NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3575-99T5F
A-3576-99T5F
A-6979-99T5F

ANTONIO CASOLA and KIM CASOLA,

Plaintiffs-Appellants,

and

STATE AGRICULTURAL DEVELOPMENT COMMITTEE,

Plaintiff/Intervenor-Appellant,

v.

PLANNING BOARD OF THE TOWNSHIP OF HOLMDEL,

Defendant-Respondent.

Argued December 12, 2000 - Decided JAN 2 2 2001

Before Judges Pressler, Kestin and Alley.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, L-2497-99.

Anthony J. Sposaro argued the cause for appellants.

Eileen P. Kelly, Deputy Attorney General, argued the cause for intervenor-appellant (John J. Farmer, Jr., Attorney General, attorney; Mary C. Jacobson, Assistant Attorney General, of counsel; Ms. Kelly, on the brief).

John M. Marmora argued the cause for respondent (Kirkpatrick & Lockhart, attorneys; Mr. Marmora, of counsel; Craig M. Goodstadt, on the brief; Paul M. Hauge of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, on the brief).

McTighe & McTighe submitted a brief on behalf of amicus curiae New Jersey Farm Bureau (Arthur A. McTighe, on the brief).

PER CURIAM

These are consolidated appeals in an action in lieu of prerogative writs in which plaintiffs Antonio and Kim Casola appeal from a judgment of the Law Division sustaining the resolution of defendant Planning Board of the Township of Holmdel granting them site plan approval for enlargement of their retail farm market and for operation of seasonal hay rides. The resolution, however, imposed numerous conditions and limitations of which plaintiffs complain. Also before us are interlocutory rulings made by the trial court respecting the preemptive effect of the Right to Farm Act (Act), N.J.S.A. 4:1C-1 to -10, and denying the motion of the State Agricultural Development Committee (SADC) to intervene in the action. We granted the motions of plaintiffs and SADC for leave to appeal as well as SADC's motion to intervene.

While the interlocutory appeal was, however, pending, the trial court proceeded to try the action in lieu of prerogative writs and to enter final judgment, from which plaintiff separately appealed. We consolidated that appeal with the interlocutory appeal and rescheduled a consolidated argument for all the appeals. We are now advised that there is a virtually parallel administrative proceeding pending before the State Agricultural Development Committee, whose motion to intervene in these appellate proceedings we had previously granted. We now dismiss the appeal

and vacate the judgment appealed from. We have concluded that primary jurisdiction of this dispute resides in the administrative process and, moreover, that under the time of decision rule, the Planning Board's resolution, in any event, is unsustainable.

This matter, regrettably brought to us in piecemeal fashion, raises issues arising under the 1998 amendments to the Act enacted by L. 1998, c. 48, effective July 2, 1998, and more particularly, N.J.S.A. 4:1C-9, as then amended, which provides for a degree of preemption by the Act of municipal ordinances. The amendments then adopted also repose quasi-adjudicative powers in county agricultural development boards with respect to disputes arising out of the operation of commercial farms, N.J.S.A. 4:1C-10.1; provide for an appeal process to the SADC, N.J.S.A. 4:1C-10.2; and accord extensive rule-making powers to the SADC, N.J.S.A. 4:1C-10.3 and 10.4. Rules have in fact been adopted. See, e.g., N.J.A.C. 2:76-2.1 to -2B.2. As we have noted, we were advised shortly before oral argument that the dispute between plaintiffs and the Township of Holmdel is now pending on appeal before the SADC.

Some further background is necessary to explain our disposition of this appeal. To begin with, plaintiffs made their site plan review application to the Planning Board in November 1997 seeking permission to enlarge the farm market and to conduct the hay ride operation. Public hearings commenced in May 1998 and continued, through five sessions, until March 1999. There was concern by local residents about the enlarged operation focusing

upon feared increased noise, nuisance, and traffic. During the course of the proceedings and in an effort to accommodate the residents' concerns, plaintiffs modified their plans in several respects. After the hearings had commenced but before their completion, L. 1998, c. 48 was enacted. The Planning Board, however, as appears from the resolution it adopted in May 1999 and as further confirmed by its attorney during oral argument, did not take the 1998 amendments into account in its deliberative process. Rather, it merely referred to the Act in passing, apparently relying on our pre-amendment decision in Villari v. Zoning Bd. of Adjustment, 277 N.J. Super. 130 (App. Div. 1994), in which we confirmed the municipal land-use authority over commercial farms. The Board's resolution, as we have noted, thus imposed numerous conditions and limitations on its site plan approval, including requirements respecting area limitations, landscaping, buffering, lighting, hours of operation, and source of products to be sold at the market. As to the last of the conditions, the resolution limited the farm market to sale of "indigenous agricultural products," that is, products actually grown on the farm.[1]

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[1]The relevant portion of the resolution reads as follows:

> The definition of ""Indigenous Agricultural Products" shall consist of products actually grown on the Property (or, to the extent the enterprise may be covered by the Right to Farm Act, actually grown on the Applicant's "commercial farm," as defined therein). For fruits and vegetables, this shall be defined as an entire growing season; for nursery stock, this shall be defined as at least two entire growing seasons; and for flowers, annuals, bedding plants, and perennials, this shall be

Plaintiffs filed this action in lieu of prerogative writs contending that they operated a commercial farm subject to the protections of the Act as amended; that municipal regulation, at least to the extent attempted to be imposed by the resolution, had been preempted; and hence that the conditions and limitations to which they objected were null and void. In urging preemption, they relied primarily on N.J.S.A. 4:1C-9 as amended, which reads in pertinent part 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.

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defined as having been grown on the Property (or, to the extent the enterprise may be covered by the Right to Farm Act, actually grown on the Applicant's aforesaid commercial farm) from seedlings or cuttings. Non-Indigenous Agricultural Products shall be stored only within the Outdoor Retail Area. All other Agricultural Products shall be grown in accordance with accepted agricultural practices; provided, however, that containerized growing of nursery stock shall be limited to a partially fenced-in area consisting of approximately 93,000 square feet and designated on the plans as the "containerized growing area." The plans shall be revised to reflect this. The intention of this condition is that the Property is to be used primarily as a farm and a vehicle for the sale of products grown on the Property (or, to the extent the enterprise may be covered by the Right to Farm Act, actually grown on the Applicant's aforesaid commercial farm), rather than as a retail outlet for products grown or produced elsewhere. In the event of complaints by residents, the Applicant shall supply reasonable proofs requested by the zoning officer in order to demonstrate compliance with this condition.

> 4:1C-3 et al.), and the operation of which conforms to agricultural management practices recommended by the committee and adopted pursuant to the provisions of the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), or whose specific operation or practice has been determined by the appropriate county board, or in a county where no county board exists, the committee, to constitute a generally accepted agricultural operation or practice, 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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> . . . .
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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;
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> . . . .
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> 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;

They also rely on the definition of "farm market" added by the 1998 amendment of N.J.S.A. 4C:1-3, which provides that:

> "Farm market" means 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 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.

After issue had been joined, plaintiffs moved for a declaratory judgment holding that the only jurisdiction reserved to the Planning Board under N.J.S.A. 4C:1-9, as amended, was, as provided by section c, the assurance of compliance with municipal standards governing "the construction of building and parking areas." SADC, which had been alerted by plaintiffs to their motion, then sought and obtained permission from the court to file a brief in plaintiffs' support and to move for intervention, which it did. The Planning Board then filed a cross-motion for summary judgment declaring that its site-plan jurisdiction and its right to impose conditions and limitations thereunder were unaffected by the 1998 amendments. The court, hearing the motions together, granted the Planning Board's and denied plaintiffs' based on the conclusion that the 1998 amendments did not preempt or limit the Board's traditional site-plan review authority. The court then denied the intervention motion of SADC on the ground that since there was no preemption, there was no necessity for intervention. A conforming order was entered, and both plaintiffs and the SADC moved this court for leave to appeal.

We granted both motions for leave to appeal by orders entered on March 15, 2000, and on that date we also granted SADC leave to intervene. By order entered on March 23, we consolidated the two appeals. After entry of that order, a series of procedural anomalies occurred that combined to make our disposition of the merits of the substantive issues raised by the appeals essentially

impractical.

In sum, despite our grant of leave to appeal and the pendency of the matter in this court, the trial court nevertheless, in violation of R. 2:9-1(a), proceeded to conduct the prerogative writ trial and entered judgment sustaining the Board's resolution as meeting the test of a reasonable and reasoned exercise of its discretion based on fact-finding supported by the record before it. Plaintiffs filed a separate appeal from that judgment. When we learned of this development at the originally scheduled argument of the interlocutory appeal and were advised that briefing on the appeal from final judgment was then nearly completed, we consolidated the appeal from the final judgment with the two interlocutory appeals, accelerated the appeal from final judgment, and scheduled an expedited argument date for the entire consolidated matter.

In the meantime, administrative proceedings were also pending. Plaintiffs applied to the Monmouth County Agricultural Development Board for a determination that their farm and its operation, including the hay rides, constituted a commercial farm and generally accepted agricultural management practices entitled to the protections of the Act. The County Board conducted a hearing at which the Township, but not the Planning Board, appeared by counsel, and objecting local residents appeared as well. Following the hearing, the County Board, by resolution adopted on April 5, 1999, held that plaintiffs' farm operation was within the

protection of the Act and that the hay rides constituted a recreational activity within the intendment of N.J.S.A. 4:1C-9(h) and hence were an approved agricultural practice as well. The County Board did not, however, directly address the import of its findings vis-a-vis the Act's asserted preemption of the Planning Board's authority to have imposed any of the conditions of its site plan resolution. The Township then appealed to the SADC complaining of the County Board's substantive determinations in plaintiffs' favor as well as its failure to consider the relationship between its determinations and the municipality's right to exercise its police and land-use powers. The Township's appeal was referred to the Office of Administrative Law for contested-case hearing before an administrative law judge. That matter is still pending there unheard.

We were unaware of the pendency of the administrative appeal before the SADC until shortly before oral argument. What we now have are three consolidated appeals from judicial action and a simultaneously pending appeal before a state administrative agency. On our inquiry, we were assured by the Deputy Attorney General representing the SADC that the SADC will be considering the preemption issue raised by plaintiffs and will address the extent to which, if any, the Planning Board retains jurisdiction under N.J.S.A. 4:1C-9 to regulate, by site plan review, the operation of plaintiffs' farm market and farm-related recreational activities.

It is clear to us that the statutory and regulatory scheme

reposes a broad authority in the administrative agency charged with enforcement and implementation of the Act, namely the SADC, to adjudicate the questions raised on this appeal as well as those raised in the Township's appeal to the SADC. Indeed, in large measure those questions are congruent and in full measure they overlap. While it is true that the SADC's determinations will involve interpretation of the Act and, particularly, its 1998 amendments, and while it is also true that an agency's interpretation of the statute it is charged with administering is not binding on this court, nevertheless we accord that interpretation substantial weight. See, e.g., National Waste Recycling, Inc. v. MCIA, 150 N.J. 209, 228 (1997); Nelson v. Board of Educ. of Tp. of Old Bridge, 148 N.J. 358, 364 (1997); Matter of Musick, 143 N.J. 206, 217 (1996).

It is our view that primary jurisdiction consequently resides in the SADC to determine whether plaintiffs operate a commercial farm subject to the protections of the Act, whether their proposed activities constitute generally accepted agricultural management practices, and the extent to which, if at all, in view of the preemptive language of N.J.S.A. 4C:1-9, those activities are subject to municipal regulation beyond the assurance of their conformance with standards relating "to construction of building and parking areas." See generally as to the doctrine of primary jurisdiction and the courts' obligation to defer in the first instance to administrative adjudication of matters within the

agency's jurisdiction and expertise, Kristiansen v. Morgan, 153 N.J. 298, 313-315 (1998), modified on other grounds, 158 N.J. 681 (1999).

In short, we deem it appropriate for the SADC to determine in the first instance plaintiffs' status and the status of their proposed activities vis-a-vis the Act's protections; whether the full scope of authority vested in a planning board in exercising its traditional site plan approval authority survives N.J.S.A. 4C:1-9 intact; and, if it does not, the scope of the preemption thereof on the one hand and, on the other hand, the scope of those matters subject to municipal standards governing "construction of building and parking areas." Thus, the SADC must and, in fact, has agreed before us, that it will decide, if it concludes that the commercial-farm and approved agricultural management practices tests have been met, whether any of the limitations and conditions the Planning Board has attempted to impose remain reserved to it by the amended statute. Moreover, although the issue has not been directly raised, we are aware of a municipal concern respecting the effect of plaintiffs' uncontrolled operation on public health and safety. N.J.S.A. 4C:1-9 apparently subjects the pursuit of commercial farm use to overriding considerations of public health and safety but does not identify the board or body charged with determining when particular activities implicate those concerns. We read that statute, however, as reposing primary jurisdiction to make those determinations in the administrative agency.

Since we have concluded that primary jurisdiction to address and adjudicate the basic issues before us resides in the first instance in the SADC where the matter is already pending, we dismiss this appeal in deference to the SADC's jurisdiction. Obviously, any party aggrieved by the ultimate decision of the SADC will have the right of review by this court pursuant to R. 2:2-3(a)(2). It was, moreover, brought to our attention at oral argument that while the Township is a party to the SADC appeal, the Planning Board is not. Its participation is obviously essential. The Planning Board has agreed to move forthwith to intervene therein, and we have no doubt that the motion will be promptly granted. We are further satisfied that any interim relief any party may seek can be applied for to the SADC.

The status of the Law Division judgment affirming the action of the Planning Board remains to be considered. That judgment must be vacated based on our view of primary jurisdiction. As we have pointed out, the Planning Board did not appropriately consider the 1998 amendments of the Act in its final determination of the conditions and limitations set forth in its site plan resolution, and the Law Division considered the reasonableness of the Planning Board's action without specific reference thereto either. Some of the conditions and limitations, for example, the indigenous product provision, appear to be directly contrary to the amendment of N.J.S.A. 4:1C-3.

It is well settled that the time of decision rule required

both the Planning Board and the Law Division to take the status of the statutory law at the time of their respective decisions into account. See, e.g., Pizzo Mantin Group v. Township of Randolph Planning Bd., 137 N.J. 216, 235 (1994); Kruvant v. Mayor & Council of Cedar Grove, 82 N.J. 435, 440 (1980); Lake Shore Estates v. Denville Tp., 255 N.J. Super. 580, 589 (App. Div. 1991), aff'd o.b., 127 N.J. 394 (1992); Aronowitz v. Planning Bd. of Tp. of Lakewood, 257 N.J. Super. 347, 363 (Law Div. 1992). Since it appears that the Planning Board failed adequately to do so and that the 1998 amendments have had at least some effect on its decision, we are satisfied that neither its resolution nor the court's affirmance can now be sustained. Clearly, then, following the determination by SADC of the scope of retained municipal regulatory authority, the Planning Board will have to reconsider the site plan review application in light of the SADC's decision and the 1998 amendments.

The judgment of the Law Division is vacated and the appeal is dismissed.