EDWARD and LINDA FEINBERG,

Petitioners,

v.

HUNTERDON COUNTY AGRICULTURE DEVELOPMENT BOARD; and ANN DEL CAMPO and LAURA DEL CAMPO C/O STONYBROOK MEADOWS, LLC,

Respondents.

OAL DKT. NO. ADC 08445-2012
AGENCY DKT. NO. SADC ID #1342

FINAL DECISION

The issues in this case are: (1) whether the Hunterdon County Agriculture Development Board (HCADB or board) had jurisdiction to decide a September 2011 application for a site specific agricultural management practice (SSAMP) determination filed by Stonybrook Meadows, LLC (Stonybrook) pursuant to N.J.S.A. 4:1C-9 of the Right to Farm Act (RTFA); and (2) if the HCADB had jurisdiction, whether its SSAMP determination was consistent with the RTFA and State Agriculture Development Committee (SADC) regulations. The May 10, 2012 board resolution approved, approved with conditions, and denied, in part, the SSAMP application, generating an appeal of the resolution on jurisdictional grounds by Edward and Linda Feinberg (Feinberg), who reside next to the Stonybrook farm property, and a cross-appeal by Stonybrook as to the portions of the resolution denying and conditionally approving the SSAMP.

The SADC forwarded the Feinberg appeal and Stonybrook cross-appeal to the Office of Administrative Law (OAL) as a contested case on June 11, 2012. N.J.S.A. 4:1C-10.2; N.J.S.A. 52:14B-1, et seq. The administrative law judge (ALJ or judge), on motion for summary decision filed by Feinberg, concluded in his June 19, 2013 Initial Decision that the board had no jurisdiction to decide the SSAMP application. The judge reasoned that because the Stonybrook farm property is located in a municipal zoning district in which agriculture is a conditional use, Stonybrook could not comply with the requirement in the RTFA that, to be entitled to an SSAMP, a commercial farm must be located in a zoning district in which agriculture is a permitted use. The ALJ also dealt with whether Stonybrook had shown sufficient income for commercial farm eligibility and whether appropriate public notice had been provided for the HCADB hearings.

The record in this case is comprised of the motion briefs and voluminous exhibits filed by Feinberg and Stonybrook, and the ALJ referred to many of those materials in the Initial Decision. No testimony of the parties was taken because the judge concluded the facts were not in dispute. For the purpose of this Final Decision, the SADC will amplify the salient portions of the record set forth in the extensive documents and materials submitted by the parties in the OAL proceedings. When appropriate, the SADC will also take administrative notice of facts set forth in available public records, in the OAL file transmitted to the agency with the Initial Decision, and on correspondence from the parties in the OAL proceedings of which the SADC received copies. N.J.S.A. 52:14B-10(b); N.J.A.C. 1:1-15.2; N.J.R.E. 101(a)(3); Re New Jersey Bell Telephone Company, 1992 WL 526766 (N.J.Bd.Reg.Com.).

I. Factual background and procedural history

From July 1994 to December 2003, zoning ordinances of East Amwell Township, Hunterdon County ("East Amwell" or the "township") designated an area of the municipality as the "Stony Brook District" and identified agriculture, farms and farm stands as conditional uses. In December 2003 East Amwell merged the "Stony Brook District" into the "Sourland Mountain District", maintaining the conditional use classification of agriculture, farms and farm stands.

In October 2005 revisions were made to the conditional uses of agriculture, farms and farm buildings in the Sourland Mountain District pursuant to Ordinance No. 05-30, and Section 92-89D. of the township zoning ordinance provided as follows:

D. Conditional uses shall be as follows:

* * * *

(4) Agricultural uses and farms, including all farm and agricultural activities, such as nurseries, small animal and livestock raising, provided that:

(a) Such uses and cleared areas for farms shall be limited to existing cleared areas as shown on an aerial photograph prepared by the New Jersey Department of Environmental Protection and dated March 2002.

(b) Woodland management activities conducted in order to qualify for farmland assessment shall not require approval by the Planning Board. Refer also to Chapter 129, Tree Harvesting, which prohibits clearcutting as a method for obtaining farmland

> assessment. A farm having farmland assessment as of December 11, 2003, and consisting of cropland harvested and/or cropland pastured and/or permanent pasture as documented on a properly filed FA-1 farmland assessment application, need not apply for conditional use approval, provided such use does not involve any additional clearing and does not exceed the maximum lot coverage as permitted according to § 92-89F.
>
> (c) Farm buildings, as defined in this chapter[,] shall be situated on lots of at least 30 acres. However, on lots smaller than 30 acres, the Zoning Officer shall approve an accessory building which is 2,000 square feet or less, and such accessory building may be used for farm animals, at the landowner's discretion, provided it does not require any additional clearing, it meets all setback requirements for a farm building and does not exceed the maximum lot coverage as permitted according to § 92-89F.
>
> (d) Any application for a change in land use from woodlot management to any other form of agriculture which requires clearing of trees shall be subject to conditional use approval by the Planning Board.

Key words and phrases in Section 89-92D.(4) are defined in Section 92-4 of the township land use ordinance. "Lot coverage" is "[t]he total area of a lot covered by buildings, structures and paved or impervious surfaces." "Impervious surface" means "[a] surface that has been compacted or covered with a layer of material so that it is highly resistant to infiltration by water."

Section 92-89F. of the township land use ordinance provides that the maximum lot coverage in the Sourland Mountain District is 5% of the first 5 acres of lot area; 3% of additional lot area up to 15 acres; and 1% of additional lot area over 15 acres. The words "clearing" and "clearcutting" are not defined.

An "Editor's Note" accompanying the conditional use section applicable to agriculture [Section 92-89D.(4)] includes a cross-reference to Ordinance No. 05-30, a history of the ordinance enactment, and the following text:

> The purpose of this ordinance is to revise the provisions of Chapter 92, The Code of East Amwell Township, §92-89, Sourland Mountain District, to clarify existing provisions which protect the fragile environmental resources in this District. In addition, provisions pertaining to agriculture in the Sourland Mountain [District] are clarified. Existing farming operations are allowed to continue. New farms or the expansion of existing farms are discouraged, especially

> if it would require irrigation or include animals. A property owner pursuing woodland management for farmland assessment need not apply to the Planning Board, and a farm with farmland assessment for cropland or pasture is grandfathered as a conditional use. These revisions seek to balance environmental protection goals without interfering with current active farming operations. . .

Ann del Campo purchased Block 41, Lot 40.05, a vacant, approximately 20 acre farm property located at the time within the Stony Brook District, for $130,000.00 by deed dated June 25, 1997 and recorded July 21, 1997 in the Hunterdon County Clerk's Office in Deed Book 1170, Page 195. The mailing address for the property is 82 Stony Brook Road, Hopewell, NJ. The record reflects that a certificate of occupancy (CO) was issued for a residence on the property in October 1997. Over the next several years, del Campo engaged in equine activities on the property, breeding, raising and selling horses, and offering boarding services and riding lessons. In 1997 the farm had a "lesson horse", with which del Campo's daughter had won an equestrian championship and Monmouth County 4-H competition, and a yearling. Stonybrook added two (2) mares in 1998 and a stallion in 1999, resulting in a foal being born in 2001.

Feinberg purchased Block 41, Lot 40.06, an approximate 12 acre residential lot adjoining the Stonybrook farm property, for $900,000.00 by deed dated December 30, 2005 and recorded January 10, 2006 in the Hunterdon County Clerk's Office in Deed Book 2144, Page 947. The mailing address for the Feinberg property is 84 Stony Brook Road, Hopewell, NJ.

The Stonybrook farm property shares driveway access with Feinberg and with C. R. Perry Rogers, Jr. and Toni M. Tracey (Rogers-Tracey), who own adjoining Block 41, Lot 40.07, pursuant to a joint driveway easement recorded when all of the properties were subdivided. The easement provides for maintenance of the driveway in equal shares. Both the Stonybrook and Feinberg properties are flag lots, with their flag stems adjoining each other. The flag stem for the Stonybrook property is approximately 1100′ long and the flag stem to Feinberg's property is about 1400′ long. Each property's stem has about 55′ of frontage on Stony Brook Road. According to the June 1994 "Final Plat" for the Stony Brook Hills subdivision, the access driveway for the Stonybrook, Feinberg and Rogers-Tracey parcels appears to be plotted as 25′ wide and straddles the common boundary of the Stonybrook and Feinberg flag stems. The Rogers-Tracey lot, immediately north of the Stonybrook-Feinberg flag stems, has 437′ of frontage on Stony Brook Road.

New Jersey Department of Treasury records reflect that a certificate of formation for “Stonybrook Meadows LLC” was filed on February 13, 2002 and refiled on October 11, 2010; the latter document identified del Campo as a member/manager and recited a “Business Purpose” of “Agricultural program---working with horses for stress management, farm educational activities, farm markets (grown local).” In this Final Decision we will interchangeably refer to the parties as “Stonybrook” or “del Campo”.

Agricultural buildings were installed on the Stonybrook property to support equine operations. On July 17, 1997, the East Amwell construction official issued del Campo a Uniform Construction Code (UCC) permit for a 70’ x 100’ barn and an attached 36’ x 60’ horse barn, with an estimated total construction cost of $71,000.00. A CO for the structure, which del Campo called an “equestrian center” for the lesson horse and yearling, was issued on October 16, 1997. Additional UCC construction permits were issued in June 2000 for a 30’ x 48’ pole barn and in March 2004 for a 30’ x 50’ pole barn. According to del Campo, by 2004 these buildings contained 18 large animal housing units.

Stonybrook reported total farm income of $1,610.00 in 1998, its first full year of operations; farm income of $13,514.00 and $4,786.78 was reported in 1999 and 2000, respectively. The Farmland Assessment Act, N.J.S.A. 54:4-23.1, et seq., requires that land be devoted to agricultural uses for at least the two (2) successive years immediately preceding the tax year in which reduction in land value is sought, and the Stonybrook farm property did not begin receiving farmland assessment until 2001. Since then, East Amwell has approved the property for farmland assessment annually through the 2013 tax year.

On June 16, 2005 del Campo filed an application with the township zoning board to “alter [the] existing indoor arena; enlarge to regulation-size for equine activities” and for “use of run-in sheds”. The approvals sought were “Use variance – Conditional Use – Expansion of Farm Use” and “Bulk variance(s) – Site Plan Approval for Farm Buildings in excess of 10,000 [square feet]”. The application to the zoning board was in response to a June 8, 2005 letter from the zoning officer denying approval for the building project. The denial letter recited that del Campo wished to construct a 70’ x 100’ addition to the existing 70’ x 100’ structure approved in 1997 and three (3), 18’ x 20’ run-in sheds.

The zoning officer's June 8, 2005 denial letter concluded, *inter alia*, that the three (3) run-in sheds constituted an expansion of farm use, and would require conditional use approval, because the Stonybrook farm property already contained six (6) 18′ x 20′ run-in sheds and one (1) 8′ x 12′ run-in shed.[1] The proposed expansion of the barn-equine center to 70′ x 200′, according to the zoning officer, triggered site plan approval under the land use code's "Farm Building" definition and "requires conditional use approval under Section 92-89(D):4 [*sic*] since it is an expansion of the farming use".

Del Campo did not proceed with the June 16, 2005 zoning board application. Instead, on September 15, 2005 she applied to the HCADB for an SSAMP ("the 2005 SSAMP") for the farm's seven (7) existing run-in sheds and for three (3) new ones. Del Campo stated in the "Commercial Farm Certification" form accompanying the application that the Stonybrook property:

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

The alternate statement in the form that the farm "was in operation as of July 2, 1998" was not checked off by del Campo. She also certified that the Stonybrook property was more than five (5) acres in size and produced agricultural and/or horticultural products worth $2,500.00 or more annually.

The HCADB met on October 13, 2005 to consider Stonybrook's SSAMP application and determined that "Stonybrook. . .is a commercial farm operation". The board provided notice of Stonybrook's application to East Amwell by letter dated October 25, 2005 and inspected the farm on October 26. Joan McGee, the township planning board administrator, expressed East Amwell's concerns about the SSAMP application in a November 10, 2005 letter to the HCADB.

After observing that lands in the Sourland Mountain District are environmentally sensitive and that ground water quality in the zone is protected by restricting tree clearing and establishing impervious cover limits, McGee noted that "[a]griculture is a conditional use, with the one condition that there be no clearing of any trees for fields or pastures,

[1] There is no indication in the record when, prior to June 2005, the seven (7) run-in sheds were built.

because of the importance of retaining the forest canopy." She then updated the zoning officer's June 5, 2005 denial letter in light of recently-enacted Ordinance No. 05-30:

> The ordinance amendment grandfathered existing farms, so the conditional use approval is not an issue, as there will be no clearing of trees as part of this application.
>
> The ordinance amendment clarifies that site plan approval is not triggered by the cumulative square feet of farm buildings on the property exceeding 10,000 square feet; instead[,] sketch plans are required for proposed new farm buildings over 2000 square feet (this application) and [a] full site plan [for new farm buildings] over 4000 square feet [is required].
>
> The ordinance amendment clarifies that construction is permitted in areas beyond 500 feet from the road, as long as these areas are pre-existing cleared areas, so this is not an issue.
>
> The variance needed for a side yard setback for one shed is not a serious concern.

McGee advised that the planning board still had concerns about the SSAMP application's lack of detail on the size of the proposed run-in sheds, the absence of a wetlands delineation, the failure to disclose the number of horses on site, and the lack of information about water usage and manure disposal on the property. McGee also estimated impervious surface coverage based on run-in shed size assumptions and stated that "it is possible to conclude that the construction of the proposed run-inn [*sic*] sheds is acceptable". However, the proposed indoor arena expansion, which McGee observed was "not being pursued at this time" in the SSAMP application, could exceed impervious cover limits allowed on a property Stonybrook's size in the Sourland Mountain District if the property driveway was included in the calculations.

The HCADB held a public hearing on the SSAMP application on November 10, 2005, with notice of the hearing published in the Hunterdon County Democrat newspaper and provided by certified mail to all of Stonybrook's East Amwell Township neighbors within 200 feet of the farm property. No one appeared at the hearing on behalf of East Amwell; the only individuals who provided testimony, both in support of the application, were del Campo and an Oliver Elbert.

The board's December 8, 2005 resolution included a list of

various written exhibits, including the June 8, 2005 and November 10, 2005 letters from the township zoning officer and McGee, respectively. The HCADB approved the run-in sheds, making affirmative findings that Stonybrook was "a commercial farming operation. . .entitled to protection under the New Jersey Right-to-Farm law", that the run-in sheds evidenced proper equine management and were an acceptable agricultural management practice, and that the impervious surfaces created by the sheds would pose only a "minimal impact on the environment". It is not evident how the board determined Stonybrook's commercial farm eligibility.

The December 8, 2005 resolution was sent to the SADC and to the township zoning officer, the township planning and zoning boards and to del Campo by HCADB cover letter dated December 15, 2005. The township did not appeal the December 8, 2005 resolution to the SADC.

More zoning permits were issued by East Amwell to del Campo: for a "shelter structure" on May 3, 2007; and for a backyard greenhouse and farm market, the latter within an existing building on the Stonybrook property, on September 27, 2011.

Del Campo stated that, due to the decline in the national economy from 2007-2010, Stonybrook sought "an evolution in our farming operation". In early 2011, del Campo organized a workshop at the farm for 30 young customers to determine what would be attractive at a local community farm. Suggestions included yoga for equestrians, acupuncture, community gardening, farm tastings and workshops.

By letter dated August 10, 2011, the East Amwell zoning officer denied zoning approval to del Campo. The record does not reflect exactly what uses, structures and/or activities for which del Campo sought approval, but the zoning officer's letter recited that the denial was based on "[n]on-permitted commercial use of property beyond that encompassed by the Right-to-Farm law" and "failure to conform to 'Farm Stand' application standards". The zoning officer referred del Campo to the zoning board administrator for information on applying for a variance or appealing the denial.

Del Campo did not proceed with a variance application or an appeal to the township zoning board. Instead, on September 14, 2011 she applied to the HCADB for an SSAMP ("the 2011 SSAMP") for the following activities:

- Performance of equine activities, including horsemanship classes, horse auctions, equestrian birthday parties and Iyengar Yoga classes for equestrians and farmers;

- Marketing of agricultural products, including farm tastings;

- Performance of educational forums and events pertaining to certain products which are produced on the farm;

- Breeding and selling of horses, swine, lambs and other farm animals, and the production of other specialty products on the farm;

- Increasing the size of the farm infrastructure, including an increase in the size of the existing structures, specifically the expansion of the existing farm market, located in an existing 250 square foot utility barn, to 900 square feet, without municipal site plan approval;

- Erection of hoop-style greenhouses, which would be covered for part of the year;

- Erection of a prep-clean room on the farm, subject to approval of the Hunterdon County Health Department (the prep-clean room to be used for baking and packaging of herbs, bread, and other farm products; canning, jellies and pickling);

- Increasing the number of parking spaces from 10 existing spaces to 19;

- Erecting signs on the property's flag stem for the farm market and directing vehicular traffic.

The "Commercial Farm Certification" form accompanying the 2011 SSAMP application was identical to that completed for the 2005 SSAMP application. Del Campo certified that the Stonybrook property was more than five (5) acres, produced agricultural and/or horticultural products worth $2,500.00 or more annually, and "is located in an area in which, as of December 31, 1997 or thereafter, agriculture has been a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan." The statement in the 2011 application form that the farm "was in operation as of July 2, 1998" was not checked off.

Notice of the SSAMP application was provided by the HCADB administrator to the East Amwell clerk and the SADC by letter dated September 26, 2011. The notice advised that the board would consider Stonybrook's commercial farm eligibility at the

next monthly meeting on October 13, 2011.

The HCADB's guidelines for handling RTFA complaints and SSAMP applications were first published in August 2006 and revised in October 2007. The guidelines provide that the board will consider commercial farm eligibility at a regular monthly meeting following receipt of a complete SSAMP application and, if eligibility is approved, a site visit is scheduled at which "[a]ll parties involved in the application are notified. . .and invited to attend. It is optimal that the issue or dispute is resolved at the site visit." The guidelines further state:

> If the matter is not resolved at the site visit, a public hearing is scheduled for the next regular CADB meeting. The applicant must serve public notice to landowners within 200 feet of the boundaries of the farm, the municipality, municipal planning board, and all parties involved in the application at least 10 days prior to the hearing. Proof of notification will be required prior to the hearing.

The board, following its guidelines, reviewed Stonybrook's eligibility as a commercial farm at its regular meeting on October 13 and hearing on November 10, 2011. The record indicates a site visit was conducted, but not the date of the visit. Farm income documentation provided by del Campo included IRS Schedule F forms ("Profit or Loss from Farming") for 2004 through 2010; invoices from September 2011 to October 2011 reflecting the sale of agricultural products totaling $1,105.45; and a bank statement from March 2011 to October 2011 showing deposits to a Stonybrook account greatly exceeding $2,500.00.

At the October 13, 2011 HCADB meeting del Campo also testified that Stonybrook did not satisfy the income requirements in 2010 to qualify as a commercial farm, as the IRS Form Schedule F showed income of only $1,319.00. The 2012 FA-1 form filed on July 29, 2011 and submitted to the HCADB lists 7 horses and ponies, 6 sheep, 15 swine and 70 laying chickens. One (1) total acre of vegetable crops is listed for snap beans, carrots, cucumbers, eggplant, squash, tomatoes, melons and mixed vegetables.

Based on these proofs, the HCADB certified Stonybrook as a commercial farm contingent on del Campo providing a copy of Stonybrook's 2011 Schedule F and 2011 FA-1 forms at the board hearing on November 10, 2011. At the November 10, 2011 hearing, del Campo presented the board with the 2011 Schedule F showing a farm profit of $14,757.00. The 2011 FA-1 form, filed on July 28,

2010, lists 18 acres of active agricultural lands comprised of 16 acres of permanent pasture, 1 acre of cropland harvested and 1 acre of equine training; livestock is composed of 6 horses and ponies. The HCADB administrator confirmed to the board he had received the income documentation requested at the October 13 meeting.

Notice of the November 10, 2011 hearing was provided by del Campo by placing a legal advertisement in the Hunterdon County Democrat newspaper on October 27, 2011, and by certified mail on October 31, 2011 to all of Stonybrook's East Amwell Township neighbors within 200' of the farm based on a certified list of property owners provided to del Campo by the township tax assessor on October 20, 2011. Del Campo also provided certified mail notice on October 31 to various utility companies, a cable television company, the Hunterdon County planning board and the New Jersey Department of Transportation. On November 1, 2011, Feinberg signed the certified mail "green card" acknowledging receipt of notice of the November 10, 2011 hearing.

The newspaper notice advised of the date, time and place of the November 10, 2011 HCADB hearing, that Stonybrook was requesting its farming activities be deemed generally accepted agricultural practices, that other relief might be sought from the board, if appropriate, and that copies of the SSAMP application and supporting materials were available for public inspection at the HCADB offices during regular business hours.

The board held public hearings on Stonybrook's SSAMP application on November 10, 2011, December 8, 2011, February 9, 2012, March 8, 2012 and April 12, 2012. Meanwhile, on January 12, 2012 and during the pendency of the HCADB hearing, East Amwell issued another zoning permit to del Campo, this time for farm signs. Feinberg, through counsel, appeared at each hearing and objected to the HCADB's exercise of jurisdiction based on Stonybrook's location in a land use zone allowing agriculture as a conditional use, on insufficient proof of commercial farm income, and on inadequate public notice of the hearing. Feinberg's counsel made legal arguments at the November 10 and December 8, 2011 hearings and cross-examined del Campo on February 9, 2012. Mr. and Ms. Feinberg testified at the March 8 and April 12, 2012 hearings and presented a planning expert on April 12.

At the April 12, 2012 hearing Feinberg's planning expert testified that agriculture was a conditional use in the Sourland

Mountain District and that agriculture was inconsistent with East Amwell's municipal master plan. In addition, on April 12 an attorney for residents Rogers-Tracey stated that his clients were concerned about the increase in traffic on the access easement as a result of commercial uses that might be allowed if the SSAMP were issued by the board.

Nine (9) other individuals made statements during the public comment portion of the April 12, 2012 hearing. One commenter expressed concern about water resources in the Sourland Mountain District, one objected to the board's references during the hearing to the use of a draft agricultural management practice (AMP) for on-farm direct marketing activities that had been issued by the SADC, and several other individuals advocated for the support of agriculture in general and Stonybrook's operations in particular. The board closed the hearing and publicly deliberated on Stonybrook's SSAMP application. HCADB members discussed and voted on each of Stonybrook's requests, and the board's decision was memorialized in a resolution dated May 10, 2012. No one testified on behalf of East Amwell Township at the HCADB's October 13, 2011 meeting and at the five (5) hearings at which the Stonybrook SSAMP application was considered.

The HCADB's resolution found that Stonybrook had provided satisfactory proof of commercial farm eligibility and proper notice of the SSAMP hearing. The board then dealt with Feinberg's objection to jurisdiction based on agriculture being a conditional use in the zone district in which the Stonybrook property is located.

The HCADB interpreted N.J.S.A. 4:1C-9 to allow for the issuance of the 2011 SSAMP, regardless of East Amwell's conditional use zoning of agriculture in the Sourland Mountain District, based on the issuance of the 2005 SSAMP. The board interpreted the introductory paragraph of N.J.S.A. 4:1C-9 as follows:

> Stonybrook . . . qualifies to receive Right to Farm protection because the farm meets at least one of three criteria set forth in N.J.S.A. 4:1C-9, which requires:
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> > 1. The commercial farm to be 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,
> >
> > 2. the commercial farm to be in operation as of July

> 3, 1998,[2] and the operation conforms to agricultural management practices recommended by the SADC and adopted pursuant to the Administrative Procedure Act; or
>
> 3. ***the commercial farm, whose specific operation or practice, has been determined by the appropriate county board 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.*** [Emphasis in original].

The board opined that the third criterion had been satisfied by the issuance of the 2005 SSAMP to Stonybrook and, consequently, the HCADB had authority to approve the 2011 SSAMP. The board noted

> [t]his criterion. . .cites no specific effective zoning date, nor whether agriculture must be a 'permitted use'. This third criterion is a mechanism for affording farms Right to Farm protection for those commercial farms which fall outside the first two criteria.

The HCADB stated that Stonybrook had not received conditional use approval from East Amwell for agricultural activities on the property. But the board "concluded that municipal [conditional use] approval was impliedly granted based on the municipality's repeated practice of issuing permits for [del Campo's] farming operation. In addition, the Township has raised no objection to this [SSAMP] application."

The HCADB's May 10, 2012 resolution approved educational forums and events pertaining to products produced on the farm, but denied RTFA protection for the Iyengar Yoga classes and the expansion of the existing farm market building from 250 square feet to 900 square feet; as to the farm market, the board took notice of and relied on the September 27, 2011 municipal approval for the 250 square foot farm market and stated that the HCADB would provide no additional approval. The resolution approved the horsemanship classes and horse auctions but conditioned the approval of equestrian birthday parties to no more than three (3) per month. Farm tastings were approved, provided no more than fifteen (15) tastings per year were held and at a frequency of no more than two (2) per month.

Approval was also granted for the breeding and selling of

[2] The effective date of the 1998 amendments to the RTFA was July 2, 1998.

horses, swine, lambs and other farm animals, and the production of other specialty products on the farm subject to Stonybrook's compliance with state and local waste management rules. Stonybrook was required to obtain HCADB approval to breed and sell animals not specifically approved by the board.

Stonybrook's proposed erection of hoop-style greenhouses was approved, conditioned on the farm obtaining all necessary approvals from East Amwell. The proposed construction of a prep-clean room was approved so long as Stonybrook obtained all necessary permits from the Hunterdon County Health Department.

Finally, the HCADB conditioned the approved increase in parking spaces from 10 to 19, and the erection of signs on the property's flag stem, on Stonybrook's compliance with the SADC's draft AMP for on-farm direct marketing, facilities and events. A copy of the draft AMP was attached to the board's resolution.

II. The OAL appeals and motion for summary decision

Feinberg's appeal contended that the HCADB lacked jurisdiction to decide the 2011 SSAMP due to inadequate notice of the hearing, insufficient proof of income submitted by Stonybrook, and conditional use zoning of the Stonybrook farm property for agriculture and farms. Del Campo appealed based on the HCADB's denial of SSAMP approval for the Iyengar Yoga classes and expansion of the farm market, on the board's failure to issue an SSAMP for the existing 250 square foot farm market, and on the board's requirement that the additional parking and signage satisfy the SADC's draft on-farm direct marketing AMP.

On November 12, 2012, Feinberg filed a motion for summary decision with a brief and exhibits. N.J.A.C. 1:1-12.5.[3]

Feinberg questioned the quantity and veracity of the documents Stonybrook had introduced to substantiate commercial farm income, including proof that the reported income was permissible under the SADC's equine production requirements in N.J.A.C. 2:76-2B.3(e) and (f), and stated that notice of the hearing was not provided in accordance with the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. (MLUL) and in accordance with the HCADB's guidelines. Feinberg reiterated that agricultural uses and farms were conditional uses in the

[3]Feinberg's attorney during the HCADB proceedings withdrew as counsel, and Feinberg entered an appearance *pro se*, by substitution of attorney filed with the OAL on or about August 24, 2012. The motion was incorrectly styled as one for "judgment" rather than for "summary decision".

Sourland Mountain District in which Stonybrook was located and that, despite the township's issuance of zoning and construction permits on the Stonybrook property, del Campo never applied for approvals from any East Amwell Township land use boards. Feinberg contended that the Stonybrook property exceeded the maximum lot coverage allowable in the Sourland Mountain District even without the additional uses and structures proposed in the 2011 SSAMP. Since one of the conditions of conditional use approval in Section 89-92D.(4)(b) is that agricultural uses not exceed the maximum lot coverage set forth in Section 89-92F., Feinberg claimed that the proposed activities for which Stonybrook was seeking RTF protection triggered the need for approval from the municipal zoning board.

Del Campo filed a responding brief and exhibits on December 19, 2012, presenting farm income receipts and copies of the various zoning approvals East Amwell had issued for the construction of facilities on the Stonybrook property. In the December 19 brief, Stonybrook asserted, among other things, that East Amwell considered agricultural uses on the farm property to be permitted, not conditional, pointing to the various zoning and building permits issued by the township over the years; del Campo also contended that Stonybrook "complies with the only condition specific to farm uses in the Sourland Mountain District: 'that the use be limited to existing cleared areas.'"

On December 21, 2012, the HCADB filed a letter brief in response to Feinberg's motion in which the board's counsel reiterated the findings of fact and conclusions of law set forth in the May 10, 2012 SSAMP resolution. Feinberg replied to del Campo and the HCADB by brief and exhibits dated January 2, 2013 reiterating, *inter alia*, that Stonybrook's proposed activities "exceed[] the impervious coverage requirements", thus requiring conditional use approval from the municipal zoning board.

The OAL record also reflects that del Campo filed:

(1) a January 7, 2013 brief replying to Feinberg's January 2 brief and exhibits; included in the January 7 submission was the 2013 FA-1 form for the Stonybrook property dated July 20, 2012. It declared a total of 18 acres devoted to agriculture: 16 acres of permanent pasture; 1 acre of cropland harvested; and 1 acre of equine training area. The FA-1 also listed cover crops of rye and clover; livestock of 7 horses and ponies, 15 sheep, 20 swine, 3 beehives, 18 chickens for meat, 100 chickens for laying, 18 turkeys (seasonal); and one (1) total acre of vegetable crops composed of snap beans, carrots, cucumbers,

eggplant, squash, tomatoes, melons and mixed vegetables;

(2) a booklet dated January 15, 2013 containing various customer invoices, check stub payments and bank statements from 2011;

(3) a February 2, 2013 binder including more farm income data, this time for the period September 2010-September 2011, as well as copies of the legal advertisement in the Hunterdon County Democrat newspaper, certified mail receipts and signed "green cards" evidencing notice of the November and December 2011 HCADB hearings;

(4) a May 17, 2013 brief, with exhibits, entitled "Reply For Request For Proof that Agricultural Activities Do Not Need Conditional Use Approval From East Amwell Township".

The February 2 and May 17, 2013 information was submitted by del Campo to the judge upon his written request. We note that most of the legal arguments made in the various briefs set forth above were reiterated in a more concise form in the exceptions to the Initial Decision filed by Feinberg, Stonybrook and the Hunterdon CADB in July 2013.

III. The OAL Initial Decision

A. Commercial farm eligibility

Feinberg contended in the summary decision motion that Stonybrook was not a "commercial farm" as defined in N.J.S.A. 4:1C-3, which provides as follows:

> "Commercial farm" means (1) 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, P.L.1964, c. 48 (C.54:4-23.1 et seq.). . .

There was no dispute that the Stonybrook Farm property comprises approximately 20 acres, thus exceeding the 5-acre farm size requirement accompanying the $2,500.00 in agricultural or horticultural production value needed for commercial farm eligibility in N.J.S.A. 4:1C-3, and that the property was farmland assessed at the time of, and for several consecutive years prior to, the 2011 SSAMP application.

The ALJ found that Stonybrook satisfied the commercial farm production value criterion by providing "clear evidence" of

documented sales of the farm's agricultural output in the amount of $3,040.66 from June 14, 2011 to November 9, 2011, but only after the judge allowed del Campo to supplement the record.

The $3,040.66 in sales of agricultural output from the Stonybrook farm property was comprised of eggs, herbs, vegetables, squash and melons, as well as two (2) hogs.

Prior to del Campo furnishing additional financial material to the court, the judge expressed concerns that the IRS Schedule F for 2011 showing a profit of $14,757.00 did not provide a breakdown of how the profit was generated; that bank statements from March 2011 to October 2011 showing deposits to a Stonybrook bank account far in excess of $2,500.00 did not reflect which of the deposits represented sales of agricultural products; and that deposit slips from January 2011 to December 2011 did not match product invoices, resulting in del Campo hand-writing the agricultural products purportedly represented in the sales on the margins of each deposit slip. We ascribe these proof problems to poor recordkeeping by Stonybrook and inadequate preparation for the HCADB and OAL hearings. Commercial farm eligibility is the foundation upon which RTFA protection may be granted, and the SADC cautions those seeking such protection in the future to marshal their financial data in a clear and organized manner so that CADBs, the OAL and the SADC can readily understand a farm operation's business income.

Stonybrook presented evidence of $1,045.00 in revenue from horsemanship riding lessons for the period June 2011 through December 2011, but this income was not included in the ALJ's calculations of agricultural output. Fees from riding lessons cannot be counted as commercial farm income pursuant to N.J.A.C. 2:76-2B.3(f)2.

The SADC **ADOPTS**, based on the facts and legal reasoning in the Initial Decision, the ALJ's determination that Stonybrook satisfied commercial farm eligibility criteria in N.J.S.A. 4:1C-3 applicable to farms 5 acres or more in size.

B. Adequate notice of the 2011 HCADB hearings

The ALJ determined that adequate notice of the November 2011 HCADB hearing was provided to the relevant parties, finding compliance with the board's hearing guidelines.

We take administrative notice that the HCADB provided written notice of the September 2011 SSAMP application to East

Amwell Township and the SADC by letter dated September 26, 2011 in accordance with N.J.A.C. 2:76-2.3(c). That regulation provides:

> (c) The board shall advise the [SADC] and the municipality(ies) in which the commercial farm is located, in writing, of the receipt and nature of the request within 10 days.

The letter advised that the board would begin its consideration of commercial farm eligibility at a meeting scheduled on October 13, 2011. In addition, notice of the November 10, 2011 public hearing before the board on the merits of the SSAMP application was published at Stonybrook's request in the Hunterdon County Democrat newspaper on October 27, 2011, and written notice of the November 2011 and December 2011 hearings was transmitted by Stonybrook via certified mail, returned receipt requested, to East Amwell neighbors within 200' of the farm property, including Feinberg.

The newspaper notice and certified mailings were undertaken by Stonybrook in compliance with HCADB guidelines first promulgated by the board in August 2006 and revised in October 2007. The HCADB's public notice requirements anticipated by several years, and Stonybrook's public notifications in this matter occurred several months before, the directive by the Appellate Division that "affected property owners" be noticed of an SSAMP application. Curzi v. Raub, 415 N.J.Super. 1, 23 (App. Div. 2012).

Feinberg contended that no written notice was given to the public of the October 13, 2011 HCADB meeting at which Stonybrook's commercial farm eligibility was determined and that the newspaper notice did not detail the SSAMP request. However, the SADC concludes the newspaper notice, which is not required in SADC's RTFA regulations, was sufficient by advising readers of the date, time and place of the meeting, the fact that an SSAMP was being applied for, and that the details of the application could be obtained by inspecting Stonybrook's application materials at the HCADB offices.

No written notice of the October 13, 2011 meeting was required by N.J.A.C. 2:76-2.3(c) and HCADB guidelines. For the same reason, we reject the argument that the HCADB lacked jurisdiction because residents of Hopewell Township within 200' of the Stonybrook property, and the Hopewell Township clerk, were not provided notice. Stated simply, at the time of the HCADB hearings the full panoply of MLUL-type notice was not

required by SADC regulations.

As a practical matter, Feinberg posited no individualized harm with respect to the lack of notice of the October 13, 2011 meeting and the alleged inadequacy of the newspaper notice, and we perceive no such harm. Feinberg, through counsel, appeared at the board hearings on November 10, 2011, December 8, 2011, February 9, 2012, March 8, 2012 and April 12, 2012, actively contesting board jurisdiction and Stonybrook's SSAMP request. According to the HCADB's May 10, 2012 resolution, and as borne out by the hearing transcripts, "at the onset of the hearing and on multiple occasions during the pendency of the hearing. . . [Feinberg] objected to the Board's exercise of jurisdiction. . .", including the board's October 13, 2011 determination that Stonybrook had satisfied commercial farm eligibility criteria.

The SADC **ADOPTS**, based on the facts and legal reasoning in the Initial Decision, the ALJ's conclusion that Stonybrook provided adequate public notice of the SSAMP hearing before the HCADB.

C. Agriculture as a conditional use in the Sourland Mountain District.

The Initial Decision concluded that Stonybrook failed to show that agriculture is a permitted use in the zone in which the farm property is located, citing the requirement in N.J.S.A. 4:1C-9 that a commercial farm must be located "in an area in which, as of December 31, 1997 or thereafter, agriculture is a permitted use under the municipal zoning ordinance. . ." The ALJ supported his determination by reviewing the MLUL definition of "conditional use"; Section 92-89D. of East Amwell Township's land use ordinances establishing agriculture as a conditional use in the Sourland Mountain District; the township's conditional use exemption (or "grandfather") ordinance for farms having farmland assessment as of December 11, 2003, provided the agricultural activity does not involve additional land clearing and exceed maximum lot coverage; and In re Tavalario, 386 N.J.Super. 435 (App. Div. 2006).

The judge noted that "a conditional use that does not need conditional use approval is a permitted use" (Initial Decision, p.20), and observed that Stonybrook neither provided evidence that it had obtained conditional use approval nor showed that such an approval was unnecessary, citing similar findings by the HCADB in its May 10, 2012 SSAMP resolution. The judge rejected del Campo's argument that East Amwell considered agriculture to

be a permitted use on the Stonybrook farm property based on the various zoning and UCC permits issued over the years, concluding that "such approval by implication is insufficient" (Initial Decision, p.21). Although the ALJ recited East Amwell's conditional use "grandfather" ordinance [Section 92-89D.(4)(b) and (c)], there was no discussion in the Initial Decision whether and how Stonybrook's proposed agricultural activities listed in the 2011 SSAMP application fit into the township's conditional use exemption provisions.

The SADC finds that the record in this case amply demonstrates a course of conduct in which East Amwell issued numerous zoning permits and COs to Stonybrook for agricultural buildings and structures over a 15 year period. We also note that East Amwell decided not to testify before the HCADB in 2005 and 2011 to oppose Stonybrook's SSAMP requests and to assert the township's rights under the conditional use ordinance. However, there is insufficient evidence justifying what del Campo posits, in pages 5-6 of her exceptions to the Initial Decision, that the township should be equitably estopped from denying that agriculture is a permitted use on the farm property. East Amwell's issuance of various permits was accompanied by denials of other zoning permits impelling Stonybrook to seek relief from the HCADB in 2005 and 2011. There is also insufficient evidence to justify binding East Amwell municipal government to the actions of its zoning officer and planning board administrator.

The doctrine of equitable estoppel is rarely invoked against government entities. Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000); Wood v. Borough of Wildwood Crest, 319 N.J.Super. 650, 656 (App. Div. 1999). Equitable estoppel may only be applied against a governmental entity "where the interests of justice, morality and common fairness clearly dictate that course." Gruber v. Mayor of Raritan, 39 N.J. 1, 13 (1962); Twp. of Neptune v. N.J. Dep't of Envtl. Prot., 425 N.J.Super. 422, 438 (App. Div. 2012).

While the SADC is hesitant to apply equitable estoppel to East Amwell Township based on the record in this case, we reiterate our previously-expressed concern about municipal action and inaction leading to a commercial farmer's reasonable expectations of protection under the RTFA. Township of Lopatcong v. Raymond L. Raub and Gail A. Raub, OAL Dkt. No. ADC-03446-08, Agency Ref. No. SADC ID #695 (Final Decision November 8, 2012). The SADC considers a municipality's issuance of permits to a commercial farmer, written communications from

municipal officials that agricultural uses are “grandfathered”, and the municipality’s lack of participation in the RTFA hearing process, to be legitimate factors for a CADB to consider when balancing local ordinances against a commercial farmer’s request to engage in legitimate agricultural activities. Township of Franklin v. den Hollander, 383 N.J.Super. 373, 390-391 (App. Div. 2001), aff’d 172 N.J. 147 (2002).

N.J.S.A. 4:1C-9, which lists the agricultural operations or practices entitled to RTFA protection (“section 9”), provides as follows:

> 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;

i. Engage in the generation of power or heat from biomass, solar, or wind energy, provided that the energy generation is consistent with the provisions of P.L.2009, c.213 (C.4:1C-32.4 et al.), as applicable, and the rules and regulations adopted therefor and pursuant to section 3 of P.L.2009, c.213 (C.4:1C-9.2); and

j. Engage 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.).

Section 9 allows a commercial farmer to apply for an SSAMP to conduct activities listed in subparagraphs a. through j. A "commercial farm" is defined in N.J.S.A. 4:1C-3, the relevant portion of which was cited on page 16 of this Final Decision. If the SSAMP for an eligible commercial farm is approved by the CADB, or approved by the SADC in counties where no CADB exists, then the commercial farm enjoys broad protections. The SSAMP activities are protected against unreasonable municipal and county ordinances, as set forth in the first sentence of the introductory paragraph of section 9, and are shielded with an irrebuttable presumption that those activities are not a public or private nuisance. N.J.S.A. 4:1C-10. However, the commercial farmer is entitled to these RTFA protections only upon proof of the following to the CADBs or the SADC, all of which are contained in the introductory paragraph of section 9:

A "locational requirement": the commercial farm is "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**

An "operating date requirement": the commercial farm "is in operation as of the effective date of P.L.1998, c. 48 (C.4:1C-10.1 et al.)", which is July 2, 1998.[4]

If the locational and/or operating date requirements are satisfied, *then the commercial farmer must additionally demonstrate* that the section 9 agricultural operations for which RTF protection is sought "conform[] to agricultural management practices [AMPs] recommended by the [SADC] and adopted pursuant to the 'Administrative Procedure Act,' P.L.1968, c. 410 (C.52:14B-1 et seq.) **OR** the commercial farmer must prove to the CADBs or the SADC that the specific activities for which RTFA protection is sought on the particular farm property "constitute a generally accepted agricultural operation or practice". (Emphasis added).

The need for the commercial farmer to prove that the agricultural operation complies with an AMP, or that the operation is entitled to an SSAMP determination, is a separate, independent requirement for RTFA protection and is not, as the HCADB concluded in its May 10, 2012 resolution, a "third criterion" supplementing the locational and operating date standards that a commercial farm must satisfy as a condition precedent under section 9.

However, even if the locational and/or operating date requirements are satisfied, the CADBs or the SADC have no authority to entertain applications under section 9 if the commercial farm's operation does not conform with "all relevant federal or State statutes or rules and regulations adopted pursuant thereto" or "pose[s] a direct threat to public health and safety".

We have previously held that certain of the above requirements are jurisdictional predicates within CADB and SADC authority to determine, and that a CADB and the SADC can deny

[4] There was no dispute that Stonybrook was not a commercial farm in operation as of July 2, 1998 because the farm did not produce agricultural or horticultural products worth $2,500.00 or more annually. Stonybrook also could not be considered a commercial farm as of July 2, 1998 because the property upon which the farm is located was not eligible for farmland assessment until 2001. N.J.S.A. 4:1C-3; N.J.S.A. 54:4-23.2 and -23.6. Accordingly, the SADC **ADOPTS** the ALJ's finding that Stonybrook was not a commercial farm in operation as of July 2, 1998.

eligibility for RTFA protection should any of these section 9 provisions not be proven. This authority emanates not only from a fair reading of the RTFA itself, but also from the doctrine of "primary jurisdiction" reviewed at length in Township of Franklin v. den Hollander, supra, 383 N.J.Super. at 391, 172 N.J. at 151; Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J.Super. 338, 349 (App. Div. 2004), cert. den. 179 N.J. 372 (2005) and Curzi, supra, 415 N.J.Super. at 20.

A few examples of such jurisdictional determinations by the CADBs and the SADC are: In the Matter of Alexander Adams, SADC Resolution #FY2013R2(13), February 28, 2013 ("commercial farm" eligibility denied due to lack of proof of "farm management unit" criterion in N.J.S.A. 4:1C-3); Ciufo v. Somerset County Agriculture Development Board, OAL Dkt. No. ADC-04217-11, Agency Ref. No. SADC ID #1033, Final Decision July 26, 2012 (CADB denies SSAMP application for farm operation involving commercial nonagricultural vehicles); In the Matter of Holloway Land, LLC, SADC ID #1243, Hearing Officer's Report and Recommendations dated January 26, 2012 (RTFA eligibility conditioned on commercial farm owner addressing vehicular traffic safety); Peter LeCompte v. Hunterdon County Agriculture Development Board, OAL Dkt. No. ADC 09378-10, Agency Ref. No. SADC ID #1156 (CADB denies SSAMP eligibility for proposed bottling of on-farm generation of spring water).

We examine the section 9 locational requirement---that the commercial farm is located in an area in which agriculture is a permitted use as of December 31, 1997 or thereafter, and is consistent with the municipal master plan---in the same context as the other jurisdictional factors subject to CADB or SADC review when an SSAMP application is made.

The SADC is mindful of the distinction between a permitted use and a conditional use. A "conditional use" is defined in N.J.S.A. 40:55D-3 of the MLUL as

> [a] use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use as contained in the zoning ordinance, and upon the issuance of an authorization therefor by the planning board.

Cases construing conditional uses all contain the same basic elements: a conditional use is a permitted use, provided all conditional are met [Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 294 (1994)]; if the

conditions are satisfied, jurisdiction over such use lies solely with the planning board because no variance is required [Omnipoint v. Board of Adjustment, 337 N.J.Super. 398, 419 (App. Div.), certif. den. 169 N.J. 607 (2001)]; the planning board has no authority to waive or alter a specific conditional use standard [WaWa Food Market v. Planning Bd., 227 N.J.Super. 29, 34-38 (App. Div.), certif. den. 114 N.J. 299 (1988)]; if the conditions are not satisfied, then relief from the conditional use standards may be sought only through the zoning board by way of a use variance under N.J.S.A. 40:55D-70(d) [Lincoln Heights Ass'n. v. Township of Cranford Planning Bd., 314 N.J.Super. 366, 375 (Law Div. 1988), aff'd 321 N.J.Super. 355 (App. Div.), certif. den. 162 N.J. 131 (1999)].

The only SADC case that dealt in any way with conditional uses was In re Anthony Tavalario, OAL Docket No. ADC 52-04, SADC Docket No. 0818-04 (Final Decision July 22, 2004). Tavalario received a zoning summons for keeping horses on his 7-acre property, a conditional use in the municipality's "A Residence" zone, as Tavalario had not obtained conditional use approval for his equine operation.

The SADC's Final Decision observed that the RTFA can preempt municipal land use authority provided that the farm is a "commercial farm" as defined in N.J.S.A. 4:1C-3 and the farm meets either the locational or operating date requirements in N.J.S.A. 4:1C-9. The "Legal Analysis" section of the decision contained a lengthy review of Tavalario's farm income and concluded that he had not shown satisfactory agricultural production value of at least $2,500.00 annually from the sale of horses at any time between 1998 and 2003. It was on that basis that RTFA protection was denied by the SADC which, in passing, also stated that

> Agriculture was not a permitted use on the Property in 1997 without a conditional use approval and Mr. Tavalario did not have such approval. To qualify for the protections of the [RTFA], therefore, the Property had to be a commercial farm in operation as of July 3 [*sic*], 1998.
>
> Although the record shows that Mr. Tavalario's farm was in operation as of July 3 [*sic*], 1998, the record does not support a finding that the Property met the definition of commercial farm in 1998. Mr. Tavalario reported gross income for 1998 as $600 on a supplemental farmland assessment and as $675 on the Profit or Loss From Business Form (IRS Schedule C to Form 1040).

In affirming the SADC's Final Decision with respect to Tavalario's lack of proof of $2,500.00 in annual minimum

agricultural production value, the Appellate Division, in In the Matter of Anthony Tavalario, 386 N.J.Super. 435, 442 (App.Div. 2006) stated:

> Because the zoning of Tavalario's property was amended to "A" Residence in 1995 under an ordinance that denominated agriculture as a "conditional" not a "permitted use", he could not comply with the first portion of the [section 9] qualification provision. Tavalario's efforts were therefore directed at the second means of qualification and centered on the requirements that he demonstrate that he operated a "commercial farm" as of July 3 [*sic*], 1998. The SADC. . .found that he failed to qualify because his operation did not meet the definition of "commercial farm" as the SADC construed it.

It is clear that the Tavalario decisions by the SADC and the Appellate Division merely restated an obvious tenet of land use law: a conditional use is not a permitted use without conditional use approval. No further RTFA analysis was undertaken in either case, and none was needed because Tavalario failed to show $2,500.00 in annual farm production. Therefore, those cases left unanswered a more fundamental question: how are CADBs and the SADC to handle conditional use zoning of agriculture in the context of the RTFA when the SSAMP applicant satisfies the commercial farm income criteria?

The ALJ accepted Feinberg's argument that if agriculture is a conditional use in the zone in which the farm property is located, then the farm owner must apply to the planning board or zoning board, depending on whether the condition is satisfied or requires a zoning variance, for approval of *all* proposed agricultural activities. We find this theory to be inconsistent with the purposes of the RTFA for four (4) reasons: first, it is overbroad, as not all agricultural activities which are the subject matter of an SSAMP application implicate a given conditional use ordinance, and those activities should be reviewed by the CADB or the SADC on their merits as any other SSAMP involving lands in municipal zones in which agriculture is a permitted use; second, sanctioning such overbreadth could encourage municipalities to "freeze" pre-existing farms from diversifying their business operations, a result inconsistent with the legislative findings underpinning the RTFA in N.J.S.A. 4:1C-2, even if the new agricultural activity has nothing to do with conditions the municipality has identified in a conditional use ordinance; third, it glosses over the permitted use requirement in the context of other jurisdictional criteria that CADBs and the SADC are mandated to examine; fourth, it fails to appreciate the special role CADBs and the SADC have been given

in the RTFA by the Legislature and the courts under the "primary jurisdiction" doctrine.

The SADC sees no logical distinction between allowing CADBs and the SADC to undertake baseline jurisdictional reviews such as commercial farm eligibility criteria, whether the activity for which RTFA protection is sought is agricultural, whether the commercial farm is in violation of state or federal law, or whether the commercial farm poses a direct threat to public health and safety, and the authority of CADBs and the SADC to determine whether the condition(s) of a conditional use approval ordinance can be satisfied by the commercial farmer. We believe this approach to the permitted use requirement in the first portion of N.J.S.A. 4:1C-9 is consonant with the legislative intent and purpose of the RTFA and is consistent with relevant case law. Accordingly, the SADC holds that a CADB and the SADC have authority to determine whether a commercial farmer can comply with the conditions of a conditional use ordinance, and a commercial farmer is not required to obtain a conditional use approval from the municipal planning board as a condition precedent to applying for an SSAMP.

While the SADC concludes that municipal government cannot be the sole entity that can determine whether conditions in a conditional use approval ordinance can be satisfied, we do not foreclose the ability of a commercial farmer to seek municipal approval, if the farmer so chooses, and to present the conditional use approval to the CADB or the SADC in connection with an SSAMP application; in addition, because the existence of a permitted use is a jurisdictional requirement in section 9, the CADBs and SADC do not have the ability to preempt a condition. If a commercial farmer needs to satisfy the section 9 "locational requirement" but cannot demonstrate that a specific agricultural activity proposed in an SSAMP application complies with a condition in a conditional use ordinance, then the CADB and the SADC are deprived of jurisdiction to hear that particular aspect of an SSAMP application unless and until the commercial farmer obtains a variance for that specific agricultural activity from the municipal zoning board.

For the reasons set forth above, the SADC **REJECTS** the judge's conclusion that the HCADB had no jurisdiction to decide the SSAMP application due to the Stonybrook farm property's location in a conditional use zone.

D. Agriculture as consistent with the East Amwell Township's municipal master plan.

The ALJ also determined that agriculture is consistent with the municipal master plan because the Sourland Mountain District allows agricultural uses and farms as conditional uses (Initial Decision, p.22). Feinberg disagreed, citing to MLUL provisions indicating that master plan consistency means that the proposed use is permitted and comports with specific municipal land use regulations. N.J.S.A. 40:55D-28 and -62. East Amwell's land use plan for the Sourland Mountain District, according to Feinberg, refers to protection of critical resources and ecological systems, especially the conservation of large contiguous areas of undisturbed habitat such as forests.

The township's master plan recognizes the importance of agriculture and sets forth certain goals:

> The East Amwell Township Master Plan (2006) cites preserving farmland and open space as one of the most important policy goals for the Township. The first key objective listed in the plan is to:
>
> - Maintain the community's prevailing agricultural character by promoting the industry of farming and preserving the productive agricultural land base.
>
> The Master Plan emphasizes the importance of agriculture and provides several strategies to retain and encourage agriculture in the township. The Plan states that:
>
> - Agriculture is important in East Amwell's history and its future, providing a rural lifestyle valued by farmers and non-farmers alike, while also contributing breathtaking scenic views, promoting the local economy and utilizing a valuable natural resource.

While the Sourland Mountain District was primarily zoned to protect critical area habitat, Section 92-89D. of the township's land use ordinance acknowledges that agriculture is compatible with the purposes of the master plan zone scheme provided agricultural activities are limited to already cleared areas and do not result in an increase in the maximum lot coverage allowed in Section 92-89F.

In addition, and related to the municipal master plan, East Amwell enacted a Right to Farm ordinance. Section 110-1 of that ordinance states that the purpose of East Amwell's Right to Farm

ordinance is

> [t]o assure the continuation and expansion of commercial and home agricultural pursuits by encouraging a positive agricultural business climate and protecting the farmer against municipal regulations and private nuisance suits, where agricultural management practices are applied and are consistent with relevant federal and state law and nonthreatening to the public health and safety.

Accordingly, the SADC **ADOPTS** the legal conclusion in the Initial Decision that agriculture is consistent with East Amwell Township's municipal master plan.

IV. Review of activities, uses and structures in the 2011 SSAMP

Because the SADC has determined in this Final Decision that the board had jurisdiction to consider the 2011 SSAMP notwithstanding conditional use zoning of the farm property, the SADC **MODIFIES** the Initial Decision by determining, in Section IV., the propriety of the HCADB's resolution approving, conditionally approving and denying various activities for which Stonybrook sought SSAMP approvals. Our review is based on the relevant provisions of N.J.S.A. 4:1C-9a. through j., which are set forth on pages 21-22 of the Final Decision, on applicable SADC regulations and, where appropriate, on the relevant provisions of the East Amwell Township land use ordinances.

The SADC makes several observations before undertaking an itemized review of the HCADB's 2011 SSAMP. The review is based on the list of activities, structures and uses set forth on pages 15 and 16 of the May 10, 2012 board resolution. We relied on the transcribed testimony at the HCADB hearings and the materials the parties submitted to the OAL.

One of the first exhibits attached to Stonybrook's OAL submittal was a Google Earth© aerial view of the del Campo farm and surrounding properties. We also reviewed the site plan that accompanied del Campo's September 14, 2011 SSAMP application to help orient the specific activities requested with their approximate locations on the farm property. This site plan was the subject of testimony at the HCADB hearing and of references by the board.

The map materials and the testimony at the hearings make it abundantly clear that none of the activities, uses and structures proposed by Stonybrook involve land clearing. At no time during the HCADB hearings was any testimony presented or

evidence introduced that the activities resulted in additional clearing of the Stonybrook property, including additional tree clearing, and nothing was presented along these lines in the summary decision motion papers. The absence of land clearing in connection with the SSAMP request makes practical business sense, as Stonybrook's existing farm complex contains building infrastructure in close proximity to each other.

Under the SADC's holding in this case, Stonybrook would have been able to show the HCADB, rather than the East Amwell planning board, compliance with that portion of the "grandfather" clause in Section 89-92D.(4)(b) and (c) that the proposed SSAMP activities involved no additional land clearing. Whether the proposed SSAMP activities increase existing lot coverage, the other criterion in the "grandfather" provision, is dealt with below consistent with our holding in Section III C., above.

The SADC notes that the HCADB attached to its May 10, 2012 resolution a draft version of the on-farm direct marketing AMP. The AMP rule proposal was published on June 17, 2013 (45 N.J.R. 1449), public comments were received, and no publication of the rule adoption has been scheduled. The SADC will not be employing the proposed AMP in its review of Stonybrook's proposed activities and will not require compliance with an unadopted regulation.

Critical factual and legal issues in this matter were not addressed or were dealt with in only a cursory manner; the hearing transcripts indicate that the testimony failed to disclose important details as to what exactly was being proposed in the SSAMP. Accordingly, the SADC is remanding the case to the OAL pursuant to N.J.A.C. 1:1-18.7(a) "for further action on issues or arguments not previously raised or incompletely addressed". We avoid remanding cases, if at all possible, based on a complete record, but the SADC cannot recognize RTFA protection based on vague and sometimes shifting testimony, and insufficient evidence of AMP compliance.

A. Equine activities including horsemanship classes, horse auctions, equestrian birthday parties and Iyengar Yoga classes.

The HCADB made no findings of fact and conclusions of law regarding whether Stonybrook's current equine operation and the equine activities proposed in the 2011 SSAMP comply with the detailed requirements set forth in N.J.A.C. 2:76-2A.10 ("Agricultural management practice for equine activities on

commercial farms") and N.J.A.C. 2:76-2B.3 ("Eligibility of equine activities for right to farm protections"). On remand, proof will need to be submitted to the OAL that Stonybrook complies with all relevant provisions of these AMPs.

An example of the lack of clarity in the 2011 SSAMP is the "request to perform activities *including* horsemanship, horse auctions [and] equestrian birthday parties". (Emphasis added). We require much greater clarity to the activities for which RTFA protection is sought, and observe that any equine-related activity or event must be very carefully considered in light of the AMP requirements in N.J.A.C. 2:76-2A.10 and -2B.3. In addition, claims that the elements of an equine operation may be farm-based educational or recreational activities must be closely scrutinized, and then can be protected only upon sufficient proof that the activities are related to the marketing of the farm's horses pursuant to N.J.S.A. 4:1C-9h.

B. "Farm tastings" was a request that also suffered from lack of precision and, on remand, detailed and specific evidence must be presented describing what this activity will actually entail. To the extent that tastings can be considered the retail marketing of the agricultural or horticultural output of Stonybrook farm, then compliance will be necessary with the "farm market" definition in N.J.S.A. 4:1C-3 and with N.J.S.A. 4:1C-9c. The frequency of these events can only be determined in the context of whether they are properly in conjunction with a farm market and are related to the marketing of Stonybrook farm's agricultural and/or horticultural output. Any food purveying at permitted tasting events is subject to applicable state and county food-handling laws and regulations.

C. Educational forums and events were not specifically identified in the testimony as agricultural and as related to marketing the agricultural or horticultural output of the commercial farm as required by N.J.S.A. 4:1C-9h. Accordingly, on remand, the OAL will need to elicit detailed evidence on these proposed activities in order to determine whether they are entitled to RTFA protection as an SSAMP.

D. The breeding and selling of horses, swine, lambs, rabbits, poultry, goats and other farm animals are entitled to RTFA protection pursuant to N.J.S.A. 4:1C-9a., but "other farm animals" is too ambiguous to form the basis for RTFA protection. Again, on remand, Stonybrook must identify what animals will be bred and sold. The HCADB's requirement that the commercial farm must conform to state animal waste management rules is a proper

condition precedent for RTFA protection because a commercial farm must be in compliance with relevant state laws. The board's requirement that these activities must also comply with local animal waste management rules did not appear to be based on any existing municipal ordinances. In any event, local standards that exceed what is required by state law are subject to the "balancing of interests" test established by Township of Franklin v. den Hollander, supra, 383 N.J.Super. at 390-391, 172 N.J. at 153.

Stonybrook also failed to clarify what "specialty products" it intended to produce and the components of such products, so these issues must be re-examined on remand. We anticipate that "specialty products" will be a component of the farm market, which is discussed below in paragraph E., and are intended to be "value-added products". The sale of "specialty" or "value-added" products is not entitled to RTF protection unless the products are comprised of the agricultural or horticultural output of Stonybrook farm. N.J.S.A. 4:1C-9b. There was no clear indication in the record whether these products would be exclusively the agricultural or horticultural output of Stonybrook farm, the output of other farms, or a mixture of on-farm and off-farm produced ingredients. Accordingly, a remand is appropriate to determine what Stonybrook's "specialty products" really are.

E. Expansion of the existing farm market from 250 square feet to 900 square feet was denied by the HCADB due to the existence of the September 27, 2011 municipal approval for the 250 square foot farm market within a pre-existing structure. A farm market is entitled to RTFA protection pursuant to N.J.S.A. 4:1C-9c. provided the construction of building and parking areas is in conformance with municipal standards. We stress that section 9c. requires the *construction* of parking to *conform* with municipal standards and does not mean that the commercial farm must obtain municipal approval. Construction of, structural improvements to, and use of a farm market building necessitate obtaining township permits because the UCC and fire codes, administered by the municipality or by the state, are state laws.

Additionally, there was no evidence introduced by Stonybrook proving compliance with any of the elements of the "farm market" definition in N.J.S.A. 4:1C-3: a facility devoted to the wholesale or retail marketing of the agricultural output of the commercial farm, and products that contribute to farm income, provided that a retail farm market must earn at least 51% of its

annual gross sales from sales of the agricultural or horticultural output of the commercial farm, or at least 51% of the sales area must be devoted to the sale of the agricultural output of the commercial farm. Compliance with these standards must also be determined on remand.

There was scant evidence how farm market parking would be physically installed, including whether the parking would entail impervious or pervious surfaces, or was intended to occupy already cleared or grassed areas. A careful review of the facts on remand and the applicability of Section 89-92D. will also entail analysis of other relevant definitions in Section 92-4 of East Amwell's land use ordinance, including "Agricultural Use", "Farm" and "Farm Building", as well as the definition of "Agriculture" in the township's Right to Farm ordinance, Section 110-2.

In sum, the myriad factors identified above and associated with the propriety of the farm market SSAMP pose factual and legal issues which must be remanded to the OAL for further consideration. We note that if Stonybrook can comply with N.J.S.A. 4:1C-9c. in all particulars, and the issue of impervious coverage is resolved in Stonybrook's favor, then a farm market of 900 square feet in an existing building would be entitled to RTFA protection.

F. The construction of hoop-style "greenhouses" as set forth in the SSAMP resolution is entitled to RTFA protection pursuant to N.J.S.A. 4:1C-9a. for the growing of the farm's agricultural or horticultural crops, but the evidence indicates that only one (1) greenhouse of indeterminate size was proposed. There was no testimony regarding the length of time the greenhouse would be opened and closed. There are varying state and federal regulations on how long a hoop-style greenhouse is enclosed for it to trigger a finding of impervious surface. Given the uncertainty about how the hoop-style greenhouse will be used, its size, planting schedules, enclosure periods and the appropriate regulation to apply, a remand is required. The remand hearing must consider the same impervious coverage issues presented by the proposed farm market parking.

G. Construction of a prep-clean room in an existing building is entitled to RTFA protection pursuant to N.J.S.A. 4:1C-9b. Del Campo's testimony was that the prep-clean room is needed for drying herbs (Transcript April 12, 2012, p.41, lines 13-15) and the CADB's approval was given with the understanding that Stonybrook had withdrawn its request to use the room for

canning, jellying and pickling. The HCADB's requirement that all necessary approvals be obtained from the county and state health departments is reasonably related to public health and safety and RTFA compliance with relevant state laws. Stonybrook's prep-clean room is not limited to the drying of herbs it grows on the farm; a prep-clean room can be used for processing and packaging any other agricultural and horticultural output of the Stonybrook commercial farm. If Stonybrook seeks SSAMP protection for use of the prep-clean room for any other of its farm-produced commodities, then any specific requests can be raised as part of the remand hearing.

H. Increasing the number of parking spaces on the property from 10 to 19 for, according to del Campo, the farm market and for overflow parking in connection with the outdoor riding ring, is entitled to RTFA protection pursuant to N.J.S.A. 4:1C-9c. and is related to the holding of equine events permitted by N.J.A.C. 2:76-2B.3(b)(1) and (2). However, aside from the number of additional spaces requested and an indication of their location on the map accompanying the September 14, 2011 SSAMP application, there was no definitive testimony on whether the spaces would occupy existing grass or exposed areas on the farm. The precise number of spaces that may be allowed is also dependent on disposition of RTFA protection for the farm market and the equine activities. All of these issues dictate a remand to the OAL.

I. The request to erect additional signage on the property is entitled to RTFA protection as a component of the operation of a farm market, N.J.S.A. 4:1C-9c. However, there was no clear evidence of the number of signs proposed, their specific location, and their size(s) and subject matter. Any existing signs on properties other than Stonybrook's, without permission of the owner(s), shall be removed. Locational and direction signs can permissibly be erected on Stonybrook's property provided they do not create traffic, sight distance or obstruction problems, especially if the signs are constructed along the driveway easement. Curzi v. Raub, supra, 415 N.J.Super. at 21-22, requires a balancing of the commercial farmer's interests with those of the farm's neighbors. No RTFA protection can be granted if the location of the signs pose a direct threat to public health and safety. Due to the paucity of evidence on the number, location and subject matter of the signs, and the need to insure protection of the neighbors' safety in particular and the public in general, the SSAMP for signs must be reconsidered on remand.

The HCADB's May 10, 2012 SSAMP resolution did not address a legitimate public comment made at the April 12, 2012 hearing from the attorney for adjoining landowners Rogers-Tracey, who stated that his clients were concerned about the increase in traffic on the common driveway that could result from any intensification of commercial activity on the Stonybrook farm property. At the April 12 hearing, del Campo admitted that "for the last decade or more. . . we have had up to 35 cars [and] we have started to manage traffic, so we have a person at the end of our driveway in the beginning of the parking area." [Transcript April 12, 2012, p.47, lines 12-16]. Like the issues regarding the erection of signs, the remand hearing must address how Stonybrook will undertake reasonable protective efforts so that the activities and events that may be permitted under the SSAMP and the resultant increased commercial use of the common driveway do not pose a direct threat to public health and safety.

V. Summary of decision

The SADC **ADOPTS**, based on the facts and legal reasoning in the Initial Decision, the ALJ's determination that Stonybrook satisfied commercial farm eligibility criteria in N.J.S.A. 4:1C-3 applicable to farms 5 acres or more in size.

The SADC **ADOPTS**, based on the facts and legal reasoning in the Initial Decision, the ALJ's conclusion that Stonybrook provided adequate public notice of the SSAMP hearing before the HCADB.

The SADC **ADOPTS,** based on the facts and legal reasoning in the Initial Decision, the ALJ's finding that Stonybrook was not a commercial farm in operation as of July 2, 1998.

The SADC **REJECTS** the judge's conclusion that the HCADB had no jurisdiction to decide the SSAMP application due to the Stonybrook farm property's location in a conditional use zone; instead, the SADC holds that:

- CADBs and the SADC have authority to determine whether a commercial farmer can comply with the conditions of a conditional use ordinance, and a commercial farmer is not required to obtain a conditional use approval from the municipal planning board as a condition precedent to applying for an SSAMP;

- the commercial farmer can choose to seek conditional use

approval and present the conditional use approval to the CADB or the SADC in connection with an SSAMP application;

- because the existence of a permitted use is a jurisdictional requirement in N.J.S.A. 4:1C-9, the CADBs and SADC do not have the ability to preempt a condition of condition use approval, and if a commercial farmer needs to satisfy the section 9 "locational requirement" but cannot demonstrate that a specific agricultural activity proposed in an SSAMP application complies with a condition in a conditional use ordinance, then the CADB and the SADC are deprived of jurisdiction to hear that particular aspect of an SSAMP application unless and until the commercial farmer obtains a variance for that specific agricultural activity from the municipal zoning board.

The SADC **ADOPTS,** based on the facts and legal reasoning in the Initial Decision, the ALJ's conclusion that agriculture is consistent with East Amwell Township's municipal master plan.

The SADC **MODIFIES** the Initial Decision by remanding to the OAL for further consideration, pursuant to N.J.A.C. 1:1-18.7(a), elements of the SSAMP approval issued by the HCADB and identified above in Section IV., paragraphs A. through F., H. and I., as well as how Stonybrook will undertake reasonable measures to prevent any direct threat to public health and safety occasioned by the use of the driveway easement for increased commercial activity on the Stonybrook farm. An **ORDER OF REMAND** accompanies this Final Decision.

The SADC **MODIFIES** the Initial Decision by determining that the prep-clean room is entitled to SSAMP protection, as discussed above in Section IV., paragraph G., and we note that if Stonybrook wishes to seek SSAMP protection for use of the prep-clean room for any other of its farm-produced commodities, then any specific requests can be raised as part of the remand hearing.

IT IS SO ORDERED.

Dated: November 14, 2013 /s/ Douglas H. Fisher_____
Douglas H. Fisher, Chairperson
State Agriculture Development Committee