

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2163-04T5

IN RE SAMAHA FARMS
(APPEAL BY RONALD AND DONNA
SAMSON FROM THE DECISION OF
THE MONMOUTH COUNTY AGRICULTURE
DEVELOPMENT BOARD)

Argued: March 21, 2006 - Decided: April 11, 2006

Before Judges Axelrad, Payne and Sabatino.

On appeal from a Final Decision of the State
Agriculture Development Committee, ADC-8497-
02.

Stephen M. Bacigalupo, II, argued the cause
for appellants Ronald and Donna Samson
(Schottland, Manning, Caliendo & Thomson,
attorneys; Vincent P. Manning, on the
brief).

Thomas J. Clarke argued the cause for
respondent John Samaha.

Eileen P. Kelly argued the cause for
respondent State Agriculture Development
Committee (Zulima V. Farber, Attorney
General, attorney; Michael Haas, Assistant
Attorney General, of counsel; Ms. Kelly, on
the brief).

PER CURIAM

Ronald and Donna Samson appeal from a final determination
of the State Agricultural Development Committee (SADC) holding
that their neighbor's use of a liquid propane cannon as a

noisemaking device to protect his sweet corn crop from bird predation was entitled to protection as a generally accepted agricultural management practice, provided it was used in conformance with conditions imposed by the Monmouth County Agriculture Development Committee (CADB), and a permit issued by the Department of Environmental Protection, Division of Fish and Game (DEP). We affirm.

John Samaha grows sweet corn on sixty acres of the 107-acre property known as Block 34, Lots 2, 18 and 19 that he leases in Colts Neck Township. Sweet corn is vulnerable to predation by birds, which eat the ends of the stalk and render the crop unmarketable. Samaha uses a combination of methods to scare the birds away from his crops, including flash tape, mylar tape, streamers, large balloons with large eyes, and the liquid propane cannon that is the subject of this appeal. For the period from July 1, 2002 to October 31, 2002, Samaha obtained a DEP permit to use the cannon at noise levels not exceeding 128 decibels, measured within a distance of 100 feet from the cannon. See N.J.A.C. 7:25-3.2 (DEP Fish and Game maximum sound level for use of mechanical noisemaking devices).

Samaha then filed an application to the Monmouth CADB requesting a site-specific recommendation pursuant to the Right to Farm Act, N.J.S.A. 4:1C-1 to -10.1, permitting the use of the

cannon as a generally accepted agricultural management practice. N.J.S.A. 4:1C-9. He sought to use the cannon for a period of about four to six weeks on an "as needed" basis during the middle of the summer and dry periods, with hours of operation not earlier than one-half hour before sunrise to one-half hour after sunset. The cannon would be placed at a distance of no closer than 300 feet to any home, and no closer than 50 feet to any road, with the nozzle being pointed away from the road. The cannon would fire at twelve to fifteen minute intervals.

Samaha's application was opposed by several neighbors, including appellants, who claimed the noise of the cannon was so loud and annoying as to constitute a nuisance. The CADB considered, among other items, that the use of a cannon to prevent bird predation of sweet corn was an approved Agricultural Management Practice (AMP) as specifically referenced in the Rutgers Commercial Vegetable Production Recommendations adopted by the SADC; that the Colts Neck Township Noise Ordinance provided for a maximum permitted sound-pressure level of 69 decibels at the property line or along any public right-of-way; and that according to the objector's expert, when the cannon was faced directly at the Samson's property, it emitted a maximum of 65.2 decibels. Following several days of public hearings, the CADB concluded that

Samaha's use of the cannon qualified for Right to Farm Act protection as a site-specific AMP, based on compliance with the following conditions:

- a. The Cannon may only be used during the period one-half hour after sunrise to one-half hour before sunset.
- b. The use of the Cannon will only be used as a last resort and that other methods and devices shall continue to be employed whenever possible.
- c. That Mr. Samaha will endeavor to explore the use of alternative methods of preventing bird predation that are less burdensome on the neighboring residents as such new methodologies become economically available.

The Samsons appealed the CADB's determination to the SADC pursuant to N.J.S.A. 4:1C-10.2, and the SADC referred the matter to the Office of Administrative Law (OAL) for a contested case hearing. The parties agreed the matter would be decided by the Administrative Law Judge (ALJ) based on the record developed before the CADB. On August 25, 2004, the ALJ issued an initial decision upholding the decision of the CADB that Samaha's use of a liquid propane cannon to prevent bird damage to his sweet corn crop constituted a generally accepted AMP protected by the Right to Farm Act. The Samsons filed exceptions on September 2, 2004. The SADC issued its final decision on November 4, 2004, rejecting certain legal conclusions of the ALJ, but affirming

the factual findings and the final result of the initial decision, concluding:

The SADC rejects the ALJ's conclusions that the Right to Farm Act requires the SADC to adopt noise control rules and that the SADC has implicitly adopted noise standards. The SADC finds that a DEP noisemaking permit for the operation of liquid propane cannon is a condition for receiving the protections of the Right to Farm Act and does not constitute implicit rulemaking. This condition is set forth in the Commercial Vegetable Production agricultural management practice, as well as in the Right to Farm Act, which requires that an operation be in compliance with all relevant State laws to receive the protections of the Act. The SADC adopts the ALJ's findings that Samaha met this condition.

The SADC rejects the ALJ's conclusion that the Monmouth CADB was not required to give deference to the noise protection ordinances adopted by the Township without a DEP determination that approval of the ordinances was necessary. The SADC finds, however, that the ALJ properly considered the impact of the noise from the liquid propane cannon on the public health and safety, and imposed appropriate limitations on the use of the propane cannon.

The SADC adopts the remainder of the ALJ's findings with clarifications as set forth above, including his conclusion that Appellants failed to meet their burden of proving that the site-specific agricultural management practice issued by the Monmouth CADB should be reversed or modified in any way.

On appeal, the Samsons argue:

POINT ONE

THE CREATION OF AN IRREBUTABLE PRESUMPTION, COUPLED WITH AD HOC SITE SPECIFIC AGRICULTURAL MANAGEMENT PRACTICE APPROVAL, RENDERS THE RIGHT TO FARM ACT'S SO-CALLED PROTECTIONS MEANINGLESS.

POINT TWO

THE DETERMINATION THAT THERE HAS BEEN NO OBJECTIONABLE IMPACT OR EFFECT OF THE CANNON ON NEIGHBORS, PUBLIC HEALTH AND SAFETY, HAS NO BASIS IN THE RECORD.

Appellants' counsel acknowledged at argument there was no proof the measured decibel level on the Samaha's property exceeded the maximum decibel level of the Colts Neck Township Noise Ordinance. Nevertheless, appellants still contended the SADC failed to focus on local concerns and consider the impact of the decibel level and repetitive nature of the cannon charge on the residents. Essentially, what appellants' challenge boils down to is their belief there is a less intrusive means to shield away birds than the propane cannon used by their neighbor.

The arguments advanced by appellants in their brief and during oral argument are without merit. The irrebuttable presumption established in the Right to Farm Act insulates Samaha from appellants' common law claims of nuisance. N.J.S.A. 4:1C-10. Based on our review of the record, we are satisfied the agricultural boards balanced the competing interests of the farmer, who was in need of an agricultural management tool to protect his crop, and those of his neighbors, who regarded the

noise of the cannon as too disruptive. The Monmouth CADB and the SADC, as entrusted under the Right to Farm Act, appropriately considered the impact of the cannon on the local public health and safety, Township of Franklin v. Hollander, 172 N.J. 147, 153 (2002), and imposed reasonable conditions on its use. Based on our limited standard of review and deference to the expertise of the administrative agencies, we affirm substantially for the reasons set forth by the SADC in its final determination.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION