

Is a Wetland Mitigation Project Permitted in an Area Zoned "Agricultural Residential"?: New Jersey Appellate Court Opinion



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A New Jersey appellate court addressed in a July 31st opinion whether a wetlands mitigation project is permitted in an agricultural residential zone. See *Baduini v. Land Use Bd. Of Independence Township* Docket No., A-2487-16T2, 2018 WL 3625409 (Superior Court of New Jersey, Appellate Division, July 31, 2018).

Wetlands mitigation is the creation, restoration or under certain circumstances the increased protection of an existing area often implemented to fulfil the United States' goal of no net loss of this resource.

Plaintiffs Louis Baduini and Joel Schnetzer ("Plaintiffs") had challenged an Independence Township Land Use Board ("Board") decision that a wetland mitigation project proposed by a limited liability company and an environmental/wetland consultant (collectively "Defendants") is allowed in an area zoned "agricultural residential."

The limited liability company ("Roes Island") was stated to be the owner of an 18-acre tract of land. Public Service Electric & Gas Company entered into an agreement with Roes Island to have wetlands mitigation responsibilities undertaken on its behalf on the property. The property had previously been considered a wetland but was subsequently drained and converted for agricultural use in the past.

The project would involve restoration of the wetlands by:

- Plowing
- Planting trees in close proximity to existing streams and ditches
- Allowing a return to its natural state of forest and wetlands with permanent stabilization of the area with native grasses, wildflowers, trees and shrubs
- Installation of a temporary deer exclusion fence to protect plants
- Maintenance of bee hives for the commercial sale of honey
- Filling of secondary ditches on the property

The Board considered whether the wetlands mitigation project fit within the definition of "customary agricultural and horticultural uses" in an agricultural residential zone. It determined that the project could constitute an agricultural use with the Board Chairman apparently noting:

. . . that wetland mitigation or wetland enhancement would not in and of itself be considered “agriculture” in order to support a favorable interpretation for the project but as an element of other agricultural uses proposed as part of the overall use of the property; therefore, the enhancement of wetlands and any associated mitigation is permitted.

Plaintiffs filed an action to rescind the Board’s decision. The action was dismissed with prejudice and the Plaintiffs appealed.

The Plaintiff’s articulated three arguments for why the land should not be permitted for such use. They included:

1. The wetland restoration did not fall within the permitted uses for an agricultural residential zone.
2. A separate ordinance did not permit wetland restoration as an “agricultural use.”
3. The Board violated the Open Public Meetings Act, invalidating their findings.

The Court first affirmed that restoring qualifies as an agricultural accessory use. It agreed that “even though it may not fit in the narrow categories of traditional agricultural use- defendants’ project was permitted in the agricultural residential zone because its uses were agricultural in nature and consistent with the intent of the ordinance.”

The Court also declined to consider the impact of the separate ordinance. This argument was rejected because of a failure to raise it in the lower court. Regardless, the ordinance had been amended after the Board’s decision and therefore did not affect the outcome of the case.

Finally, the court found that the Board had properly used an exception for discussions involving attorney client privilege or impending litigation (as to the private discussions). The rest of the deliberations was public as required under the Open Public Meetings Act.

A [copy of the opinion](#) can be found here.