

In the Matter of Hopewell
Valley Vineyards, Hopewell
Township, Mercer County

- Hearing Officer's Findings
- Recommendations of the State
Agriculture Development Committee

I. Hearing Officer's Findings

Statement of the Case

This matter comes before the State Agriculture Development Committee ("SADC" or "Committee") as a result of complaints by Hopewell Township and certain township residents (collectively referred to as the "Township") against Hopewell Valley Vineyards ("HVV"). HVV operates a winery and vineyards on approximately 75 acres of farmland-assessed property in the township designated as Block 48, Lots 2 and 3.02 and having a street address of 46 Yard Road. Farmland assessment forms for the 2010 tax year indicate that Lot 2, comprising 20.48 acres, is owned by Senti, LLC and Lot 3.02, comprising 52.38 acres, is owned by Hopewell Valley Enterprises, LLC; however, at the hearing Sergio Neri represented himself to be the owner, winemaker and vineyard manager for HVV and, where appropriate, this report will refer to them interchangeably as "HVV" or "Neri".

The complaints against HVV were filed with the Mercer County Agriculture Development Board ("MCADB" or "board") in April and May 2010 as required by the Right-to-Farm Act ("RTFA"), N.J.S.A. 4:1C-10.1a. Since the activities complained of at HVV did not involve agricultural management practices recommended in regulations promulgated by the SADC ("rule AMPs"), the MCADB properly forwarded the dispute to the SADC for a hearing. N.J.S.A. 4:1C-10.1c; N.J.A.C. 2:76-2.10(c).

Hearings were held on August 12, August 13 and September 20, 2010 at the Health & Agriculture Building in Trenton during which sworn testimony and documentary evidence were presented to the undersigned as hearing officer. The Township and the individual complainants stipulated that HVV satisfied the "commercial farm"

eligibility criteria set forth in N.J.S.A. 4:1C-3 entitling it to the protections afforded by the RTFA. Based on my review of HVV's monthly sales receipts for the period January 2009-June 2010 submitted into evidence, I can confirm there is no question that HVV produced agricultural products (grapes and wine) generating income far in excess of the \$2,500.00 minimum set forth in N.J.S.A. 4:1C-3.

This report is prepared in accordance with N.J.S.A. 4:1C-10.1c and N.J.A.C. 2:76-2.10(c). As the hearing officer, I have set forth my findings upon which the SADC will base its recommendations to the MCADB pursuant to N.J.A.C. 2:76-2.10(c)3. The final report approved by the Committee will be submitted to the MCADB, Hopewell Township, HVV and the individual complainants. The board, within 60 days of receipt of the report, will hold another hearing and issue its own written findings. Id. Anyone aggrieved by the MCADB's determination may appeal to the SADC within ten (10) days of receipt of the board's decision; the SADC will forward the matter to the Office of Administrative Law (OAL) as a contested case in accordance with the RTFA and agency rules. N.J.S.A. 4:1C-10.1d; N.J.A.C. 2:76-2.10(b)2ii. Pursuant to N.J.S.A. 52:14B-10 of the Administrative Procedure Act (APA), the OAL will issue an Initial Decision which can be affirmed, modified or rejected by the SADC in a Final Decision constituting final agency action appealable to the Superior Court, Appellate Division.

I will first briefly comment on the procedure established by state law for RTFA disputes not involving "rule AMPs". I believe that, in requiring the SADC to conduct the first hearing in a case dealing with agricultural practices for which no regulations provide instruction, the Legislature determined that it is important for the Committee to express an initial, statewide perspective that may assist a county agriculture development board ("CADB") when the dispute is reheard at the local level. In turn, the RTFA recognizes that the CADB's decision on rehearing contributes to a collaborative effort informing the SADC of local insights. Since the Committee may be called upon to issue a Final Decision at the end of the APA process, this Hearing Report is designed to provide appropriate guidance to the MCADB rather than an exhaustively detailed recital of facts and law.¹

¹Transcripts of the SADC hearing, all documentary evidence, and all written materials submitted to the agency by the parties and interested

This report is limited to the activities associated with HVV's winery that are in dispute due to the Township and residents' complaints. Other agricultural activities, on HVV's farm property, if any, are not addressed herein.

The HVV Property

Neri purchased Block 48, Lot 2 in 1996 and decided to plant a vineyard in 1999 or 2000. Twelve (12) acres of grapes were planted in 2001-2002, around which time he also built the farm's first building, located nearest to Yard Road. In August 2003 HVV opened for business.

The first building ("Building 1") was 40' x 80' and split into two parts. A front 40' x 25' portion was and is used primarily for wine tasting and sales from a wine shop, and the back 40' x 55' section was used for winemaking and included processing, tanks, barrel-aging, a bottling machine, and associated equipment. A patio deck for use by customers is attached and has access to the wine shop. The wine shop contains a small bar and display areas for HVV's wines and wine-related supplies. A Uniform Construction Code ("UCC") certificate of occupancy was issued by the Township for Building 1 in May 2003. The permit's description of use for Building 1 was "Agricultural building (winery) processing and sales of wine. Consistent with Hopewell Township ordinances."

A second building ("Building 2") was constructed by HVV in 2005. This building, also 40' x 80', is located just behind and perpendicular to Building 1. It was initially used for storage. Based on my review of the document in evidence entitled "Hopewell Township Construction Department Timeline", HVV did not obtain a separate UCC permit for Building 2. The record is unclear whether the May 2003 UCC permit covered both Building 1 and Building 2.

In 2004 or 2005, Block 48, Lot 3.02 was purchased from a neighbor and, shortly thereafter, Neri started planting 10 acres of grapes in the middle back field of that lot. HVV keeps the front field of Lot 3.02, comprising

persons subsequent to the conclusion of the hearing are being provided to the MCADB to assist the board in making its own determination. The facts set forth in this report are based on the testimony and written evidence introduced at the hearing and baseline data obtained from the agency's prehearing inspection of HVV. The documentary evidence forming the basis of this report is set forth in the indices of each transcript.

approximately 8 acres, in grass and mows it so the tract can be used for large special events and temporary parking. Another, approximate 5-acre portion of Lot 3.02 is planted in hay and straw harvested by June, and that tract is used for supplementary temporary parking for large special events.

In 2006 HVV decided the winery needed more space for tastings, events, and wine production activities, and township approval was sought for the construction of a new, approximately 6,000 sq. ft. building that would have included an underground basement storage area for wine and a ground floor area for a larger tasting room, meeting place, office and laboratory. Neri testified that he felt this expansion was protected under the RTFA but that he consulted with the Township zoning officer, who recommended that HVV obtain a variance. The Township strongly disputes Neri's statement that the zoning officer advised HVV to seek a variance. In any event, Neri testified that he applied for a variance and that he felt there were no problems with obtaining approval based on what transpired at the first two land use board meetings; however, Neri stated that at the third meeting neighbors advocated against his project and he ultimately decided to withdraw the application.

In 2009 Neri built a two-story, approximate 3,000 sq. ft. addition linking Building 1 and Building 2 (hereinafter referred to as the "addition"). This addition includes bathrooms and a kitchen area on the first floor and offices on the second floor. The kitchen, which is used for preparing small food trays for events and as a staging area for outside caterers for large events, also serves as a lab for wine testing purposes.

Also around 2009, HVV completed internal renovations on the 40' x 55' portion of Building 1. This work was undertaken to make the area more suitable for expanding the wine tasting area and for accommodating other winery events. The work coincided with moving most of the wine production activities from the area in Building 1 to the space in and around Building 2. The renovated 40' x 55' area ("assembly area") is for larger-group assemblies and has a bar, a pizza oven, a small stage with a piano, a sound system, and seating for 110 patrons. It also houses a storage area for several barrels of wine being aged.

The Township issued a UCC permit in April 2008 for footings and a foundation associated with the addition based on a March 2008 document from HVV's architect that the work encompassed "a connection between two winery buildings" (Building 1 and Building 2) used for agricultural storage. When the Township conducted a final inspection of the addition, the code official also discovered the renovated assembly area. This discovery resulted in the issuance of a March 25, 2010 violation notice to HVV and, ultimately, to the RTFA complaint the Township filed against HVV with the MCADB. In addition to the UCC issue, HVV's installation of the kitchen for preparing and handling food was completed without obtaining, in advance, health department permits.

Resolution of any alleged UCC violations is beyond the scope of this report; instead, the agency notes that N.J.S.A. 4:1C-9 requires HVV to comply with state laws, such as the UCC, state health regulations for food handling establishments, and the Alcohol Beverage Control (ABC) laws, in order to receive the protections of the RTFA. We understand that HVV is attempting to obtain all needed UCC and health code permits for the addition, assembly area, kitchen and any other building components regulated by state law. No evidence was presented by the township that HVV has failed to obtain an appropriate ABC license or is in violation of an ABC license in HVV's possession. Accordingly, the dispute before the SADC concerns whether, and to what extent, the activities at HVV set forth below are protected by the RTFA.

HVV Activities

Since 2003 HVV has been involved in the following on-farm activities which are the subject matter of this right-to-farm case:

1. grape production and winemaking;
2. retail wine sales at the wine shop and wine tastings;
3. winery and vineyard farm tours;
4. weekly and monthly wine and music night events;
5. winery-run educational courses on different wine topics;
6. Garden State Wine Growers Association wine trail events;
7. vintner's dinners;
8. large festivals, but only after obtaining a municipal permit;
9. fund raisers and charity events;
10. weddings and wedding receptions;
11. private group events such as reunions, corporate meetings, bridal showers and other significant life

- celebrations;
12. other entertainment-based events including "Comedy Night" and "Happy Hour", which includes the making and serving of pizza for on-site consumption; and the making and/or selling of other food products, either prepared on-site or catered by a third party, in conjunction with "Music Night", "Comedy Night", "Happy Hour" and other events.

These activities are described in more detail as follows:

1. Grape Production and Winemaking

As noted above, the farm currently has about 22 acres planted in grapes. Neri stated that every acre produces three (3) tons of grapes per year and every ton of grapes makes about 170 gallons of wine. Since every gallon makes about five (5) bottles of wine, each acre is capable of generating about 2,550 bottles of wine per year.

The overwhelming majority of the wine produced at HVV currently comes from the grapes grown in the farm's vineyards. Neri provided a post-hearing submission reflecting the following percentages of HVV's grapes produced and used in the winemaking process over the past six (6) years: 2005 - 70%; 2006 - 90%; 2007 - 88%; 2008 - 91%; 2009 - 86%; 2010 - 92% (estimated).

2. Retail Wine Sales at the Wine Shop and Wine Tastings

Retail sale of the farm's wine accounts for the vast majority of HVV's income. Based on my review of the monthly sales receipts provided at the hearing and covering the period January 2009 through June 2010, almost 90% of HVV's gross income was generated from wine sales and approximately 4% of gross income was derived from related products in the wine shop such as corkscrews, cork pops, coasters, decanter brushes, bottle stoppers, cheeses and crackers. [Two percent (2%) of HVV's gross income came from food sales, and the remaining 4%, classified as "rental", was described by Neri in testimony as "admission fees. . .that we charge to participate in events whether promoted by (HVV) or requested by a customer. . ."].

Photographs of the interior of the winery introduced into evidence by the Township and other evidence introduced into evidence by Neri indicate to me that at least 51% of the

floor space of the wine shop and assembly area is devoted to the retail sale of HVV's wine and wine supplies.

The wine shop is open every day from 12 noon to 5 p.m. Some people purchase wine for off-site consumption, while others come for wine tasting and/or purchase glasses or bottles of wine and drink the wine at HVV. Visitors are allowed to sample several varieties of HVV's wine by paying a set fee and being served the samples in a complimentary winery glass.

HVV also offers wine barrel tastings in the assembly area.

3. Winery and Vineyard Farm tours.

The farm offers tours, provided people call ahead with a minimum of 10 people per reservation. Neri stated the tours cost \$10.00-\$15.00/person and that the resulting wine sales at the end of a tour account for more in sales than the tour itself.

4. Weekly and Monthly Wine and Music Night Events.

On Friday nights, the winery stays open an extra three hours and has a local artist perform music while the patrons consume wine. Some complimentary cheeses and crackers are available, and customers can purchase separate cheese plates, olives, and small-sized pizza from HVV's brick oven. Neri testified that the pizza is the only food item the winery makes itself.

Saturday evening events, occurring once a month, are essentially the same as the Friday night events except there is a \$10.00 per person cover charge assessed to help defray the costs of a larger performing act and more free cheese and crackers. At first, the farm offered wine and music nights on some Saturdays. The event was moved to Fridays and became weekly, and HVV kept the Saturday events once a month.

5. Winery-Run Educational Courses on Different Wine Topics.

HVV teaches three courses: 1) "Seed to Bottle" (how grapes are grown and wine is made), 2) "Wine Tasting Appreciation", and 3) "Wines of the World". The charge for each class is \$50.00/person, lasts three hours, and has an

attendance of 20-50 people. Parts of the classes include a tour, tasting, and education about the farm's wine.

6. Garden State Wine Growers Association "Wine Trail" days.

The Association selects and promotes several days a year as New Jersey "Wine Trail" days to encourage people to visit and buy wine from New Jersey wineries. Neri testified that the wine shop and tasting area are open on these occasions and that the farm provides tastings and tours for those who attend.

7. Vintner's dinners.

Occasionally HVV will host a dinner where the farm coordinates with a local caterer to offer a dinner that is tailored to promote the farm's wine.

8. Large festivals.

A few times a year, the farm holds festivals on the 8-acre field by Yard Road on Block 48, Lot 3.02. The most recent such special event at the farm was the June 26-27, 2010 "East Coast Food and Wine Festival" sponsored by the Central Jersey Slow Food and Estate Wine Growers of New Jersey. The event consisted of local restaurants providing samples of dishes they prepared using locally grown products; local wineries offering samples of wine to pair with the food; tours of the farm; and food and cooking seminars, presentations and demonstrations by popular authors, chefs, and food personalities. Tickets were sold for \$35.00-\$40.00 for one day and \$55.00-\$60.00 for two days. A portion of the proceeds went to "Share Our Strength", a nonprofit organization dedicated to fighting childhood hunger, and the event had sponsors such as NJN, Wegmans, and Kitchen Kapers.

Neri said about 1,500 people attended the festival. For this and other large festivals, Neri and Township witnesses testified that HVV obtains local permits under the township's "Festivals and Large Assembly" or "Temporary Activities" ordinances. According to the testimony, HVV hires police to supervise traffic and public safety, and attendees park in the adjoining fields. Neri also testified that, in his opinion, a festival with 3,000 people did not create a traffic problem.

I do not consider festivals for which HVV obtains appropriate township permits to be disputed agricultural operations or practices, and they are not addressed in the Legal Discussion and Summary Conclusions set forth below.

9. Fund raisers and charity events.

There was testimony that the winery has hosted, indoors, fund raisers and charity events for nonprofit organizations like the Northeast Organic Farming Association (NOFA), or to benefit autism awareness.

10. Weddings.

Neri described how the winery hosts weddings and other private parties and sells wine at these events. He said people are not allowed to bring in any outside spirits and that only HVV wine is served and sold. Neri added that the farm also offers tours and tastings as part of its wedding contract package and that most people take this option.

Neri said that at any party or social event where wine is served, people consume about one glass/person/hour on average. For the bottles purchased as favors, the winery may create special labels affixed to the bottle to commemorate the event. No one is required to purchase or drink HVV wine at the weddings, HVV wine is not placed on the tables, and water and soft drinks are available.

HVV charges about \$2,000.00 for hosting a wedding and for helping coordinate the arrangements. Neri testified that the farm avoids becoming too involved in the food aspect of weddings and that the wedding party usually chooses a local caterer. The wedding party and caterer will have their own contract, and the farm will coordinate as necessary with the caterer by providing the winery's kitchen as a staging area. Without being specific as to timeframe, Neri stated that "in the past" the farm has averaged about one wedding/month, with about half of them held inside and half outside. In 2010, he said the farm had hosted three weddings and decided to cancel the rest (six) and not take reservations for more weddings until this RTFA matter was completed.

11. Other private group events.

HVV has worked with a variety of individuals and groups on a range of private events. This includes, for example, birthday parties with wine tasting and tours; bridal and baby showers; reunions; alumni group meetings; Rotary Club meetings; and company meetings. Aside from a group's formal meeting purposes, the gathering will often sign up for a tasting, tour and/or an educational winemaker's presentation.

Neri stated the size of the events varies generally from 10 to 50 people, as do the fees charged for use of the facility and for HVV staff time. Smaller parties visiting during regular business hours might just take up a corner in the wine shop and do a tasting on their own, while other parties might reserve the wine shop or assembly area at a time outside the farm's regular business hours and get a more formal presentation by farm staff. Neri estimated that prior to the filing of the RTFA complaints, HVV was having a couple of small private events per week. He said that now the farm was doing less than one a week.

12. Other entertainment-based events.

Neri also described "Comedy Night", which he set up in a manner similar to his monthly "Wine and Music Night" events, and "Happy Hour". The record is unclear as to how often these events actually occurred and whether the names of these events have been used interchangeably to describe background entertainment complementary to wine drinking.

Township and Residents' Complaints

Hopewell Township does not object to HVV engaging in what the Township considers customary agricultural activities like growing grapes, making wine, selling wine from the wine shop, allowing customers to taste the wine prior to purchase, and allowing patrons to consume wine by the glass. It also has no objection to the winery conducting tours, educational classes, and being a destination on the "Wine Trail".

But the Township, through its witnesses, does object to all of the other activities which, individually or collectively, it deems non-agricultural "commercial entertainment", and constituting a "catering facility", a "nightclub" or a "bar/restaurant". Since these are not agricultural activities that preempt municipal ordinances

under the RTFA, the Township asserts that HVV must obtain variances and site plan approval.

The Township claims that HVV's activities adversely impact public health and safety because the winery "circumvented the municipality's site plan review process, which is intended to protect the public from developments with substandard or unsafe parking, lighting, drainage, ingress and egress and traffic impacts". With respect to traffic, the Township expressed concern about an increased number of vehicles on Yard Road---a "secondary" road not appropriate for adjoining commercial uses---and about the Route 31-Yard Road intersection which is not controlled by a traffic light.

The Township also complained about HVV generating more sewage, and requiring more water, than the winery's existing on-site facilities can accommodate; accordingly, these problems pose a threat to nearby groundwater.

The private complainants agreed with the Township's position that the winery is operating without appropriate land use board approvals. Their specific public health and safety concerns were that Yard Road was not equipped to handle traffic associated with HVV's activities and that there was a potential for intoxicated drivers to use that road.

HVV's response to the complaints

Neri contends that the farm is not operating a restaurant, bar, nightclub, or entertainment business; instead, its activities and events correspond with standard and typical wine industry practices for marketing a farm's wine. All activities are designed to promote the winery and sell more wine; foster an agricultural "experience"; attract people to the winery and create immediate and future customers; and build awareness of and exposure to the winery. The continued viability of the farm depends on creating customers and having direct farmer-to-consumer sales of wine, so the more events HVV can engage in, the more customers and sales HVV generates.

Friday Happy Hours allow patrons to drink wine at discounted prices, and Comedy and Music Nights allow patrons to drink wine in a relaxed and enjoyable setting with entertainment as a complement to the experience.

In response to the Township's and neighbors' public health and safety concerns, HVV said it applied to the Township for all UCC permits and is awaiting municipal approvals. HVV previously was unaware of the need to apply for a food handling permit but has since applied for one.

HVV considers the claims about increased traffic on Yard Road to be unsubstantiated. HVV introduced into evidence a Traffic Study prepared in connection with its abortive 2006 expansion project, a more recent traffic count conducted under Mr. Neri's auspices, and copies of three (3) township police reports of accidents on Yard Road in January, September and October 2009, respectively.

I submit the above findings to the SADC for its recommended determination to the MCADB in accordance with N.J.S.A. 4:1C-10.1c and N.J.A.C. 2:76-2.10(c)3.

/s/ Brian D. Smith
Brian D. Smith, Esq.
Chief of Legal Affairs

II. SADC Recommendations to the MCADB

The issue in this case is "whether the disputed agricultural operation [at HVV] constitutes a generally acceptable operation or practice". N.J.S.A. 4:1C-10.1c; N.J.A.C. 2:76-2.10(c).

N.J.S.A. 4:1C-9, which lists the agricultural operations or practices entitled to RTFA protection, 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.).

The SADC's reading of the RTFA, and N.J.S.A. 4:1C-9 in particular, is that the Legislature wished to emphasize protection of agricultural production activities. Indeed, all of the section 9 provisions contain either explicit protection of the methods directed toward growing agricultural commodities (subsections a., b., d., e., f. and g.) or contain an agricultural output component (subsection c. regarding operation of a "farm market", as further defined in N.J.S.A. 4:1C-3, and subsection h.). Put another way, the production of an agricultural commodity and the methods by which such production is achieved are the prime beneficiaries of RTFA protection.

With respect to the RTFA's protection of farm markets and recreational and educational activities, a nexus to the farm's agricultural output must exist. The definition of "farm market" in N.J.S.A. 4:1C-3 requires that the majority of the market be devoted to sale of the agricultural output of the farm, either in terms of annual gross sales or sales area. A farm market can also engage in the sale of

products that contribute to farm income, and the Legislature's recognition of this limited opportunity for a farm market to sell products other than the farm's agricultural output reinforces the legislative intent that RTFA protection is afforded to activities that *primarily* are related to agricultural production. It is reasonable to conclude that the Legislature intended this principle of proportionality to apply also to recreational and educational activities.

N.J.S.A. 4:1C-9h. refers to educational and recreational activities that are "farm based" and "are related to marketing the agricultural or horticultural output of the commercial farm." The SADC does not believe that it is valid to interpret the term "farm based" in strictly the locational sense---meaning that *any* educational or recreational activity that takes place on a farm should be protected---but rather that the Legislature intended "farm based" to protect activities intrinsic to the agricultural production of a particular farm.

Further, given the Legislature's primary intent to protect agricultural production activities, the SADC does not believe that the phrase "related to marketing the agricultural or horticultural output of the farm" in N.J.S.A. 4:1C-9h. can be viewed as allowing only a tangential link to the farm's agricultural output. Rather, the Committee interprets the RTFA in its entirety to mean that educational and recreational activities must be connected to agricultural production. Obviously there is a whole host of educational and recreational activities that logistically can take place on farms and draw visitors who may or may not buy the farm's agricultural output as a result of visiting the farm. However, the SADC suggests it is reasonable to conclude that the Legislature intended to protect only those types of activities where there is a direct, primary connection to agricultural production.

Producing, processing and packaging agricultural output

The SADC concludes there is no dispute by the township, and so finds that, as permitted by N.J.S.A. 4:1C-9a. and b., HVV's farm and winery engage in the production, processing and packaging of wine, the agricultural output of the commercial farm generated from the grapes harvested from HVV's vineyards. So long as HVV is in compliance with its Plenary Winery License and relevant ABC regulations,

municipal ordinances (if any) restricting those activities may be preempted.

Operation of a farm market

HVV also operates a farm market. A "farm market" is defined at N.J.S.A. 4:1C-3 as

a facility used for the wholesale or retail marketing of the agricultural output of a commercial farm, and products that contribute to farm income, except that if a farm market is used for retail marketing at least 51% of the annual gross sales of the retail farm market shall be generated from sales of agricultural output of the commercial farm, or at least 51% of the sales area shall be devoted to the sale of agricultural output of the commercial farm, and except that if a retail farm market is located on land less than five acres in area, the land on which the farm market is located shall produce annually agricultural or horticultural products worth at least \$2,500.

The threshold issue is determining what parts of HVV's facility are used for wholesale and retail marketing of the farm's wine. First, there is no dispute in the record, and the Committee so finds, that the front 40' x 25' portion of Building 1 containing the wine shop, and the patio deck on which customers can sit at tables and drink wine, is devoted to wholesale and retail marketing and sales. Further, the SADC considers the assembly area to be part of the farm market sales facility because customers use that space as a venue to consume HVV's wine.

Based on the testimony and materials provided by HVV at the hearing, the SADC also finds that substantially more than 51% of the annual gross sales at HVV's retail farm market is generated from sales of the agricultural output of HVV's commercial farm---it's wine---and at least 51% of the sales area is devoted to selling that output.

A winery is an atypical farm market because the vendor-purchaser relationship goes beyond the mere sale of an off-the-shelf agricultural product. In addition to such static sale-purchase transactions, wineries actively market their agricultural output by allowing customers to sample and consume bottles of wine on-site for a set price or in anticipation of purchase. The Township agrees that the

tasting and drinking of wine at HVV is a generally-acceptable agricultural operation or practice at a winery.

HVV intentionally tries to enrich the customer's visit by offering a limited amount of customary food products for consumption to accompany and facilitate the wine drinking experience. Viewed in the special context of a farm market that is also a winery, the offering of "wine-pairing" commodities like cheese, crackers, olives and cold cuts cannot be equated to a typical tavern or restaurant. In addition to those minor food items, HVV makes personal-size pizzas at its winery as another supplement to the on-premises drinking of the farm's wine. According to the monthly sales receipts in evidence, HVV charges \$6.00 per pie, and the testimony is that the pizza is not available for "take-out".

As stated earlier, HVV must be in compliance with state law in order to be protected under the RTFA, and it has applied for health code permits as a "food-handling establishment". However, the Committee understands but does not agree with the Township's position that by making and selling pizza as HVV does, the winery is operating as a restaurant and needs municipal site plan approval.

A restaurant prepares and serves meals--food, drink and dessert--to customers in return for money. A meal is different from a "snack" in that meals are larger, more varied and more filling, and are customarily associated with breakfast, lunch and dinner. These terms and concepts were obtained by reference to various on-line dictionaries and make sense to the SADC. In contrast, the Township asserts that HVV operates a "restaurant" defined by municipal ordinance as a commercial establishment where food and drink are prepared, served and consumed. Technically, the Committee has no quarrel with that definition, but the SADC considers it too general and does not believe it is applicable to the farm market-winery context described above.

Even if the municipal ordinance on restaurants were applicable to HVV's operation, the RTFA requires balancing the local law against the commercial farm's activities. In that regard it is the SADC's judgment that HVV has presented a legitimate, farm-based reason for offering minor food items as a supplement to its agricultural output that preempts the Township ordinance.

The Committee must add that if HVV's extremely restricted food offerings expand beyond what is currently available to drinking patrons, and/or if HVV begins preparing and serving meals in the conventional sense, the winery may become a restaurant and lose its protected status as a farm market.

"Music Night", provided this type of entertainment meets the proportionality test by being subordinate and accessory to consumption of HVV's wine, should also be entitled to RTFA protection for the same reason customary, incidental food items are allowed at a farm market/winery-- they enhance the experience of purchasing the farm's agricultural output. The Committee relies on testimony indicating that Neri has his own musical group for which he plays piano and that a jazz group has performed. In the Committee's view piano playing and other types of background music are complementary and subordinate to the wine drinking, and intended to promote an appropriate atmosphere for relaxation and enjoyment. But the SADC adds a caution similar to that with the serving of incidental food items. The reason the Committee finds the musical entertainment at HVV to be permitted is that it is a sidelight to the consumption of wine; musical performances that lose their status as a modest supplement to wine drinking turn the winery into a nightclub for which there is no RTFA protection. Other more active forms of entertainment, like comedy acts, cross the line from being supplemental to the consumption of the agricultural product to becoming a primary nonagricultural activity that cannot enjoy the protections of the RTFA.

A farm market is not only a facility engaged in the wholesale and retail marketing of a farm's agricultural output, but also can sell, with RTFA protection, "products that contribute to farm income". While this phrase in N.J.S.A. 4:1C-3 is undefined, the SADC believes that it can reasonably be construed based on the remaining language in the definition of "farm market" and on the intent of the RTFA.

The word "products" must be given its plain and ordinary meaning as "items" or "commodities" rather than services, and RTFA protection for the sale of such income-contributing items or commodities must be evaluated consistently with the RTFA's primary goal of protecting

agricultural production activities. The SADC's analysis is also informed by the Legislature's restriction of RTFA protection for farm markets to the sale of only two (2) types of goods: (a) the agricultural output of the commercial farm; and (b) "products that contribute to farm income". The Committee believes that RTFA protection for farm markets can be rationalized if these two (2) commodity groupings are interrelated rather than viewed separately, so that the privilege of enjoying RTFA protection means that a farm market's "contributing" products must have a clear connection to agricultural outputs. Otherwise, the importance of protecting the sale of the commercial farm's agricultural output would be diminished by protecting products having no or little nexus to that output, and the special status accorded farm markets in the RTFA would be undermined.

Accordingly, the Committee believes "products that contribute to farm income" possess the appropriate nexus to the protection of agricultural production activities if they are complementary to or supplement the commercial farm's agricultural output. The SADC does not agree that a farm market can enjoy RTFA protection if the sale of agricultural commodities is accompanied by the sale of, for example and not by way of limitation, sporting goods, electronic equipment, stationery, and health and beauty aids.

The SADC understands and agrees that the sale of minor items promoting the particular farm and/or farm market, like T-shirts, while not fitting the description of a complementary or supplementary product, is a common practice at farm markets and should be protected, although the item must promote the particular farm market or the farm upon which it is located. This latter limitation is reasonably imposed to prevent a farm market from becoming a retail facility for items promoting anything that generates income.

Applying the above principles to HVV, the sale at the wine shop of items like coasters, bottle openers, stoppers and other wine- and farm-related gift items is protected because these products complement the consumption of wine or are minor promotional items that help market the HVV winery. The sale of cheeses and crackers is protected because they are food items that customarily supplement the consumption of wine. On the other hand, special events

like weddings; corporate retreats and community organization meetings; parties; other entertainment activities that are not subordinate and accessory to the consumption of HVV's wine; and other similar uses of the farm market or farm are nonagricultural services provided by or at the winery. They are neither the agricultural output of HVV's commercial farm nor "products that contribute to farm income" as described above. Accordingly, these types of events are not entitled to RTFA protection, and monies generated from or fees charged for these events cannot be counted toward "commercial farm" income eligibility or toward the farm market's annual gross income as set forth in N.J.S.A. 4:1C-3. "Music Night" cover charges also cannot be counted toward "commercial farm" income eligibility or toward the farm market's annual gross income under the statute, but the SADC has previously decided that the activity itself is protected so long as it is subordinate and accessory to consumption of HVV's wine.

The HVV farm market must still comply with municipal building and parking standards pursuant to N.J.S.A. 4:1C-9c., and the record reflects that HVV has applied for and is awaiting the issuance of appropriate building permits. With respect to parking standards, another phrase undefined in the RTFA, there appears to be ample space to accommodate customers and provide for safe traffic circulation on and around the farm market facility. In that regard, the Committee takes administrative notice of Hopewell Township's minor site plan ordinance; it seems to the SADC that the Legislature did not intend farm markets to be subject to the intense municipal scrutiny accorded typical commercial projects particularly where, as here, HVV's facility is located on an extremely large tract of land set back well off Yard Road. Instead, the Committee believes N.J.S.A. 4:1C-9c. intends to strike a balance between reasonable municipal safety concerns as to parking and the benefits a farm market provides to the general public.

The generation of traffic on Yard Road and impacts to nearby groundwater as a result of HVV's activities were the subject of dispute at the hearing, but the SADC finds the evidence introduced by both sides on these issues to be inconclusive. However, RTFA protection can be extended to the HVV farm market only if the facility "does not pose a direct threat to public health and safety". N.J.S.A. 4:1C-9. The Committee believes that traffic safety on Yard Road is a legitimate issue requiring further study and

reasonable resolution by the parties in conjunction with the site plan approval for farm market parking. Again, the SADC suggests N.J.S.A. 4:1C-9c. informs the Township that a balanced approach should be taken in addressing legitimate traffic concerns posed by the HVV farm market. The SADC makes no recommendations with respect to alleged groundwater problems and, to the extent that issue implicates compliance with state laws, HVV is subject to those laws in order to enjoy RTFA protection.

Agriculture-related education and farm-based recreation

The other provision in N.J.S.A. 4:1C-9 that may be applicable to HVV is subsection h., "agriculture-related educational and farm based recreational activities related to marketing the agricultural output of the commercial farm". The SADC's review of the record indicates there is no dispute that HVV's winery tours and wine classes are permitted, agriculture-related educational activities that market the farm's wine. The facility tours inform the public about the history of the HVV farm and the step-by-step process by which the facility produces wine; and the classes provide a more in-depth study of the winemaking art. These educational efforts are obviously directed at getting the participants to sample and purchase HVV's wine. Vineyard tours achieve both an educational and recreational purpose related to the marketing of the farm's agricultural output.

The remaining issue is whether, and to what extent, HVV's operation of a special events facility is otherwise protected under the RTFA as farm-based recreational or educational activities.

Initially the SADC notes that not every marketing tool employed to get customers to a winery is recognized in the RTFA. Although HVV made a detailed and effective presentation on the importance of New Jersey's wine industry and of the need to market this local agricultural product, HVV missed the point that the activities it undertakes to market the wine must fit, clearly or by reasonable implication, within one or more of those permitted in N.J.S.A. 4:1C-9 in order to be protected under the RTFA. The Committee has already determined that the drinking and sampling of wine, and the serving of minor food items and the presentation of accessory, complementary music to enhance the experience of purchasing and consuming

the farm's agricultural output, are all essential parts of a farm market-winery entitled to RTFA protection.

The Legislature did not define "farm-based recreational activities", nor did the 1983 and 1999 versions of the RTFA anticipate the growing importance of "agritourism" as a business model. The SADC also suggests that "alcohol-based agricultural entertainment"--the essence of winery operations such as HVV's--is even further beyond legislative contemplation. Despite these handicaps, administrative agencies like the SADC and county agriculture development boards must still attempt to discharge their duties consistent with the plain meaning or reasonable implication of state laws. If the Legislature has not provided an administrative agency with a sufficient delegation of statutory authority on a given public policy issue, then recourse must be had to the legislative branch to amend the law. In implementing the RTFA, the SADC "cannot alter the terms of [that] legislative enactment or frustrate the policy embodied in the statute." New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 82 (1980); Knight v. City of Hoboken, 332 N.J. Super. 547, 551 (App.Div. 2000). While the SADC is currently drafting agritourism regulations, the proposed rules must still be reviewed and approved by the Attorney General's Office for consistency with the RTFA and be adopted pursuant to the rulemaking process.

Therefore, although it appears to be commonly accepted that hosting weddings, birthday parties and other "celebratory life events", corporate retreats, business luncheons, charity and fundraising events, and similar special events are an effective marketing tool at wineries, the fact remains that these are *services*, not the agricultural output or the methods by which such output is produced that the Legislature sought to protect under the current version of the RTFA. Included within this "service" category is catering or catered events in which food is brought to the winery by a third party to serve larger-group assemblies or events like the vintner's dinner. While the HVV winery is an aesthetically pleasing venue, the special events described above and hosted there are not subordinate and accessory to consumption of the commercial farm's agricultural output and fail the proportionality test marking true farm-based recreational activities. Put simply, attendees are present for the

event itself, not for the wine. Finally, the Committee's review of the record indicates that HVV failed to present meaningful evidence of an educational component accompanying these special events.

Summary Recommendations

Based on the evidence submitted at the hearing and the above discussion, and provided HVV complies with relevant state laws and regulations and does not pose a direct threat to public health and safety, the SADC recommends to the MCADB that the following components of HVV's winery operation constitute generally acceptable agricultural practices:

- Producing, processing and packaging HVV's grapes and wine;
- Wine drinking, sampling or tasting;
- Winery tours and wine education classes;
- Garden State Wine Growers Association "Wine Trail" days;
- The operation of a farm market, provided buildings and parking areas are constructed in conformance with municipal standards;
- The sale of HVV's wine and wine-related products;
- The offering of, for sale or *gratis*, cheese, crackers, olives, cold cuts and personal pizza as a supplement to the on-site consumption of HVV's wine;
- Music, provided it is subordinate and accessory to the on-site consumption of HVV's wine.

Based on the evidence submitted at the hearing and the above discussion, the SADC recommends to the MCADB that the following components of HVV's winery operation do *not* constitute generally acceptable agricultural practices:

- The hosting of weddings and other "celebratory life events" such as, but not limited to, birthday parties, bridal and baby showers, class reunions and alumni group meetings;
- The hosting of corporate retreats, business luncheons, community organization meetings, and the like;
- Vintner's dinners;
- Fund raisers and charity events;
- Catering and catered events;
- Any other activities or events involving

entertainment that is not subordinate to the sale and/or consumption of HVV's wine.

Activities that are not considered generally acceptable agricultural operations or practices as determined by the SADC may still be undertaken if HVV so chooses, but they do not currently enjoy the protections of the RTFA. The Committee recognizes it has the authority, pursuant to N.J.S.A. 4:1C-9j. and the rule making process, to add any such operations or practices to the list of protected *agricultural* activities set forth in N.J.S.A. 4:1C-9.

For the SADC:

/s/ Susan E. Payne
Susan E. Payne
Executive Director

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