

## **RESOLUTION 2007-01**

### **DECISION APPROVING AN AMENDED SITE-SPECIFIC AGRICULTURAL MANAGEMENT PRACTICE (AMP) IN ACCORDANCE WITH THE NEW JERSEY RIGHT TO FARM ACT**

**WHEREAS**, pursuant to the Right to Farm Act, N.J.S.A. 4:1C-1 et seq. and the State Agriculture Development Committee [hereinafter "SADC"] regulations, N.J.A.C. 2:76-2.3, a commercial farm owner or operator may make a request to the County Agriculture Development Board to determine if his or her operation constitutes a generally accepted Agricultural Management Practice ("AMP"); and

**WHEREAS**, in 2003 the Appellate Division found that the SADC was the proper forum for the adjudication of a dispute between the Borough of Closter [hereinafter "Borough"] and the Abram Demaree Farm Homestead Farm [hereinafter "Farm"] regarding soil movement and water drainage issues; and

**WHEREAS**, in 2006, at the request of the Borough and the Farm, the SADC transferred jurisdiction to the Bergen County Agriculture Development Board [hereinafter "BCADB" or "Board"]; and

**WHEREAS**, the Board agreed and the parties consented to accept jurisdiction over the Farm's request for an Agricultural Management Practice (AMP), pursuant to the Right to Farm Act, that the Farm had a right to move the soil in question. More specifically the Board agreed to rule upon the Farm's request that the soil movement which created a berm along the farm's southern boundary to prevent flooding from Durie Estates and additional movement of soil along its westerly property line adjacent to the railroad property to create a windbreak through the planting of trees, shrubs, perennials, grasses, cut flowers, and annuals and for the further purpose of eliminating and reducing weeds and hiding places for animals and for creating a boundary - constitutes a generally accepted agricultural management practice with regard to the production of agricultural and horticultural crops (hereinafter referred to as "Site-Specific AMP Request"); and

**WHEREAS**, the Board and the parties also agreed that, in the context of the AMP request, the Board would make a finding as to the merits of the Borough's allegations regarding the blockage of the storm water drainage from Durie Estates and other adjacent property owners; the movement of soil onto the Farm's southern and western borders; any safety and mosquito issues caused by the blockage; and any other issue raised in the Borough's court pleadings, so that the municipal issues would be resolved in the context of Abram Demaree Homestead's Site-Specific AMP Request pursuant to N.J.A.C. 2:76-2.3; and

**WHEREAS**, the parties have engaged in good faith discussions of the issues and participated in informal mediation sessions with the Board's counsel; and

**WHEREAS**, the parties have jointly requested that the Board conduct a public hearing and issue this formal ruling confirming the settlement as to the substantive issues; and

**WHEREAS**, the Board is familiar with the property based upon a Site Review conducted on March 29, 2006 ("the Site Visit"), which was attended by BCADB Board members Evelyn Spath-Mercado, Ronald Binaghi Jr., and Daryl Secor as well as Closter Officials; and Mary Crain and her attorneys, Anthony Sposaro Esq., and Frank Rivellini Esq., of Francis J. DeVito P.A., Edward Rogan and Closter Officials at a meeting noticed in compliance with the New Jersey Statutes and the Open Public Meetings Act; and

**WHEREAS**, the Board members present during the site visit made observations as to the location of the moved soil; and

**WHEREAS**, the Board noticed a meeting for June 19, 2007 in compliance with the Open Public Meetings Act and a quorum of the Board being present at the aforesaid meeting, the BCADB considered the application; and

**WHEREAS**, the Abram Demaree Homestead represented by Frank Rivellini, Esq., of Francis J. DeVito P.A. consented to the form and substance of this resolution; and

**WHEREAS**, the Borough represented by Edward T. Rogan Esq., had no objection to the form of this resolution; and

**WHEREAS**, the Board received the following Exhibits into evidence:

- A. Application (Exhibit "A") for an Agriculture Management Plan.
- B. Aerial Photo (Exhibit "B"), scaled at 1" = 50', prepared by the County of Bergen to show a proposed area bordered Old Hook Road on the north; Schraalenburg Road on the east, the Harvest Restaurant on the south; and by the railroad on the west.
- C. Letter & Exhibits (Exhibit "C") from David Hals of Hals, Schwanewede P.E., engineer for the farm, dated December 19, 2007 analyzing drainage calculations and conditions and recommending options to resolve the issue.
- D. Joint Exhibit List attached hereto dated 8/15/07.

**WHEREAS**, the Board has considered the Farm's application for an amended Agriculture Management Practices plan and exhibits filed and admitted into evidence as well as the Borough's arguments, filings and concerns; and

**WHEREAS**, the Board took judicial notice of the following:

- A. Closter Zoning Ordinance
- B. Closter Zoning Map
- C. Closter Master Plan

**NOW THEREFORE BE IT RESOLVED**, that the Bergen County Agriculture Development Board makes the following determinations:

### **PROCEDURAL BACKGROUND**

1. In 1994 the Farm, in contravention of municipal requests and demands, moved soil to form berms along the Farm's borders to prevent drainage from the Durie Estates subdivision from flooding its fields.

2. In 1998 the Borough of Closter filed suit in a lawsuit entitled Borough of Closter vs. Abram Demaree Homestead, Inc. et. al (Docket No. BER-L-6334-98) alleging that the Abram Demaree Homestead Inc., [the Farm] improperly and without legal authority moved soil to block the flow of storm drainage water from Durie Estates and from adjacent properties. On May 29, 2002, the trial court ruled that the Farm's movement of soil constituted a nuisance to others in the community and interfered with the use and enjoyment of the land of its southern neighbors.

3. On January 14, 2004, the Appellate Division of the Superior Court vacated the trial court's order and remanded the case to the trial court for transfer to the State Agriculture Development Committee (SADC) for adjudication.

4. In 2006, at the request of the Borough and the Farm, the SADC transferred jurisdiction to the Board (BCADB).

### **JURISDICTION**

5. The BCADB finds, and the parties stipulated, that:

A. The Abram Demaree Homestead Farm, located at 110 Schraalenburgh Road, Closter (Block 202 Lot 1), is a "commercial farm" as defined by the statute as "a farm management unit of no less than five acres producing agricultural or horticultural products worth \$2,500 or more annually, and satisfying the eligibility criteria for differential property taxation pursuant to the 'Farmland Assessment Act of 1964,' ... [ N.J.S.A.] 54:4-23.1 et seq." N.J.S.A. 4:1C-3; see N.J.S.A. 54:4-23.1 to -23.23.

B. The Farm is located in an area in which, as of December 31, 1997 or thereafter, agriculture has been consistent with the municipal master plan and is a permitted use under the municipal zoning ordinance:

“Article IV, District No.1, Residence Area A, Section 200-6(F) Uses: Farms, nurseries or greenhouses, provided that said uses must reserve on site no less than one acre of open space.”

C. The Farm was in operation as of July 2, 1998.

## LEGAL AUTHORITY

6. Prior to the Right to Farm Act the general rule of law was that a municipal governing body is vested with the ultimate responsibility of establishing the essential land use character of the municipality through the adoption of zoning ordinances that divide the municipality into districts, identify the uses permitted in each district, and impose general limitations on construction.

7. The Right to Farm Act (N.J.S.A. 4:1C-1 et seq.), as amended in 1998, renders its provisions *preeminent* to “any municipal or county ordinance, resolution, or regulation to the contrary,” N.J.S.A. 4:1C-9. The New Jersey Supreme Court affirmed, in Twp. of Franklin v. Hollander, 172 N.J. 147 (2002), that the Farm Act's provisions are preeminent over a municipality exercising its powers under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -112. or local ordinance, resolution or regulation and that the Act was designed “to promote to the greatest extent practicable and feasible, the continuation of agriculture in the State of New Jersey while recognizing the potential conflicts among all lawful activities in the State.” Senate Natural Res. and Agric. Comm. Statement No. 854- L. 1983, c. 31 (N.J.1998).

8. The Court acknowledged the difficulty and complexity of the agriculture board's assignment, observing: "The potential for conflict between farming interests and public health and safety exists. Nevertheless, we repose trust and discretion in the agricultural boards to decide carefully future disputes on a case-by-case basis and to balance competing interests." It also cautioned that in the exercise of jurisdiction over agricultural practices, the county agriculture development board is limited by public health and safety concerns. These issues of health and public safety must also be given due consideration by the agricultural agencies citing the appellate court's finding that:

“We consider the statutory language in the Act which speaks to conduct that poses a *'direct threat to public health or safety'* must be considered broadly, and not as a narrow limitation in considering complaints of an aggrieved party that local land use or other relevant ordinances are being violated by the conduct of the commercial farm operator. In sum, in exercising its authority under the Act, the CAB or SADC must afford a local agency comity in recognition that the municipality interests must be appropriately acknowledged and considered.”

9. Lastly, the New Jersey Supreme Court recognized that the Right to Farm Act may preempt municipal regulations, but directed the CADBs and SADC to consider relevant

municipal standards and, in instances where the ordinance “has a peripheral effect on farming that does not directly conflict with farming practices,” defer to the ordinance. Township of Franklin v. den Hollander, 338 N.J. Super. 373 (App. Div. 2001), aff’d. 172 N.J. 147, 151-152 (2002). CADBs and the SADC are also required to consider the impact of the agricultural activity on public health and safety “and temper their determinations with these standards in mind.” Ibid.

10. As a result of the Hollander case agriculture boards, such as the BCADB, have primary jurisdiction over municipal/farm disputes but do not have unlimited authority regarding issues that directly affect public health and safety. In other words the BCADB must give appropriate consideration to municipal concerns - including but not limited to hours of operation, lighting, traffic and parking - where they are implicated and balance the commercial agricultural operation, activity or structure which conforms to agricultural management practices against the governmental regulation and any direct threats to public health and safety. N.J.S.A. 4:1C-10.

11. For a farm to receive this protection, the appropriate CADB must determine that the activity at issue conforms with agricultural management practices (AMPs) adopted by the SADC pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. or that it constitutes a generally accepted agricultural operation or practice. Thus, when an agriculture board issues an AMP, on a case-by-case basis, it creates an “irrebuttable presumption” that any activity of a commercial farm that is determined by the CAB “to constitute a generally accepted agricultural operation or practice [cannot]...be deemed to otherwise invade or interfere with the use and enjoyment of any other land or property,” provided the operation or practice “does not pose a direct threat to public health and safety.” N.J.S.A. 4:1C-10.

## **FARM TOPOGRAPHY**

12. The Farm’s 14 acres are located immediately south of Old Hook Road and form the shape of a large rectangle. The entire rectangular parcel is at a substantially lower elevation than all of the surrounding property and, in effect, operates as a “sunken living room” in relation to the surrounding properties.

A. The easterly border of the Farm abuts Schraalenburgh Road for a distance of approximately 1600 feet. This roadway sits an average of about three feet higher than the surface of the Farm.

B. The northerly border of the Farm abuts Old Hook Road and the roadway is about two feet higher than the Farm except for driveways into the Farm in a small area which had been used for access into the Farm.

C. The westerly border of the Farm abuts property owned by CFX (formerly Conrail) Railroad. The railroad border is about 1600 feet long. The railroad property in this area contains one elevated railroad track, which sits on top of a dirt and gravel embankment. The top of the

embankment is 6 feet to 8 feet higher than the surface of the Farm. The westerly border area of the Farm also contains two sewer easements - one to the County of Bergen and another to the Borough of Closter.

D. On the Farm's southerly border is Lot 2, occupied by the Harvest Restaurant. Lot two is just north of Durie Estates and sits between the Farm and Durie Estates. The surface of the Harvest's Lot two is at least 10 feet higher than most of the Farm's planting fields. Durie Estates' elevation is presently filled and similar in elevation to that of the Harvest's Lot 2, but previously the Durie elevation was lower and substantial amounts of water was naturally held on site. See Exhibit 15, Borough of Closter letter to the Department of the Army dated September 1<sup>st</sup>, 1988; Exhibit 35, Transcript of Jeff Morris, page 80 lines 13-25; page 81, lines 1-9.

### **FARM'S SELF HELP REMEDY**

13. In the spring of 1994 the Abram Demaree farm was flooded by an outburst of water from the newly installed drainage system of a recently constructed 23 home subdivision known as Durie Estates located approximately 150 feet south of the Farm's property.

14. At the time of the flooding some of Durie Estate's drainage flowed north via a stagnant drainage ditch on railroad property along the westerly boundary of Durie Estates and the Harvest Restaurant (Lot 2). Thereafter the storm water ran onto and over the Farm's land and planting fields.

15. In response to the flood the Farm directed an on site contractor who was delivering clean soil for use on the fields to block the water flow by depositing (berming) some soil along the Farm's southern boundary. This initial deposit of soil in the southwest corner of the farm blocked the flow thereby preventing the flooding of fields and the subsequent loss of crops. As an aside in June of 2004 Natural Resources Conservation Service (NRCS) approved the Farm's farming conservation plan (Exhibit 30) involving the movement of soil as a sound practice. It is noted that the existing culvert had insufficient capacity in its condition at the time to handle both the Farm and Durie drainage.

16. In 1996, the Farm continued constructing windbreaks and soil berms on its borders to protect its fields, to create a windbreak for the planting of trees, shrubs, perennials, grasses, cut flowers, and annuals and for the further purpose of eliminating and reducing weeds and hiding places for animals.

### **RAILROAD PROPERTY & CULVERTS**

17. There are two culverts under the Railroad embankment which borders Durie Estates, the Harvest Restaurant and the Farm. The southerly culvert is located behind Durie Estates (hereinafter the "Durie Culvert") and was cleaned out by Durie Estates prior to the Farm's flooding. This culvert allows some of Durie's drainage to pass under the railroad tracks through extensive piping to Schaeffer's pond in Haworth and then into the Oradell reservoir.

18. The northerly culvert (Farm's Culvert) is located some 1600 feet north of Durie Estates and abuts the Farm's westerly border on the railroad side. This northerly culvert was constructed in the 1860's when the railroad was constructed. It was clogged and barely allowed for the flow of water to pass through it until Railroad cleaned it out in 1992. It should be noted that the culvert was and continues to be undersized when flow from Durie Estates is added to the Farm's drainage. See Exhibit 31.

### **DURIE ESTATES DRAINAGE DESIGN**

19. In 1989 the Borough's Planning Board granted subdivision approval to Durie Estates to develop its 14.8 acres of vacant land into 23 lots for construction of single-family homes.

20. Prior to Closter's subdivision approval, Durie Estates was vacant property consisting of uplands with significant portions of wetlands, marshlands and two ponds, all of which retained significant amounts of water on site. Both ponds were both drained in 1988. The smaller pond drained in 24 hours but the larger pond took three months to drain – the length of time being indicative of the site's pre-development capacity to retain water (Exhibit 15).

21. Durie Estate's first drainage plan was designed for a 25-year storm event, as required by NJDEP's standards at that time. The overall intent of the drainage design was to collect the entire impervious area of the site (roof runoff, driveways, roadway, half of Durie Avenue runoff) as well as much of the pervious area (grassed backyards) and bring it to an on site detention basin.

22. The first drainage plan proposed by Durie Estates provided for all the drainage to flow through the Durie Culvert to Schaeffer's pond in Haworth and thereafter to the Oradell reservoir. The Borough's Engineer, rejected this plan and required the drainage water to be split so it theoretically flowed to both the Durie Railroad Culvert located directly behind Durie Estate *and* to the Farm's railroad culvert located some 1600 feet to the north in an attempt to duplicate preexisting conditions and to comply with the NJDEP's standard for controlling 25 year storms.

23. The approved drainage plan for Durie Estates, designed for a 25-year storm event, provided for the entire impervious area of the site, as well as most of the grassed yard areas, to be piped into a large, open detention basin in the northeast section of an approximately four (4) acre wetland area. The wetlands do not drain to the basin.

24. The northeast detention basin is approx. (as per the plan) 39' x 84' at the bottom with 2:1 slopes. The bottom is at an elev. of 40.75' and the top of bank is at 49.0'. There are two

outlet structures. Each outlet structure has a 15” pipe at the base of the basin (elevation 40.75’) that enters a “control box” in which there is a wall with a bolted-on orifice plate:

A. One control box structure outlets through two 6” pipes toward the west and thence the wetlands behind the Harvest Restaurant next to Abram Demaree Farm. At the time of the approval the northerly portion of the site drained to the railroad embankment area on Railroad property located west of Durie Estates and is depicted on the Durie Estates Drainage Maps as a “stagnant ditch” on railroad property (Exhibits 12 & 13). The Planning Board required the stagnant ditch to be cleared and graded to the Farm’s Culvert.

B. A second control box structure outlets through one 4” pipe to the west, then turns southward to the wetlands area in the middle of the subdivision and thence under the internal subdivision road to a 3-foot area directly in front of the Durie Culvert under the railroad. The Durie Culvert was cleaned out and a cement headwall and riprap constructed. On the west side of the railroad tracks the water enters directly into a pipe and travels under a public road approximately 500 feet or so into Schaeffer’s pond in Haworth

### **The Drainage Ditch**

25. At the time of the approval Durie Estates mistakenly thought that the drainage ditch in question was entirely on Railroad property. That was correct behind Durie Estates and behind Lot 2 but incorrect where the railroad abuts the Farm’s property (Exhibits 2, 12, 13, 14; Exhibit 35, Transcript of Jeff Morris, page 93 line 25; page 94 lines 1-25; page 95, lines 1-25, page 96, lines 1-25, page 97 lines 1-14.5).

26. As a result of Durie Estate’s mislocation of the ditch, the Durie Drainage Study Map (Exhibit 13) erroneously states that the ditch to the Farm’s Culvert would be cleared and graded with approvals from the Railroad – totally omitting reference for the need of downstream approval by United Water, the Farm’s predecessor.

27. As a result of Durie Estate’s oversight no one sought approval from the Farm; its predecessor in title, the Water Company; or the Railroad (Exhibit 35 Transcript of Jeff Morris page 97, lines 4-18; Page 98, 23-25, page 99, lines 1-10). A conditional Railroad approval was subsequently obtained after the Borough instituted a lawsuit but not until April 30, 1999, five years after the Farm flooded. (Exhibit 25).

28. Had Durie Estates consulted an aerial topographic map done for the County in 1975 by Curtis Johnson, L.S., it would have discovered that the railroad ditch became undefined on the restaurant property at an elevation of 37.50’. The discharge pipe from the Durie Estates detention basin enters the railroad ditch at elevation 37.40’. The railroad ditch was to be regraded with a high point 170’ south of the discharge pipe at elevation 38.06’. This would result in water ponding approximately 8” before flowing south and ponding 1” before flowing north onto the farm property. It appears that Durie Estates did not regrade the ditch as required by its



subdivision approval. Durie Estate's failure to rechannelize and clean the ditch and the berm erected by the farm to keep unwarranted flow off its property, has blocked the flow of water so that it rises to a level as deep as 2' to 2.5' feet on the restaurant's property

## FINDINGS OF FACT

29. When Durie Estates constructed its outlet control structure from the northeast detention basin water commenced flowing north faster than pre-development conditions because the elevation of the outlet pipe effectively eliminated any on-site retention of water for small storm events.

30. The Durie Estate's outlet structures were designed to control only the 25-year flow - the standard at the time. Unfortunately, this standard caused problems by letting the smaller storm events through without retention.

31. The Board finds that application of the Residential Site Improvement Standards (RSIS) adopted in 1997 to control 2, 10 and 100 year storms will solve downstream ponding problems as set forth below.

32. In light of the current RSIS regulations, the Board finds that the Borough of Closter should correct the adverse drainage conditions by implementing the solutions set forth below. The Board further finds that the farm should contribute \$2,500 directly to the Borough payable when the Board advises the Farm that the solutions have been properly implemented and completed. The Borough shall be solely responsible for implementing the solutions set forth below and the farm shall have no further obligation or liability for the issues that are the subject of this resolution other than to make the \$2500.00 payment when directed to do so as aforesaid. The intent of each solution is not to recalculate the entire system, but to make economical modifications to the existing outlet structures that will divert water away from the farm.

A. The first solution involves raising the 15" pipe of the outlet structure (that drains toward the Harvest Restaurant) by 12" so that water will begin to drain at elevation 41.75'. This would involve sealing the existing 15" orifice and making a new 15" orifice, which is 12" off of the bottom of the basin. This solution would force the first foot of water in the basin to outlet to the southern wetland area. No water would outlet to the back of the restaurant for the smaller storm events.

B. The second solution involves cleaning and regrading the Railroad ditch leading from behind the restaurant southerly. Clearing the debris and fallen trees in the railroad ditch behind Durie Estates will result in diminished ponding behind the restaurant. The detention pond should also be cleaned of debris so as to function properly.

C. Thirdly, after observing the effects of the first two steps (if the southern wetlands can handle the flow and the area behind the restaurant experiences substantial ponding) then, in that

event, a third solution can be applied. This solution involves switching the bolted orifice plates in the two outlet structures. That is, instead of two 6" pipes taking 3/4 of the flow to the back of the Harvest Restaurant and one 4" pipe taking 1/4 of the flow to the southern wetlands there would be one 4" pipe to behind the restaurant (1/4 of the flow) and two 6" pipes to the southern wetlands (3/4 of the flow).

### **ISSUANCE OF AGRICULTURAL MANAGEMENT PRACTICES PLAN**

33. In accordance with title 4:1C-1 et. seq. the BCADB has considered the relevant municipal public health and safety standards including those which might have a peripheral effect on farming but do not directly conflict with farming practices. It has also considered the concerns and arguments of the parties, the exhibits and stipulations and, after weighing the facts and circumstances, makes the following findings and rulings:

A. The Abram Demaree Homestead Inc., qualifies as a commercial farm as defined in the New Jersey Right to Farm Act (N.J.S.A. 4:1C-3).

B. The municipal zoning code, ordinances, regulations and resolutions apply to the farm only to the extent they embody issues of public health or safety.

C. The Farm's Agriculture Management Practices plan for berming soil to prevent flooding and to buildup its borders with dirt and wood chips to plant trees, shrubs, perennials, grasses, cut flowers, and annuals to create a windbreak, to eliminate the brush on its borders, and reduce weeds and hiding places for animals, which are a constant battle on a farm, does not pose a direct threat to public health and safety and is a valid Agricultural Management Practice.

### **INCORPORATION OF EXHIBITS**

34. Incorporation of Exhibits, etc. The exhibits, testimony and proofs given by the Applicant at the aforementioned public hearing and the BCADB's finding of fact and conclusions of law as set forth above are incorporated herein by reference and form the basis of this BCADB's determination herein.

A. Material Deviation. In the event of any material deviation or change from the testimony, representations or findings of fact the BCADB reserves the right and option to modify, alter, change or revoke the within approval.

B. Terms & Condition. If terms and conditions agreed to on the record below are omitted from this resolution, the Applicant and the Borough are nevertheless bound to abide by same pursuant to Fieramosca V. Barnegat Tp., 335 N.J. Super, 526, 533-534 (Law Div. 2000).

**NOW, THEREFORE, BE IT RESOLVED** that, based on the aforesaid findings of fact, the Bergen County Agriculture Development Board approves an Agriculture Management Practices for the operation of the Abram Demaree Homestead involving the use and movement of soil as described above.

**PROVIDED FURTHER THAT**, nothing herein shall prevent the Borough of Closter from seeking determinations on future undecided issues that directly affect health and safety.

**PROVIDED FURTHER THAT**, all provisions of Resolution 2006-03 and Resolution 2006-04 which are not modified herein remain in full force and effect.

YES: ABMA, BINAGHI, JAMES, SPATH-MERCADO

NO: NONE

ABSTAIN: NONE

ABSENT: SECOR

I certify that the foregoing is a true copy of the Resolution of the Bergen County Agriculture Development Board, duly adopted by vote of the majority of the members of the Board as set forth above at a regular meeting of the Board on June 19, 2007.

Dated: June 19, 2007

*Evelyn Spath-Mercado*

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Evelyn Spath-Mercado, Chairperson