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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4035-15T2

RAJESHWAR SINGH YADAV and
ROOPA YADAV,

Petitioners-Appellants,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION —
LAND USE REGULATION,

Respondent-Respondent.

Argued November 27, 2017 — Decided December 15, 2017

Before Judges O'Connor and Vernoia.

On appeal from the New Jersey Department of
Environmental Protection.

Rajeshwar Singh Yadav, appellant, argued the
cause pro se.

Ryan C. Atkinson, Deputy Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney;
Melissa H. Raksa, Assistant Attorney General,
of counsel; Timothy P. Malone, Deputy Attorney
General, on the brief).

PER CURIAM

Petitioners Rajeshwar Singh Yadav and Roopa Yadav appeal from the New Jersey Department of Environmental Protection's (DEP) final agency decision cancelling their application for a letter of interpretation (LOI) verifying the location of freshwater wetlands, transition areas, and State open waters on property they own in West Windsor. Because we are satisfied there is sufficient credible evidence in the record supporting the DEP's decision and there is no merit to petitioners' legal arguments, we affirm.

In August 2012, petitioners applied to the DEP for a freshwater wetlands line verification LOI pursuant to the Freshwater Wetlands Protection Act (FWPA), N.J.S.A. 13:9B-1 to -30, and its regulations, N.J.A.C. 7:7A-3.1 to -3.6, for their West Windsor property. A LOI provides the DEP's determination as to: "[w]hether there are any freshwater wetlands, transition areas, and/or State open waters present . . . ;" "where the boundaries of the freshwater wetlands, transition areas, and/or State open waters are located . . . ;" and "[w]hat is the resource value classifications . . . of freshwater wetlands on a site."¹ N.J.A.C. 7:7A-3.1(a)(1), (2) and (3); see also N.J.A.C. 7:7A-1.4 (defining "'Letter of interpretation' or 'LOI'").

¹ The resource value classifications are determined "under N.J.A.C. 7:7A-2.4." N.J.A.C. 7:7A-3.1(a)(3).

The DEP processed petitioners' LOI application. During an October 2, 2012 site inspection of the property, DEP staff observed wetlands vegetation and evidence of water surface flows and ponding. Staff also noted "naturally occurring streams" that were consistent with the results of a soil survey, which showed the majority of the soil on the property was indicative of a high ground water table. DEP staff determined the majority of the property contained wetlands² but petitioners' LOI application did not delineate all of the wetlands on the property.

In October 2012, the DEP sent petitioners a letter advising that "large areas of wetlands were omitted from" the delineation contained in the survey plan included with their LOI application. The DEP noted other deficiencies in the application. For example, petitioners were advised that certain features on their survey plan, such as their designation of certain areas as "DITCH[ES]" and "MANMADE DITCH[ES]," were not consistent with the definition of "ditch" under the regulations.³ The DEP requested that

² The DEP utilized the standards in the 1989 Federal Manual For Identifying And Delineating Jurisdictional Wetlands, as defined in N.J.A.C. 7:7A-1.4, to identify and delineate the wetlands on petitioners' property. See N.J.A.C. 7:7A-2.3.

³ See N.J.A.C. 7:7A-1.4 (defining "ditch" as a "linear topographic depression with bed and banks of human construction, which conveys water to or from a site, which is surrounded by uplands which is not located within a wetland. This does not include channelized or redirected natural water courses.").

petitioners remedy the deficiencies within sixty-days so it could conduct a full site inspection and continue its review of the LOI application. The DEP advised petitioners that if they could not meet the deadline, they should withdraw the application and resubmit it when the deficiencies were corrected.

In January 2013, petitioners submitted a revised site plan in support of their application. The submitted plan was deficient because it was neither signed nor surveyed. Nevertheless, the DEP conducted an interim site inspection on January 29, 2013, which revealed petitioners' revised site plan again did not delineate all of the property's wetlands.

The following day, the DEP sent petitioners a letter noting that the revised site plan did not accurately delineate the wetlands and requesting submission of a corrected property survey. The DEP offered to meet with petitioners to discuss any discrepancies prior to the submission of "a revised wetlands survey."⁴ The DEP advised petitioners to correct the deficiencies within thirty days or consider withdrawing their LOI application.

⁴ The letter also stated that the site inspection revealed petitioners were engaging in regulated activities within the wetland areas and they should cease those activities "until an accurate wetland delineation is established."

Petitioners did not correct the deficiencies identified in the DEP's letters. On May 10, 2013, the DEP sent petitioners a letter in accordance with N.J.A.C. 7:7A-12.6 advising that if the deficiencies were not corrected within thirty-days, the LOI application would be cancelled.⁵ Petitioners did not correct the noted deficiencies, but instead submitted correspondence to various DEP officials arguing the property was exempt from the DEP regulations. On July 22, 2013, the DEP cancelled petitioners' LOI application.

Petitioners requested reconsideration of the cancellation, but it was denied. The DEP informed petitioners it could not waive the requirements of the wetlands regulations. The DEP also explained it had not received any permit applications from petitioners but cancelled only petitioners' application for the LOI. The DEP noted that an LOI is limited to delineating the parameters of the various wetlands on the site.⁶

Petitioners requested a hearing before the Office of Administrative Law, and the DEP transmitted the matter for

⁵ N.J.A.C. 7:7A-12.6 requires that the DEP provide only fifteen-days' notice of cancellation of an LOI application.

⁶ Following the cancellation of petitioners' LOI application, the DEP issued a notice of violation for "the placement of fill and woodchips within a freshwater wetland and transition area" on their property. The notice constituted a warning and the DEP did not take any further enforcement action.

determination of a single issue: whether petitioners' LOI application was properly cancelled. Following discovery, the DEP moved for a summary decision dismissing the matter. Petitioners cross-moved, arguing they were exempt from the DEP regulations.

The administrative law judge (ALJ) issued an initial decision, granting the DEP's motion and denying petitioners' cross-motion. The ALJ first rejected petitioners' claim that they were exempt from FWPA requirements. Petitioners asserted they were exempt from the FWPA's requirements because they obtained preliminary subdivision approval of the property from West Windsor in 1985,⁷ prior to the FWPA's July 1, 1988 effective date. See L. 1987, c. 156 § 1.

The ALJ rejected petitioners' claimed exemption based on the prior subdivision approval, relying on this court's decision in Yadav, in which we considered petitioners' challenge to West Windsor's denial of petitioners' renewed application for a major

⁷ The approval followed entry of a 1983 consent order in a lawsuit filed by petitioners against West Windsor challenging its denial of petitioners' application for a major subdivision. Yadav v. Twp. of West Windsor, A-2329-04 (App. Div. Mar. 17, 2006) (slip op. at 2). The order authorized petitioners to refile the application. Ibid. West Windsor granted preliminary approval in 1985. Ibid. Yadav challenged the preliminary approval and, in 1987, the trial court upheld the 1985 approval. Ibid. We affirmed the court's ruling, with a single minor modification, in 1989. Ibid.

subdivision approval. Yadav, slip. op. at 3. In that matter, we determined that the 1985 preliminary approval "expired after three years" and that petitioners "no longer [had] any right to develop their land in accordance with . . . the 1985 preliminary approval."⁸ Id. at 5. We held petitioners "may no longer rely upon the preliminary approval or any of the previous court orders to subdivide their property. Should they choose to pursue their interest, they must comply with the current zoning regulations and . . . apply for the appropriate permits and to seek approval." Id. at 6.

Here, the ALJ concluded that petitioners could not rely upon the 1985 preliminary approval as the basis for their claimed exemption from the FWPA's requirements here. The ALJ adopted the reasoning in our 2006 opinion and found that the "pre-1988 preliminary subdivision approval" did not have "any ongoing legal significance" and therefore did not have "any bearing on whether or not the LOI application was properly cancelled."

The ALJ also found the undisputed facts established the DEP notified petitioners of the deficiencies in their LOI application, and petitioners ignored the deficiencies in favor of arguing they

⁸ We also held petitioners did not have the right to develop their property under the 1983 consent order or our 1989 decision. Yadav, slip op. at 6.

were exempt from the FWPA's requirements. The ALJ determined the DEP provided proper and timely notice of its intention to cancel the LOI application, and petitioners failed to correct the deficiencies in the application. The ALJ therefore concluded the DEP properly cancelled the LOI application in accordance with N.J.A.C. 7:7A-12.6(b).

Petitioners filed exceptions to the ALJ's decision. The DEP determined petitioners failed to correct the deficiencies in the LOI application after properly receiving notice of the deficiencies and of the intention to cancel the application, and concluded the decision cancelling the LOI application was appropriate. This appeal followed.

"The scope of appellate review of a final agency decision is limited," and we will not overturn an agency's final decision "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." In re Carter, 191 N.J. 474, 482 (2007) (citations omitted). "[A] court may intervene when 'it is clear that the agency action is inconsistent with its mandate.'" In re Proposed Quest Academy Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385 (2013) (quoting In re Petitions for Rulemaking, N.J.A.C. 10:82-1.2 & 10:85-4.1, 117 N.J. 311, 325 (1989)). "Unless a [c]ourt finds that the agency's action was arbitrary, capricious, or

unreasonable, the agency's ruling should not be disturbed." Brady v. Bd. of Review, 152 N.J. 197, 210 (1997).

Our Supreme Court has stated that,

[a]lthough sometimes phrased in terms of a search for arbitrary or unreasonable action, the judicial role [in reviewing an agency action] is generally restricted to three inquiries: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[In re Proposed Quest Academy Charter Sch., 216 N.J. at 385 (alterations in original) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

The party challenging an agency action has "[t]he burden of showing that an action was arbitrary, unreasonable or capricious" McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002) (citing Barone v. Dept. of Human Servs., Div. of Med. Assistance & Health Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987)). Although we are not "'bound by the agency's interpretation of a statute or its determination of a strictly legal issue,' if substantial evidence supports the agency's decision, 'a court may

not substitute its own judgment for the agency's even though the court might have reached a different result.'" In re Carter, 191 N.J. at 483 (citations omitted).

We have carefully reviewed petitioners' arguments and find they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(3). We add only the following brief comments.

The record amply supports the DEP's decision. Petitioners were advised of the deficiencies in their LOI application and did not correct them despite being afforded numerous opportunities to do so. The DEP provided the required notice of cancellation and then cancelled petitioner's application based on petitioners' undisputed failure to correct the noted deficiencies or otherwise show "good cause" for their failure to do so. See N.J.A.C. 7:7A-12.6(b).

We reject petitioners claim they are exempt from the FWPA's requirements under N.J.S.A. 13:9B-4(d). In pertinent part, the statute provides an exemption "from the requirement of a freshwater wetlands permit and transition area requirements" for "[p]rojects for which . . . preliminary site plan or subdivision applications have received preliminary approvals from the local authorities pursuant to the 'Municipal Land Use Law,'" N.J.S.A. 40:55D-1 to -163, or "preliminary site plan or subdivision applications have

been submitted prior to June 8, 1987." N.J.S.A. 13:9B-4(d). The exemption, however, does not apply where "the United States Environmental Protection Agency's [(EPA)] regulations providing for the delegation to the state of the federal wetlands program conducted pursuant to the Federal Act⁹] require a permit for any of these activities." N.J.S.A. 13:9B-4. In that case, the DEP "shall require a permit for those activities identified by" the EPA. Ibid.

As we explained in MCG Associates v. Department of Environmental Protection, 278 N.J. Super. 108, 111 (App. Div. 1994), N.J.S.A. 13:9B-4 exempts projects that were approved prior to the FWPA's effective date of July 1, 1988, "unless federal regulations conditioned New Jersey's assumption of the federal program upon voiding the exemptions." On March 2, 1994, "the federal government granted the State's application to assume jurisdiction over most of the freshwater wetlands in New Jersey[,]" id. at 110, and thus the EPA required that New Jersey "void exemptions for construction in wetlands in order to assume the federal program," id. at 111. As a result, the N.J.S.A. 13:9B-4(d) exemption upon which petitioners rely does not apply to any

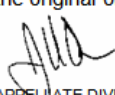
⁹ The "Federal Act" is "section 404 of the 'Federal Water Pollution Control Act Amendments of 1972' as amended by the 'Clean Water Act of 1977' (33 U.S.C. § 1344) and the regulations adopted pursuant thereto." N.J.S.A. 13:9B-3.

freshwater wetlands on their property. Ibid. The N.J.S.A. 13:9B-4(d) exemption, however, continues to apply to the State's transition area requirements because the "federal program does not regulate buffer areas." Ibid.

Petitioners are not exempt from the FWPA under N.J.S.A. 13:9B-4(d) because, as they acknowledge and the undisputed facts show, their property includes freshwater wetlands. They are not entitled to the N.J.S.A. 13:9B-4(d) exemption because since the DEP assumed jurisdiction over freshwater wetlands in 1994, the statutory exemption no longer applied to the freshwater wetlands on their property.¹⁰ Ibid.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

¹⁰ It is not disputed that petitioners' property includes freshwater wetlands and that they failed to correct the deficiencies related to the freshwater wetlands in their LOI application. We find it unnecessary to determine the extent of the N.J.S.A. 13:9B-4(d) exemption, if any, to any transition areas on their property because their failure to correct the survey plan deficiencies related to the freshwater wetlands alone required cancellation of the application. Because we find petitioners are not exempt from the FWPA's requirements for the freshwater wetlands on their property, it is also unnecessary to decide if the DEP correctly determined petitioners could not rely on the 1985 preliminary approval to support the claimed exemption under N.J.S.A. 13:9B-4(d) for any "transition area requirements."