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INITIAL DECISION

OAL DKT. NO. ADC8497-02

AGENCY REF. NO. 1309-05

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

Vincent P. Manning, Esq., for appellants Ronald and Donna Samson (Schottland, Manning, Caliendo and Thomson, attorneys)

John Samaha, *pro se,* respondent

Record Closed: February 25, 2004 Decided: August 25, 2004

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellants, Ronald and Donna Samson appeal from the decision of the Monmouth County Agriculture Development Board asserting that its decision to permit Samaha Farms to use a liquid propane cannon is not an accepted agricultural management practice. The matter was transmitted to the Office of Administrative Law (OAL) on December 9, 2002, for hearing as a contested case. The matter was assigned to me on January 2, 2003, and a prehearing conference was scheduled for March 26, 2003. During the prehearing conference, it was realized that the applicant, John Samaha, had not been made a party to this proceeding. Accordingly, with the consent of the other parties, I contacted Mr. Samaha and advised him of his right to participate in this proceeding, and he agreed to do so. Subsequently, the parties agreed that the matter should be decided based upon the record before the Monmouth County Agriculture Development Board and transcripts were ordered from that Board. After these transcripts were prepared and submitted, and upon further conference which occurred on August 20, 2003, the parties agreed to submit written arguments concerning this matter. Upon receipt of these arguments and receipt of all documents and materials, the record was closed on February 25,

2004. By orders of extension entered in this matter the time limit for filing the initial decision was extended until August 26, 2004.

FACTUAL DISCUSSION

Most of the essential facts in this matter are not disputed. The dispute arises with regard to whether the use of a propane cannon for control of predators for the production of sweet corn is an acceptable agricultural management practice.

The facts in this matter may be gleaned by reviewing the transcript of proceedings before the Monmouth County Agriculture Development Board, and the Resolution adopted by that Board on August 7, 2002 (C-4).

John Samaha proposes the use of a liquid propane cannon for the purpose of protecting sweet corn from bird predation on a farm located at [redacted], Township of Colts Neck in the County of Monmouth, designated as Block 34, lots 2, 18 and 19 on the Township tax map. Mr. Samaha requested a determination pursuant to *N.J.A.C.* 2:76-2.3 whether the proposed use of the cannon to protect his sweet corn crop from bird predation constituted a generally accepted agricultural management practice.

Hearings before the Board occurred on April 3, 2002, May 1, 2002, and August 8, 2002. The following is not intended to be a verbatim report of the proceedings before the Board, but is intended to summarize the testimony and evidence before that Board with particular emphasis on testimony and evidence relevant to the issues herein.

Respondent, John Samaha, pursuant to the Board's regulations, made a presentation for a site-specific agricultural management practice. He indicated that he was requesting a site-specific recommendation permitting the use of a propane cannon for predator control on sweet corn. He is actively involved in the production of sweet corn and has one farm that he leases in Colts Neck and one in Holmdel.

Mr. Samaha explained that there are many variables to raising a successful sweet corn crop and it must be harvested at the peak of perfection, but is very vulnerable to bird damage. As soon as the birds attack the end of the corn, it is no longer marketable. Among the practices he uses are flash tape, Mylar tape, streamers, large balloons with large eyes, and one propane cannon that sets off a charge to help scare away birds. No single device works by itself and sometimes all coupled together do not work, but they are a help and they sometimes do work. They are all part of the operation of raising sweet corn to keep the birds out during the harvest season.

Mr. Samaha is seeking a permit to operate generally for six weeks with hours of operation one-half hour before sunrise to one-half hour after sunset. The cannon would be placed at a distance no closer than 300 feet to any home, and no closer to 50 feet to any road, with the nozzle being pointed away from the road.

Mr. Samaha indicated that birds are not always a problem and the cannon is only used when it is necessary. When other farmers are harvesting other crops, the birds generally go there and leave the sweet corn. When other crops are finished being harvested, the birds start on the sweet corn groves. Later in the season other crops become available and birds do not bother the sweet corn. Birds are also a problem during very dry conditions.

Mr. Samaha indicated that he is in compliance with the condition applicable to a Noisemaking Permit that the device shall not have a sound level in excess of 128 decibels at 100 feet from the device. Mr. Samaha indicated he has no device to measure decibels, but believes he is compliance based upon the manufacturer's specifications. He also indicated while the permit allows the cannon to be located within 300 feet of the nearest home, he is actually about 1350 feet away from the nearest home. Birds are most damaging to sweet corn because it is not marketable thereafter. He indicated that he tries not to use the cannon unless it is absolutely necessary, but unfortunately, early start is a key to success because the birds fly from their nesting area and look for a place to feed and once they find it, they stay there for the day, and it is hard to get them out.

Mr. Baumley, the State Agricultural Development Committee representative, explained that the State Agricultural Development Committee has adopted and incorporated by reference in its regulations the Rutgers Cooperative Extension 2002 Commercial Vegetable Production Recommendations as the Commercial Vegetable Production Agricultural Management Practice. (*N.J.A.C.* 2:76-2A.5(a)).

Mr. Kinney, the Board attorney, supplied a copy of the Colts Neck Township Noise Ordinance, which on page 10299 states that the maximum permitted sound pressure level at the property line or along any public right of way is 60 decibels. He indicated the Noisemaking Permit substantially exceeds that so there is a conflict between the local noise ordinance and the Right to Farm Act. The Planning Board staff advisor pointed out that under the DEP regulations there is an exemption from the noise ordinance for agricultural uses (C-11). The board attorney indicated that it is clear that the Noisemaking Permit allows for a decibel level much higher than the local noise ordinance. Mr. Samaha pointed out that the ordinance decibel level was at the street or property line, which is approximately 1300 feet from the device.

Upon questioning by members of the public, Mr. Samaha indicated he does not know the decibel level of the propane cannon. The manufacturer of the cannon is called Scare Away. If the sweet corn crop were unattended, there would be 100% damage. He explained that flash tape, Mylar tape, streamers and balloons each have a small effect, and everything combined has a better effect. He has used all of these measures without the propane cannon. In the prior growing season he did not use the propane cannon every day, but approximately two to three times a week. He used it sporadically when necessary. There is a crude setting and he estimated that it was shooting every twelve to fifteen minutes. He reset it to shoot every 30 minutes in order to be friendlier to the neighborhood. He did not keep records of the rate of firing in relation to crop damage. However a lot of corn was lost when the setting was 30 minutes and he had to drive the tractor up and down the cornfield to scare away the birds. He never investigated using synthetic sounds, but learned from others that it is a waste of money. The propane cannon is manufactured by Scare Away and costs $500.00. He does not know if he is in compliance with state laws because he does not have any decibel meter. He can assure that at 1300 feet the cannon is well in compliance.

There is a vegetative buffer between the cornfields and most of the other neighbors. He is sensitive to the concerns of neighbors and he listens to the sound from the cannon at the road. He does not want to aggravate anyone or ruin anyone's day, but is just doing what he needs in order to be a farmer raising sweet corn.

Mr. Ronald Samson, an objector and the appellant herein, testified that he owns a farm in another state and has a farming background. However, last summer he and his wife were awakened at 6:30 in the morning by

the sound of a cannon. The placement of the cannon and the nature of the property magnifies the effect of the sound. Mr. Samaha was firing the cannon three times in rapid succession every six minutes from 6:30 a.m. until just before sunset. He had done it the year before it but it was not as loud or irritating. The cannon's sound occurred throughout the day. They are outdoor people as are their neighbors. He called the police and found out that it was Mr. Samaha. He then called Mr. Samaha and stated that he knew that he had a bird problem but this intrusion into their lives was unreasonable. They then came to an agreement that Mr. Samaha would fire the cannon less frequently. However, the firing continued into September past the growing season, and he wrote Mr. Samaha and told him he would use all his ability to stop the use of the cannon because it is an intrusion into their lives. His whole family is affected by it. Colts Neck is not a farming community anymore but is a suburban community with many expensive homes. The use of the cannon devalues the homes of others.

Mr. Samson disputed Mr. Samaha's testimony concerning firing intervals. Many times Mr. Samaha's workers came back and reset the cannon to fire more rapidly. It was incessant for most of the summer. They are knocked out of bed when it goes off in the morning.

Mr. Giordano, another objector, stated that Mr. Samaha does not live on the property, but he and his neighbors are homeowners who live right there with children. They all pay an enormous amount of taxes. If there is another device he can try he should do so to keep the peace rather than using the cannon.

Mr. Samson stated that there are two types of electronic synthetics sound makers to repel birds and they are more effective than cannons. There are other people growing sweet corn that do not use a cannon. The property is surrounded by homes, which pre-date the use of the cannon. He strongly urged the Board to deny this request because it is an unreasonable infringement into their lives and liberties as citizens of Colts Neck. Mr. Samson stated that he never brought a formal complaint against Mr. Samaha, but tried to resolve this. He did not go to the code enforcement officer to complain and no one else did to his knowledge. Mr. Samson reported that the police felt the cannon is clearly in violation of the Township ordinance.

Mr. McCarthy, a board member, inquired whether the location of the cannon might focus the sound away from the neighbors. He also indicated that electronic sound devices work well when used in combination with propane-type cannons. However, the decibel level of the cannon must be continually increased to achieve success.

Mr. Samaha stated that the cannon is placed in midfield. Mr. Samson stated that the sound is equivalent to someone shooting a twelve-gauge shotgun outside an open window. Mr. Samaha indicated that he only points the cannon in a direction away from Mr. Samson's home. He is there all day long and does not recall any incident in which his workers changed any settings. There is no adjustment as to intensity. He stated that he does not know of a sweet corn grower that does not use the cannon. He explained that this property was previously an orchard, but he started using the cannon in 1997 for his sweet corn crop. There were trees removed from the property in the winter of 1997.

Mr. Samson recalls being awakened by the cannon on July 2, 2000, at 6:15 a.m. when they were asleep and it blew them out of bed.

Mr. Kinney indicated that the Board has the testimony from the State Agriculture Development Committee representative that this operation is considered a valid agricultural management practice. Any sound testing would have to be done in the growing season with foliage on the trees to get the same test results. Mr. Obal stated that this is not an agricultural issue because the use of a sound device such as this is one of the recommended methods. There are other experimental methods that may be more annoying such as a high pitch bird distress call. There are other possibilities, but he also knows a lot of sweet corn growers who just stopped growing sweet corn if they cannot use the cannon. Cannons are used other places in Monmouth County. The Fish and Game Noisemaking Permit limits the cannon to 128 decibels within 100 feet.

The Board directed its staff to obtain additional information on the acoustical level at the side of the road and statistics from the cannon manufacturer.

At the next public hearing on May 1, 2002, the Board adopted a motion to hold in abeyance as premature any conflict resolution application made by attorney for the objectors.

Karen Colvin, Staff Advisor to the Board, stated that a site review was performed by Mr. Bill Sciarappa from the Rutgers Cooperative Extension. They measured the distance to the property line up the road, which was about 1600 feet. Mr. Samaha obtained a sound meter from Radio Shack. The report from Mr. Sciarappa indicated that the sound meter showed a decibel level of 86 at the mouth of the device's muzzle. At 60 feet the sound level dropped to 70 decibels, but increased to 75 decibels with the wind. At 100 feet distance, the decibel levels measured 65 to 70 with the wind and 60 to 65 into the wind. At 400 feet, 51 to 60 decibels and 53 to 60 decibels were recorded. At the property's stonewall, 875 feet away, levels of 52 to 60 decibels were recorded. At 1600 feet away at the road's edge, the sound from the cannon was audible but not detected by the meter, which had a minimum setting of 50 decibels. Mr. Sciarappa indicated that, subjectively, the noise level was not objectionable. Mr. Manning, attorney for the objectors, objected to this report and requested the opportunity to conduct an independent test. The board attorney agreed that it is reasonable to allow an independent examination.

Mr. Samson testified that they have heard three shots fired in rapid succession and that the cannon model is the Scare Away M8. The one that is capable of firing a single shot was shooting at a level that was not bothering his wife. He believes that the cannon that was used on the day of the testing is not the cannon they heard. The board attorney indicated that if approved, the specific model used would be a condition of the recommendation of approval. Mr. Samaha responded that he only has one cannon which is the Scare Away M8 and that is the one used on the day of the testing.

Mr. McCarthy questioned what the Board is supposed to be doing if the State has already approved this as an approved agricultural management practice. Mr. Baumley clarified what he said at the prior meeting. He explained that the State is in the process of amending the regulations and that as a part of that document the use of a Noisemaking device is an acceptable use provided there is compliance with all Federal and State regulations. What comes into play is that the applicant would have to be in compliance with a Noisemaking Permit issued by Fish and Game in order to receive Right To Farm protection. The Board is verifying that the applicant's use of the cannon complies with the accepted management practice adopted by the State Committee, as well as the requirements of the Fish and Game Permit. The use of a cannon is a recommended practice, but the question is whether on this site it is in too close proximity to neighbors. If the Board finds that the applicant

is in violation of the Noisemaking Permit, the matter ends and the applicant is referred back to comply with the municipal ordinance.

Pete Griffin, a neighbor of the Samsons, confirmed that the noise from the cannon is obtrusive and annoying, and over time, cumulatively, it is a real nuisance. His wife, Mary Ellen Griffin, stated that the discussion was upsetting to the point of being shocking, and that whatever the decibel readings may be, it is noise to them. The noise can be heard from quite a distance away. It is very disturbing throughout the house and on the patio. Many properties are being acquired with taxpayer money for farm preservation, but if cannons are an approved practice, there will be no peace and quiet except in the city.

At the hearing on August 8, 2002, the letter of Ronald and Donna Samson dated July 31, 2002, was read into the record. In that letter they state that Mr. Samaha began using his cannon this year on July 6, 2002, at 7:20 a.m. They have been awakened by it every morning since then and have been tormented as this goes on throughout the day at six-minute intervals, three shots each time. It is not reasonable to expect that anyone should be subject to these explosions on a daily basis. They believe that sweet corn is not a suitable crop for this land because of its proximity to the Swimming River Reservoir and the surrounding homes. Sweet corn is a high value crop, but Mr. Samaha has chosen the most inexpensive way to protect his investment. There are other more expensive methods such as netting, which costs $10,000.00 for 35 acres and gives absolute protection. The quality of life should not be sacrificed for the economic benefit of one individual's part-time business interest.

Also read into the record was the Noisemaker Permit inspection report from Anthony McBride, a Principal Biologist with Fish and Game, dated July 16, 2002. He stated that on July 11, 2002, at approximately 10:00 a.m. he toured the sweet corn fields with Mr. Samaha and he observed evidence of bird damage to the sweet corn. He was shown the propane cannon and it was set to operate three times every fifteen minutes. The device was being used in accordance with regulations and all of the criteria for such devices. It was not set in a manner, which endangered the public, it was not within 25 feet of a public road, and it was not operated within 300 feet of another dwelling without permission of the occupant. Although decibel levels were not measured, Mr. Samaha reported to him that testing was performed and that at no point was the noise level over 100 decibels. They then traveled to the vicinity of the complainants' residents and listened to the propane cannon and, although it could be heard, it was very muffled due to the distance of approximately one-third mile from the device to the residence and an intervening forested area. Mr. McBride determined that there was no need to suspend the permit based on the complaint.

Also produced as part of the record was a Noisemaking Permit issued by the Department of Environmental Protection, Division of Fish and Wildlife, for the period from July 1, 2002 to October 31, 2002. Under the provisions of the Permit, the device could only be operated one-half hour before sunrise to one-half hour after sunset.

The Board also referred in the record to a report provided by the attorney for the objectors from Paul Carpenter Associates, Inc., dated May 28, 2002. In that report it is stated that an average noise level of 50 decibels is a typical background noise measurement. Sharon Paul Carpenter reported that on May 22, 2002, noise measurements were conducted at the McCrane property located north of the Samson property. The background noise level was 45.6 decibels at approximately 4:30 p.m. The noise level measurement at 50 feet

from the propane cannon was 107.5 decibels. A noise level measurement conducted 100 feet from the propane cannon resulted in a noise level of 102.7 decibels. Noise level measurements were then taken at the Samson property. The background noise level was determined to be 50 decibels just prior to the testing. The cannon was then pointed toward the Samson property at the request of the Board members. The expert indicated that the maximum noise level was 65.2 decibels. She noted that a noise source that is ten decibels or greater than the background noise dominates the acoustics signature of the noise environments. She also reviewed the acoustic test performed by Bill Sciarappa and indicated that either the propane cannon used for that test was not the same or the noise meter was incorrect by more than 30 decibels. Finally she stated that considering the noise level increase due to the cannon, the continuous blasts from sunrise to sunset are particularly annoying to adjoining residential areas. As neighboring residential areas abut farmlands or other noise contributors, conflicts of this nature are bound to occur. It is recommended that another form of bird control be investigated.

Upon questioning, Mr. Samson agreed that the noise level at his location is less than authorized by the State permit. The standard is less than 128 decibels at 100 feet from the gun and it was 107.5 decibels at 50 feet and 102.7 decibels at 100 feet. Both of these measurements would be within the maximum. Mr. Samson stated that he obtained his information on netting cost for 35 acres on the Internet. Mrs. Samson has lived at the premises for six and a half years as of August 2002. He and his wife first noticed the sound last year, although it started in 1999. It was 2001 when it became aggravating. He indicated that he even though they have central air conditioning in the house, the cannon will wake them up in the morning.

In response to the foregoing, Mr. Samaha stated that much of the information heard by the Board from the objectors was inaccurate and embellished. He indicated that the cannon was not used on July 7, 8, 9 or 10, 2002, but it was used on July 11, 2002, because it was necessary. It was used on July 12, but not on July 13 or 14. 2002. It was used on July 15, but it was not used on July 16, 17 or 18. It was used on July 19 and 20, and intermittently on July 21, 2002. When the birds are an oppressive problem as they were during the past week during the heat wave he would turn it on. The instructions to the worker is who is blowing on a trumpet is that when he cannot effectively get the birds and the scary man is not doing its job, the cannon is to be turned on. This is done about five times a day.

Mr. Samaha stated that the cannon is the number one recommended practice for getting birds out of sweet corn in the Rutgers Vegetable Growers Recommendation book. The trumpet and the scary man are devices he developed to help control the problem. Netting is ludicrous because the field cannot be worked with having netting over them. The Noisemaking Permit says he can use the cannon from July 1 to October 31, 2002, but the crop should be completed by August 24, 2002. The cannon is used for about six weeks. He denied using the cannon through the month of September last year because he is not on the farm in September. He normally does not start the cannon before 9:00 or 9:30 a.m., but because of the birds starting early he sometimes must turn it on. If he can get them out early they will find another place to feed.

Mr. Samaha denied that the cannon goes off every six minutes, and stated that it is turned off for hours at a time. He feels he is operating within the scope of the law and the proper permits and it is unfair to be here in this manner when he is trying to raise food to feed people. He indicated that at one point he did not use the cannon for five days because they were effectively able to get rid of the birds and other ways. Other neighbors

indicated that it does not bother them at all. During this past seven days during very hot weather the cannon was used more than other times. He did not use the cannon for seven days out of sixteen. When the cannon is needed it is turned on, and when it is not needed it is turned off. He uses the same device in Holmdel and has never had a complaint. He could use multiple cannons under the permit but uses only one, which is the least amount of noise protection that he can possibly get away with.

Mr. Samaha acknowledged that he did receive a summons issued by Colts Neck Township because of the complaining witness Ronald Samson, for violation of the noise ordinance on July 10, 2002.

Mr. Samaha explained that many factors affect feeding habits of birds. The pattern in August is different because wood and grass begin to come to seed and the birds change their feeding habits rather than going to the corn. He seldom has a problem in September or late August. He did not use the gun in September 2001. From July 6 through August 31 he probably used the cannon 60 or 70 per cent of the days. It is never used before sunrise.

The report from Gregory Romano from the State Agricultural Development Committee was referred to and read into the record. It stated that the State Agricultural Development Committee adopts as its rules and regulations the Rutgers report which is the Commercial Vegetable Production Recommendations dated 2002.

Mr. Samson testified that Mr. Samaha did not have a permit from Fish and Wildlife commission for any of the prior fourteen years. Sweet corn is not a crop that addresses world hunger and a hardship is not going to be created if it goes away. Mr. Samson stated that they have been living in their home for number of years and this infringement came into their lives after they bought their house. It is an intrusion that has been created over the past three years and it has had a deep impact on their lives and the lives of other objectors. He acknowledged the partial truth of Mr. Samaha's representation that he has fired the cannon a limited percentage of time, and that he has taken steps to limit his use of the cannon. He indicated that he was willing to have Mr. Samaha use the cannon from 9:00 a.m. until 3:30 p.m., one shot every fifteen minutes. The objectors are not trying to drive Mr. Samaha out of business, but they are looking for some relief. Colts Neck is no longer a farming community. They are asking that the Board institutionalize a set of rules that the parties can live by. He wants what he is living through every day to be controlled in some way that is rational and reasonable.

At the conclusion of the hearing, and after deliberations made by the Board on the record, the Board made findings which may be summarized as follows:

1. The commercial farm is no less than five acres.

2. The commercial farm produces agricultural/horticultural products worth at least $2,500.00 per year.

3. The products produced each year are listed in the application.

4. The farm is eligible for differential property taxation pursuant to the Farmland Assessment Act of 1964.

5. The farm is located in an area in which, as of December 31, 1977 or thereafter, agriculture has been a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan.

6. The Samaha Farm Management unit was in the operation as of July 2, 1998.

7. The A-1 Zone in Colts Neck allows for agriculture as a permitted use.

8. The A-1 Zone in question was in place as of December 31, 1997 or thereafter.

9. A complete written application for recommending a Site-Specific Agricultural Management Practice was made to the Monmouth County Agriculture Development Board.

10. With all of the above criteria having been satisfied, the Samaha Farm Management Unit meets the eligibility criteria under the Right To Farm Act.

11. The site-specific agricultural management practice that is being sought is found to be included in one or more of the following eligible activities:

    a. Production of 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;

    b. Processing and packaging the agricultural output of the commercial farm and/or commercial farm management unit;

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

    d. Other activities as adopted by the State Agriculture Development Committee, pursuant to the Administrative Procedure Act, specifically, the use of Noisemaking devices to prevent bird predation of sweet corn crops.

12. The Samaha farm does not engage in ineligible activities listed below:

    a. Agricultural-related services, such as landscape installation.

    b. Processing commodities produced off the farm management unit.

13. Based upon the testimony of Mr. Baumley, the representative from the SADC, the use of a cannon to prevent bird predation of a sweet corn crop is an approved agricultural management practice as it is specifically referenced in the Rutgers Commercial Vegetable Production Recommendations 2002 adopted by the State Agriculture Development Committee.

14. Although the noise testing device used by Dr. Sciarappa was not as accurate as that used by the objector's expert, the results of both tests show that the use of the cannon does not exceed the decibel limitations prescribed by the New Jersey DEP -Division of Fish and Wildlife Noise-Making permit. The report by Dr. Sciarappa is admissible and any deficiencies in the accuracy of the testing equipment would go to the weight that the board would place on the evidence.

15. The audiometric testing conducted by Paul Carpenter Associates on behalf of the objectors did not establish that the use of the cannon was outside of the operating parameters set forth by the New Jersey DEP-Division of Fish and Wildlife Noise-Making Permit.

16. The Monmouth County Agriculture Development Board has jurisdiction to approve the use of the cannon, in conjunction with a valid Noisemaking Permit issued by the New Jersey DEP-Division of Fish and Wildlife.

17. The Noisemaking Permit issued by the New Jersey DEP-Division of Fish and Wildlife for the period July 1, 2002 to October 31, 2002 was valid for the 2002 growing season.

18. The only local zoning ordinance that affects this application is the Colts Neck Township noise ordinance. Based upon exhibit Board 6, a municipality that chooses to adopt a noise ordinance to address community concerns must, pursuant to the New Jersey Noise Control Act, propose an ordinance that is more stringent than the State's noise code and that it must be approved by the New Jersey Department of Environmental Protection. While the Colts Neck Township noise ordinance is more stringent than the State's noise code, based upon the testimony from Karen Colvin relating her conversation with Timothy Anfuso, the Colts Neck Township Planner, the Colts Neck Township noise ordinance has not been approved by the New Jersey Department of Environmental Protection. Therefore, the Colts Neck Township noise ordinance is not valid and under the holding by the New Jersey Supreme Court in *Hollander*, the Board need not consider an invalid local zoning ordinance.

19. Notwithstanding the invalidity of the Colts Neck noise ordinance, based upon New Jersey DEP codified regulations *N.J.A.C.* 7:29-1.4 - exceptions to the State Noise Control Act, "agricultural activities" are specifically exempt from the State Noise Control Act. Accordingly, the Board found that a municipal noise ordinance based upon the State Noise Control Act cannot reach "agricultural activities," such as in this case.

20. The Board duly considered the objector's position that it take into account the negative impact that the use of the cannon has on the neighboring residents and that a hardship is imposed upon them.

21. The Board considered the contents of the letter from Mr. Samson to the Board dated July 31, 2002.

22. The Board considered the report from Mr. McBride, Principal Biologist, Wildlife Services Section, New Jersey DEP-Division of Fish and Wildlife, on his site inspection visit.

Based on the foregoing findings of fact, the Monmouth County Agriculture Development Board found that the operation of the property by Samaha, specifically the utilization of a liquid propane cannon to prevent bird predation of a sweet corn crop, constitutes a generally accepted Agricultural Management Practice. The board additionally found it to be reasonable to impose the following conditions on the use of the cannon.

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 as a last resort and other methods and devices shall continue to be employed whenever possible.

c. Mr. Samaha will endeavor to continue 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 a viable.

LEGAL DISCUSSION AND ANALYSIS

Applicable legal principals

This matter arises under the provisions of the Right to Farm Act, *N.J.S.A.* 4:1C-1 to -10.4. The legislative policy behind the Act is stated in N.J.S.A. 4:1C-2 as follows:

> The Legislature finds and declares that:
>
> a. The retention of agricultural activities would serve the best interest of all citizens of this State by insuring the numerous social, economic and environmental benefits which accrue from one of the largest industries in the Garden State;
>
> b. Several factors have combined to create a situation wherein the regulations of various State agencies and the ordinances of individual municipalities may unnecessarily constrain essential farm practices;
>
> c. It is necessary to establish a systematic and continuing effort to examine the effect of governmental regulation on the agricultural industry;
>
> d. All State departments and agencies thereof should encourage the maintenance of agricultural production and a positive agricultural business climate;
>
> e. 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.

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 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 adopted rules for such "site-specific agricultural management practice" determinations.

N.J.A.C. 2:76-2.3. states that a commercial farm operator or owner may apply to the CADB in its 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). Unless the CADB's determination is appealed to the SADC the CADB's decision is binding. *N.J.A.C.* 2:76-2.3(f)2.

The Legislature has given to the CADB the responsibility of making site-specific agricultural management practice 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.

In *Township of Franklin v. Hollander,* 172 N.J. 147 (2002), the New Jersey Supreme Court held that that the Right to Farm Act preempts municipal land use authority over commercial farms. It pointed out that the Legislature has reposed trust in the County Agricultural Boards and the State Agricultural Development Committee 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. The Court stated, however, that "such immunity ... is not completely unbridled" and must not "be exercised in an unreasonable fashion so as to arbitrarily override all important legitimate local interests." [Citations omitted.] *Id.* at 150. The Court went on to say:

> [A]lthough the CAB and the SADC have primary jurisdiction over disputes between municipalities and commercial farms, the boards do not have *carte blanche* to impose their views. Because the authority of the agricultural boards is not unfettered when settling disputes that directly affect public health and safety, the boards must consider the impact of the agricultural management practices on public health and safety and "temper [their] determinations with these standards in mind." [Citations omitted.]
>
> [*Id.* at 151.]

As a general rule the threshold question will be whether an agricultural management practice is at issue, in which event "the CAB or SADC must then consider relevant municipal standards in rendering its ultimate decision." *Id.* at 152. Once that determination is made, a fact-sensitive inquiry will be essential in virtually every case. 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. In those circumstances boards 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. *Id.* at 153. Trust and discretion have been reposed in the agricultural boards to decide carefully future disputes on a case-by-case basis and to balance competing interests. *Ibid.*

In the present matter, based on a prior holding by the State Agricultural Development Committee, the burden of proof rests on the Samsons to show that the activities of Samaha do not constitute a generally accepted agricultural operation or practice. In, *In Matter of the Right To Farm Act Application of Casola,* OAL Dkt. No. ADC06462-008, Agency Docket No. RTF 1318-01, the State Agricultural Development Committee entered an Order in which it determined an interlocutory appeal concerning the burden of proof and procedural rulings issued by the ALJ. The ALJ had held that the farmer-applicant must bear the burden of proof in demonstrating that the agricultural activities conform to generally accepted agricultural management practices pursuant to *N.J.S.A.* 4:1C-9 and *N.J.A.C.* 2:76-2.3 and that the hearing to be held before the ALJ is to be *de novo*.

The State Agricultural Development Committee agreed that the hearing before the ALJ is *de novo.* As to the burden of proof issue, the Committee explained that, with respect to permit or approval applications, the

initial burden of proof rests with the applicant who seeks the permit or approval. Accordingly, in requests for site-specific determinations, the farm owner/operator has the burden of showing to the CADB that his or her agricultural activities conform with generally accepted agricultural management practices and meet the other statutory criteria of the Act. The Committee held that once the determination has been made by the CADB that the applicant has met his or her burden of proof, in this case with the issuance of the site-specific agricultural management practice, the burden then shifts to the party or parties contesting the CADB's action. At that point the governmental action is presumed valid unless and until the contrary is demonstrated, with the burden of proof thereof on the attacking party.

The Committee stated that the presumption of validity and reasonableness of agency action is even stronger where the agency has developed special expertise in scientific or technical areas, as is the case here, citing, *Newark v. Natural Resource Council, Department of Environmental Protection,* 82 N.J. 530, 540 (1980). The Legislature gave the CADB the responsibility of making site-specific agricultural management practice determinations because of their agricultural knowledge and expertise. Thus, once the quasi-legislative function of review of a site-specific agricultural management practice has reached finality, the determination is deserving of the presumption of validity. What remains then is the quasi-judicial review of the allegations of the objector, namely that the site--specific determination was improperly issued.

Arguments of the parties and analysis.

In his submission of October 14, 2003, attorney for appellants refers to and incorporates those arguments set forth in his June 25, 2002 letter submitted to the Monmouth CADB. A summary of those arguments and my analysis thereof are set forth in the paragraphs that follow.

Attorney for appellants agrees that *N.J.S.A.* 4:1C-9 protects commercial farm operations which conform to agricultural management practices recommended by the State Committee and adopted pursuant to the Administrative Procedure Act. He argues that the provisions of *N.J.A.C.* 2:76-2.1, require the State Committee to address noise control as an issue. He asserts that the State Committee has not addressed noise control in the adopted regulations and thus, by this omission, has failed to follow the legislative mandate. Accordingly, he argues that the CADB had no jurisdiction to entertain the application to use a specific noise-making device as an agricultural management practice and, as a logical consequence, the Right to Farm Act does not preempt *N.J.S.A.* 23:4-63.5 and -63.6 which permits the Division of Fish and Wildlife to issue permits to the owners of land for the use of NoiseMmaking devices. Thus, he asserts that the employment of NoiseMaking devices in an agricultural setting is governed solely by the Division of Fish and Wildlife and not the State Agricultural Development Committee. He therefore, contends that neither the County Board nor the State Committee have jurisdiction to authorize the use of a liquid propane cannon.

It is noted that the provisions of *N.J.A.C.* 2:76-2.1 relied upon by attorney for appellants were not adopted by the Legislature but are implementing regulations adopted by the regulatory agency. However, *N.J.S.A.* 4:1C-6c does require the State Committee, as one of its duties, to,

> [s]tudy, develop and recommend to the appropriate State departments and agencies thereof a program of agricultural management practices which shall include, but

> not necessarily be limited to, air and water quality control, noise control, pesticide control, fertilizer application, integrated pest management, and labor practices; . . .

N.J.S.A. 4:1C-7d. also imposes on the State Committee the additional duty to,

> [s]tudy, develop and recommend to the departments and agencies of State government a program of recommended agricultural management practices appropriate to agricultural development areas, municipally approved programs (provided that these practices shall not be more restrictive than for those areas not included within municipally approved programs) and other farmland preservation programs, which program shall include but not necessarily be limited to: air and water quality control; noise control; pesticide control; fertilizer application; soil and water management practices; integrated pest management; and labor practices; . . .

In connection with such agricultural management practices recommended by the State Committee, *N.J.S.A.* 4:1C-10 provides:

> In all relevant actions filed subsequent to the effective date of [*N.J.S.A.* 4:1C-10.1 to -10.4 involving complaints against commercial farms, the effective date of which is July 2, 1998], there shall exist an irrebuttable presumption that no commercial agricultural operation, activity or structure 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, shall constitute a public or private nuisance, nor shall any such operation, activity or structure be deemed to otherwise invade or interfere with the use and enjoyment of any other land or property.

In the present matter, the Monmouth CADB found as a fact that the site-specific agricultural management practice that is being sought is included in a number of eligible activities as set forth in its Findings No. 11. In particular, it is included as one of the other activities adopted by the State Agriculture Development Committee, pursuant to the Administrative Procedure Act, specifically permitting the use of Noisemaking devices to prevent bird predation of sweet corn crops. It is also stated in Monmouth CADB Findings No. 13 that the use of a cannon to prevent bird predation of a sweet corn crop is an approved agricultural management practice as specifically referenced in the Rutgers Commercial Vegetable Production Recommendations 2002 adopted by the State Agriculture Development Committee. Implicit in this authorization is the requirement that the Noisemaking device comply with the noise standards adopted by the New Jersey DEP, Division of Fish and Wildlife. I **FIND** that the State Agriculture Development Committee has adopted by implication noise standards applicable to Noisemaking devices that are permitted as an approved agricultural management practice. Therefore, I **CONCLUDE** that the County Board and the State Committee on appeal have jurisdiction to authorize the use of a liquid propane cannon.

Attorney for appellants' second argument is a factual argument in which it is asserted that Mr. Samaha did not have a valid Noisemaking permit issued by the Division of Fish and Wildlife at the time of his application on or about November 27, 2001. Thus, he asserts that the Samaha application is defective and should not be considered by the Board because there is no permit from the Division of Fish and Wildlife and, more

importantly, because Mr. Samaha has attempted to have the Board rely upon an official government document that does not exist.

The Monmouth CADB specifically addressed this issue in its deliberations in this matter. It specifically found in Findings No. 17 that a Noisemaking permit had been issued and was valid for the 2002 growing season. In its deliberations, the CADB took the position that it was ruling on the validity of an agricultural management practice as of and after the time of its decision.

Once this determination was made by the CADB, the governmental action is presumed valid and the burden then shifts to the party contesting the CADB's action. In this regard, I **FIND** that at the time of his application, there is no evidence in the record that Mr. Samaha had been issued a valid Noisemaking permit. However, I **FIND** that as of the 2002 growing season, a valid Noisemaking permit had been issued. Accordingly, I **FIND** that this alleged defect in the original application has been cured by the issuance of a valid Noisemaking permit. Finally, I **FIND** that appellants have failed to overcome the presumption of validity of the Monmouth CADB finding with respect to the Noisemaking permit.

Attorney for appellants' next argues that the Samaha application should be denied under the *Hollander* decision. It is asserted that the Board failed to take into account, when evaluating the Samaha application, the impact the cannon has on residents. He relies upon the report of Sharon Paul Carpenter, dated May 28, 2002, which states that a noise source that is ten decibels or greater dominates the acoustic signature of the noise environment and this is an undue hardship upon the residents in the area and has a negative impact on the surrounding residential community. In his submission of October 14, 2003, attorney for appellants' further argues that the Board abused its discretion and acted in an arbitrary and capricious manner. He asserts that the activities of Samaha are highly disruptive and nuisance-liking in character and should not be tolerated. In *Hollander,* the Appellate Division required that the County Agricultural Board consider the impact of practices on the municipality and also consider the standards established by local ordinance. He asserts that the Board gave no deference whatsoever to the local ordinance and that the Board would approve any activity conducted by a farmer.

John Samaha, responded to the foregoing in a letter dated December 1, 2003. He asserts that professional sound testing on location concluded that the decibel level of the device used did not exceed legal limits, and that when measured at the road's edge, the decibel meter was unable to detect and give a reading. The objector, Mr. Samson, lives approximately one-third mile from the device with a forested area between the device and his dwelling. Finally, he is a sweet corn farmer and is following the New Jersey Commercial Vegetable Production Recommendations published by Rutgers and he operates within the scope of the law. He further asserts he has complied with the reduction of use measures as recommended by the County Board and is trying to be a good neighbor and be sensitive to all who live around the farm.

In its Findings No. 15, the CADB considered the audiometric testing by Paul Carpenter Associates on behalf of the objectors, and found that this testing did not establish that the use of the cannon was outside of the operating parameters set forth by the New Jersey DEP, Division of Fish and Wildlife Noisemaking Permit. In addition, in its Findings No. 18, the CADB found as a fact that the Colts Neck Township noise ordinance is the

only local ordinance that affects this application, but that it is invalid and need not be considered because it has not been approved by the New Jersey DEP.

I **FIND** that under the provisions of the *Hollander* decision, this determination by the CADB is correct, and that the CADB need give no deference to an invalid and unenforceable local ordinance. In addition, I **FIND** that the CADB did consider the effect of the propane cannon on the neighbors and imposed reasonable conditions on its use. I **FIND** no basis in the record for the assertion that the activities of Mr. Samaha are highly disruptive and nuisance-like in character. The fact is that the use of this device fully conforms with the only standards that apply, *i.e.,* those applicable to the issuance of a Noisemaking permit. The evidence in the record in this matter also seems to indicate that the testimony of the objectors was embellished and overstated. Both the report of Mr. Sciarappa and the inspection report by Mr. McBride, principal biologist with the Division of Fish and Wildlife, indicated that while the cannon could be heard from appellants' residence, the sound was muffled and not objectionable. Even the appellant acknowledged in his testimony that Mr. Samaha has fired the cannon a limited percentage of time and has taken steps to limit his use of the cannon.

As has been previously stated, once the determination has been made by the CADB that the applicant has met his or her burden of proof, in this case with the issuance of the site-specific agricultural management practice, the burden then shifts to the party or parties contesting the CADB's action. At that point the governmental action is presumed valid unless and until the contrary is demonstrated, with the burden of proof thereof on the attacking party. The presumption of validity and reasonableness of agency action is even stronger where the agency has developed special expertise in scientific or technical areas. Thus, once the quasi-legislative function of review of a site-specific agricultural management practice has reached finality, the determination is deserving of the presumption of validity. I **FIND** that appellants have failed to overcome the presumption of validity of the Monmouth CADB approval, and have failed to meet their burden of proving that site-specific agricultural management practice approved by the Monmouth CADB should be reversed or modified in any way.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that the decision of the Monmouth County Agricultural Development Board permitting Samaha Farms to using liquid propane cannon as an accepted agricultural management practice to prevent bird predation of a sweet corn crop is hereby **AFFIRMED**, and appellants' appeal is hereby **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 (45) 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 (13) 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.

August 25, 2004

Date **JOSEPH F. MARTONE**, ALJ

Receipt Acknowledged:

Date STATE AGRICULTURE DEVELOPMENT COMMITTEE

Mailed to Parties:

Date OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF EXHIBITS

By the ALJ:

C-1 Transcript of proceedings before the Monmouth County Agriculture Development Board dated April 3, 2002

C-2 Transcript of proceedings before the Monmouth County Agriculture Development Board dated May 1, 2002

C-3 Transcript of proceedings before the Monmouth County Agriculture Development Board dated August 8, 2002

C-4 Resolution of the Monmouth County Agriculture Development Board dated August 7, 2002

C-5 Inspection report concerning Noisemaker Permit (Board 1)

C-6 State Agricultural Development Committee Proposed Amended Rules dated April 2, 2002 (Board 2)

C-7 Application for Farmland Assessment (Board 3)

C-8 Rutgers Cooperative Extension report on sound level (Board 4)

C-9 Colts neck Township Noise Ordinance (Board 5)

C-10 NJDEP response as to enforcement of municipal noise ordinances (Board 6)

C-11 Copy of *N.J.A.C.* 7:29-1.4 exceptions to noise standards (Board 8 (7))

For appellant:

A-1 Letter of Vincent P. Manning, Esq. to the Monmouth County Agriculture Development Board dated June 25, 2002 (Objector 1)

A-2 Letter of Vincent P. Manning, Esq. to the New Jersey Division of Fish and Wildlife dated July 11, 2002 concerning Noisemaking Permit (Objector 2)

A-1 Letter of Vincent P. Manning, Esq. to the Monmouth County Agriculture Development Board dated July 31, 2002 (Objector 3)

For respondent:

R-1 Request for Site Specific Agricultural Management Practice Recommendation

R-2 New Jersey Division of Fish and Wildlife Noisemaking Permit

R-3 Colts Neck Township Municipal Court Summons and Complaint

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