

MEMORANDUM

TO: Board of Environmental Protection

FROM: Lisa Vickers, Project Manager, and Marybeth Richardson, Licensing and Compliance Manager, Division of Land Resource Regulation, Bureau of Land and Water Quality

RE: Russell LaPorte and Sea Spray Homeowners Group Appeal of Natural Resources Protection Act Tier 1 Approval #L-24923-TA-B-N, Beth Zagoren and Robert Gilpatric

DATE: November 7, 2013

Statutory and Regulatory References: The applicable statutory and regulatory framework for the issues raised in this appeal are the Natural Resources Protection Act (NRPA), 38 M.R.S.A. §§ 480-A to 480-HH, and the Wetlands and Waterbodies Protection Rules (Chapter 310). The law and rules contain standards for preventing unreasonable impacts to protected natural resources. Procedures for appeals before the Board are outlined in the Department's Rules Concerning the Processing of Applications, Chapter 2 Section 24.

Location: The project site is located on Sea Spray Drive in the City of Biddeford.

Procedural History and Project Description: On April 9, 2010, the applicants filed a NRPA application for the alteration of 2,736 square feet of freshwater wetlands associated with the construction of a single-family residence in the City of Biddeford. The project site contains scrub shrub wetland, which is classified as a wetland of special significance due to its location within 250 feet of a coastal wetland. Alterations of wetlands of special significance typically require an Individual NRPA permit review. Individual NRPA projects must meet all of the standards of Chapter 310. However, there is a reduced review process where certain Individual NRPA applications can be eligible for Tier 1 review. Because of the nature and location of the freshwater wetland and the proposed size of the impact to the wetland, the Department determined that the proposed project would not negatively affect the freshwater wetlands or any other protected natural resources, and the Department determined that the proposed project was eligible for Tier 1 review.

In Department Order #L-24923-TA-A-N, dated May 13, 2010, the Department approved the Tier 1 application. The applicants did not begin construction within the time period specified in a condition of the permit, and the permit expired on May 13, 2012. On April 29, 2013, the applicants filed a second application for the project. The application was not materially different from the first application filed in 2010. The Department approved the second application in Order #L-24923-TA-B-N, dated May 30, 2013.

A timely appeal was filed to the Board on June 29, 2013 by Russell LaPorte and the Sea Spray Homeowners Group. The appellants object to the Department findings and conclusions relating to the following:

- A. Tier 1 Permit Review
- B. Wetland of Special Significance Practicable Alternatives
- C. Avoidance and Minimization
- D. Flooding of Appellants' Property

In addition, the appellants request that the Board hold a public hearing to consider conflicting technical information and reverse the Department decision.

Environmental Issues and Discussion: The appellants contend that the project will negatively affect the wetland and other natural resources and should be reviewed under the Tier 3 review process¹. In addition, the appellants assert that the applicants have practical alternatives that would avoid unreasonable impacts to the wetland of special significance, and that the applicants have failed to avoid and minimize wetland impacts. Further, the appellants' assert that the activity will result in a measurable increase in flooding both within the alteration area and on adjacent properties.

In response to a written request from the applicants as set forth in Chapter 310, Section 4(B), the Department determined that, due to the nature and location of the freshwater wetland and the proposed size of the impact to the freshwater wetland, the project was eligible for review as a Tier 1 application. Department staff made this determination after considering these issues and after conducting a site visit. As part of the application, the applicants submitted an avoidance and minimization statement that states that the parcel is small in size (\pm 0.65 acres), located adjacent to a coastal wetland, and contains a shrub-scrub freshwater wetland. Due to these factors and in order to comply with local building setbacks, there is a limited amount of area on the parcel where development can occur, and some wetland impacts would be unavoidable. The applicants proposed to site the proposed dwelling and associated fill envelope to utilize the uplands areas on the parcel to the greatest practical extent. The applicants also designed the project to maintain existing drainage patterns on the parcel.

Since the proposed project was reviewed under the Tier 1 permit review process, certain standards of the NRPA 38 M.R.S.A. §480-D do not apply to projects that qualify for Tier 1 review. As such, subsection 6 of 38 M.R.S.A. §480-D, which states that the activity will not unreasonably cause or increase flooding of the alteration area or adjacent properties, does not apply to projects that qualify for Tier 1 review. The Department determined that the proposed project satisfies the general permitting requirements and standards as set forth in the NRPA, 38 M.R.S.A §480-X.

Department Recommendation: The Department recommends the Board deny the request for a public hearing since the appellants had the opportunity to present information and argument to the Department during the review process. Further, after reviewing the appellant's arguments, the

¹ Alterations of wetlands of special significance usually require an individual NRPA permit application (See Chapter 310 Section 4(B)). Tier 3 permit applications are typically for projects that alter greater than 43,560 square feet of freshwater wetlands.

Department recommends that the Board find that the applicants have met the requirements for a Tier 1 freshwater wetland alteration application, and recommends the Board deny the appellants' appeal and affirm the Department's decision.

Agenda Item: 1 hour

DRAFT BOARD ORDER

IN THE MATTER OF

BETH ZAGOREN & ROBERT GILPATRIC) NATURAL RESOURCES PROTECTION
Biddeford, York County) FRESHWATER WETLAND ALTERATION
HOUSE LOT DEVELOPMENT) WATER QUALITY CERTIFICATION
) APPEAL
L-24923-TA-C-Z (denial)) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S.A. §§341-D (4) and 344 and Chapter 2, Section 24 of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeal of the RUSSELL LAPORTE AND SEA SPRAY HOMEOWNERS GROUP, its supportive data, the response of the applicants, and other related materials on file, and FINDS THE FOLLOWING FACTS:

1. PROJECT DESCRIPTION AND PROCEDURAL HISTORY:

A. On April 9, 2010, Beth Zagoren and Robert Gilpatric (applicants) filed a Natural Resources Protection Act (NRPA) application for the alteration of 2,736 square feet of freshwater scrub-shrub wetlands of special significance associated with the construction of a single-family residence. In Department Order #L-24923-TA-A-N, dated May 13, 2010, the Department approved the application. The applicants did not begin construction within the time period specified in a condition of the permit, and the permit expired on May 13, 2012. On April 29, 2013, the applicants filed a second application for the same amount and type of wetland alteration as the April 9, 2010 application. The Department approved the application in Order #L-24923-TA-B-N, dated May 30, 2013. The project site is located on Sea Spray Road in the City of Biddeford.

B. On June 28, 2013, Russell Laporte and Sea Spray Homeowners Group (appellants) filed an appeal of Department Order #L-24923-TA-B-N to the Board. In their appeal, the appellants requested that the Board reverse the decision of the Department and hold a public hearing to consider supplemental evidence, or, alternatively, request that the Board direct the Department to conduct a Tier 3 NRPA application review process. The appellants submitted two exhibits as proposed supplemental evidence that were not admitted to the record by the Board's Presiding Officer. Specifically, the Board's Presiding Officer determined the first exhibit presented as supplemental evidence was of questionable relevance. Further, it was determined that the appellants failed to present the information to the Department earlier in the licensing process by the exercise of reasonable diligence. The second exhibit of supplemental evidence was determined by the Board's Presiding Officer to not be relevant with respect to the licensing criteria for the requested permit.

2. STANDING:

The appellants consist of owners of lots adjacent to, or in close proximity to, the project site; therefore, the Board finds that the appellants are aggrieved persons as defined in Chapter 2, Section 1(B) and may bring this appeal before the Board.

3. FINDINGS AND CONCLUSIONS OBJECTED TO:

The appellants object to the Department findings and conclusions relating to the following:

- A. Tier 1 Permit Review
- B. Wetland of Special Significance Practicable Alternatives
- C. Avoidance and Minimization
- D. Flooding of Appellants' Property

4. BASIS FOR APPEAL:

The appellants assert that the Department erred in its findings that:

- A. The proposed activity will not negatively affect the freshwater wetland of special significance or other protected natural resource and is eligible for Tier 1 review;
- B. There is no practicable alternative which would be less damaging to the environment; and,
- C. The applicants avoided and minimized wetland impacts to the greatest extent practicable.

Based on the objections to the finding and conclusions listed above, the appellants assert that the project should be reviewed under the Tier 3 NRPA application review process, and that the Department erred in its findings that a practicable alternative does not exist and that the applicants have avoided and minimized wetland impacts to the greatest extent practicable.

5. REMEDY REQUESTED:

The appellants request that the Board review the record of this permit proceeding, grant a public hearing to consider supplemental evidence, and reverse the May 30, 2013 Department decision approving the alteration of 2,736 square feet of scrub-shrub freshwater wetlands of special significance associated with the construction of a single-family residence in the City of Biddeford. Alternatively, the appellants request the Board direct the Department to conduct a Tier 3¹ NRPA application review process.

¹ Alterations of wetlands of special significance usually require an individual NRPA permit application (See Chapter 310 Section 4(B)). Tier 3 permit applications are typically for projects that alter greater than 43,560 square feet of freshwater wetlands.

6. RESPONSE TO REQUEST FOR A PUBLIC HEARING:

The appellants reviewed the Department file and had ample opportunity to present information and argument to the Department during the application review process and the appellants availed themselves of that opportunity. Further, the appellants did not request a public hearing be held as part of the Department's application review process. The Board finds that the record is adequately developed with regard to the regulatory criteria, and that the appellants did not demonstrate that there is sufficient conflicting technical evidence to warrant a public hearing.

7. RESPONSE TO APPEAL:

A. TIER REVIEW PROCESS:

The appellants contend that the permit application should have been processed as a Tier 3 permit review procedure because the proposed fill activity would have a significant adverse effect on the wetland, wetland functions, and adjacent upland areas.

38 M.R.S.A. §480-X (2) of the NRPA outlines a three-tiered review process for reviewing applications to undertake activities altering freshwater wetlands which is typically based on the amount of impact proposed. Under this three-tiered process, an application for freshwater wetland alteration may be reviewed as follows: alterations up to 15,000 square feet are considered under Tier 1; alterations between 15,000 square feet and one acre are considered under Tier 2; and alterations of greater than 1 acre are considered under Tier 3. However, 38 M.R.S.A §480-X (4) states that alterations of wetlands located within 250 feet of a coastal wetland are ineligible for the more expedited Tier 1 and Tier 2 review process unless the Department determines that the activity will not negatively affect the freshwater wetland. Further, Chapter 310 Section 4(B) states that alterations of wetlands of special significance usually require an individual Natural Resources Protection Act permit. However, at the applicant's request, the Department may make a determination that the activity will not negatively affect the freshwater wetland or other protected natural resources present and may be analyzed using the Tier 1 or Tier 2 review process. In making this determination, the Department considers such factors as the size of the alteration, functions of the impacted area, existing development or character of the area in and around the alteration site, elevation differences and hydrological connection to surface water or other protected natural resources.

The wetland on the project site was delineated by the applicants' wetland consultant, and meets the definition of a wetland of special significance due to its location within 250 feet of a coastal wetland. At the request of the applicants for a reduced review procedure, the Department evaluated the preliminary site plan submitted with the request and conducted a site visit on August 25, 2009. The site plan outlined the location of the wetland on-site, the existing drainage pattern, and the available building envelope based on local setbacks. The Department determined that the applicants had a limited building envelope for the construction of a single-family residence and the proposed alteration was located in the southwesterly portion of the on-site wetland and represented a small portion of impact to

the overall wetland. In addition, the proposed location of wetland alteration would not impact the existing hydrology or connection to other protected natural resources as the site plan identified two existing culverts that contribute to the wetland on-site and the flow pattern for this source of water would not be eliminated as a result of the construction of the house. The Department also considered that the surrounding area is developed with single-family residences and the proposed residence would be similar in size and design to the existing residences. Further, the proposed impact to the wetland did not appear to increase the risk of flooding on the applicants' property or the abutting properties based on the elevation differences between the abutting properties, the applicants' property, and the coastal wetland. For these reasons, the Department determined the proposed impact would not negatively affect the freshwater wetlands or any other protected natural resources present and determined that it was appropriate to review the application under the Tier 1 review process.

The Board finds that the Department's determination that the proposed project be reviewed under the Tier 1 review process was based on adequate information and concurs with the Department's finding that the proposed project is eligible for the Tier 1 review process.

B. PRACTICABLE ALTERNATIVES:

The appellants contend that the applicants' site plan reveals several other practicable building options that could be used to either avoid or significantly minimize freshwater wetland impacts. The appellants also contend that Chapter 310 Section 5(A) of the NRPA Rules considers practicable alternatives to exist and deems the proposed impacts to be unreasonable and, therefore, impermissible.

Tier 1 permit applications are subject to a reduced procedure review process as outlined in the NRPA (38 M.R.S.A. §480-X(2)) and have a shorter statutory deadline for permit processing than Tier 2 and Tier 3 applications. The standards cited in Department Regulations Chapter 310 Section 5(A) do not apply to Tier 1 permit applications pursuant to Chapter 310 Section 2 (A), which states that only specific sections of Chapter 310 apply to Tier 1 permit applications. The Department determined that the construction of a single-family residence with associated site improvements is an eligible project under this review process.

Because the proposed project was reviewed under the Tier 1 review level, the Board finds that the plan proposed by the applicant is deemed to have no practical alternative.

C. AVOIDANCE AND MINIMIZATION

Projects that meet the eligibility requirements for Tier 1 review must also satisfy the permitting requirements set forth in the NRPA at 38 M.R.S.A. §480-X(3). These permitting standards include: avoidance of wetland impacts to the extent feasible considering cost, existing technology and logistics based on the overall project purpose; minimization to the impact amount necessary to complete the project; proper use of erosion

control measures on the project site to protect natural resources; and compliance with applicable water quality standards pursuant to 38 M.R.S.A. §480-D of the NRPA.

The appellants contend that the proposed building envelope and setbacks depicted in the application do not justify any wetland impacts on the site and the applicant has not avoided and minimized wetland impacts. The appellants further contend that the 25-foot fill envelope around the proposed house site is not required and could be reduced substantially to entirely avoid or minimize wetland fill.

The site plan submitted with the application demonstrates that the applicants located all but a small portion of the house outside of the wetland. The primary impact is a result of a 25-foot fill envelope around the perimeter of the house. The Department permitting record contains an avoidance and minimization statement provided by the applicant and includes justification for the alteration of 2,736 square feet of freshwater wetlands. The permitting record also contains a statement that explains that a 25-foot fill envelope around the perimeter of the proposed dwelling is proposed in order to ensure proper grading for the construction of the residence. The 25-foot fill envelope is considered by the Department to be the minimal amount of fill necessary for positive drainage around a house foundation and is routinely accepted.

The applicants' avoidance and minimization statement further explains that the parcel is relatively small in size (\pm 0.65 acres), located adjacent to a coastal wetland, and contains a shrub-scrub freshwater wetland. Due to these factors and in order to comply with local building setbacks, there is a limited amount of area on the parcel where development can occur. It is acknowledged that in order for the applicants to meet project goals, some wetland impacts are unavoidable. The applicants proposed to site the proposed dwelling and associated fill envelope to utilize the uplands areas on the parcel to the greatest practical extent. The applicants also designed the project to maintain existing drainage patterns on the parcel.

Based on its review of the Department's record, the Board finds that the alteration of 2,736 square feet of freshwater wetland for the construction of a single-family residence and associated fill envelope represents the least amount of wetland alteration to meet the goal of the project, and that wetland impacts have been avoided and minimized to the extent feasible based on the overall purpose of the project.

D. FLOODING OF APPELLANT'S PROPERTY

The appellants contend that construction of a permanent structure with associated driveways and other impervious area at the proposed location will result in a measurable increase in flooding both within the alteration area and on adjacent properties.

As outlined in Finding 6A above, Tier 1 permit applications are subject to a reduced review process procedure. More specifically, the standards of 38 M.R.S.A. §480-D do not apply to projects that qualify for Tier 1 review, except that habitat standards under 38 M.R.S.A. §480-D(3) and water quality standards under 38 M.R.S.A. §480-D(5) apply to Tier 1

projects. As such, the applicant is not required to meet 38 M.R.S.A. § 480-D(6), which requires that an activity not unreasonably cause or increase flooding of the alteration area or adjacent properties.

The Board concurs with the Department's finding that the alteration of 2,736 square feet of freshwater wetland for the construction of single-family residence will not have an unreasonable impact on the freshwater wetland or other protected natural resource. The Board also concurs with the Department's finding that the application satisfies the general permitting requirements and standards as set forth in the NRPA, 38 M.R.S.A §480-X.

Based on the above findings, the Board concludes that:

1. The appellants filed a timely appeal.
2. The appellants have not demonstrated that there is credible conflicting technical information regarding the Department's applicable licensing criteria to warrant a public hearing on the appeal.
3. The applicants' proposal to alter 2,736 square feet of freshwater wetland of special significance meets the criteria for a Tier 1 freshwater wetland permit application as set forth in Chapter 310 Section 4(B) of the NRPA.
4. The applicants' proposal to alter 2,736 square feet of freshwater wetland of special significance for the purpose of constructing a single-family residence will not have an unreasonable adverse impact on the freshwater wetland or any other protected natural resource present; and the proposed project meets the criteria for a Tier 1 freshwater wetland permit application, as set forth in 38 M.R.S.A §480-X.

THEREFORE, the Board AFFIRMS the findings in Department Order #L-24923-TA-B-N approving the application of BETH ZAGOREN AND ROBERT GILPATRIC to alter 2,736 square feet of freshwater wetland to construct a single-family residence in Biddeford, Maine and DENIES the appeal of the RUSSELL LAPORTE AND THE SEA SPRAY HOMEOWNERS GROUP.

DONE AND DATED AT AUGUSTA, MAINE, THIS _____ DAY OF _____, 2013.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Susan Lessard, Presiding Officer

