State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ADC 06084-11
AGENCY DKT. NO. SADC #1261

WAYNE POMANOWSKI/
BECKER'S TREE SERVICE,
Petitioner,
v.
MONMOUTH COUNTY AGRICULTURE DEVELOPMENT BOARD AND TOWNSHIP OF COLTS NECK,
Respondents.

Robert L. Witek II, Esq., appearing for petitioner Wayne Pomanowski/Becker's Tree Service (Resnikoff, Resnikoff and Witek, attorneys)

Christopher Beekman, Esq., appearing for respondent Monmouth County Agriculture Development Board (The Beekman Law Firm, attorneys)

John O. Bennett III, Esq., appearing for respondent Township of Colts Neck (Dilworth Paxson, attorneys)

Record Closed: January 4, 2013 Decided: January 31, 2013

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner Wayne Pomanowski (Pomanowski), on behalf of himself and his tenant Becker's Tree Service, appeals the determination of respondent Monmouth County Agriculture Development Board (MCADB) that Pomanowski's property located in respondent Township of Colts Neck (Township) does not qualify as a "commercial farm," which would afford it certain protections under the Right to Farm Act of 1983 and place it under the jurisdiction of the MCADB.

PROCEDURAL HISTORY

On November 30, 2010, petitioner Pomanowski filed an application for a site-specific agricultural management practice (SSAMP) approval with the MCADB for approval of activities conducted on the property by his tenant/lessee, Becker's Tree Service, specifically, the production of firewood, mulch and other forestry products. The MCADB held a public hearing on March 2, 2011, and made a determination that the criteria for a commercial farm were not met by the petitioner, which, on April 6, 2011, was memorialized in a resolution passed by the MCADB.

The petitioner filed a timely notice of appeal, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on May 26, 2011. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on December 13, 2012.[1] The record remained open until January 4, 2013, for the receipt of briefs and responses, at which time the record closed.

FACTUAL DISCUSSION

Michael LaMana was accepted as an expert in farmland and natural-resource management. He has a bachelor's degree in natural-resource management from

[1] Hearing dates were adjourned because the parties advised that a zoning matter which would dispose of this appeal had been heard in the Township municipal court and that a decision from the judge was anticipated by November 2012. That month, the municipal court judge determined that a conflict existed, so he recused himself, and the matter was to be re-heard before another judge. At that time, it was determined to proceed with this appeal given the age of the matter.

Rutgers and a master's degree in entomology from Oregon State. He is certified by the Society of American Foresters and is an approved consulting forester. He does forestry and planning for the State and other agencies, and has testified as an expert on numerous prior occasions.

LaMana's consulting firm had handled the petitioner's property for many years, and the matter was assigned to LaMana in 2007 or 2008. Pomanowski asked for long-term agricultural planning and wanted to keep his woodland management plan[2] (WMP) in place so he could harvest the crop from his property in Colts Neck. LaMana advised Pomanowski that there were anticipated changes in woodlands planning, and LaMana wanted to revise the plan in accordance with the new regulations in development. Under pertinent tax statutes, a WMP contains specific elements which must be included, including ownership, location, types of wood, goals of the forestry operation and how the objectives can be met. On Pomanowski's property, where the bulk of the acreage is mostly woodlands, a WMP is required.

Pomanowski's property consisted of 50–56 acres and received farmland assessment. According to the Farmland Assessment Act of 1964, the following criteria must be met to qualify: at least five acres must be devoted to agriculture; a minimum income of $500 plus $.50 per acre on those acres over the first five is required; the application must be made on or before August 1 for the year; and in those cases where forestry is the agriculture, a WMP is necessary. LaMana did not know how the property was zoned. Over time Pomanowski had used the property for various farm activities, including the breeding of pigs, then breeding of goats and chickens, and then woodland management.

LaMana prepared his WMP on December 18, 2010. The previous plan was not consistent with Pomanowski's plans for the property and it needed some technical changes because of the changes in regulations. The report recommended the continued selective harvest of trees to free up resources, and to capture the economic value and increase the value of future timber crops. Essentially, the forest is thinned by

[2] A "woodland management plan" is a professional guidance document designed to help manage woodlands to achieve a specific purpose.

culling out and harvesting poor species, undesirable species or trees that are too crowded.

Pomanowski's woodland property has three separate components to be managed which total approximately 39.4 acres out of the entire parcel of 50–56 acres:

1. Stand 1 is a mature oak-pine forest, about seventy to ninety years old, with trees generally in good condition, but with some damage. This area has 10.2 acres, with an estimated 120–145 trees per acre,[3] and a total standing volume of cordwood of about thirty-one cords per acre.[4] Stand One is growing eight to nine cords of wood per year. LaMana's recommendation for that stand is to harvest the growth of eight cords per year over ten years. That would be a reasonable estimate for this stand and the forest would remain in situ.

2. Stand 2 is a younger patch of woods of about 5.2 acres. It is growing four to five cords per year. He recommends harvesting six cords per year.

3. Stand 3 is 24 acres of wetlands and streams. This parcel should harvest six cords of wood per year.

Overall, LaMana recommended harvesting twenty cords of wood per year from the site. In 2012, a cord of firewood cost $175–250 if sold in full-cord units. The price would go up if the cord were broken down into units such as half-cords, as purchasers end up paying more when the units are smaller.

LaMana toured the property approximately two to four times. He saw the harvest of forestry products and the conversion of firewood and mulch. He saw the wood and mulch being moved around and the treetops being turned into mulch. He saw trees being dragged from the woods and the trees being processed, but he did not see trees being taken or cut down. LaMana could not specifically identify any of the trees being

[3] The density of the unit, expressed as the "stand basal area" (the total cross-sectional area of the trees in a stand, at breast height), averaged 95–105 square feet per acre. LaMana added the treetops into his estimate of trees per acre because Pomanowski uses the treetops as well as the trunks.
[4] A cord of wood is equal to a stack measuring 4ft. x 4ft. x 8ft. (128 cubic feet).

worked on as coming from the property. He did see several trees that had been felled, and some were off their stumps.

LaMana saw much mulch being produced when the treetops were put into the grinder. The treetops first came out of the grinder as half mulch, and were then ground finer, which turns them into landscape mulch. On the Pomanowski property the value of the treetops was captured. This was also a good idea for management of the property, as getting rid of the treetops reduced the potential for fire if they were left behind.

LaMana went to the site unannounced at least two times in 2011. He did not observe any trees being felled during those visits.

As for the economic return for the firewood, the revenue that could be generated if each stand were operated according to plan would be $175 per cord, times twenty, for a total anticipated production of $3,500 per year for firewood and mulch.

LaMana did not know whether all three stands were considered as part of the farmland assessment. He knew what it was in 2010, but did not remember it at present. However, he wanted to implement the entire acreage as farmland. In order for the farmland to be considered a commercial farm, the income threshold was higher. There must be $2,500 worth of production per year from the property. There is no dispute that the property produced at least $500 per year, but there was a dispute as to whether the property itself generated $2,500 per year.

LaMana felt that his recommendations were being followed as he made observations during his inspections. He felt that Pomanowski was following the WMP for his application in 2011 and 2012. In 2011, LaMana went to the property, walked around and looked at the woodland. He interpreted what he saw as whether Pomanowski was following the plan. It was obvious that there was activity as he walked around the woods. He believed the level of harvesting was greater than $600 from firewood and mulch. He believed the harvesting of trees on the property was consistent with the WMP. LaMana never asked for receipts, and he did not verify sales; he just

spoke with Pomanowski. Based on his observations, the harvest was greater than $600. Assessors now ask for receipts, but at that time they did not.

In 2012, LaMana went to the site twice. In March it looked like harvesting had occurred. He went back in the woods and saw no problem with the level of work being performed on the woodlands. He never observed any sale of the wood products.

LaMana was not aware of any contracts Pomanowski had to sell wood products. LaMana never signed any certificate that Pomanowski had trees available for harvest, and LaMana did not know about any specific sales contract.

Wayne Pomanowski resides at [redacted], on a large piece of land he purchased in 1978. It consisted of uplands, wetlands and a home in the middle. The property was zoned A-1 for agricultural use, and was located in zone AG-10, which meant that ten acres were required for horticulture. The property had been farmland assessed since 1983. Originally Pomanowski raised hogs and sold firewood. He stopped raising hogs in 2003–2004. At one time azaleas were grown on the grounds and guinea hens were raised, but he no longer does that.

In the early 1980's Pomanowski entered into a relationship with Becker, who had the equipment to take care of the firewood. Becker came in, cleared off some woods and expanded his operation. At first there was a log splitter (which splits logs one at a time, although some machines can do more), then later a tree processor and a tub grinder (which grinds the wood up and blends it). He was not sure if the property was subject to development because there was not too much frontage and it was zoned for AG-10, meaning ten acres were needed to build.

Pomanowski knew he needed a WMP and wanted to follow the New Jersey laws. He hired John Perry from Heartwood Ecological Consulting, and then Michael LaMana, who took over the file. Pomanowski and LaMana discussed the new regulations, especially concerning the wetlands. Pomanowski wanted a meticulous long-term plan in place for wood harvesting and for the big forest to be preserved in Colts Neck. He reviewed the WMP and discussed it with Becker. Pomanowski lives on the property

and he sees trees being cut down. Some trees have little value. By the end of the year you can get up on your production. Becker does farming when he gets to it, and Pomanowski tells Becker to get it done. He believes that Becker was following the WMP, as approximately twenty cords of wood were produced each year. As to any personal knowledge of the value of the trees, Pomanowski sees the trees being removed. He counts the trees and the prices for firewood cords. Each year he gives the assessor a copy of his Schedule F of his tax return, which shows the expenses from the business and its income. He typically exceeds several thousand dollars in income from the property.

Pomanowski knew the number of cords produced on the property but had no knowledge of the proceeds. He had no contracts with Becker for the sale of firewood. The wood is brought in from outside. He was not aware of any process Becker had for segregating the proceeds from the property and the proceeds from trees brought in. Farmland assessment is different from a commercial farm because it depends on the value of what is produced. There is a difference between production and harvesting. With a farmland assessment, you do not have to sell. With a commercial farm, you need cash sales. No one has yet determined this operation to be a commercial farm.

Harriet Honigfeld is on the staff of the MCADB and administers farmland. For a farm to come under the Right to Farm Act, it must request an SSAMP. The first step is to ensure that the applicant meets the definition of commercial farm with over $2,500 per year of actual production income, and over $50,000 for small farms. Pomanowski/Becker filed an application with the MCADB for an SSAMP for the property in Colts Neck.

The Right to Farm Act is designed to provide a forum to adjudicate disputes and to try to prevent disputes. The statutory scheme protects farmlands. It offers some relief to farmers from generally accepted agricultural management practices, such as noises or smells, which might be objectionable to others who live in the area. Sometimes there are tensions between neighbors who are not familiar with farming practices.

The procedure is that when an application comes in for an SSAMP, the MCADB first asks questions about the issuance. There may be neighborhood tension concerning eligibility under the Right to Farm Act, and an income certification is required. Years ago, the certification was taken as a given. But without receipts and proof it is difficult to demonstrate the amount of the product produced on the land. Now the burden is on the applicant to show income and production. A subcommittee of the MCADB reviews the application and a hearing is held. If the hearing is successful, an SSAMP is generated. But sometimes the committee needs more information on income.

Becker and Pomanowski have been before the MCADB over the years. An application was previously reviewed by the MCADB in 2003–2004, but it did not get beyond the staff-level review because it appeared there was an environmental issue pending, and therefore the MCADB did not have jurisdiction.

The difficulty the MCADB had with this pending application for an SSAMP was how to distinguish the wood produced from the farm itself from the wood brought onto the farm for processing from off-site. The off-site amount could not be calculated. Honigfeld never saw any receipts for the farm's production. The MCADB cannot get to the issues under its jurisdiction if the jurisdictional prerequisites, including the income requirement for products generated from the land, have not been met.

Honigfeld was familiar with In re Arno, ADC 4748-03, Initial Decision (January 21, 2004), adopted, State Agriculture Development Committee (February 26, 2004), <http://njlaw.rutgers.edu/collections/oal/>, which concerned current and future productivity. The MCADB used it as a guideline since the decision directed the MCADB to the income issue. Arno dealt with receipts and the three factors to use in making a determination as to whether a woodland could be characterized as a commercial farm.

However, the MCADB never was able to reach a determination as to whether Pomanowski was entitled to an SSAMP, because the issue of actual income generated from the property could not be determined with any accuracy. The MCADB needed to see $2,500 in gross receipts from the trees harvested on-site because the off-site trees

were not included. When that could not be proven by the applicant, the MCADB had no jurisdiction to decide the matter.

Findings

After considering the testimony as well as the evidence, including the transcript of the hearing before the MCADB on March 2, 2011, I make the following findings:

Pomanowski purchased the property in 1978 and has used it for agricultural purposes since then. Over time he raised hogs and guinea hens, sold firewood, and otherwise used the property for agricultural purposes. In 1982, Pomanowski was granted farmland assessment, which he has maintained since that date. In approximately 1983, Pomanowski and Becker reached an agreement on the use of the property. Becker became Pomanowski's tenant, with the authorization to run the tree-farming operation on the property. Becker would harvest trees from the property and, together with trees he brought onto the property, produce firewood and mulch. During the past thirty years, the relationship between Pomanowski and Becker has continued. Becker followed the WMP for the harvesting of trees located on-site, and also brought in many trees from off-site for producing mulch and firewood for his commercial enterprise located on the property.

The property generated approximately $55,000 per year in firewood and mulch income, of which Pomanowski received $25,000 as his rent. Neither Pomanowski nor Becker could allocate with any certainty which part of the firewood and mulch production came from trees harvested on-site or which came from trees brought to the property, although Becker stated in his testimony before the MCADB that he believed approximately three-quarters of the trees were brought to the site for processing, and the rest harvested from the property.

In his testimony before the MCADB, LaMana stated that it was possible that the property produced a total of eight cords of wood, which, at a high estimate of $270 per cord, equaled $2,160 in annual production. At the hearing, LaMana testified that the WMP that he developed indicated that the property was capable of producing twenty

cords of wood per year, which could generate income in excess of $2,500 per year. However, LaMana could not ascertain whether the logs he saw being processed on the property during his two visits were grown on-site or off, as there was no specific identification of either, or whether the trees grown on-site and then processed had generated $2,500 in income for the year.

Pomanowski did not have a written contract to provide a specified amount of wood from his trees within a specific time frame for the sale of more than $2,500 worth of wood from the property, nor had he received a signed statement from a certified forester certifying that he had a sufficient amount of trees ready for harvest to fulfill the terms of a written contract. Pomanowski did have a WMP prepared by a certified forester.

Without proof of income generated from the products of the property's woodland which met the income requirement to designate the property as a commercial farm, the MCADB could not entertain the application for an SSAMP because it lacked jurisdiction.

LEGAL ANALYSIS AND CONCLUSION

The issue presented in this matter is whether the Pomanowski property located in Colts Neck meets the criteria for "commercial farm," thereby placing it under the jurisdiction of the MCADB for development of an SSAMP, and essentially removing it from local control over agricultural activity conducted on the property.

The Right to Farm Act, initially passed in 1983, was enacted 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." Senate Natural Resources and Agriculture Committee Statement to Assembly Bill No. 854, L.1983, c.31. The Legislature further stated: "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[s], 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-2(e); see also Curzi v. Raub, 415 N.J. Super. 1 (App. Div. 2010).

N.J.S.A. 4:1C-3, as amended in 1998, 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 [N.J.S.A. 54:4-23.1 to -24], 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 [N.J.S.A. 54:4-23.1 to -24]."

N.J.S.A. 4:1C-9, as amended in 1998, lists permissible activities that can be conducted by owners or operators of "commercial" farms regardless of local zoning. However, the owner or operator must (1) have owned or operated a "commercial farm" in an area in which agriculture was a permitted use under municipal zoning ordinances as of December 31, 1997, and is consistent with the municipal master plan, or (2) have owned or operated a "commercial farm" in operation as of July 3, 1998, that conforms to specific agricultural management practices, conforms to all relevant federal or State statutes or rules and regulations, and does not pose a direct threat to public health and safety.

Pursuant to the Act, an owner or operator of a commercial farm may conduct specified agricultural activities notwithstanding municipal ordinances to the contrary if the appropriate county agriculture development board (CADB) determines that the activities constitute a generally accepted agricultural operation or practice and if other criteria of the Act are met. N.J.S.A. 4:1C-9. The State Agriculture Development Committee (SADC) has adopted rules for such "site-specific agricultural management practice" determinations.

If a farm meets the eligibility criteria for a commercial farm set forth above, the commercial farm operator or owner may apply to the CADB in the owner's county for a determination of whether his or her operation constitutes a generally accepted

agricultural operation or practice. N.J.A.C. 2:76-2.3(a). The procedure for making such a determination is also set forth in the rule. Ibid. Any person aggrieved by a CADB's site-specific agricultural management practice decision may appeal the decision to the SADC. N.J.S.A. 4:1C-10.2; N.J.A.C. 2:76-2.3(f). If the CADB's determination is not appealed to the SADC within forty-five days, the CADB's decision is binding. N.J.A.C. 2:76-2.3(f)(2).

The Legislature has given to the county boards the responsibility of making SSAMP determinations because of their agricultural knowledge and expertise. Each CADB consists of seven voting members who are residents of the county, four of whom are actively engaged in farming, the majority of whom own a portion of the land they farm, and three of whom represent the general public. Three non-voting members also serve on the CADB: a representative of the county planning board, a representative of the local soil conservation district, and the county agent of the New Jersey Cooperative Extension Service. N.J.S.A. 4:1C-14.

In Township of Franklin v. Hollander, 172 N.J. 147 (2002), the Supreme Court held that the Right to Farm Act preempted municipal land use authority over commercial farms. The Court noted that the Legislature has reposed trust in the CADBs and the SADC to make the appropriate decisions in respect of whether the operation of a commercial farm implicates agricultural management practices, and, if so, whether those practices affect or threaten public health and safety.

In this matter, there is no question that the property owned by Pomanowski is assessed as farmland. And there is also no question but that agricultural activities, such as the harvesting of trees grown on-site, and processing them into firewood and mulch, are conducted on the property. A much larger portion of the agricultural enterprise conducted on the property, however, consists of the tenant (Becker's Tree Service) bringing trees to the site, where they also are processed into firewood and mulch.

In order to determine whether this property is entitled to the designation of "commercial farm," it is necessary to analyze how much income is generated by the

trees harvested from the site. And it is this fact that cannot be proven. All the witnesses were credible, yet no witness could distinguish the amount of income that could be attributed to trees harvested from the property and the amount that resulted from those trees brought to the property. All the trees that were processed were reduced to firewood or mulch. But the origins of the trees were not specified or differentiated. The amount of the income generated from the trees grown on the property was estimated based on speculation or conjecture. There were no receipts or other evidence to prove that at least $2,500 per year was generated by these particular trees being harvested.

While it is clear from LaMana that if the WMP were implemented in its entirety, the property could generate income in excess of $2,500 per year from on-site trees, this potential is not determinative of actual production. And this is the critical distinction: the capacity for production is not the same as actual production. Indeed, if the farm were barren of trees, but trees were trucked in from off-site for processing and income generation, the criteria for a commercial farm could not be met. Likewise, if trees from a mature woodland farm were present on the land but not harvested or under contract to be harvested, and off-site trees were brought in for processing, the criteria for a commercial farm could not be met. In both of these examples, the final product was not generated by the particular piece of farmland.

It is not the nature of the land or the trees thereon that is dispositive, it is the amount of income that can be attributed to the fruits of the particular farmland itself. That is why it is so critical for the production to distinguish between the income generated from the woodlands on the farm, and the income produced by those trees that are brought to the farm from another location. While the trees brought to the farm for processing from off-site are indeed farm products, they are not in fact the products of this particular farm.

The parties have cited In re Arno, ADC 4748-03, Initial Decision (January 21, 2004), adopted, State Agriculture Development Committee (February 26, 2004), <http://njlaw.rutgers.edu/collections/oal/>, which concerned whether unharvested trees could be deemed the production of agricultural products. In that case, the SADC

determined that they can when three conditions are met: the farmer has a written contract to provide a specified amount of wood from his trees within a specified time frame; the farmer has obtained a WMP prepared by a certified forester; and the farmer has a signed statement from a certified forester certifying that the farmer has a sufficient amount of trees ready for harvest to fulfill the terms of the written contract. Essentially, the unharvested trees not only had to have the capability of generating income, but also, that income would have to be realized within a specified period of time under the terms of the contract. It was the terms of a contract demanding performance that turned unharvested trees into income. And if the income met the required level, the woodland could be considered a commercial farm.

In this matter, Pomanowski had a WMP, but there was no written contract to provide a specified amount of wood from his trees within a specific time period. There would be no need for a certified forester to certify that the property contained sufficient trees to meet the demand if there were no contract. The fact that unharvested trees remain on a farmland property, even with a WMP in place, is not by itself sufficient to qualify the property as a commercial farming enterprise.

After consideration of all the evidence, there was no proof by a preponderance of the evidence that the harvesting of trees grown on-site and their production into firewood and mulch produced income of $2,500 per year for this farmland. Nor was there proof that a contract for the sale of trees grown on-site which met the criteria for a commercial farm as set forth in the Amo decision existed. Accordingly, I **CONCLUDE** that the property in question does not meet the requirements for a commercial farm as indicated in the statute, and therefore the property does not fall under the jurisdiction of the MCADB.

ORDER

It is **ORDERED** that the action of the Monmouth County Agriculture Development Board dismissing the application of Wayne Pomanowski is **AFFIRMED**. It is further **ORDERED** that the appeal of Wayne Pomanowski is **DISMISSED**.

I hereby **FILE** my initial decision with the **STATE AGRICULTURE DEVELOPMENT COMMITTEE** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE AGRICULTURE DEVELOPMENT COMMITTEE**, which by law is authorized to make a final decision in this matter. If the State Agriculture Development Committee does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE STATE AGRICULTURE DEVELOPMENT COMMITTEE, Health/Agriculture Building, PO Box 330, Trenton, New Jersey 08625-0330**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Susan Scarola

January 31, 2013
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency:

Date Mailed to Parties:
mel

LIST OF WITNESSES

For petitioner:

Michael LaMana

Wayne Pomanowski

For respondent:

Harriet Honigfeld

LIST OF EXHIBITS

For petitioner:

P-1 Heartwood Ecological Consulting 10-Year Forest Stewardship Woodland Management Plan dated December 10, 2010

For respondent:

R-1 Letter to Steven Becker from Harriet Honigfeld dated May 20, 2005

R-2 Request for site-specific agricultural management practice recommendations dated November 30, 2010

R-3 Resolution of the Monmouth County Agriculture Development Board dated April 6, 2011

R-4 Transcript of Sworn Testimony (Pomanowski, Becker, and LaMana) taken before the Monmouth County Agriculture Development Board on March 2, 2011