

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5916-04T2

IN THE MATTER OF KAREN WILKIN
and JAMES URBANO, JR.

Argued October 3, 2006 - Decided October 25, 2006

Before Judges Lintner and S.L. Reisner.

On appeal from a Final Decision of the State
Agriculture Development Committee, Docket
No. ADC-2609-03.

Gil D. Messina, Assistant Monmouth County
Counsel, argued the cause for appellant
Monmouth County Agriculture Development
Board (Malcolm V. Carton, Monmouth County
Counsel, attorney; Mr. Messina, on the
brief).

Eileen P. Kelly, Senior Deputy Attorney
General, argued the cause for respondent
State Agriculture Development Committee
(Stuart Rabner, Attorney General, attorney;
Patrick DeAlmeida, Assistant Attorney
General, of counsel; Ms. Kelly, on the
brief).

Edmund J. Corrigan, argued the cause for
respondent Township of Howell (Hiring,
Gannon & McKenna, attorneys; Mr. Corrigan,
on the brief).

Peter McLaughlin, respondent, argued the
cause pro se.

PER CURIAM

Karen Wilkin and James Urbano appeal from a final decision of the State Agriculture Development Committee (SADC), determining that N.J.S.A. 4:1C-9(a) to (h) of the Right to Farm Act, does not shield agricultural labor housing from local zoning regulation. We affirm the SADC's decision that sections (a) to (h) of the Act do not apply to agricultural labor housing, substantially for the reasons stated in the agency's decision. We do not decide whether N.J.S.A. 4:1C-9(i) authorizes the SADC to adopt regulations extending the protections of the Act to agricultural labor housing.

I

Wilkin and Urbano, who own a horse farm in Howell Township, sought to convert an unused chicken coop into housing for a caretaker, employed to provide continuous care for the horses, particularly while the owners attend horse shows. The Township Director of Land Use/Code Enforcement advised them that use of the structure for housing would constitute a second principal building on the property, requiring a fifty-foot side-yard setback, and they would need to apply to the Zoning Board for a bulk variance. Instead of applying for the variance, Wilkin and Urbano applied to the Monmouth County Agriculture Development Board (MCADB) for a "site specific agriculture management practice recommendation" under the Right to Farm Act.

After a hearing, the MCADB approved use of the structure, concluding that it was customary for horse farms to have on-site housing for a caretaker to provide security and care for the horses, that agricultural labor housing was an accessory use under the Howell Township zoning ordinance, and that the Township's objection to the application was not based on public health and safety but on the insufficiency of the available set-back.

The Township appealed the MCADB decision to the State Agriculture Development Committee. See N.J.S.A. 4:1C-10.2. Following an evidentiary hearing, an administrative law judge (ALJ) concluded that while the MCADB had authority to determine that the housing at issue was an accepted agricultural management practice, it lacked authority to override the Township's interpretation of its zoning ordinance by deeming the housing to be an accessory use. He also concluded that the applicants' right to farm was not implicated, because the zoning ordinance did not preclude the applicants from having agricultural labor housing, but only decreed where the housing could be located, even if it might be more expensive to build new housing elsewhere on their land. Relying on Twp. of Franklin v. den Hollander, 172 N.J. 147 (2002), he concluded that since the zoning ordinance requirements "do not affect a

generally accepted agricultural operation or practice, but only the amount of money respondents must expend to engage in that practice, the [MCADB] must show deference to the local Zoning Ordinance."

The SADC rejected the ALJ's reasoning, but agreed with his conclusion that Wilkin and Urbano's proposed "agricultural labor unit" was "not entitled to the protections of the Right to Farm Act." The SADC concluded that "the Act and regulations promulgated thereunder do not currently protect agricultural labor housing and hence, cannot preempt Howell Township's determinations with respect to the Wilkin/Urbano agricultural labor residence." The agency reasoned that agricultural labor housing was not protected because it was not included in a series of specific protected activities listed in the Act:

The Right to Farm Act lists a number of uses or activities that may be eligible for protection, provided that the [MCADB] and/or the SADC determines that they are executed in a manner consistent with generally accepted agricultural management practices and the other criteria of the Act. N.J.S.A. 4:1C-9(a) through (i). Agricultural labor housing is not included in this list; rather, the parties and the ALJ apparently concluded that it was encompassed by N.J.S.A. 4:1C-9(a), which provides Right to Farm protection to the "[production of] agricultural and horticultural crops, trees and forest products, livestock and poultry and other commodities . . ."

The classifications of protected activities are fleshed out by N.J.S.A. 4:1C-9a through i. These activities include many that could be considered ancillary or necessary to agricultural production; agricultural labor housing, however, is not included in this list. Although we agree that, as a general proposition, appropriate agricultural labor housing is properly viewed as ancillary to the production of agricultural products, at the same time we must recognize that the express inclusion of many other such uses, which are also ancillary to agricultural production, appears to reflect a legislative intent to limit automatic eligibility for Right to Farm consideration to activities within these categories. Gangemi v. Berry, 25 N.J. 1, 11 (1957); Masel v. Paramus, 180 N.J. Super. 31, 41 (App. Div. 1981)(recognizing doctrine of expression [sic] unius est exclusion [sic] alterius, meaning express mention of one thing implies exclusion of another.)

For this reason, and because of the special concerns related to the residential nature of this use, discussed in further detail below, we conclude that agricultural labor housing is not currently a protected activity under the Right to Farm Act.

Our decision that agricultural labor housing is not currently protected reflects our awareness that, unlike other farm structures, agricultural labor housing involves a dual use -- agricultural and residential. The residential component is a significant factor in the SADC's determination that agricultural labor housing is not currently protected by the Act. Housing approvals invoke public health and safety issues that are not typically present with other farm structures, such as barns or silos, and could be considered

outside the agricultural expertise of the SADC and CADBs.

For example, residences raise such public health and safety concerns as adequate water supply and sewage disposal facilities, over-concentration of houses, fire hazards and providing residents sufficient air and light. The Municipal Land Use Law authorizes municipalities to adopt ordinances to address these concerns. N.J.S.A. 40:55D-2 and 38. While the New Jersey Department of Environmental Protection regulates water and sewer facilities, planning and zoning boards are also responsible for reviewing and approving applications for development which specifically impact on environmental issues. 35 N.J. Practice, Local Government & the Environment, §16.1 at 568 (Michael A. Pane) (rev. 1999).

Although the New Jersey Supreme Court mandated the SADC and CADBs to consider the impact of agricultural activities on public health and safety and "temper their determinations with these standards in mind," Township of Franklin v. den Hollander, 338 N.J. Super. 373 (App. Div. 2001), aff'd, 172 N.J. 147, 151-152 (2002), the SADC believes neither it nor the CADBs have such jurisdiction over the residential component of agricultural labor housing at this time. Given the concerns expressed above, and the Legislature's silence with regard to agricultural labor housing, it is reasonable to conclude that the Legislature did not intend to extend Right to Farm protection to agricultural labor housing.

[Footnote omitted.]

The agency also indicated its intention to adopt regulations in the future addressing agricultural labor housing under N.J.S.A. 4:1C-9(i).

II

As we discussed in greater detail in Twp. of Franklin v. den Hollander, 338 N.J. Super. 373, 383 (App. Div. 2001), aff'd, 172 N.J. 147 (2002), the Right to Farm Act was adopted to protect commercial farms against nuisance lawsuits and against local regulation that had the intent or effect of driving out farms in favor of other forms of land use:

It is the express intention of this act to establish as the policy of this State the protection of commercial farm operations from nuisance action, where recognized methods and techniques of agricultural production are applied, while, at the same time, acknowledging the need to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in New Jersey.

[N.J.S.A. 4:1C-2(e).]

To that end, the Act creates an irrebuttable presumption that certain agricultural activities, determined by either a local agriculture development board or the SADC to be accepted agricultural operations or practices, are not subject to nuisance suits:

In all relevant actions filed subsequent to the effective date of P.L.1998, c. 48 (C.4:1C-3 et al.), 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," . . . 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 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.

[N.J.S.A. 4:1C-10.]

The Act also protects certain farming activities against local regulation:

Notwithstanding the provisions of any municipal or county ordinance, resolution, or regulation to the contrary, the owner or operator of a commercial farm, located in an area in which, as of December 31, 1997 or thereafter, agriculture is a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan, or which commercial farm is in operation as of the effective date of P.L.1998, c. 48 (C.4:1C-10.1 et al.), 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:

a. Produce agricultural and horticultural crops, trees and forest products, livestock, and poultry and other commodities as described in the Standard Industrial Classification for agriculture, forestry, fishing and trapping or, after the operative date of the regulations adopted pursuant to section 5 of P.L.2003, c. 157 (C.4:1C-9.1), included under the corresponding classification under the North American Industry Classification System;

b. Process and package the agricultural output of the commercial farm;

c. Provide for the operation of a farm market, including the construction of building and parking areas in conformance with municipal standards;

d. Replenish soil nutrients and improve soil tilth;

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

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

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

h. Conduct agriculture-related educational and farm-based recreational activities provided that the activities are related to

marketing the agricultural or horticultural output of the commercial farm;

[N.J.S.A. 4:1C-9(a) to (h); emphasis added.]

The Act also permits the SADC to define, by regulation, additional protected activities. Accordingly, subsection (i) provides that farmers may, with the protections of the Act,:

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

[N.J.S.A. 4:1C-9(i).]

As we stated in Blecker v. State, 323 N.J. Super. 434, 442 (App. Div. 1999):

When an administrative agency interprets and applies a statute it is charged with administering in a manner that is reasonable, not arbitrary or capricious, and not contrary to the evident purpose of the statute, that interpretation should be upheld, irrespective of how the forum court would interpret the same statute in the absence of regulatory history.

See also Reck v. Director, Div. of Taxation, 345 N.J. Super. 443, 448 (App. Div. 2001), aff'd, 175 N.J. 54 (2002).

We agree with the SADC that agricultural labor housing is not included in the specific protected activities listed in subsections (a) to (h). To be protected, an agricultural practice must not only be recognized as "generally accepted;" it

must also fall within one of the specific enumerated categories in (a) through (h) or be included in a SADC regulation under (i). Otherwise, virtually any "agricultural management operations or practices" could be protected under (a) to (h) if they are somehow related, however loosely, to the specific activities enumerated in those sections, and there would be no need for subsection (i). See McCann v. Clerk of Jersey City, 167 N.J. 311, 321 (2001)(effect should be given to every word of a statute).

The structure of the statute, listing specific protected activities and permitting the SADC to add protected activities by regulation, further persuades us that the doctrine of expresio unius est exclusio alterius is appropriately applied here. See Gangemi v. Berry, 25 N.J. 1, 11 (1957)(discussing expresio unius doctrine). If the Legislature did not list an activity in (a) to (h), it did not intend to protect that activity, unless the agency, by regulation, included it under (i).

We also agree with the SADC that agricultural labor housing is distinct from the types of agricultural activities listed in (a) to (h). Providing residential housing is fundamentally different from housing livestock or growing crops. Housing implicates a host of health and safety issues that the

Legislature has addressed in other statutes such as the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -99.¹

Appellants contend that we should construe the Act in pari materia with the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.11, which recognizes labor housing as part of land taxed for agricultural use, and with the SADC's regulations under the Agriculture Retention and Development Act (N.J.S.A. 4:1C-11 to -48), N.J.A.C. 2:76-6.15(a)(14), which exempt agricultural labor housing from restrictions on construction of new buildings on land deed-restricted for farmland preservation. This argument is unpersuasive. If anything, these provisions indicate to us that when the Legislature or the SADC intend to include agricultural labor housing in farmland protection provisions, they do so specifically rather than by implication.

In summary we agree with the SADC that agricultural labor housing is not protected from local regulation by N.J.S.A. 4:1C-9(a) to (h). We do not decide whether the SADC may adopt regulations addressing agricultural labor housing under N.J.A.C. 4:1C-9(i), because that issue is not properly before us.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION

¹ For example, the Howell Township Code Enforcement Director testified that placing houses too close together could cause problems with septic systems and wells; hence there is a greater need for setback requirements for houses than for chicken coops or other farm buildings.