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BY EMAIL AND PRIORITY MAIL EXPRESS
New Jersey State Agriculture Development Committee
Susan E. Payne, Executive Director
State Agriculture Development Committee
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CC: Brian D. Smith, Esq., Chief of Legal Affairs
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RE: SUBMISSION OF COMMENTS ON PROPOSED NEW RULES: PROPOSED N.J.A.C. 2:76-25 AND 25A, SOIL DISTURBANCE ON PRESERVED FARMLAND AND SUPPLEMENTAL SOIL DISTURBANCE STANDARDS.

Dear Ms. Payne:

This letter provides comments on the State Agriculture Development Committee (SADC) proposed new rules N.J.A.C. 2:76-25 and 25A which propose to regulate Soil Disturbance on Preserved Farmland and Supplemental Soil Disturbance Standards. 55 N.J.R. 8(1), August 7, 2023. I am a New Jersey real estate and land use attorney with a focus in agricultural properties including preserved farmland. I am familiar with the implications of farmland preservation in real estate transactions, due diligence and compliance, annual monitoring, appraisals, farm ownership and operation, valuations, special programs available to preserved farm owners, interpretation of agricultural use, rights under schedule B exceptions, division of preserved farmland, and so on. Please review and address the below comments.

Introduction

The proposed rules must be withdrawn. Below are twenty pages of concerns with the substantive and procedural implications of the proposed soil disturbance regulations. In sum, the proposed rules retroactively curtail agricultural development rights and in some cases residential development rights, take property rights without just compensation, discriminate against all form of agricultural production except for the most traditional methods of plant production, require navigation of overly complicated and burdensome procedures and standards that will be costly and time consuming to implement, reverse the SADC's decades long position on the farm conservation plan as the compliance mechanism for soil conservation, limit the use of tents necessary for production related activities in an arbitrary manner that disproportionately harms equine and on-farm retail farmers, contain inherent policy inconsistencies and discriminatory provisions, put nearly fifty farms in immediate noncompliance status causing them to lose eligibility for Right to Farm protections, and create complicated waiver procedures that require a farmer directly involving the SADC in the planned conservation of soil, water, and forestry resources on the entire preserved farm after notice to abutters and municipalities. This is not an exhaustive list. And this harm to

preserved farm owners is improperly founded as the proposed rules ignore the plain and settled rules of easement construction. The New Jersey Supreme Court has made it clear that an easement holder may not expand the scope of its right in a manner than unreasonably interferes with the rights of the landowner.

Before I was a land use lawyer, I was an ecologist. Make no mistake, I appreciate conservation values and am very familiar with the depth of existing regulations that protect natural resources. Preserved farm owners remain subject to NJDEP regulations including natural resource protection laws. The soil disturbance standards are not necessary to achieve natural resource protection goals, and objecting to the standards is not an objection to resource protection. Instead, the within objections are about protecting established property rights and limiting agency overreach through retroactive restrictions. *When it comes to balancing agricultural development against soil and water conservation, farm-specific soil and water conservation planning and projects are the intended compliance mechanism. This is the official position taken by the SADC since 1994*, which position was not before the New Jersey Supreme Court and now seems swept under the rug. Now, reading more into the Quaker Valley Farms decision than is legally defensible, the SADC overreaches in a manner that arbitrarily caps agricultural development even if it is done in accordance with Natural Resource Conservation Service (NRCS) guided soil and water conservation planning. This is inherently unfair and directly in conflict with the enabling statute, SADC's own regulations, SADC's past interpretations, and the Quaker Valley Farms decision. While the majority of farms are far under the disturbance limits, this does not justify wrong action, and agency overreach left unchecked will not stop with these regulations, nor with those farms that are currently over the 12 per cent limit.

Lack of Authority for Imposing a Soil Disturbance Limit

The SADC lacks jurisdiction and legislative authority to impose a soil disturbance limit, which imposition is not a reasonable interpretation of its own regulations nor the Agriculture Retention and Development Act, N.J.S.A. 4:1C-11 et seq. ("ARDA"). The SADC may not promulgate rules which are arbitrary, capricious, unreasonable, or beyond the agency's delegated powers. In re Amend. of N.J.A.C. 8:31b-3.31 & N.J.A.C. 8:31b-3.51, 119 N.J. 531, 543-44 (1990). The SADC also may not extend a statute to give it a greater effect than its language permits. GE Solid State, Inc. v. Dir., Div. of Tax'n, 132 N.J. 298, 306 (1993) (citing, Kingsley v. Hawthorne Fabrics, Inc., 41 N.J. 521, 528 (1964)). See, Reilly v. AAA Mid-Atl. Ins. Co. of N.J., 194 N.J. 474, 486 (2008). "[A] rule will be set aside if it is "inconsistent with the statute it purports to interpret." That is, the agency "'may not under the guise of interpretation ... give the statute any greater effect than its language allows.' " In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004).

In the State of New Jersey, State Agriculture Development Committee v. Quaker Valley Farms, LLC, 235 N.J. 37 (2018), the New Jersey Supreme Court guided the SADC to provide guidance such that a farmer may understand the balancing of two competing provisions of ARDA and farmland preservation deeds of easement.

On the one hand, N.J.A.C. 2:76-6.15(a)(2), requires that preserved farmland be retained for agricultural use and production, which:

> "shall mean the use of the premises for common farmsite activities including, but not limited to: production, harvesting, storage, grading, packaging, processing and the wholesale and retail marketing of crops, plants, animals and other related commodities and the use and application of techniques and methods of soil preparation and management, fertilization, weed, disease and pest control, disposal of

> farm waste, irrigation, drainage and water management, and grazing (emphasis added)."

As such, "agricultural use" and "agricultural production" expressly refer to a wide variety of agriculture, without any priority given to "crops" and "plants" over "animals and other related commodities." To favor one form of agricultural production over another is contrary to the plain meaning of N.J.A.C. 2:76-6.15(a)(2) and ARDA. Agricultural viability "means that each parcel is capable of sustaining a variety of agricultural operations that yield a reasonable economic return under normal conditions, solely from each parcel's agricultural output (emphasis added)." N.J.A.C. 2:76-6.15. The deed of easement creates a legal and economic expectation that all forms of agricultural use and agricultural production are permitted with only non-agricultural development restricted. This right to engage in agricultural use and development cannot become illusory. Russell v. Princeton Labs., 50 N.J. 30, 38 (1967) ("A contract should not be read to vest a party … with the power virtually to make his promise illusory."). The deed of easement "imposes no obligation or restriction on the Grantor's use of the Premises except as specifically set forth in [the] Deed of Easement." N.J.A.C. 2:76-6.15(a)(17).

On the other hand, N.J.A.C. 2:76-6.15(a)(7), provides:

> "No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation, erosion control, or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises.
>
> i. Grantor shall obtain within one year of the date of this Deed of Easement, a farm conservation plan approved by the local soil conservation district.
>
> ii. Grantor's long-term objectives shall conform with the provisions of the farm conservation plan (emphasis added)."

In its notice of rulemaking proposal, the SADC referenced only the first part of N.J.A.C. 2:76-6.15(a)(7), without subparts (i) and (ii) that pertain to farm conservation planning. However, a restrictive covenant should not be read in a way that defeats the plain and obvious meaning of the restrictions. Bubis v. Kassin, 184 N.J. 612, at 624 (2005). In interpreting a contract, a court must avoid interpreting one provision in isolation from others pertaining to the same subject. Newark Publishers Ass'n v. Newark Typogrpahical Union, 22 N.J. 419, 425-26 (1956).

The deed of easement's plain language, when read in its entirety, points to farm conservation planning as its soil and water conservation compliance mechanism. "It is particularly important to keep in mind that the easement must be read, and interpreted, in its entirety, so that the interpretation of each individual provision is consistent with the overall intent of the document and the interpretation of all other provisions." (State Agriculture Development Committee Deed of Easement Assessment Subcommittee, Interpreting the Provisions of the Deed of Easement, Report No. 1, General Guidance, revised May 26, 2011)(identifying N.J.A.C. 2:76-6.15(a)(7)(i) and (ii) (farm conservation planning) as key provisions of the deed of easement provisions).

Farm conservation planning should be the appropriate mechanism of confirming soil and water conservation planning for all forms of agricultural development. Farm conservation planning requirements were proposed at 26 N.J.R. 1419(a)(April 4, 1994), in which the SADC explained to the public the following:

> **The proposed amendments at N.J.A.C. 2:76-6.15(a) which require the landowner to secure a farm conservation plan within one year of selling a development easement reinforces the landowner's commitment that no activity shall be permitted on the farm which would be detrimental to drainage, flood control, water conservation, erosion control or soil conservation. A farm conservation plan is developed as a cooperative effort between the landowner and the local soil conservation district.**

26 N.J.R., at 1420.

The SADC responded to comments from the Hunterdon County Agricultural Development Board as follows:

> **COMMENT: The Hunterdon CADB suggested that the proposed amendment at N.J.A.C. 2:76-6.15(a)7ii be revised to read, "Grantor's long term management of the farm shall conform with the objectives of the farm conservation plan." The Hunterdon CADB further stated that a landowner's management of the farm can be measured in terms of compliance with conservation practices, but unwritten long term objectives might be more difficult to evaluate.**
>
> **RESPONSE: The SADC disagrees with the recommendation of the Hunterdon CADB that the "Grantor's long term management of the farm shall conform with the objectives of the farm conservation plan." The SADC's amendment requires that the grantor's long term objectives shall conform with the provisions of the farm conservation plan. Most importantly, the Grantor's long term objectives as they pertain to a particular agricultural operation must be reflected in revisions to the farm conservation plan. The plan contains the soil and water conservation practices which are needed for the specific type of agricultural operation.**
>
> **The term "management" as suggested by the Hunterdon CADB may imply other business related decisions or a broader interpretation than the specific purposes of the farm conservation plan. Ultimately, the measure of compliance is the Grantor's conformance with the farm conservation plan.**

26 N.J.R., at 3161. To quote the SADC, farm conservation plans are intended to contain "the soil and water conservation practices which are needed for the specific type of agricultural operation," and "the measurement of compliance is the Grantor's conformance with the farm conservation plan." 26 N.J.R., at 3161.

The SADC responded to comments from the Burlington County Soil Conservation District as follows:

> COMMENT: The Burlington County Soil Conservation District (SCD) expressed its concern that the proposed amendment at N.J.A.C. 2:76-6.15(a) mandates that a landowner who has sold a development easement obtain a farm conservation plan from the local soil conservation district and be approved by that district. The Burlington SCD further noted that while the local districts have the technical and staff resources to carry out this mandated work, they are not provided with a funding source to cover the expenses which are incurred in providing this service. Consequently, the development of the farm plans may have to be given a low priority in the district's workload assessments. This situation could be easily remedied by the SADC providing a dedicated funding source to the local soil conservation district which would cover the expenses incurred in the development of a farm conservation plan.
>
> RESPONSE: The proposed amendment at N.J.A.C. 2:76-6.15(a)7 allows the landowner one year from the date of the sale of the development easement to secure a farm conservation plan from the local soil conservation district. In reality, the local soil conservation district could be put on notice that a farm conservation plan would be needed on any application which has received final approval by the CADB. Generally, this would provide an additional six months notice to begin developing a farm conservation plan.
>
> Furthermore, there would be a limited number of farms requiring conservation plans from each county under each annual funding round. In many instances, the farms already have a farm conservation plan which may only need to be updated or modified to meet the landowner's long term objectives. Lands which are permanently preserved should be viewed as a priority consideration to ensure that the soil and water resources on the farm are protected.

26 N.J.R., at 3161. The following is further comment and response with the Burlington County Soil Conservation District:

> Since it is within the scope of the SADC to mandate and administer the rules pursuant to the Farmland Preservation Bond Act, the SADC should be required to secure a funding source for local soil and water conservation districts which carry out certain responsibilities for the SADC.
>
> RESPONSE: The Attorney General's Office has issued an opinion stating that the State bond funds do not permit the SADC to provide administrative costs to local soil conservation districts. It is the SADC's position that it will provide up to a 50 percent grant to landowners for legally permissible costs associated with approved soil and water conservation projects. If the SCDS have the authority to charge the landowner a fee for costs associated with soil conservation projects and the districts choose to charge fees, the SADC will reimburse the landowner up to 50 percent of the fees. Since the bond acts and the Agriculture Retention and Development Act permit such reimbursement, there is no need to enact regulations which provide for such payments.

The established statutory and regulatory framework call for agricultural development which is implemented in accordance with soil and water conservation practices that are developed through farm conservation planning under the jurisdiction of the soil conservation district. The SADC now proposes to set aside the plain meaning of N.J.A.C. 2:76-6.15(a)(7)(i) and (ii) and reverse its position on soil conservation compliance through farm conservation planning. Nothing in the Quaker Valley Farms decision supports such overreach.

Farm conservation planning is also an alternate compliance tool under the Soil Erosion and Sediment Control Act, N.J.S.A. 4:24-39 and its regulations at N.J.A.C. 2:90-1.1. The Soil Conservation District is also responsible for reviewing major agricultural development under the Stormwater Management Rules, N.J.A.C. 7:8-5.2(k). Farm conservation plans are also the planning tool for agricultural development in the Highlands Preservation Area when the new impervious cover increases cumulatively by at least three percent (3 %) percent and not more than nine percent (percent 9 %), and recourse management systems plans are the planning tool for new impervious cover that cumulatively increases by over nine percent (9 %). N.J.S.A. 13:20-31; N.J.A.C. 2:92-1.1 et seq. Both farm conservation plans and resource management system plans are developed with the assistance of the Natural Resource Conservation Service local field office. These plans must conform with the June 1, 2005 NRCS New Jersey Field Office Technical Guide (NJ-FOTG), which contains many sections, and may be found at: http://www.nrcs.usda.gov/technical/efotg/. The primary difference between the Farm Conservation Plan and the Resource Management System Plan is that the Farm Conservation Plan need only conform to Section III and IV of the NJFOTG, while the Resource Management System Plan must conform to all sections I through V of the NJFOTG. These statutes must be read in harmony with the ARDA, which defines "Soil and water conservation project" as "any project designed for the control and prevention of soil erosion and sediment damages, the control of pollution on agricultural lands, the impoundment, storage and management of water for agricultural purposes, or the improved management of land and soils to achieve maximum agricultural productivity." N.J.S.A. 4:1C-13(l). ARDA requires appointment of a member of the local soil conservation district on all County Agriculture Development Boards. N.J.S.A. 4:1C-14(a). ARDA requires that the local soil conservation district approve soil and water conservation projects which receive grants. N.J.S.A. 4:1C-24.

The farmland preservation program creates investment backed expectations with respect to a wide variety of agricultural uses and developments which may occur on preserved farmland subject to farm conservation planning. Neither ARDA nor the standard easement provisions support an arbitrary limit on the extent of otherwise permissible agricultural use and development of preserved farmland. The terms, "soil disturbance," "disturb," or "disturbance" are not used in ARDA nor the preservation deed of easement. Yet, "soil conservation," as per N.J.A.C. 2:76-6.15(a)(7), which underpins the New Jersey Supreme Court's directive to the SADC to guide farmers, remains undefined in the rule proposal. And, the N.J.A.C. 2:76-6.15(a)(7) subparts which address farm conservation planning were not addressed by the SADC in its Rule Proposal nor were they an issue before the New Jersey Supreme Court in the Quaker Valley Farms decision.

Further, it is plainly clear that disturbance may occur on preserved farmland provided a balance is struck. The SADC prevailed in the Quaker Valley Farm litigation in part by providing testimony of how such disturbance may occur. Specifically, the New Jersey Supreme Court quoted the SADC's resource conservation witness testimony which compared the defendant's practices to permissible, large-scale grading activities where soil is carefully conserved in stockpiled layers so that it could be restored. (Quaker Valley Farms, at 46)(farm conservation planning was not specifically discussed in the New Jersey Supreme Court opinion, but the testimony refers to is a soil conservation practice). This soil stockpiling conservation practice was compared to the SADC's allegations of large scale and "total" destruction of prime farmland that precluded the use of the farmland for a variety of agricultural uses. Of all the testimony which must have informed the record, the New Jersey Supreme Court appears to have found the SADC's technical expert testimony of how large-scale disturbance may properly occur to be material to what was, and what was not, a reasonable soil conservation practice when disturbing soil. See also, proposed N.J.A.C. 2:76-25A.5, Topsoil Stockpiling.

ARDA's soil and water conservation mandate does not justify an arbitrary limit on agricultural use and development nor discriminating against a wide variety of agricultural production and farm conservation planning. A wide variety of agricultural development requires a wide variety of improvements which are

essential to the wide variety of agricultural production that is protected farming in New Jersey. Exemptions that only support a limited variety of agricultural production are arbitrary and capricious, exceed the delegated authorities, and interfere with ARDA's legislative findings and declarations, which require that the SADC encourage the maintenance of agricultural production and a positive agricultural business climate and make available to preserved farm owners financial, administrative and regulatory benefits in exchange for participation in the farmland preservation program.

The impacts on industries such as equine, poultry, greenhouses, and similar infrastructure-intensive agricultural production will be greatest. Yet, the express language of ARDA and the preservation deeds of easement acknowledge the right to such agricultural development, which is further protected farming under the Right to Farm Act, N.J.S.A. 4:1C-1 et seq. Rather than enabling a wide variety of farmers to make such improvements with guidelines on farm conservation planning with grants for soil conservation projects, the SADC holds the keys to the kingdom and puts farmers under a *de facto* conservatorship whereby it limits and manages the farmer's productivity and improvements through a time consuming, costly, complicated, and uncertain waiver process at best and total prohibition at worst. What's more, waivers have onerous requirements, are only granted after notice to the municipality and abutters, require information on zoning without acknowledging Right to Farm, and require that the farmer provide a certified plan stewarding all soil, water, and forestry resources on the entire preserved farm premises.

Proposed N.J.A.C. 2:76-25.4(b) acknowledges planning criteria and conservation practices and standards developed by the NRCS, Field Office Technical Guidance, and farm conservation plan approved by the local soil conservation district and NRCS prior to installation. However, the proposed rules only exempt conservation practices resulting from normal tillage and approved by the NRCS. Implementation of conservation practices via farm conservation planning for other agricultural uses and improvements are disregarded and will not be treated as exempt, which is arbitrary and capricious and contrary to the SADC's purposes and deed of easement language as previously interpreted by the SADC. Instead, any agricultural development made in accordance with soil and water conservation methods pursuant to a farm conservation plan should be an exempt activity.

The SADC is presumed to be aware of the NRCS, FSA staffing issues which disrupt a farmer's ability to obtain timely approvals of farm conservation plans and the technical service provider program which in part addresses this issue. However, the SADC has not authorized the use of private technical service providers when preparing farm conservation plans for tillage deemed exempt from the calculation of a farm's disturbance. By comparison, waiver applications must, in part, be completed and certified by a technical service provider, professional engineer, NRCS-certified conservation planner, or other SADC approved conservation professional. See, Proposed N.J.A.C. 2:76-25A.8(a)(4). The SADC should expand exemptions to include any agricultural development made in conformance with a farm conservation plan addressing soil and water conservation, the SADC should similarly accept such farm conservation plans when completed and certified by a technical service provider, professional engineer, NRCS-certified conservation planner, or other SADC approved conservation professional.

In sum, the proposed rules represent a leap from the concept of permissible agricultural development balanced against reasonable soil and water conservation practices to the much more stringent concept of arbitrary limits on soil disturbance that dispose of the farm conservation plan as a compliance mechanism.

Breach of Contract and Taking of Otherwise Permitted Development Property Rights

The proposed rules violate the deal made with farm owners at the time of preservation, breach the preservation deed of easement, and take property rights without just compensation. The deed of easement "imposes no obligation or restriction on the Grantor's use of the Premises except as specifically set forth in [the] Deed of Easement." N.J.A.C. 2:76-6.15(a)(17). I have also reviewed past notices of auction of preserved farms that were purchased in fee simple by the SADC and then auctioned. At least the notices that I reviewed include in disclosures to potential purchasers of the preserved farm the following seller's representation: "The construction of agricultural buildings is not limited by the deed restrictions."

Quite plainly, a deal is a deal, and purchasers relied upon the SADC's representations and deed of easement terms which permit agricultural development. The SADC may not retroactively change these deals. The proposed rules reduce the agricultural and residential development rights that have been expressly granted to farmers without any valid basis in law or contract. The myriad of problematic circumstances that will result is far reaching.

The SADC is attempting to retroactively expand the reach of the deed of easement to limiting not only non-agricultural development rights, but also to limiting otherwise settled agricultural and residential development rights in a manner that interferes with investment backed expectations. The SADC overreaches any reasonable interpretation of section 7 to create a new restriction not otherwise set forth in the deed of easement, which violates numerous aspects of the deed of easement, including N.J.A.C. 2:76-6.15(a)(17) (The deed of easement "imposes no obligation or restriction on the Grantor's use of the Premises except as specifically set forth in [the] Deed of Easement.").

A restrictive covenant is regarded in New Jersey as a contract, and enforcement of the easement constitutes a contract right. Cooper River Plaza East LLC v. The Braid Group, 359 N.J.Super. 519, at 527 (App. Div. 2003).

> The restriction thus must be analyzed in accordance with the principles of contract interpretation, which include a determination of the intention of the parties as revealed by the language used by them. *** [I]n the context of a deed restriction meant to bind subsequent purchasers that are strangers to the initial transaction, the intent of the restriction must manifest itself in the language of the document itself. * * *An intention disguised by an ambiguity cannot bind a subsequent purchaser who, as the result of an absence of clarity in the instrument of conveyance, lacks notice of restrictions that the initial parties have attempted to place on the property being conveyed. A holding otherwise would be inconsistent with principles of contract law, which require sufficient definiteness of terms so that the performance required of each party can be ascertained with reasonable certainty, as well as knowledge of and acquiescence in the stated terms. It would also undermine the central public policy underlying New Jersey's Recording Act: that "a buyer ... of real property should be able to discover and evaluate all of the ... restrictions on the property" from a review of the public record.

Cooper, at 527 – 528 (internal citations omitted). A restrictive covenant should not be read in a way that defeats the plain and obvious meaning of the restrictions. Bubis v. Kassin, 184 N.J. 612, at 624 (2005).

The preservation deed of easement is an express easement created by conveyance. Leach v. Anderl, 218 N.J. Super. 18 (App. Div. 1987). The preservation deed of easement clearly states that farm conservation planning is the tool for addressing soil and water conservation, and the SADC expressly stated as much in its 1994 rulemaking comments. The SADC might now attempt to claim an implied right to expand the scope of its easement to limit development in favor of soil conservation. However, such implication would fail to withstand legal scrutiny. Any implications must be established by clear and convincing evidence. Id. Here, neither the evidence nor the Quaker Valley Farms decision support the rights which SADC seeks to exercise through its arbitrary soil disturbance limit.

When determining the scope of the preservation deed of easement and the permissible reach of the SADC thereunder, the Court will look to the intent of the parties at the time of the deal making, which is the contract and its closing as memorialized in execution of the preservation deed of easement. Tide-Water Pipe Co., v. Blair Holding Co., 42 N.J. 591, 603 (1964); Leach, at 28; *citing*, Sergi v. Carew,18 N.J.Super. 307, 311 (Ch.Div. 1952) . In ascertaining the intent of the farmer and the SADC, the parties will consider the situation which existed at the time the deed of easement was granted. Sergi, at 311. The SADC must exercise its rights in such reasonable manner as to avoid unnecessary increases in the burden upon the farm owner beyond that expressly dictated by the deed of easement. Tide-Water Pipe Co., at 604 - 605; citing, Lidgerwood Estates, Inc. v. Public Service Electric and Gas Co., 113 N.J.Eq. 403 (Ch. 1933). Where the language in the grant is plain, as derived from the language read as an entirety and in light of the surrounding circumstances, the language of the deed of easement will control, without resort to artificial rules of construction. Tide-Water Pipe Co., at 605; citing, Hammet v. Rosensohn, 26 N.J. 4115 (1958). The issue of farm conservation planning, the compliance mechanism for soil conservation on preserved farms, was never before the New Jersey Supreme Court in Quaker Valley Farms, yet it is plainly derived from the language of the deed of easement read as a whole. The SADC now chooses to rely on selective portions of the deed of easement language to claim right to a new, much more restrictive and burdensome compliance regulations, ignoring established New Jersey precedent which clearly restricts the SADC from increasing its servitude to the injury of the preserved farm owner. Id., at 609.

Most deeds of easement arose out of a contract to sell non-agricultural development rights for which consideration paid was limited to an appraisal of non-agricultural development rights based upon a valuation that permitted agricultural and certain residential development. Auction of SADC owned preserved farms included a representation that the deeds of easement did not restrict the construction of agricultural buildings.

The property rights which remained at the time of preserving each farm included agricultural development rights, any rights to construct or relocate a residence on preserved lands, and any rights to continue any Schedule B nonagricultural uses on preserved lands. The SADC cannot retroactively change the terms of the deed of easement to curtail agricultural development rights which remained intact in the preservation deed of easement, with no consideration paid by SADC for same.

Designating past and future residential development and areas used for pre-existing nonagricultural activities as "disturbed" further interferes with these established, investment backed expectations and is a taking of these development rights without just compensation. The failure to exempt housing relocation and residual dwelling site opportunities alone moves the needle on property valuations and the appraisals which supported not only the SADC's acquisition price, but also the appraisals which support existing and future mortgage loans. A farmers real estate asset value will be decreased, while mortgage loans remain in full. In appraising development easements, the New Jersey Farmland Preservation Program Appraiser Handbook sets forth specific Appraisal Considerations. These include:

> Pre-existing nonagricultural uses: Any pre-existing nonagricultural uses identified in the SADC's "Application for An Easement Purchase Cost Share Grant" must be noted in the appraisal report. The appraiser must determine if there is an effect on the development easement value if the existing nonagricultural use is permitted to continue in the "After" situation (emphasis added).
>
> Residential Opportunities: This term encompasses exceptions which permit a residence, existing residential units and residual dwelling site opportunities (RDSOs). Generally, the ability to reside on the property provides an increment of value attributed to the land, which is independent of the actual value of the physical structure (improvement). This ability may exist through an RDSO, existing residential unit, or an exception area, which is not encumbered by the general deed restrictions as contained in the Deed of Easement. The Appraiser should provide an explanation of any adjustments to the subject or comparable properties when reviewing Residential Opportunities (emphasis added).

Even if not expressly set forth in the appraisals used at preservation, the right to such preexisting nonagricultural uses and residential opportunities were a material term in the preservation deal and an expressly permitted right. Therefore, residential and schedule B non-agricultural improvements and activities which occur on the premises should be included as exemptions when calculating soil disturbance.

Placing retroactive limitations on otherwise permissible development rights is unauthorized in the preservation deed of easement. Without any basis in contract or legal authority, the proposed rules overreach the SADC's authorities and amounts to a taking without just compensation.

Proposed N.J.A.C. 2:76-25.1, Applicability

For the reasons stated above, the retroactive application of the rules is a violation of a preserved farm owner's contract, property, and constitutional rights, breaches the deed of easement terms, and takes agricultural and residential development rights without just compensation. Similarly, the application of the rule to properties under contract to sell non-agricultural development rights is a breach of contract and further changes material terms of the appraisals used to value the easement.

Proposed N.J.A.C. 2:76-A.2, Purpose

The authority for the rulemaking lies in the express language of ARDA as interpreted by Quaker Valley Farms, which decision called for a balancing of agricultural development against conservation of soil so that the land may be retained for a variety of agricultural uses. "Disturbance" is not defined anywhere in ARDA or the preservation deeds of easement, and "soil conservation," the very statutory term giving rise to the proposed rules, is not defined anywhere in the proposed rules. Also overlooked is the requirement that the land be available for a "variety of agricultural uses." The SADC's rule proposal purpose statement, which sets forth a right to place an arbitrary limit on "disturbance," memorializes the SADC's overreach.

Proposed N.J.A.C. 2:76-25.2 states:

> Exceeding the soil disturbance limitation established in this subchapter shall constitute a violation of the deed of easement, which prohibits activities

detrimental to soil conservation and detrimental to the continued agricultural use of the premises in accordance with N.J.A.C. 2:76-6.15(a)(7).

Preserved farms which exceed disturbance as of the effective date should be deemed prior nonconforming farms which are not in violation of the deed of easement as a result of the pre-existing disturbance. Without this revision, upon its effective date, the proposed regulations will immediately put property owners with greater than 4 acres/12% disturbance in violation of their deeds of easement. As a result, these farmers will have clouds on title and will not be afforded Right to Farm Protections which are unavailable to preserved farms with deed of easement violations.

Additionally, the additional 1 acre / 2% request is not available to farms with deed of easement violations, and, therefore, farms which exceed the 4 acre / 12 % disturbance limit are without a remedy except to remove disturbance and remediate soils, a highly inappropriate outcome. If the intent is instead to allow farmers that exceed the 4 acre/12 % limit to request the additional 1 acre / 2%, the proposed rules must include language establishing that preserved farms which exceed disturbance as of the effective date are deemed prior nonconforming farms. This will also ensure that Right to Farm protections remain available to such farms.

Proposed N.J.A.C. 2:76-25.3, Definitions

"Agricultural Productivity"

"Agricultural productivity" should be re-termed "soil agricultural productivity" due to its limited applicability to "the capacity of a soil to produce a specific plant…." This is necessary for consistency with N.J.S.A. 4:1C-13(l), the definition of "soil and water conservation project," in which "agricultural productivity" is specifically pertaining to the productivity of soils. This is necessary to avoid industry and interpretive confusion with the concept of "agricultural production," which is not limited to agricultural products grown in soil, but also includes many other forms of agricultural production, including the breeding and raising of animals. As per the ARDA, "increased agricultural production" is the first priority use of preserved farmland. N.J.S.A. 4:1C-13(h). To date, I am unaware of any precedent which prioritizes agricultural production of plants over other forms of agricultural production, such as equine, bees, honey, and similar. Therefore, distinguishing "soil agricultural productivity" from "agricultural productivity" appears imperative and necessary to avoid the slippery slope of SADC passing regulations which might be used to justify bias towards crop production over other forms of agricultural production.

"Normal tillage" and "Human-altered and human-transported soils"

The definition of "Normal tillage" includes only tillage where the practice does not meet the definition of human-altered or human-transported soils, which includes: 1) soils that have profound and purposeful alteration; 2) soils that occur on landforms with purposeful construction or excavation and the alteration is of sufficient magnitude to result in the introduction of a new parent material (human-transported material); or 3) a profound change in the previously existing parent materials (human-altered material). Please clarify if the third item as listed above is meant to be a separate criterion or a continuation of the second criterion. Please explain what this means and provide a variety of examples and scenarios so that the meaning, purpose, and intent of non-exempt tillage due to human activities may be ascertained with sufficient clarity to guide enforcement. Objections are also raised regarding the complexity and lack of clear understanding of acceptable tillage.

"Innovation Waiver"

The definition of "innovation waiver" only applies to new or innovative agricultural practices which are approved by the SADC "in advance." Please clarify the meaning of "in advance." May innovation waivers be applied to existing infrastructure or agricultural uses? There exists farmers who have invested in infrastructure with substantial technical guidance including soil conservation considerations, and in some cases these improvements were made under the direct supervision of the SADC. In one example, the SADC has reviewed pervious equine arenas which are laid over existing soil and found compliance with the preservation deed of easement. However, under the proposed rules, such areas are non-exempt disturbance and move a farmer towards or into noncompliance. Likely other examples of consciously installed infrastructure exists over the many decades of implementing the farmland preservation program. Farmers should be afforded exemptions for such carefully developed areas.

"Livestock training area"

The proposed rules define "livestock training area," but it appears this term is not elsewhere used in the proposed rules. Adequate provisions for equine and similar livestock-based agricultural development do not exist in the proposed rules. As a result, agricultural production of livestock, including equine, will be disproportionately and arbitrarily limited by the soil disturbance limit.

The proposed rules include an inherent bias towards plant production and discriminate against equine and similar production. They therefore fail to promote a variety of agricultural practices and instead discriminate against many forms of agricultural production. The bias is also found in inherent policy inconsistencies without a rational basis, such as treating tents on fields in a manner that is somehow more restrictive than parking vehicles on fields.

"Temporary Tent"

The definition of "Temporary tent" limits the exemption for temporary tents to tents that are in place for no more than 120 cumulative days per calendar year. This is inconsistent with the SADC's determination that temporary tents in place for 180 cumulative days or less will not be treated as impervious cover nor in violation of the deed of easement provided vegetative cover is maintained. Reducing the number of days that tents may exist on a preserved farm to 120 days despite vegetative cover is arbitrary when compared to temporary overflow parking which may exist under the proposed rules provided minimum vegetative cover is maintained.

Tents should also be permitted for a minimum of 180 cumulative days for consistency with N.J.A.C. 5:23-2.14(b) Construction permits, which exempts such tents from construction permits as follows:

> 4. Exceptions to permit requirements for temporary structures, tents, tensioned membrane structures, canopies, and greenhouses are as follows:
>
> * * *
>
> ii. Tents, tensioned membrane structures, and canopies: A construction permit is not required for tents, tensioned membrane structures, and canopies that meet all of the criteria in (b)4ii(1) through (5) below. Tents, tensioned membrane structures, and canopies meeting the following

criteria shall be subject to the permitting requirements of the Uniform Fire Code (N.J.A.C. 5:70-2.7).

(1) The tent, tensioned membrane structure, or canopy is 140 feet or less in any dimension and 16,800 square feet or less in area whether it is one unit or is composed of multiple units;

(2) The tent, tensioned membrane structure, or canopy remains in place or will remain in place for fewer than 180 days;

(3) The tent, tensioned membrane structure, or canopy is used or occupied only between April 1 and November 30;

(4) The tent, tensioned membrane structure, or canopy does not have a permanent anchoring system or foundation; and

(5) The tent, tensioned membrane structure, or canopy does not contain platforms or bleachers greater than 11 feet in height.

iii. A temporary greenhouse, also called a "hoophouse" or "polyhouse," meeting the criteria stated in N.J.A.C. 5:23-3.2(d), shall not require a permit.

iv. Regardless of whether the tent, tensioned membrane structure, canopy, or greenhouse requires a permit, a permit shall be required for any electrical equipment, electrical wiring or mechanical equipment that would otherwise require a permit.

Under the stormwater management rules, development on agricultural lands includes any activity which requires a permit or approval, including permits and approvals from the SADC. N.J.A.C. 7:8-1.2. Because tents that are in place for fewer than 180 days are exempt from UCC permit requirements and currently permitted under farmland preservation, they are also not considered agricultural development under the Stormwater Management Rules. N.J.A.C. 7:8-1.2. The SADC now proposes to restrict tents in place for more than 120 days, which restriction rolls back the current rights of farmers to utilize tents without building permits or SADC approval if they are in place for 180 days or less. The proposed definition of temporary tent must be revised to 180 days for consistency with existing property rights and existing rules and regulations in the State of New Jersey. The SADC has not provided any rational basis for discriminating against tents, especially when vegetative cover may be maintained, and especially when other exemptions allow arguably more intensive temporary use of fields provided vegetative cover is maintained.

"Unimproved travel lane"

The definition of "unimproved travel lane" includes a condition that, to be exempt, the unimproved travel lane may not be located closer than 300 feet to another unimproved travel lane or travel lane. Please clarify that this is not inclusive of intersections.

"Soil Conservation" and "Soil Conservation Methods"

The definitions do not define "soil conservation" or "soil conservation methods." This ignores the foundational concern raised by the New Jersey Supreme Court in the Quaker Valley Farms decision, which considered deed of easement language pertaining to "soil conservation" and directed the SADC to provide guidance on same.

Proposed N.J.A.C. 2:76-A.4, Exemptions

Conditional Exemptions

The language at N.J.A.C. 2:76-A.4(h) should be clarified to put readers on notice that some soil disturbance exemptions are conditional. As the exemption provision is currently written, readers are not alerted to the conditions that must be met for some of the enumerated exemptions to qualify.

For example, upon reviewing N.J.A.C. 2:76-A.4(h), a lay reader would reasonably believe that temporary overflow parking as per the agricultural management practice for on-farm direct marketing facilities, activities, and events, N.J.A.C. 2:76-2A.13(h), remains an exempt parking solution without specific conditions. However, proposed N.J.A.C. 2:76-25A.6 sets forth a list of new objective and subjective criteria which the SADC and the grantee may use to "determine" whether a temporary parking area may be considered exempt, including: 1) weight of the equipment or vehicles; 2) frequency of use; 3) the field's potential yield; 4) pasture management; 5) plant species present; 6) drainage; 7) soil type; and 8) weather conditions and season. Additionally, the SADC proposes a condition that minimum vegetative cover be maintained for temporary overflow parking, and sets forth a sampling plan (Proposed N.J.A.C. 2:76-25A.6(c)) which is typical of those utilized by field botanists by which measurements are taken along transects, and which sampling plan must result in 70 % or more vegetative cover. Only temporary overflow parking meeting the 70 % vegetative cover standard at least nine (9) months of the year, not inclusive of weeds, qualifies as exempt overflow parking. (See, definitions of "minimum vegetative cover," "vegetative cover," and "weed," at proposed N.J.A.C. 2:76-A.3).

Similarly, "On-farm utilities" are only exempt if they meet the construction standards established at proposed N.J.A.C. 2:76-25A.4. "Unimproved travel lanes" are only exempt if they are no more than 10 feet wide for one-way traffic or 16 feet wide for two-way traffic and constructed no closer than 300 feet to another unimproved travel lane or travel lane, with no exception provided for intersections. This is not an exhaustive list of examples of conditional exemptions.

Although I dispute that authority exists to place an arbitrary cap on disturbance, if the SADC persists in its efforts to roll back agricultural and residential development rights, conditions must be disclosed in the exemption section, and consideration should be given to the creation of many more conditional exemptions which are achievable without unduly burdensome, costly, and time-consuming proofs that necessitate the hiring of attorneys, engineers, soil scientists, and botanists.

Proposed Use of Farm Conservation Planning Discriminates Against All Agricultural Uses and Development Except for Tillage Not Involving Human Affected Soils

The plain meaning of N.J.A.C. 2:76-6.15(a)(7)(i) and (ii) and the SADC's prior interpretation of same permit soil conservation compliance through farm conservation planning. Accordingly, any agricultural development conducted in accordance with an approved farm conservation plan that addresses soil conservation is already compliant with the deed of easement and, therefore, must be included as an

exemption. This is necessary to reconcile the established terms of ARDA and the preservation deeds of easement authorizing same, as follows:

> "No activity shall be permitted on the Premises which would be detrimental to drainage, flood control, water conservation, erosion control, or soil conservation, nor shall any other activity be permitted which would be detrimental to the continued agricultural use of the Premises.
>
> i. Grantor shall obtain within one year of the date of this Deed of Easement, a farm conservation plan approved by the local soil conservation district.
>
> ii. Grantor's long-term objectives shall conform with the provisions of the farm conservation plan (emphasis added)."

N.J.A.C. 2:76-6.15(a)(7). As stated by the SADC, farm conservation plans are intended to contain "the soil and water conservation practices which are needed for the specific type of agricultural operation," and "the measurement of compliance is the Grantor's conformance with the farm conservation plan." 26 N.J.R., at 3161. Contrary to this position, proposed N.J.A.C. 2:76-25.4(b) only exempts conservation practices resulting from normal tillage and meeting additional criteria. The above discussion of N.J.A.C. 2:76-6.15(a)(7) and farm conservation planning is incorporated herein. Farm conservation planning should be the appropriate mechanism of confirming soil and water conservation planning for all forms of agricultural development.

Taking of Otherwise Permitted Non-Agricultural Property Rights

For the reasons set forth, above, residential and schedule B non-agricultural improvements and activities which occur on the premises should be included as exemptions when calculating soil disturbance.

Proposed N.J.A.C. 2:76-25.5 Soil disturbance limitations

Retroactive Deed of Easement Violations

One must reference proposed N.J.A.C. 2:76-25.2 to ascertain that exceeding the 4 acre/12% soil disturbance limitation is a violation of the deed of easement. Consider referring to proposed N.J.A.C. 2:76-25.2 in section 25.5 for clarification. Restated are comments on proposed N.J.A.C. 2:76-25.2, above, and objections raised about reneging on the preservation deal, breaching contract, taking property rights without compensation, lack of legislative authority, failing to carry out the SADC purposes, and the passage of a regulation which, upon its effective date, would immediately put property owners with greater than 4 acres/12% disturbance in violation of their deeds of easement.

Determination of 4 acre/12% with revocable production waiver to 6 acre/15%.

Please set forth the rational basis which underpins the SADC's determination that disturbance should be limited to the specific amounts of 4 acre/12% with revocable production waivers allowing up to 6 acre/15%.

Using a Fixed and Retroactive Soil Disturbance Date in Proposed N.J.A.C. 2:76-25.5(b) is Arbitrary and Unfair

The soil disturbance limit is determined as of July 1, 2023, and an additional 2 percent or 1 acre of relief is based upon the conditions as of July 1, 2023. However, preliminary maps are based upon 2020 aerial photography. Farmers did not receive their maps until after July 1, 2023, and those maps contained errors. Farmers were not on notice that they required aerial photography or other proofs of their farm's land use as of July 1, 2023 for the purpose of establishing accurate, existing conditions. Upon information and belief, such aerial mapping as of July 1, 2023 is not publicly available, and even if it were, it would not be field verified.

Between 2020, the date of aerial images used for mapping, and passage of the regulation, additional improvements and disturbance may have occurred without adequate notice of the 4 acre/ 12 percent restriction. As of July 1, 2023, additional improvements or disturbance might be funded, planned, and approved in accordance with local land use or county SSAMP applications but not constructed. So as to not effect a taking, such approved disturbance must be deemed exempt as a prior nonconformity, even if not yet constructed.

Given the errors in maps distributed to farmers, farmers may further not be aware of their actual disturbance calculations. Any calculation of disturbance should not be considered final until ground verified by SADC after an opportunity for input from the farmer. The SADC has required review of ground conditions during the annual monitoring program. Time limits on any and all relief that is available to farmers, including the 2 percent/1 acre relief, should not commence until a map is field verified and reviewed with the farmer. The burden of field verification of all maps must be on the SADC as the regulations are too complicated with buried conditions of exemptions. This makes it unfair and prejudicial to shift the burden of confirming map accuracy onto the farmer. It is also unfair and prejudicial to impose an arbitrary acceptance of the maps onto the farmer even if they are not field verified by the SADC.

Proposed N.J.A.C. 2:76-25.6, Waivers

Proposed N.J.A.C. 2:76-25.6(l), Waivers are Revocable

All approved waivers are revocable as per proposed N.J.A.C. 2:76-25.6(l) and, therefore, references to waivers throughout the proposed rule should be clarified to indicate that they are "revocable" waivers. Identifying whether a property right is revocable or not is a fundamental premise of real estate law.

Proposed N.J.A.C. 2:76-25.6(b), Compliance with Deed of Easement

Deed of easement compliance is a prerequisite to granting waivers. Therefore, farms with disturbance that exceeds 4 acres or 12%, whichever is greater, as of the effective date will be out of compliance with the deed of easement as per proposed N.J.A.C. 2:76-25.2, which states:

> Exceeding the soil disturbance limitation established in this subchapter shall constitute a violation of the deed of easement, which prohibits activities detrimental to soil conservation and detrimental to the continued agricultural use of the premises in accordance with N.J.A.C. 2:76-6.15(a)(7).

Therefore, the production and innovation waivers are only available to farmers whose disturbance as of the effective date is less than the greater of 4 acres or 12 %. Preserved farms which exceed disturbance

limits as of the effective date should be deemed prior nonconforming farms which are not in violation of the deed of easement as a result of the pre-existing disturbance. Additionally, proposed N.J.A.C. 2:76-25.6(b) should be clarified to allow farmers with greater than 4 acres/12 % disturbance to apply for innovation and revocable production waivers.

Proposed N.J.A.C. 2:76-25.6(c) – No feasible alternative

Clarification of the "no feasible alternative" language is needed to indicate if denial of the project, including denials in favor of less disturbing forms of agricultural production, will be considered feasible alternatives that avoids soil disturbance. For example, if a farmer proposes to construct "livestock training areas" as defined in proposed N.J.A.C. 2:76-25.3, will these be considered production areas eligible for a revocable production waiver which may be approved despite other forms of production resulting in less soil disturbance? Clarify if the consideration of feasible alternatives is isolated to the specific form of agricultural infrastructure and production proposed by the farmer.

Further, confirm that aggregation and consolidation pursuant to Proposed N.J.A.C. 2:76-25.7 will not be required as a feasible alternative. Any provisions in the proposed rules which have the effect of forcing aggregation or consolidation should be eliminated. The lot configuration which exists at the time of preservation was a material consideration in appraised value of the farm(s) and reducing the property rights and benefits of multiple farm parcels cannot occur without just compensation.

Proposed N.J.A.C. 2:76-25.6(c) – Revocable Production Waivers Biased to Plant Production

Proposed N.J.A.C. 2:76-25.6(c)(3)(ii) requires that, as a condition of issuing a revocable production waiver, the project must have a positive impact on agricultural productivity. Yet, the SADC proposes to define agricultural productivity as limited to "the capacity of a soil to produce a specific plant….." Proposed N.J.A.C. 2:76-25.3. The SADC should clarify whether it intends to make revocable production waivers available only to projects that promote plant production and not available to projects that promote other forms of agricultural production. If the latter, the SADC should clarify that proposed revocable production waivers are limited in their availability to plant production.

More importantly, the SADC should amend this provision to eliminate the bias and develop waiver provisions that are accessible to all forms of agricultural production. If the bias is intended, the SADC should provide a rational basis for same and reconcile the bias inconsistency with its mission and the deed of easement objectives of promoting a wide variety of agricultural production.

Proposed N.J.A.C. 2:76-25.6(c)(4) exceeds the compliance mechanism of a farm conservation plan which was previously determined by the SADC to be the appropriate measure of compliance. Instead, as a condition of receiving a revocable production waiver, a farmer must have a stewardship conservation plan for the entire preserved farm premises, not just the area of development. See, proposed N.J.A.C. 2:76-25.3, definitions, "stewardship conservation plan," means a farm conservation plan that meets or exceeds the planning criteria for all soil and water resources identified on the premises (emphasis added)(premises are all areas covered by the deed of easement)." Also, the farmer must "maintain the functional integrity" of riparian vegetation in the plan. If there is forested land, the farmer must also obtain a forest stewardship plan, with a woodland management plan presumably inadequate for compliance. Therefore, the SADC appears to leverage its granting of revocable production waivers with the requirement of supervised, planned management of all soil, water, and woodland resources on the preserved farm in a manner that

exceeds that which would be necessary to ensure soil and water conservation for the proposed production activities. This is overreaching.

Proposed N.J.A.C. 2:76-25.6(e) – Revocable Innovation Waivers Biased to Plant Production

Proposed N.J.A.C. 2:76-25.6(e) requires that, as a condition of issuing a revocable innovation waiver, the project must have a positive impact on agricultural productivity (Proposed N.J.A.C. 2:76-25.6(c)(3)(ii)) and must maintain minimum vegetative cover. The SADC proposes to define agricultural productivity as limited to "the capacity of a soil to produce a specific plant….." Proposed N.J.A.C. 2:76-25.3. Minimum vegetative cover requires 70% plant cover over 9 months, not inclusive of weeds. Proposed N.J.A.C. 2:76-25.3. The SADC should clarify whether it intends to make revocable innovation waivers available only to projects that promote increased plant production and not available to projects that promote other forms of agricultural production. If the latter, the SADC should clarify that revocable production waivers are limited in their availability to plant production. More importantly, the SADC should amend this provision to eliminate the bias and develop waiver provisions that are accessible to all forms of agricultural production. If the bias is intended, the SADC should provide a rational basis for same and reconcile the bias inconsistency with its mission and the deed of easement objectives of promoting a wide variety of agricultural production.

See also, the above comments on Proposed N.J.A.C. 2:76-25.6(c)(4) with respect to revocable production waivers, which are also relevant to revocable innovation waivers. The SADC appears to leverage its granting of revocable innovation waivers with the requirement of supervised, planned management of all soil, water, and woodland resources on the preserved farm in a manner that exceeds that which would be necessary to ensure soil conservation for the proposed activities.

Proposed N.J.A.C. 2:76-25.6 – Application Notice

Proposed N.J.A.C. 2:76-25.6(g) requires that waiver applications be heard upon notice to the clerk and land use board secretary of the municipality in which the premises is located. This notice requirement should be eliminated. If the notice requirement remains, please clarify whether an application requires notice to both a planning board and a zoning board of adjustment in municipalities without a combined board, and set forth the rational basis for same.

The preservation deed of easement is a contract between the farm owner and the grantee under the jurisdiction of the SADC and, therefore, the municipality is not a party to the matter. Further, the farmland preservation program is not a zoning protection program and, therefore, it is unclear why a municipality is entitled to notice of a farmers' application to engage in agricultural production.

Notice is also required to all 200-foot abutters. This notice requirement should be eliminated as it is unduly burdensome and involves non-farm neighbors in all matters of the farm's agricultural production, including the required farm-wide soil, water, and forest resource management required as per proposed N.J.A.C. 2:76-25.6(c)(4), which management exceeds that which is required for farm conservation planning.

Municipal and abutter notice is further problematic when one considers the proposed requirement that a waiver application proposing to construct improvements include "zoning, building and development plans, site plan, relevant permits, and, if applicable, stormwater management plans and calculations." Proposed N.J.A.C. 2:76-25.6(i)(2). A claim of preemption from local zoning and site planning requirements is disregarded as an option available to farmers seeking waivers, and at a minimum, right to farm

permissions and agricultural management practice compliance should be incorporated as an alternative basis to a complete and approvable waiver application. Municipalities and objectors are continuously seeking end-runs around Right to Farm protections, and the waiver application and notice procedures invite such interference. The provisions of proposed N.J.A.C. 2:76-25.6(c)(4) and proposed N.J.A.C. 2:76-25.6(i)(2) seem certain to invite municipal and public opposition to farming projects regardless of any reasonable or rational basis for objection, which is a known issue amongst the farming community. It is unprecedented to require public notice for farm applications made solely under the farmland preservation program.

Proposed N.J.A.C. 2:76-25.6(j) – "actions or inaction"

Proposed N.J.A.C. 2:76-25.6(j) allows the SADC to deny a waiver upon consideration of the grantor's "actions or inactions" which caused or contributed to the need to submit a request for a waiver. All waiver requests will arise to some extent out of the grantor's "actions or inactions." If the SADC means "actions or inactions which caused deed of easement violations necessitating the waiver application," then the provision should be clarified to reflect same. Otherwise, the provision is too vague and broad to guide readers.

Proposed N.J.A.C. 2:76-25.6(j) – recording resolutions approving waivers

Proposed N.J.A.C. 2:76-25.6(j)(5) requires that any resolution approving a waiver be recorded. The burden of recording and paying associated fees for same should be clarified to indicate if it is born by the farmer or the SADC.

Also, proposed N.J.A.C. 2:76-25.6(j)(5) is the first reference in the proposed rules to putting a purchaser on notice that a soil disturbance limitation exists. Review of the preservation deeds of easement, alone, will not give the typical farm purchaser notice that the deed of easement has been retroactively interpreted to also restrict agricultural and residential development rights. The SADC should clarify how it expects the average purchaser of a preserved farm to be aware of the soil disturbance limit and its expansion of restrictions beyond the terms of the deed of easement to include an arbitrary cap on agricultural and residential development rights, regardless of the implementation of a farm conservation plan.

Proposed N.J.A.C. 2:76-25.9 – Soil Rehabilitation

Proposed N.J.A.C. 2:76-25.9(b)(2) allows the SADC to develop templates for rehabilitation of common soil disturbances that may be followed to meet the requirements at Proposed N.J.A.C. 2:76-25A.9. Development of such templates for a wide variety of typical disturbance in advance of promulgating rules would be a substantial improvement that is more consistent with the SADC's objectives and the New Jersey Supreme Court' directive in Quaker Valley Farms.

Proposed N.J.A.C. 2:76-25.10 – Soil protection mapping and monitoring requirements

Using a Fixed and Retroactive Soil Disturbance Date is Arbitrary and Unfair

See comments on proposed N.J.A.C. 2:76-25.5(b), above.

Reconsideration

The language of proposed N.J.A.C. 2:76-25.5(b)(3), (4), and (5) is confusing as written and should be clarified to indicate the sixty (60) day deadline for reconsideration applies only to farmers who seek to avail themselves of the 1 acre/2 % of disturbance increase. A minimum of 180 days should be afforded for making application to increase the disturbance limit so that farmers may have adequate time to review their maps, especially if the effective date coincides with the busiest months of the farming season. Limiting such requests to sixty (60) days after the effective date of the regulation is unreasonable and cannot reasonably be deemed "consent" to mapping errors as proposed in N.J.A.C. 2:76-10(c). Field verification and correcting errors in maps should be the SADC's burden and competed prior to the commencement of any time limits.

Monitoring

Burdens on the farmland preservation monitoring programs should be carefully considered, as additional time and budget allocations for farmland preservation staff will be needed to carry out the annual review and reporting of soil disturbance on each farm, including provision of all farm monitoring staff with the requisite training and GPS units. Substantial weight is placed on the ability of monitoring staff to ascertain and calculate changes from year to year, and to photograph and report same to county boards and the SADC. The SADC should discuss how it intends to support such staff in carrying out the requirements of the rules to an extent that maintains adequate reliability, accuracy, transparency, and good faith within the farming community. Local CADBs and their staff should be concerned about blame for errors given the apparent difficulties involved in confirming compliance and reporting on new disturbance during annual monitoring. Errors seem certain to occur, and in no event should this prejudice the farmer or purchaser who relies on the mapping.

Proposed N.J.A.C. 2:76-25A.2, Purpose of Supplemental Soil Disturbance Standards

The purpose of subchapter 25A is not only limited to standards for revocable waivers and soil rehabilitation, but also includes standards for certain exemptions, such as on farm utilities, solar, and temporary overflow parking. The purpose statement should be corrected to alert readers to the wider reach of the Subchapter 25A technical requirements.

Conclusion

The proposed rules are a giant leap from the concept of permissible agricultural development balanced against reasonable soil and water conservation practices to the much more stringent concept of arbitrary limits on agricultural development and soil disturbance regardless of soil and water conservation practices. A cap on soil disturbance, and exemptions that only support a limited variety of agricultural production, are arbitrary and capricious, exceed the SADC's delegated authorities, take property rights without just compensation, discriminate economically without a rational basis, and interfere with ARDA's Legislative findings and declarations, which require that the SADC encourage the maintenance of agricultural production and a positive agricultural business climate and make available to preserved farm owners financial, administrative and regulatory benefits in exchange for participation in the farmland preservation program. N.J.S.A. 4:1C-12. The proposed rules will have a chilling effect on not only agricultural development, but also farmland preservation, and they should be withdrawn. Compliance with the deed of easement and the directives of Quaker Valley Farm are already provided for through farm conservation planning.

Thank you for your attention to these comments.

Very truly yours,

Nicole L. Voigt

Cc: BY EMAIL ONLY
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New Jersey State Department of Agriculture, Joe Atchison, III, Assistant Secretary of Agriculture
New Jersey State Board of Agriculture, Linda Walker, Executive Assistant
New Jersey Farm Bureau, Allen Carter, President
Farm Credit East, Stephen Makarevich, Branch Manager
John Showler, State Erosion Control Engineer, New Jersey Department of Agriculture
Frank Pinto, Farmland Preservation Consultant, Pinto Consulting
Atlantic County Agriculture Development Board, Ranae Fehr, Administrator
Bergen County Agriculture Development Board, Nancy Witkowski, Administrator
Burlington County Agriculture Development Board, Brian Wilson, Administrator
Camden County Agriculture Development Board, Janina Robinson, Administrator
Cape May County Agriculture Development Board, Barbara Ernst, Administrator
Cumberland County Agriculture Development Board, Matthew Pisarski, Administrator
Gloucester County Agriculture Development Board, Eric Agren, Administrator
Hunterdon County Agricultural Development Board, Bob Hornby, Administrator
Mercer County Agricultural Development Board, Leslie R. Floyd, Administrator
Middlesex County Agriculture Development Board, Laurie Sobel, Administrator
Middlesex County Agriculture Development Board, Brady Smith, Administrator
Monmouth County Agriculture Development Board, Amber Mallm, Administrator
Morris County Agriculture Development Board, Katherine Coyle, Administrator
Ocean County Agriculture Development Board, Timothy Gleason, Administrator
Passaic County Agriculture Development Board, Salvatore Presti, Administrator
Salem County Agriculture Development Board, Kris Alexander, Administrator
Somerset County Agriculture Development Board, Katelyn Katzer, Administrator
Sussex County Agriculture Development Board, Maggie Faselt, Administrator
Warren County Agriculture Development Board, Corey Tierney, Administrator