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Agency Final Decision

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ADC05370-06

AGENCY DKT. NO. SADC ID # 691

IN THE MATTER OF JASON A. PETTY (APPEAL OF RESOLUTION ISSUED BY THE WARREN COUNTY AGRICULTURE DEVELOPMENT BOARD).

John M. Zaiter, Esq., for appellant Jason A. Petty (Broscious, Fischer & Zaiter, attorneys)

Michael B. Lavery, Esq., for respondent Township of Franklin (Sirkis & Lavery, attorneys)

Record Closed: April 17, 2007 Decided: May 2, 2007

BEFORE **LESLIE Z. CELENTANO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Jason A. Petty applied for a permit from respondent Township of Franklin to construct a 60-by-120-foot barn on his thirty-acre property, which he actively farms. The Township denied the permit based upon the lack of municipal road frontage and also because the site does not have a primary structure to support the accessory building. The Refusal of Permit was issued on or about February 2, 2006. Appellant then applied to the Warren County Agriculture Development Board (WCADB) for approval to construct the barn, to be utilized for storage of farming equipment and supplies, pursuant to the Right to Farm Act, N.J.S.A. 4:1C-1 to -10.4. Following a hearing, the WCADB adopted a resolution determining that the Township should immediately issue the appropriate permits for construction of the building in question. Franklin Township appealed the WCADB resolution to the State Agriculture Development Committee pursuant to the Right to Farm Act, N.J.S.A. 4:1C-10.2.

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 28, 2006, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on February 7, 2007, and following receipt of posthearing submissions and copies of all exhibits entered into evidence, the record closed.

TESTIMONY

Jason A. Petty

Jason A. Petty testified that he owns the property known as Block 58, Lot 11, in Franklin Township, New Jersey. On February 2, 2006, he applied for a zoning permit from Franklin Township, which was denied (R-1). Petty sought to erect a storage building to be used to store machinery and hay. After the permit was denied by Franklin Township, Petty sought a hearing before the WCADB (R-2). His property is approximately thirty acres in size and he has farmed it for two years. Prior to that, his family farmed the land for eighty or more years. The property was left to him by his grandfather.

Access to Petty's property is from a lane off Butler Road, which has been used for access as long as the family has owned the property. The lane is approximately fifteen feet wide and Petty brings his equipment, including a hay baler, wagons, rakes and a brush hog, to the property via the access road. He testified that his baler and mower are each thirteen feet wide. Petty cuts hay three to four times a year on this and other properties.

An appraisal prepared for Petty in connection with a farmland preservation application he had filed at one time reflects a picture on the bottom of page four showing the access lane in question (R-3). The owner of the lane, Robert Cericola, has never prevented Petty or anyone in his family from accessing their property utilizing his lane. Cericola also, however, has never acknowledged Petty's right to access. Petty has asked for a written easement, which Cericola has declined to provide. The property was farmed even before Petty's grandfather owned it.

After refusing to issue a permit to Petty, the Township communicated with the WCADB (R-4), indicating that as the property does not have road frontage or a primary structure, the accessory building request could not be accommodated. Petty filed a certification with the WCADB to confirm that his property meets the requirements for a commercial farm, in that he has a farmland assessment and earns over $2,500 annually from his crops. Petty grows hay for horse and cow farmers.

Petty testified that the access lane is also used by another neighbor, who has a house across from his field that has been there for sixty to eighty years.

Following a hearing, the WCADB determined that Petty was entitled to construct a barn and directed that the Township immediately issue appropriate permits (R-6). Petty testified that having the storage barn would cut his trips in and out of the property in half because he would be able to leave his equipment there. He indicated that he would continue to farm the property regardless of the outcome of this proceeding, and that he intends to eventually build a home on the property.

On cross-examination Petty testified that he is twenty-one years old and has been helping to farm the property since he was eight years old, riding on a tractor with his grandfather. His grandfather, father, uncle and every family member involved in farming this property over the years have used the lane in question for ingress or egress. Although the neighbor has denied him a formal easement, Petty's family has never filed suit to establish an easement. Petty testified that the neighbor stated that Petty "better have a lot of money" if he wanted an easement. Petty testified that he believes he has a prescriptive easement over the lane.

Petty has friends that help him with the farm work and he, in turn, helps them with their farm work. He testified that the lane is a combination of stone, gravel and dirt and is maintained internally on an "as-needed" basis by all of the individuals who use it. He testified that he has topped off the lane with stone several times and raked the lane, cleared brush from the lane, and done other general maintenance.

Petty also farms other properties and he wants to store hay from this property and other properties in the barn. He has approximately eight tractors, a baler, three or four wagons and a mower, and he bales approximately 10,000-15,000 bales of hay each year.

On re-direct examination Petty testified that a new tractor would cost approximately $100,000, a new baler, $35,000, and a new hay rake, $5,600. Some of what he owns now is stored outside, as he does not have a storage building like the one he is seeking to build. He testified that he has over $100,000 in machinery and would like to be able to store it indoors. Cericola has tried since Petty's grandfather owned the property to purchase the property, as his land surrounds the lot in question. When Petty refused Cericola's request to sell him the property, Cericola became extremely agitated. Petty testified that his machinery is currently stored approximately four miles away over local roads on a friend's farm, and that he sometimes has to drive his machines ten miles away. Having the storage building would cut the time that he spends on local roads in half.

James Nicholas Onembo

James Onembo is the zoning and code enforcement officer in Franklin Township, and his responsibilities include reviewing and approving permit applications. He remembers appellant's application for a 60-by-120-foot building that would be approximately 14.5 feet high and serve as an agricultural storage building. Onembo testified that when he receives a permit application he first requests a copy of the deed to make certain that the applicant owns the property in question. Thereafter he identifies whatever issues exist (drainage, easements, etc), and checks the plot plan to see what is being built. He also reviews the building plans and then determines if the plan can go ahead.

With regard to the Petty property, Onembo was unable to determine whether there were any wetland issues because no deed was submitted. He determined that there was no access to the property, which he felt was a health and safety issue, and that there was no primary building on the property. With regard to health and safety, there would need to be access for emergency vehicles to get in and out of the property. Onembo ultimately refused to issue a permit to appellant (R-1) because the property had no municipal road frontage and no access for fire and rescue vehicles.

Onembo testified that he has seen the access road used by Petty but has not driven down it. After denying the permit, Onembo referred appellant to the WCADB. Onembo also testified that he spoke to Cericola and was told, "there is an access road Petty has used." Cericola also acknowledged to Onembo that appellant's grandfather and everyone who farmed the property for the Petty family had used the access lane.

The WCADB determined that appellant was entitled to the permit he sought (R-6). Onembo testified that he articulated the Township's concerns to include the safety and fire issues, the concerns of the adjacent property owner, and the increased intensity of use of the access lane.

FACTUAL DISCUSSION

Appellant owns a thirty-acre parcel of land in Franklin Township, New Jersey, known as Block 58, Lot 11. Appellant has farmed the property for two years; however, the property has been farmed by his family for eighty years and was left to him by his grandfather.

Appellant's property has no road frontage and access to the property is from a lane off Butler Road, which has been used for ingress and egress for as long as appellant's family has owned the property. The lane is a gravel road that goes through the property owned by Robert Cericola. It is approximately fifteen feet wide and appellant drives all of his equipment, including a hay baler, wagons, rakes and a brush hog, up and down the road as needed. Appellant cuts hay several times a year and uses this equipment on each of those occasions. Appellant does not have a written easement to use the access road, which his family has utilized for eighty years. Cericola has never prevented appellant or anyone in his family from accessing the property utilizing his gravel roadway. The lane from Butler Road is the only access to appellant's property, which was farmed even before appellant's grandfather owned it.

The barn that appellant proposes to construct on his property would serve as a storage building for appellant's farm equipment and hay. The equipment to be stored in the barn would include eight tractors, a baler, three or four wagons, a mower and hay cut from his property and other properties that appellant farms. Appellant's equipment is worth well over $100,000 and he currently stores it outdoors, approximately four miles away, on a friend's farm. Having a storage building on his property would cut in half the amount of time appellant currently spends driving his equipment over local roads.

The access lane is a combination of stone, gravel and dirt and is maintained on an informal basis by all of the individuals who use it. Appellant has put down additional gravel on the lane as needed, and has also cleared brushed and done other general maintenance. The access road is used by appellant, by Cericola, and by a neighbor who lives in a house across from appellant's field. That house has been there for sixty or eighty years.

After appellant's permit application was denied he applied to the WCADB for a site-specific agricultural management practice (AMP) pursuant to N.J.A.C. 2:76-2.3. On March 13, 2006, the WCADB approved appellant's request and issued a site-specific AMP by adopting a resolution (R-6).

LEGAL DISCUSSION AND ANALYSIS

This matter arises under the provisions of the Right to Farm Act (the "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 (CADB) 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 (SADC) has adopted rules for such "site-specific agricultural management practice" determinations. Thus, whether a farm meets these eligibility criteria is a threshold issue in determining the applicability of the Right to Farm Act.

If so qualified, a commercial farm operator or owner may apply to the CADB in the owner's 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. 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 CADBs 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.

N.J.S.A. 4:1C-9 specifies that the board's authority to determine what constitutes a generally accepted agricultural operation or practice is not limited by any municipal ordinance. In Township of Franklin v. Hollander, 172 N.J. 147 (2002), the New Jersey Supreme Court held that the Right to Farm Act preempts municipal land use authority over commercial farms. The Court, quoting from the Appellate Division opinion below, noted:

> The Legislature has reposed trust in the County Agricultural Boards (CAB) and the State Agricultural Development Committee (SADC) 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.
>
> [Township of Franklin, supra, 172 N.J. at 150.]

The Supreme Court then placed limitations on the board's power to supersede local ordinances:

> In other words, although 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."
>
> [Id. at 151 (citations omitted).]

The Supreme Court went on to provide a road map for adjudicating the limitation of the board's power:

> 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." There will be those cases where the local zoning ordinance simply does not affect farming. There will be other disputes where, although the ordinance has a peripheral effect on farming, it implicatesÃ□Â a policy that does not directly conflict with farming practices. In such cases greater deference should be afforded to local zoning regulations and ordinances. Even when the CAB or SADC determines that the activity in question is a generally accepted agricultural operation or practice according to N.J.S.A. 4:1C-10.1(c), the resolution of that issue in favor of farming interests does not vest the board with a wide-ranging commission to arrogate to itself prerogatives beyond those set forth in the Act. The boards must act in a matter consistent with their mandate, giving appropriate consideration not only to the agricultural practice at issue, but also to local ordinances and regulations, including land use regulations, that may affect the agricultural practice.
>
> [Id. at 152 (citations omitted).]

The Court added, "a fact-sensitive inquiry will be essential in virtually every case." Id. at 153.

In the within matter, it is undisputed, and I **CONCLUDE**, that appellant operates a commercial farm pursuant to the requirements of N.J.S.A. 4:1C-9. I **CONCLUDE** that the WCADB properly determined that appellant is engaged in an accepted agricultural operation or practice, and that he, consequently, has a legitimate agriculturally based reason for preemption of the municipal land use authority over his operation pursuant to the Act. Application of the municipal ordinance would entirely preclude appellant's ability to construct his barn, and not merely restrict it. Moreover, no testimony was offered to remotely suggest that fire or other emergency vehicles are unable to reach appellant's property; indeed, access to the property is identical whether or not a barn is built.

Based upon all of the foregoing, the action of the Warren County Agriculture Development Board must be and hereby is **AFFIRMED**.

ORDER

It is hereby **ORDERED** that the action of the Warren County Agriculture Development Board approving the construction of a barn on appellant's property is **AFFIRMED**.

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 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 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.

DATE **LESLIE Z. CELENTANO,** ALJ

Date Received at Agency:

Mailed to Parties:

DATE OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

Witnesses

For Appellant:

Jason A. Petty

For Respondent:

James Nicholas Onembo

Exhibits

For Appellant:

None

For Respondent:

R-1 Refusal of Permit (2 pages)

R-2 Letter from Jason Petty to Warren County Agriculture Development Board dated January 19, 2006 (2 pages)

R-3 Picture of access road

R-4 Letter from John M. Zaiter to Robert Resker, Director, dated February 6, 2006 (2 pages)

R-5 Request to the Warren County Agriculture Development Board for Site-Specific Agriculture Management Practice Recommendation (2 pages)

R- 6 Resolution No. 06 (2 pages)

Cericola did not testify.

Appellant claims to have a prescriptive easement to utilize Cericola's gravel roadway, but has not filed any legal action to establish such an easement. Cericola has declined appellant's requests for a written easement.