CADB, "must act in a manner which gives appropriate consideration not only to the agricultural practices at issue, but to local ordinances and regulations which may impact on the agricultural practice." Township of Franklin v. den Hollander, 338 N.J.Super. 373, 390-91 (App.Div.2001), aff'd 172 N.J. 147 (2002). The Supreme Court, quoting the appellate division decision, stated that

> [CADBs] must take into account the interests of farmers, while simultaneously 'consider[ing] the extent of [the] use [of agricultural management practices] and consider the limitations imposed on such uses by a municipality.'
>
> [172 N.J. at 153, quoting Township of Franklin, *supra*, 338 N.J.Super. at 392].

While the Initial Decision, at p.10, correctly recited key holdings from the *den Hollander* cases related to the "balancing of interests", disposition of this case by summary decision precluded a "balancing" inquiry. Therefore, the Committee **MODIFIES** the Initial Decision by concluding that if Summit can demonstrate a legitimate, agriculturally-based reason for commercial vehicle parking along the frontage of University Boulevard contrary to Glassboro's ordinance, then the OAL, on remand, must balance the competing interests of Summit and the municipality. Even if the balance is struck in Summit's favor, Summit must also prove that its commercial agricultural operation is in compliance with relevant federal and state laws and regulations and does not pose a direct threat to public health and safety, as required in the introductory paragraph of section 9.

D. *Eligibility of vehicle parking for RTFA protection*

The Initial Decision granted the motion for summary decision, and held that the parking of Summit's commercial farm vehicles on University Boulevard was not eligible for RTFA protection, based in large part on the SADC's 2005 Bottone decision. Bottone arrived at two (2) holdings: first, that "off-farm" agricultural activities are not eligible for RTFA protection; second, that parking areas associated with a farm market are subject to municipal regulation. The Initial Decision also interpreted the OFDM-AMP's parking provisions as precluding RTFA protection of the activities proposed in Summit's SSAMP.

(1) "Off-farm" agricultural activities.

Mr. Bottone used, with the permission of the landowner, an office building parking lot adjacent to Bottone's farm property, which he leased from JCP&L, for a farm stand and for farm stand customer parking.[4] No municipal zoning and building permits were obtained for these uses from Livingston Township, as the municipality's Limited Industrial District zone in which the farm market facilities were located prohibited retail sales. The farm market was essentially a trailer immediately adjacent to which Bottone displayed his abutting commercial farm's produce on tables and in baskets. The office building parking lot was used to enhance customer visibility of and safe access to the farm market. We take administrative notice of agency staff's GIS materials presented at SADC meetings and our 2005 Bottone SSAMP file containing photographs and other materials showing that Bottone's farm fronted Eisenhower Parkway (County Route 609), a multi-lane highway with a shoulder and curb, but no sidewalk and no accessway into the farm. Instead, the parking lot abutted and had access from a municipal street with a traffic control device at its intersection with CR 609. The parking lot used by Bottone for the farm market and farm market parking was part of a 4.17-acre parcel of land also containing a commercial office building.

After receiving a cease-and-desist order from the township health department for operating the farm market "without the approval/licenses from other Departments", Bottone requested an SSAMP from the Committee because Essex County does not have a CADB. Bottone decision, p.3; N.J.S.A. 4:1C-9.

The agency's SSAMP determination confirmed that Bottone operated a "commercial farm" on the JCP&L-leased property, as that property was eligible for farmland assessment, and found that Bottone operated a farm market, in accordance with N.J.S.A. 4:1C-3. Id. However, RTFA protection could not be afforded to Bottone because the farm market and associated parking were located on property that was not producing agricultural or horticultural products. "Farm market" is defined as

> a facility used for the wholesale or retail marketing of the agricultural output of a commercial farm, and products that contribute to farm income, except that if a farm market is used for retail marketing at least

[4] One of the exhibits in Bottone was a letter from a partner of the limited liability company (LLC) owning the commercial lot stating that the LLC had "an agreement with Bottone" and supporting the opening of farm market operations "[p]rovided the Town [sic] is in agreement". (*Attachment E*, Bottone decision).

> 51% of the annual gross sales of the retail farm market shall be generated from sales of agricultural output of the commercial farm, or at least 51% of the sales area shall be devoted to the sale of agricultural output of the commercial farm, *and except that if a retail farm market is located on land less than five acres in area, the land on which the farm market is located shall produce annually agricultural or horticultural products worth at least $2,500.*
>
> [N.J.S.A. 4:1C-3; emphasis added].

"Attachment C" to the Bottone decision provides support for the conclusion that the farm market generated at least 51% of its gross sales from the farm's agricultural output. However, the farm market operation was not entitled to RTFA protection because, due to its location on a 4.17-acre parcel not producing agricultural or horticultural products, it failed to comply with the requirement that "the land on which the farm market is located shall produce annually agricultural or horticultural products worth at least $2,500".[5] Instead, RTFA protection for the farm market was conditioned on its relocation to Bottone's commercial farm property which was producing agricultural products as part of his farm operation.

The particular facts in Bottone are distinguishable from those in Summit's SSAMP proposing vehicle parking on University Boulevard, a municipal street dedicated and accepted by Glassboro for public use, including the parking of vehicles. See, generally, N.J.S.A. 39:4-197, 40:48-2.46 and 40:67-1(c); State v. Birch, 115 N.J.Super. 457, 464 (App.Div. 1971); Exhibit "H", Glassboro motion for summary decision, Ordinance #16-26. "After such dedication of streets to the public use, the public has the right to appropriate them at any time it wants or convenience requires", Highway Holding Co. v. Yara Eng'g Corp., 22 N.J. 119, 126 (1956), but subject to the municipality's right to regulate parking and traffic pursuant to ordinance.

Bottone's legal conclusion that the RTFA did not protect the farm market must also be considered in light of other judicial and agency interpretations responding to the more current reality of commercial farm operations.

The Supreme Court recognized as early as 2002 that commercial agricultural businesses do not operate in a vacuum, and that there would likely be various conflicts with municipalities requiring disposition by CADBs and the SADC. The court, not limiting its expression to whether commercial farming activities giving rise to a

[5] We note that Bottone also concluded that no RTFA protection existed for the farm market operation because the office parking lot was not a "farm management unit" pursuant to N.J.S.A. 4:1C-3. Bottone, *supra*, p. 3, fn.

municipality-farmer dispute occurred on or off the farm premises, observed:

> Agricultural boards will have to deal with an array of matters that are within the traditional jurisdiction of local authorities such as hours of operation, lighting, signage, ingress and egress, traffic flow, and parking, to name just a few.
>
> [172 N.J. at 153, quoting Township of Franklin, *supra*, 338 N.J.Super. at 392].

Similarly, the SADC dealt with ingress/egress and traffic flow associated with a community-supported agricultural (CSA) operation in In the Matter of Holloway Land, LLC, SADC ID #1243 (Hearing Officer's Decision adopted January 26, 2012). In that case, evidence was presented that, as a result of limited sight distances at the intersection of the CSA driveway and municipal road, a direct threat to public health and safety existed for CSA customers exiting the premises as well as for the motor vehicle operators using the municipal road. We conditioned RTFA protection for the operation by recommending that the CSA obtain a traffic study. Id. at p. 29; see also, In the Matter of Hopewell Valley Vineyards, SADC ID #786 (Hearing Officer's Decision adopted March 24, 2011, at p. 8) (direct threat to public health and safety obviated by winery hiring police officers to direct traffic on adjoining municipal street for festival events as part of an event management plan submitted to the municipality).

The SADC's efforts to promote the state's burgeoning agricultural tourism industry and otherwise enhance customer-based economic opportunities for commercial farms culminated in the adoption, effective April 7, 2014, of an agricultural management practice for on-farm direct marketing facilities, activities and events (OFDM-AMP). See, N.J.A.C. 2:76-2A.13, et seq. The rule clarified and built upon existing RTFA eligibility for protection of the operation of a farm market and of "agriculture-related educational and farm based recreational activities. . .related to marketing the agricultural output of the commercial farm." See, N.J.S.A. 4:1C-9c. and 9h., respectively.

The OFDM-AMP was promulgated after the SADC consulted with representatives from the New Jersey Department of Agriculture, New Jersey Farm Bureau, State Board of Agriculture, Rutgers Cooperative Extension, CADBs, towns, and farmers specializing in the direct-to-consumer marketing of agricultural products from various sectors of the agriculture industry, including viticulture, nursery, fruits, and vegetables. 45 N.J.R. 1449(a). The SADC received input that RTFA protection of certain off-premises activities was essential to promote direct marketing operations.

The OFDM-AMP specifically protects certain off-farm activities, advancing the SADC's interpretation that such activities are eligible for RTFA protection. For example, the regulations conditionally protect from contrary municipal ordinances the installation of signs up to one-half mile from the entrance of the commercial farm upon which the direct marketing facility, activity or event is located, and "directional or other signs may be installed at key intersections or other important locations." N.J.A.C. 2:76-2A.13(g)2v. and vi. The SADC was mindful that private property rights should be respected, so a commercial farmer is required to "obtain the permission of the appropriate landowner or easement holder when locating signs at off-farm locations." N.J.A.C. 2:76-2A.13(g)2vii.

The OFDM-AMP also recognizes that direct marketing events may result in increased vehicular traffic that could "likely. . .interfere with the movement of normal traffic or emergency vehicles on- and off-site"; without limiting the regulatory reach to only on-farm operations, the rule requires that for events for which larger-than-normal attendance is anticipated, the commercial farm "create and implement a written event management plan to address public health and safety issues including, but not limited to, emergency vehicle access, traffic management, and public health management." N.J.A.C. 2:76-2A.13(n)1.

The judicial and agency pronouncements noted above recognize that the day-to-day management and promotion of commercial farm operations go beyond the physical boundaries of the property upon which the operation is located, and attempt to balance the imperatives of operating a 21st century agricultural business with the competing interests recognized in the RTFA. N.J.S.A. 4:1C-2e. and 9. The SADC is cognizant that the RTFA was designed "'to promote to the greatest extent practicable and feasible, the continuation of agriculture in the State of New Jersey while recognizing the potential conflicts among all lawful activities in the State.'" Curzi v. Raub, 415 N.J.Super. 1, 15, quoting Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J.Super. 338, 346 (App.Div.), certif. denied, 179 N.J. 372 (2004).

The ALJ mistakenly expanded the Bottone holding to arrive at an absolute geographical limitation on RTFA protection, i.e., that such protection ends at the commercial farm's property line. We **REJECT** the Initial Decision to the extent it relies on Bottone, the RTFA and agency regulations for the proposition that the RTFA does not potentially protect *any* section 9 agricultural, horticultural or related activities physically occurring off of the commercial farm property.

(2) Municipal regulation of farm market parking.

The Bottone decision stated that Mr. Bottone wanted to continue using the office building parking lot, even if the farm market were moved to the adjoining leased farmland, for the convenience and safety of market customers. The Initial Decision, at pp. 11-12, incorporated the following excerpt from Bottone regarding farm market parking:

> The [RTFA] does not preempt municipal regulation of parking areas associated with farm markets. Specifically, the [RTFA] states that a farmer may '[p]rovide for the operation of a farm market, including the construction of building and parking areas in conformance with municipal standards.' N.J.S.A. 4:1C-9c. Regardless of the location of the parking area, therefore, the parking area must comply with municipal standards for parking.
>
> [Id. at p.3 and p.5].

We note that the SSAMP determination in Bottone appears to have mischaracterized RTFA protection for, and hence municipal regulation of, parking associated with a farm market. Among the permitted activities eligible for RTFA protection, section 9 recognizes that a commercial farmer can:

> c. Provide for the operation of a farm market, including the *construction* of building and parking areas in conformance with municipal standards[.] [Emphasis added].

Bottone did not clearly recognize that municipal standards regulating the *construction* of farm market parking areas are not preempted by the RTFA. Instead, the decision improperly interpreted section 9c. to mean that farm market parking itself is subject to local ordinances. The ALJ failed to appreciate this important distinction in granting summary decision to the borough. Accordingly, the SADC **REJECTS** that part of the Initial Decision concluding that Bottone is authority for municipal regulation of farm market parking areas; instead, the SADC holds that RTFA protection is available for farm market parking, but not for farm market parking construction standards, provided a municipality has enacted such standards, based on the plain language of N.J.S.A. 4:1C-9c.

The Initial Decision, at pp. 12-13, sought to distinguish the SADC's Bottone decision with the Bergen CADB's disposition of a case involving Demarest Farms in Hillsdale Borough (BCADB Resolution 2017-01, September 6, 2017). However, the Bergen CADB resolution in Demarest was not appealed to the SADC. N.J.S.A. 4:1C-10.2.

Accordingly, the Committee **MODIFIES** the Initial Decision by holding that Demarest, like any other RTFA case for which no appeal to the SADC has been taken, has no precedential value.

(3) OFDM-AMP parking provisions.

The ALJ's reliance on the parking provisions in the OFDM-AMP at N.J.A.C. 2:76-2A.13(h) was misplaced, as the Initial Decision failed to consider the regulation in its proper context.

As noted, *infra*, p. 21, a key purpose of the OFDM-AMP was to promote the state's growing agricultural tourism industry by addressing customer-based, retail marketing opportunities on commercial farms. The Summary accompanying the June 17, 2013 rule proposal stated that:

> The proposed new rule addresses on-farm facilities, activities, and events on commercial farms that are used to facilitate and provide for direct, farmer-to-consumer sales, such as farm stands, farm stores, community-supported agriculture, pick-your-own farming operations, and associated activities and events that fit within the scope of the Act. The intent of this proposed new rule is to establish standards on which farmers, the public, municipalities, and CADBs can rely, and to provide standards that are performance-based, rather than prescriptive, in order to give reliable, Statewide guidance to farmers, towns, and others throughout New Jersey, while providing flexibility to commercial farm owners and operators in complying with this AMP.
>
> [45 N.J.R. 1449(a)]

A review of relevant definitions at N.J.A.C. 2:76-2A.13(b) that further the purpose of the rule, with emphases added, is important in providing an accurate understanding of the parking provisions.

- "Agriculture-related educational activities" means on-farm educational offerings that have an agricultural focus and *are related to marketing the agricultural or horticultural output of the commercial farm. Such activities are accessory to, and serve to increase, the direct-market sales of the agricultural output of a commercial farm by enhancing the experience of purchasing agricultural products for the purpose of attracting customers to the commercial farm. . .*

- "Ancillary entertainment-based activities" means non-agricultural offerings, commonly used as incidental components

of on-farm direct marketing activities, *that are accessory to, and serve to increase, the direct-market sales of the agricultural output of a commercial farm. Such activities are designed to attract customers to a commercial farm by enhancing the experience of purchasing agricultural products. . .*

- "Farm-based recreational activities" means recreational offerings that are uniquely suited to occurring on a farm and also may include common outdoor recreation activities that are compatible with the agricultural use of the farm, *where such offerings and activities are related to marketing the agricultural or horticultural output of the commercial farm. Such activities are accessory to, and serve to increase, the direct-market sales of the agricultural output of the commercial farm by enhancing the experience of purchasing agriculture products for the purpose of attracting customers to the commercial farm. . .*

- "On-farm direct marketing" means the on-farm facilities, activities, and events *that are used to facilitate and provide for direct, farmer-to-consumer sales* of the agricultural output of the commercial farm and products that contribute to farm income.

- "On-farm direct marketing activity" or "activity" means an agriculture-related happening made available by a commercial farm that is accessory to, and serves to increase, *the direct-market sales of the agricultural output of the commercial farm. Such activities are designed to attract customers to a commercial farm by enhancing the experience of purchasing agricultural products. . .*

- "On-farm direct marketing event" or "event" means an agriculture-related function offered by a commercial farm that is accessory to, and serves to increase, *the direct-market sales of the agricultural output of the commercial farm. Such events are designed to attract customers to a commercial farm by enhancing the experience of purchasing agricultural products...*

- "On-farm direct marketing facility" or "facility" means a type of farm market including the permanent, temporary, and/or moveable structures, improvements, equipment, vehicles, and apparatuses *necessary to facilitate and provide for direct, farmer-to-consumer sales* of the agricultural output of the commercial farm and products that contribute to farm income. . .

- "Pick-your-own (PYO) operation" means *an on-farm direct marketing method wherein retail or wholesale customers are*

invited onto a commercial farm in order to harvest and pay for agricultural or horticultural products. . .

- "PYO market area" means an on-farm direct marketing facility used by a PYO operation to set up PYO activities and collect money for PYO crops harvested by *customers*.

Given that the purpose of the OFDM-AMP is to recognize customer-based marketing operations on commercial farms, there was a need to address the attendant influx of vehicles and pedestrians on farmland and the accompanying public safety issues that arise from such activities for the protection of the landowner, customers and municipality in which the retail sales facilities were located.

The regulations provide standards for commercial farms engaged in on-farm marketing in order to facilitate sales of farm products while, at the same time, protecting the safety of on-farm customers. Examples of such standards in N.J.A.C. 2:76-2A.13 include hours of operation [subsection (c)]; lighting [(d)]; sanitary facilities [(e)]; and safety procedures [(f)]. Customer-safety is also embedded in the standards governing various, specific on-farm marketing activities in N.J.A.C. 2:76-2A.13(m)(1) through (6), for "pick-your-own" fields, choose-and-cut Christmas tree activities, crop mazes, wagon rides, interaction with farm animals, and bonfires, respectively.

The parking standards at N.J.A.C. 2:76-2A.13(h) provide, in pertinent part, as follows:

> (h) In the absence of municipal standards for the construction of parking areas applicable to on-farm direct marketing facilities, the standards in this subsection shall apply to facilities' parking areas.
>
> 1. A commercial farm's parking areas for on-farm direct marketing facilities, activities, and events may include areas permanently devoted to parking, areas temporarily devoted to parking, or a combination of such areas. Areas permanently devoted to parking means areas utilized by the facility on a daily basis when the facility is open. Areas temporarily devoted to parking means areas utilized by the facility when additional parking capacity is needed on a short-term, temporary basis, such as in conjunction with seasonal on-farm direct marketing sales, activities, or events.
>
> 2. The following standards shall apply to all parking areas:
>
> i. Safe, off-road parking shall be provided. Parking shall not be located in a road right of way, and the number of spaces provided shall be sufficient to accommodate the normal or anticipated traffic volume for the commercial farm's on-farm direct marketing facilities, activities, and events;

ii. Ingress and egress points, driveway areas, and parking areas shall be arranged, so as to provide for safe traffic circulation. This arrangement shall allow customers to safely pull off of and onto adjacent roadways, and to safely maneuver to and from parking areas and into and out of parking spaces. On-farm direct marketing facilities need adequate driveway access to enable customers to reach the facility from the adjacent roadway; and

iii. Where applicable, parking areas shall accommodate bus traffic and allow for the safe unloading and loading of bus passengers.

Subsection (h) introduces the standards by directing attention to "parking areas" associated with "on-farm" facilities; the regulation then describes, in subparagraph (h)1., how and when those parking areas are to be used for "on-farm direct marketing facilities, activities and events". There is nothing express or implied in subsection (h) that "parking areas" are anywhere other than on the farm property itself. Subparagraph (h)2. is consistent with subsection (h) by using the phrase "parking areas", meaning parking areas on the farm property.

The provision of "[s]afe, off-road parking", and the prohibition on parking "in a road right of way" for on-farm customers (subparagraph (h)2i.) is interpreted to mean that customer parking is to be directed off of adjoining public streets. It is clear that customer parking and traffic associated with on-farm direct marketing operations, particularly at peak, seasonal periods, can severely burden adjoining public streets. Customer vehicle traffic, especially during busy marketing events, poses a risk of injury to pedestrians and of vehicle accidents if cars, trucks and buses are not adequately diverted off of adjoining public streets and into appropriate parking areas on the farm.

Our interpretation that "[s]afe, off-road parking" relates to on-farm customer parking is further reinforced by the AMP provision that ". . .the number of [parking] spaces provided shall be sufficient to accommodate the normal or anticipated traffic volume for the commercial farm's on-farm direct marketing facilities, activities and events". N.J.A.C. 2:76-2A.13(h)2i.

The objective of a secure environment for on-farm customers is also addressed in subparagraph (h)2ii., which provides that ingress, egress, and driveways on the farm are to be arranged to achieve safe traffic circulation within, entering and exiting the property. The regulation is directed "to allow *customers* to safely pull off and onto adjacent roadways and to safely maneuver to and from parking areas and into and out of parking spaces." Id. (Emphasis added). N.J.A.C. 2:76-2A.13(h)2iii. is similarly designed to promote *on-farm*

customer safety by providing that "on farms that allow buses, parking areas shall accommodate bus traffic and allow for the safe unloading and loading of bus passengers."

In sum, the above-noted parking and traffic standards promote the intent of the OFDM-AMP by attempting to ensure public safety *for customers on a farm* offering agricultural or horticultural marketing facilities, activities and events. The SADC was mindful that off-farm *customer* parking posed special risks not only to farm customers entering and exiting their vehicles but also to other motorists and other pedestrians using adjoining public streets, in addition to creating possible off-farm traffic circulation problems.

Our interpretation that N.J.A.C. 2:76-2A.13(h) and (h)2i. through 2iii. apply to customer vehicles, parking and traffic on the farm property itself is consistent with the agency's handling of Summit's emergency application in 2017-18, *infra*, pp. 5-6. The SADC ordered that, until a final, nonappealable order or judgment was entered in the within litigation, Ordinance #16-26 was preempted as applied to Summit's *non-customer* parking on University Boulevard, detailing that the only parking permissible under the emergency orders was for the company's "farm vehicles and equipment"; "employees and contractors' vehicles and equipment"; and "vehicles and equipment used to transport farm produce and other farm-related materials to and from the. . .farm property. . ." See, SADC orders dated March 23, 2017 and April 27, 2018.

The Initial Decision also failed to consider how the RTFA, the OFDM-AMP and Glassboro's parking ordinance were to be weighed in light of the commercial realities of agricultural business operations. The notion that there is absolutely no opportunity for RTFA protection to temporarily park non-customer, farm-related vehicles along the frontage of a farm could unduly constrain what might be a legitimate agricultural operation's need for relief from such an ordinance and, consequently, the farm operation's ability to survive.

We can envision a scenario, by way of example, where the access to a farm operation is constrained by a stream corridor and the only existing farm access is via a parking-restricted municipal street leading to a weight-limited bridge. Such a weight limit could prevent large, fully-loaded tractor trailers from making a delivery to a farm if the truck had to enter the farm via the bridge. If the farm operator instead took a pick-up truck across the bridge to the farm's frontage and temporarily parked it on the municipal street to receive the deliveries from the tractor-trailer, relief from the municipal parking restriction would be logical and reasonable.

The Initial Decision did not analyze the OFDM-AMP in a

meaningful way and, accordingly, we **REJECT** the ALJ's conclusion that N.J.A.C. 2:76-2A.13(h)2i. was authority for granting Glassboro's summary decision motion.

As a result of the OAL case being disposed of by summary decision, the Initial Decision did not address Summit's SSAMP request, and the GCADB's directive in its October 2016 resolution, that Glassboro modify signage along University Boulevard to exempt farm vehicles. The SADC finds no legal basis in the RTFA or attendant regulations permitting a CADB to direct a municipality in an RTFA dispute to modify "no parking" signs on public streets. We therefore **MODIFY** the Initial Decision by holding that such a directive is beyond a CADB's authority under the RTFA and SADC regulations.

V. SUMMARY

The SADC, having reviewed the OAL record in this matter, taken administrative notice when appropriate, analyzing pertinent provisions of the RTFA and agency regulations, and applying relevant case law, has determined in this Final Decision to:

ADOPT the determination in the Initial Decision that an appeal of a board decision in an SSAMP case is transmitted to the OAL for a *de novo* hearing, with a presumption of validity attaching to the board's resolution and the objecting party bearing the burden of proving that the commercial farmer was not entitled to the SSAMP.

MODIFY the Initial Decision by holding that commercial farm eligibility, not the potential RTFA protection of Summit's on-street parking, was the threshold jurisdictional issue.

MODIFY the Initial Decision by holding that since there was no evidence requested by or presented to the ALJ on commercial farm eligibility, Summit, on remand, shall provide the OAL with sufficient credible evidence that, in 2016, Summit was a "commercial farm" as defined in N.J.S.A. 4:1C-3 and satisfied the section 9 requirement that the farm was in operation as of July 2, 1998.

MODIFY the Initial Decision to hold that a commercial farmer may engage in an SSAMP that is directly related to or is included in subparagraph (a) through (j) of N.J.S.A. 4:1C-9, or conforms with an AMP promulgated by the SADC through rulemaking.

MODIFY the Initial Decision by stating that section 9 is a list of permitted activities and that generally accepted agricultural activities can be approved by the CADB or the SADC on a farm site-specific basis provided those activities are directly related to or

are included in the section 9 list.

MODIFY the Initial Decision by concluding that, while the "Board Checklist" set forth in N.J.A.C. 2:76-2.3(h) should be helpful to CADBs in appropriate cases, and might be of assistance to the OAL and the parties upon remand, they are not to be construed as mandatory submittals to the CADB by a commercial farm landowner.

MODIFY the Initial Decision by holding that the role of an ALJ in a *de novo* hearing of an SSAMP appeal is to make independent findings of fact and conclusions of law regarding whether the commercial farmer was entitled to an SSAMP, and not, as the ALJ did here, "reverse" a CADB decision.

MODIFY the Initial Decision by concluding that if Summit can demonstrate a legitimate, agriculturally-based reason for commercial vehicle parking along the frontage of University Boulevard contrary to Glassboro's ordinance, then the OAL, on remand, must balance the competing interests of Summit and the municipality. Even if the balance is struck in Summit's favor, Summit must also prove that its commercial agricultural operation is in compliance with relevant federal and state laws and regulations and does not pose a direct threat to public health and safety, as required in the introductory paragraph of section 9.

MODIFY the Initial Decision by holding that the Bergen CADB's decision in Demarest, like any other RTFA case for which no appeal to the SADC has been taken, has no precedential value.

MODIFY the Initial Decision by holding that a CADB directive in an SSAMP resolution for the physical modification of municipal "no parking" signs is beyond a Board's authority under the RTFA and SADC regulations.

REJECT the Initial Decision to the extent it relies on Bottone and/or the RTFA and SADC regulations for the proposition that the RTFA does not potentially protect *any* section 9 agricultural, horticultural or related activities physically occurring off of the commercial farm property.

REJECT that part of the Initial Decision concluding that Bottone is authority for municipal regulation of farm market parking areas; instead, we hold that RTFA protection is available for farm market parking, but not for farm market parking construction standards, provided a municipality has enacted such standards.

REJECT the ALJ's conclusion that N.J.A.C. 2:76-2A.13(h)2i. was authority for granting the Borough's summary decision motion.

VI. CONCLUSION

We now **HOLD**, based on the various points raised in the Legal Discussion, that the parking of Summit's farm vehicles and equipment, employees and contractors' vehicles and equipment, and vehicles and equipment used to transport farm produce and other farm-related materials to and from the Summit farm property, along that portion of University Boulevard fronting Summit's farm, are *potentially eligible* for RTFA protection.

The SADC makes no determination that such parking is *entitled* to RTFA protection, and that enforcement of Ordinance #16-26 as applied to Summit's street frontage on University Boulevard is preempted, because the OAL proceedings elicited no facts relevant to Summit's commercial farm eligibility; to whether and how the commercial farm's vehicle parking, as described in the preceding paragraph, is related to section 9 activities; to Summit's rationale for needing such vehicle parking along all or any part(s) of the 825' of University Boulevard frontage for its commercial agricultural operations, a requirement set forth in den Hollander, 172 N.J. at 153, that there is "a legitimate, agriculturally-based reason" for not complying with Borough Ordinance #16-26 as it applies to the University Boulevard frontage; to whether Summit is in compliance with relevant state and federal laws; and to whether Summit's commercial farm operation does not pose a direct threat to public health and safety. Summit will bear the burden of proving those elements when the remanded case is heard in the OAL.

The Initial Decision accurately stated that, pursuant to den Hollander, *supra*, 172 N.J. at 153, RTFA *entitlement* can only be determined after balancing the interests of a commercial farmer to engage in legitimate agricultural activities with the municipality's interests expressed in the ordinance it wishes to enforce against the farmer. Glassboro will have the burden of presenting to the OAL on remand evidence of the Borough's interests in regulating parking along the University Boulevard frontage at the Summit farm property and, pursuant to Casola, Glassboro will have the burden of persuading the ALJ that Summit was not entitled to an SSAMP approval.

The Legal Discussion illustrates various reasons why the Initial Decision failed to adequately address critical provisions of the RTFA and SADC regulations related to the Glassboro-Summit dispute and the resultant need for the OAL to create a complete factual record bearing on applicable statutory and regulatory RTFA requirements, including a clear articulation and resolution of the "balancing of interests" mandated by den Hollander. The SADC, therefore, remands the case to the OAL pursuant to N.J.A.C. 1:1-18.7(a). An order of remand, including necessary guidance on the handling of the remanded case, accompanies this Final Decision.

IT IS SO ORDERED.

10/01/2019

Douglas H. Fisher, Chairman
State Agriculture Development Committee

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BOROUGH OF GLASSBORO,
a municipal corporation
of the State of New Jersey,

Petitioner,

vs.

GLOUCESTER COUNTY AGRICULTURE DEVELOPMENT BOARD; LEWIS D. DeEUGENIO, JR. and SUMMIT CITY FARMS,

Respondents.

STATE AGRICULTURE DEVELOPMENT COMMITTEE
OAL DKT. NO ADC 18801-2016
AGENCY REF. NO. SADC ID #1787

ORDER OF REMAND
[N.J.A.C. 1:1-18.7(a)]

IT IS HEREBY ORDERED that the above-captioned matter be and hereby is remanded to the Office of Administrative Law (OAL) for a determination whether the following activities on University Boulevard fronting Summit City Farms' property, Block 360, Lot 2, Glassboro Borough (the farm property), are entitled to protection under the Right to Farm Act, N.J.S.A. 4:1C-1, et seq. and attendant regulations (RTFA), preempting enforcement of Borough Ordinance #16-26 as to such activities:

> The parking of farm vehicles and equipment, employees and contractors' vehicles and equipment, and vehicles and equipment used to transport farm produce and other farm-related materials to and from the farm property.

Consistent with the Final Decision, the OAL shall:

1. Conduct a *de novo* hearing, pursuant to the RTFA and attendant regulations, to determine whether the above-noted activities are a site-specific agricultural management practice (SSAMP).

2. Elicit, and Summit City Farms shall have the burden of introducing, testimony and evidentiary material relevant to: (a) commercial farm eligibility; (b) whether and how the commercial farm's vehicle parking, as described above, is related to activities listed in N.J.S.A. 4:1C-9

and/or conforms to an agricultural management practice adopted by the SADC through rulemaking; (c) a legitimate, agriculturally-based reason for not complying with Borough Ordinance #16-26 as to such parking on University Boulevard fronting the farm property; (d) whether the commercial farm operation is in compliance with relevant state and federal laws and does not pose a direct threat to public health and safety.

3. Elicit, and the Borough shall have the burden of introducing, testimony and evidentiary material relevant to: (a) the municipality's interest(s) in regulating parking along the University Boulevard frontage at the farm property, and (b) persuading the OAL that Summit City Farms is not entitled to an SSAMP approval for the parking described on page 1, above.

4. Create a complete factual record bearing on applicable statutory and regulatory RTFA requirements, including a clear articulation and resolution of the "balancing of interests" mandated by Township of Franklin v. den Hollander, 172 N.J. 147 (2002).

5. The *de novo* hearing may, in the discretion of the administrative law judge assigned to this matter, be conducted in accordance with N.J.A.C. 1:1-12.1, et seq. and any other relevant requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1, et seq. and the Uniform Administrative Procedure Act rules, N.J.A.C. 1:1-1.1, et seq.

10/01/2019

Douglas H. Fisher, Chairman
State Agriculture Development Committee

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