June 2, 2005

Joanne Restivo, Deputy Clerk
Office of Administrative Law

Trenton, NJ 08625-0049

Re: In the Matter of Karen Wilkin and James Urbano, Jr.
SADC ID # 1319-15
OAL Docket No. ADC 2609-03

Dear Ms. Restivo:

Enclosed please find a final decision in the above-captioned matter. The State Agriculture Development Committee (SADC) issued this decision at its May 28, 2005 meeting. Please note that the SADC's action is not effective until the Governor's review period expires pursuant to N.J.S.A. 4:1C-4f.

If you have any questions, please contact me at (609) 984-2504.

Sincerely,

Marci D. Green
Chief of Legal Affairs

Enclosures

c: Gil Messina, Esq. - Cassidy, Messina & Laffey
Thomas G. Gannon, Esq. - Hiering, Gannon & McKenna
Susan and Peter McLaughlin
Peter R. LaFrance, Esq.

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

STATE OF NEW JERSEY
OAL DOCKET NO. ADC 2609-03
SADC DOCKET NO. 1319-15

FINAL DECISION

This matter arises from an appeal of a decision by the Monmouth County Agriculture Development Board (CADB) finding that the proposed use of a storage building/former chicken coop as agriculture labor housing is an accepted agriculture management practice within the meaning of the Right to Farm Act, N.J.S.A. 4:1C-1 et seq.

PROCEDURAL BACKGROUND

Pursuant to the Right to Farm Act (Act), Karen Wilkin and James Urbano, Jr., owners of Star Cross Stable (SCS), applied to the Monmouth CADB for a site-specific agricultural practice recommendation to allow them to convert a chicken coop into an agricultural labor housing unit. The Monmouth CADB found that the proposal was an accepted agriculture management practice pursuant to the Act.

The Township of Howell and Susan and Peter McLaughlin appealed the CADB's decision to the State Agriculture Development Committee (SADC) pursuant to N.J.S.A. 4:1C-10.2. The SADC transmitted the matter to the Office of Administrative Law pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

Upon consent of the parties, Administrative Law Judge (ALJ) Bruce M. Gorman relied upon the transcripts from the Monmouth CADB hearing and supplemental

testimony at a hearing at the OAL on March 15, 2005. ALJ Gorman issued a decision on April 18, 2005, reversing the CADB's approval of the agricultural labor residence.

The CADB filed exceptions on May 5, 2005. Karen Wilkin and James Urbano and Susan and Peter McLaughlin submitted exceptions after the regulatory deadline for filing exceptions. The Township of Howell submitted a letter opposing the CADB's exceptions after the regulatory deadline for filing exceptions.

STATEMENT OF RELEVANT FACTS

Karen Wilkin and James Urbano, Jr. own and operate Star Cross Stables (SCS), a 15-acre breeding and training facility for Fresian horses in Howell Township, Monmouth County. The Monmouth CADB found that the operation meets the Act's definition of commercial farm and the Act's requirement that the farm be located in an area in which, as of December 31, 1997, agricultural has been a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan. N.J.S.A. 4:1C-9.

When SCS applied to the Monmouth CADB for Right to Farm protection, it owned nine horses. SCS sought approval to convert a former storage facility/chicken coop into two one-bedroom units for agricultural labor housing, consisting of approximately 420 square feet each. The employees would be caretakers of, and provide round-the-clock security for, the horses. The structure is located 39 feet from the property line.

Howell Township contended that the agricultural housing unit would constitute a second principal building as defined in the Township's Land Use Ordinance

("Ordinance"). As a second principal building, it would violate the Ordinance's side yard setback requirement for such buildings, which is 50 feet from the property line. The zoning officer testified that the Township Zoning Board of Adjustment consistently held that structures such as the proposed agricultural labor unit constituted second principal uses. In its brief, the Township states that the purpose of the larger setback is to "give families some 'breathing room' so that houses are not constructed too closely to one another." The ALJ states in his decision that the Township Zoning Officer testified that the agricultural labor house will require a well and septic system and that its proximity to the property line raised a concern that the new systems could adversely impact the water supply and sewage disposal at an adjacent home.*

The Monmouth CADB found that the proposed housing unit is not a second principal building, but a permitted accessory use under Howell Township's Land Use Ordinance ("Ordinance") because it is "customarily incidental and ancillary" to a permitted use. The CADB found that it is usual and customary for a horse breeding and training operation to have on-site caretakers. As an accessory use, the housing unit would comply with the Township's side yard setback requirement, which is 15 feet from the property line.

The CADB's findings were conditioned upon the agricultural labor being employees of only SCS and SCS providing landscaping as described in the plan it submitted.

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* The SADC notes that these statements are not in the CADB transcripts or in any of the evidence comprising the record below that was returned to the SADC. It is possible, however, that this testimony was given at the March 15, 2005 hearing at the Office of Administrative Law, for which no transcript was provided.

Susan and Peter McLaughlin, neighbors of SCS, opposed the conversion of the chicken coop into agricultural labor housing because their home is 21 feet from the property line and 60 feet from the chicken coop. They testified that the use of this structure as a residence would constitute an invasion of their privacy.

Administrative Law Judge Gorman found that the Right to Farm Act does not afford the CADB "the power to determine whether a use is principal or accessory." (Initial Decision, p.12). ALJ Gorman held that only a township has the authority to interpret its zoning ordinances pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-70b. Ibid. He also found that the Ordinance does not "affect an agricultural management practice" because the Township is not objecting to the use of the property for agricultural labor housing – it is objecting only to the location of the residence. (Initial Decision, pp.10-12). If the dwelling were located eleven feet further inside the property line, it would comply with the Township's setback requirements for second principal buildings. Based on this fact, the ALJ found that the right to farm is not at issue – that "the issue is money" because SCS would save money by converting the existing chicken coop into a dwelling rather than building a new structure. (Initial Decision, p. 11).

EXCEPTIONS

The Monmouth CADB filed exceptions with the SADC, asserting that it had the exclusive authority to determine whether the agricultural labor residence was an accessory structure rather than a second principal building. The CADB contended it was not bound "to blindly accept the municipality's findings. . ." and the ALJ's holding

would allow municipalities to circumvent the requirements of the Right to Farm Act by drafting their ordinances to prohibit second principal buildings. The CADB believes it gave appropriate deference to the Township's Ordinance and the local officials' interpretation of it.

Karen Wilkin and James Urbano submitted exceptions contending that the ALJ did not properly apply the Right to Farm Act in this matter. Wilkin and Urbano believe that the Right to Farm Act allows a CADB to interpret zoning ordinances and that the Act's preemption provisions are not limited to "overriding" zoning ordinances.

The Township of Howell submitted a letter after the deadline for filing exceptions. The Township objected to the exceptions filed by the Monmouth CADB based on the fact that the Monmouth CADB had chosen not to be an "active participant" in the OAL matter and had indicated to the OAL that it would not take a position in the case. The Township noted that the Monmouth CADB did not file any briefs, nor did it participate at the OAL hearing.

Susan and Peter McLaughlin submitted exceptions after the deadline for filing exceptions. They reiterated the Township's objection to the Monmouth CADB filing exceptions when it had chosen not to participate in the OAL proceedings. Mr. and Mrs. McLaughlin agree with the ALJ's conclusion, stating that "interpreting zoning ordinances is better left to zoning officials or zoning boards."

LEGAL ANALYSIS

While the ALJ's decision raises legal issues regarding the extent to which the Right to Farm Act may preempt municipal regulation of agricultural activities, the State

Agriculture Development Committee does not need to reach these issues because it concludes that the appeal must be dismissed for failure to meet a threshold requirement of the Act. Specifically, we find 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 Right to Farm Act lists a number of uses or activities that may be eligible for protection, provided that the CADB 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 unius est exclusion 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

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* It is also important to note that the Right to Farm Act specifically protects farm markets -- but requires that the structure and parking areas are in compliance with municipal standards. N.J.S.A. 4:1C-9c. This appears to reflect a legislative recognition of public health and safety issues associated with farm markets that are not present with other farm structures. The absence of agricultural labor housing in the list of protected activities, which has similar health and safety issues, can be viewed as a legislative intent to not protect the activity.

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.*

At the same time, however, the Right to Farm Act does provide the SADC with the authority to provide protection to agricultural labor housing, if it deems it advisable to do so. Specifically, N.J.S.A. 4:1C-9i allows the Committee to identify, by regulation, other agricultural activities, not listed at N.J.S.A. 4:1C-9a through h, which will be eligible for protection under the Act. Although the SADC finds that agricultural labor housing is not protected at this time, it reserves the right to invoke its regulatory

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* The SADC acknowledges that the Act does not explicitly list other agricultural buildings and uses that it would deem protected uses of farmland, but distinguishes between typical farm structures/uses that serve only an agricultural purpose, like barns and silos, and agricultural labor housing, which serves both agricultural and residential purposes. Although barns and silos are not listed in N.J.S.A. 4:1C-9, the SADC deems them to be an integral part of the production of agricultural and horticultural products, and hence, protected under N.J.S.A. 4:1C-9, which provides general protection to such production activities.

authority to adopt a rule to protect agricultural labor housing. The ability of farmers to provide housing for their labor has become a serious problem in many parts of the State as more and more municipalities prohibit or restrict this use. The SADC expects to propose, in the near future, a regulation to protect a farmer's ability to construct agricultural labor housing.

If the SADC adopts such a rule, it and CADBs will have to address on a case-by-case basis the special issues associated with residences, as described above, pursuant to the Court's ruling in den Hollander, supra. The agencies will be required to decide when agricultural labor housing will be protected from local regulation, and the extent to which the agencies will integrate and defer to local interests and processes. This will involve balancing the municipality's public health and safety concerns against the farmer's agricultural needs.

By holding that agricultural labor housing is not currently protected by the Right to Farm Act, the SADC does not need to address the other issues raised in this case. We feel compelled, however, to clarify issues raised by the ALJ's decision as to the circumstances under which a setback ordinance could be preempted and whether a CADB has the authority to evaluate a municipal determination that an agricultural activity is a principal or accessory use of land, as these issues may arise in other Right to Farm matters involving activities that are currently protected.

In concluding that there was no preemption of municipal zoning ordinances here, the ALJ held that "(t)he right to farm is not at issue" in this case. (Initial Decision, p.11). The ALJ based this conclusion in large part on the following analysis:

> The issue in this case is money. Respondents want to save money, even if in doing so they must infringe on their neighbors' rights as established in the Township Zoning Ordinance. Had respondents demonstrated that locating the farm labor dwelling anywhere else on the property would impair the operation of the farm, that is, had they shown construction of farm labor housing was possible only on the site of the old chicken coop, the result herein might will be different. [Initial Decision, p.11].

On the basis of this reasoning, the ALJ concluded that "(s)ince the side yard setback requirements of the local Zoning Ordinance in this case 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 Agriculture Development Board must show deference to the local zoning ordinance." (Initial Decision, p. 12). The ALJ also rejected the finding of the CADB that the agricultural labor dwelling "is a 'permitted accessory use in the Agriculture rural Estate Zones as defined by section 14-17.2(b)(1) of Howell Township's Land Use Ordinance...'" Specifically, the ALJ held that the CADB "has no statutory authority to *interpret* the zoning ordinance or construe such concepts as principal use and accessory use." (Initial Decision, p.12).

We find that both of these holdings misstate the scope of the CADB's and SADC's review and the burden of proof that a commercial farm operation must meet in order to qualify for right to farm protection. We therefore feel compelled to clarify our understanding of these issues.

First, we find that the ALJ's decision is in error to the extent it implies that the monetary impact of a municipal requirement that limits, but does not prohibit agriculture, can never be the basis for a finding of preemption. While we agree that the fact that a particular agricultural practice is cheaper than other alternatives permitted by the

municipality will not necessarily support preemption of those requirements, we find the total rejection of monetary impact alone as a basis for preemption to be inconsistent with the purposes of the Act. The Right to Farm Act was adopted to protect the viability of commercial farms and farmers. See N.J.S.A. 4:1C-2a. Clearly, expense caused by excessively burdensome local requirements is capable of destroying the ability to farm as surely as an outright prohibition of agricultural activities.

This is consistent with the approach mandated by the New Jersey Supreme Court in den Hollander, supra, at 72 N.J. 147. Although the ALJ correctly cites the Court's decision for the proposition that many ordinances, such as setback ordinances, should "ordinarily" be respected because on their face they do not interfere with farming, Id. at 152, it is also important to recognize that the Court follows this statement with examples in which the interests of farmers and the municipality must be balanced. Indeed, the decision goes on to state that "a fact-sensitive inquiry will be essential in virtually every case" and that a farmer may preempt an ordinance if he can demonstrate a "legitimate, agriculturally-based reason" for not complying with the ordinance. Id. at 153. Thus, while it may be more difficult for a commercial farm operator to show that he is entitled to preemption of municipal regulations where his claims are based on cost alone, rather than on the actual prohibition of an agricultural activity, the fact that there may be other, more expensive alternatives to the activity is not automatic cause for denial of Right to Farm Act protection. Rather, the individual factual situation must be considered. See Township of Franklin v. Hollander, supra, 72 N.J. at 153.

Secondly, while the SADC and CADBs obviously do not act as an appeals court to correct municipal interpretations of ordinances, their consideration and evaluation of

municipal ordinances, and of the validity of the municipality's interpretation of these ordinances, may be an important part of the SADC's and CADBs' fact-sensitive review. For example, the SADC may determine that the public interest underlying a municipal prohibition of a particular agricultural activity does not reflect a real public interest if the ordinance or determination is arbitrary and capricious, or if the municipal interpretation of an ordinance does not advance the ends of the ordinance. Thus, the jurisdiction to balance the interests of the farmer and the public carries with it, as a matter of necessity, the ability to assess rulings or interpretations made by municipal bodies. If, as the ALJ asserts, the SADC and CADBs were bound to exercise their authority by deferring, without further inquiry, to the municipality's determination in every case where local regulation limits but does not prohibit agriculture, the purposes of the Act could be nullified. Indeed, in those cases where the local ordinance does not expressly address farming issues, the ALJ's interpretation would preclude the SADC or CADBs from questioning even a ruling that on its face is arbitrary and capricious, and intended only to thwart the agricultural operation.

In short, the ALJ's conclusion is not consistent with the ruling of the New Jersey Supreme Court that the SADC and CADBs have primary jurisdiction over these issues. den Hollander, supra, at 72 N.J. 147. The Court upheld the preemption provisions in the Right to Farm Act, affirming the Appellate Division's finding that the Act "preempts municipal land use authority over commercial farms." Id., 172 N.J. at 149, citing Township of Franklin v. den Hollander, 338 N.J. Super. at 375. Such "municipal land use authority" may include interpretation, as well as application, of ordinances. While we do not need to, and in fact do not, reach the question of whether the municipal ruling

here protects an appropriate public interest, we nevertheless must register our disagreement with the interpretation of the ALJ on this significant issue.

CONCLUSION

For the reasons set forth above, the SADC rejects the legal analysis in ALJ Gorman's Initial Decision in this matter, but agrees with the ultimate finding that the agricultural labor unit proposed by Karen Wilkin and James Urbano is not entitled to the protections of the Right to Farm Act.

IT IS SO ORDERED.

Dated: _____

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Charles M. Kuperus, Chairman
State Agriculture Development Committee