



Because Agriculture Matters!

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New Jersey Farm Bureau
The Farm House
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RE: Legal Objections to the Soil Protection Standards

This is in response to your request that I analyze the Soil Protection Standards (“SPS”) and provide you with a concise summary of the legal objections to the proposed rules. You also requested that I coordinate the response with Anthony J. Sposaro, Esq., David Frank, Esq., and Nicole L. Voigt, Esq., three attorneys who also have had extensive experience with real estate law, agriculture law, and administrative law. The following is the result of our analysis.

1. The SPS unlawfully attempts to retroactively revise the terms of the Deeds of Easement (“DOEs”) for previously preserved farms.

The NJ Supreme Court (“NJSC”) explained in a 1981 decision: “It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is a general consensus among all people that notice or warning of the rules are applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them.”

2. The NJSC’s decision in the Quaker Valley Farms (“QVF”) case did not authorize retroactive application of the SPS to previously preserved farms.

The SADC’s retroactive application of soil protection standards or guidance was not an issue before the NJSC in QVF and New Jersey courts do not issue advisory opinions. Nonetheless, the NJSC cautioned the SADC that the DOEs’ terms must be such that a reasonable person would have understood the term at the time that the parties agreed to the DOE.

3. The NJSC’s QVF decision could not consider the implications of ¶7 of the DOEs that requires the grantor to obtain a farm conservation plan approved by the local soil conservation district and conform with its provisions.

The farm conservation plan requirement was not adopted until 1994. The DOE reviewed by the NJSC in the QVF matter was executed in 1993 and did not require a farm conservation plan. As a result, the QVF decision could not consider the SADC’S current conservation agricultural management practices for soil and water conservation.

4. The NJSC's QVF decision did not direct the SADC to adopt overblown "command and control" soil protection regulations.

The QVF decision referred to the SADC's need to provide farmers with guidance, guidelines, and goalposts to avoid burdening them with costly enforcement actions. That language is consistent with the Department of Agriculture's tradition of working cooperatively with the agricultural community by issuing guidance documents and agricultural management practices rather than highly detailed, technical and inflexible "one size fits all," site-blind regulations.

5. The SPS fails to consider the implications of ¶17 of the DOEs which provides: "This 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."

The DOEs are legal documents with fixed terms, recorded in the County recording offices, and are binding on the owners of the previously preserved farms, their heirs, and successors, and on the acquiring entities. The SPS represents an impermissible attempt to impose additional obligations or restrictions on those grantors' use of their premises.

6. The SPS imposes additional burdens on the owners of the previously preserved farms in violation of the fundamental principles of easement law and the government's obligation for fair dealing.

The owners of the previously preserved farms agreed in good faith to the DOEs terms in exchange for stated monetary compensation. They had no reason to anticipate that the SADC would many years later unilaterally change the terms of the settled deals by imposing additional burdens on the landowners. The law of easements prohibits the easement owner from involuntarily increasing burdens on the landowner. SPS' retroactive application also is inconsistent with the well-established principle that the "government has an overriding obligation to deal forthrightly and fairly with property owners."

7. The SPS impermissibly conflicts with the policies expressed in the Farmland Preservation Bond Act of 1981, subsequent bond acts, the Agricultural Retention and Development Act, and the Right to Farm Act.

Those enactments recognized that agriculture was an economic pursuit; important to the present and future economy of the State; and that all State departments and agencies, including the SADC, should encourage the maintenance of agricultural production and a positive agricultural business climate. Agriculture is a business, not just an attractive vista for motorists and non-agricultural neighbors to admire. Speaker after speaker at the September 27th hearing explained how the proposed rules would be detrimental to the viability of their agricultural businesses and how they were contrary to the purposes of the foundational enactments.

Very truly yours,

/s/ Anthony J. Sposaro, Esq.; /s/ David Frank, Esq.; /s/ Nicole L. Voigt, Esq.; /s/ Lewis Goldshore, Esq.
New Jersey Farm Bureau,
General Counsel