STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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PROPOSED
BOARD ORDER

FALLBROOK COMMONS DEVELOPMENT, LLC Portland, Cumberland County	) NATURAL RESOURCES PROTECTION ACT) FRESHWATER WETLANDS ALTERATIONS) WATER QUALITY CERTIFICATION
APPEAL OF: IAN HOUSEAL AND MICHAEL DENBOW	)
L-11219-TE-H-Z (DENIAL)	) APPEAL) FINDINGS OF FACT AND ORDER

Pursuant to applicable provisions of 38 M.R.S. §§ 480-A through 480-JJ; Section 401 of the Clean Water Act, 33 U.S.C. § 1341; and the Department's rules including Chapter 310, *Wetlands and Waterbodies Protection*; Chapter 315, *Assessing and Mitigating Impacts to Existing Scenic and Aesthetic Uses*; Chapter 335, *Significant Wildlife Habitat*; and Chapter 2, *Rule Concerning the Processing of Applications and Other Administrative Matters*, the Board of Environmental Protection (Board) has considered the appeals of Ian Houseal and Michael Denbow of Department of Environmental Protection (Department) Order L-11219-TE-H-N (Department Order) issued to Fallbrook Commons Development, LLC, with the underlying record, and all responses filed, and FINDS THE FOLLOWING FACTS.

A. PROCEDURAL HISTORY

History of Project: In Department Order #L-11219-87-A-N, dated October 10, 1985, the Department approved a Site Location of Development Act (Site Law) permit for the construction of 98 townhomes, a project called Ray Street Town Homes, on an approximately 20-acre parcel of land off Ray Street in the City of Portland. Subsequent orders transferred the original order to Fallbrook Inc and renamed the development Fallbrook. In Department Order #L-11219-87-E-A, dated December 28, 1992, the Department approved the conveyance of approximately 12.64 acres of the original parcel for the construction of a 27,600-square foot single-story assisted-care facility, known as Fall Brook Woods.

On February 20, 2020, Fallbrook Commons Development, LLC (licensee) submitted an application for a Natural Resources Protection Act (NRPA) permit to construct a 90-bed nursing care facility adjacent to Fall Brook Woods assisted living facility. The proposed project site is located on approximately 8.24 acres of undeveloped land within the 12.64 acres conveyed to Fall Brook Woods from the original 20-acre parcel described above.

This application was accepted for processing on March 12, 2020. After consideration of the application, public comments, comments from other State agencies, and additional filings by the applicants, the Department approved the application in Department Order #L-11219-TE-H-N, dated June 4, 2020 and filed with the Board on June 5, 2020.

On June 29 and June 30, 2020, Ian Houseal and Michael Denbow (appellants) filed timely appeals to the Board requesting that the Board reverse the decision of the Department. The Board received a submission from the licensee regarding supplemental evidence contained in one of the appeals on July 30, 2020. On September 8, 2020, the Board Chair ruled on the admissibility of this supplemental evidence. The Board received a response to the appeal from the licensee dated September 25, 2020

B. PROJECT DESCRIPTION

The applicant proposes to purchase approximately 8.24 acres of undeveloped land from the 12.64 acres originally authorized for development in Department Order #L-11219-87-E-A. This portion of the property, originally approved for development as part of the townhouse complex Fallbrook, and subsequently included as part of Fallbrook Woods, is now being proposed to be developed with a 90-bed nursing care center adjacent to Fallbrook Woods. The project site is located at the end of Merrymeeting Drive in the City of Portland. The proposed development includes a two-story, 58,197-square foot building, two courtyards, and two parking areas. The applicant is seeking Department approval under the NRPA for the alteration of 38,461 square feet of freshwater wetlands to construct the proposed project. The proposed project is shown on a set of plans, the first of which is titled "Overall Wetland Impacts of Fallbrook Commons," prepared by Sebago Technics, Inc., and dated November 12, 2019, with a final revision date of May 15, 2020.

The applicant submitted a Notice of Intent (NOI #69983) to comply with the standards and requirements of the Maine Construction General Permit which was accepted by the Department on June 1, 2020. Because the area is included in a previously issued Site Law permit, a major amendment to that permit is required for the proposed project; that application for an amendment is being reviewed by the City of Portland under its delegated review authority.

C. STANDING

An aggrieved person, pursuant to Chapter 2, is any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. Appellants Houseal and Denbow are both abutters. Abutters are generally subject to a lenient standard for meeting the particularized injury requirement. Both appellants assert standing by noting possible significant impacts to the surrounding neighborhood, environment, and wildlife resulting from the project. Each of these represents a

conceivable injury that could result from the project; accordingly, appellants Houseal and Denbow each have standing and may bring appeals before this Board.

D. APPELLANTS' ARGUMENTS AND BASES FOR APPEAL

1. Houseal Appeal. Appellant Houseal contends the Department did not provide adequate public process. Houseal asserts that the Department did not solicit comments from the public and disregarded those that it received. He further asserts that a public hearing should have been held. Appellant Houseal also challenges the Department's findings under the NRPA standards. Houseal asserts the Department did not adequately consider wildlife habitat in the project area and inappropriately relied on convenience as a factor during the Department's consideration of the applicant's alternatives analysis required by Chapter 310.

   Appellant Houseal and Appellant Denbow both raise issues concerning the Department's urban impaired stream standard in their appeals. The urban impaired stream standard is an analysis that takes place under applications for approval pursuant to the Stormwater and Site Law. Thus, that review in this instance falls under the authority of the City of Portland.

2. Denbow Appeal. Appellant Denbow raises public process concerns similar to those raised by Mr. Houseal and contends he was not notified whether a public hearing was to occur and was not provided records in accordance with Maine's Freedom of Access Act. Appellant Denbow also challenges the Department's findings under the NRPA standards. Specifically, Mr. Denbow contends that the applicant failed to demonstrate no unreasonable interference with existing scenic and aesthetic uses, and that analysis was incorrectly omitted by the Department in its review. Mr. Denbow also objects to the Department's use of maps to identify significant wildlife habitats and he contends that the information used was outdated. Lastly, Appellant Denbow challenges the alternatives analysis and asserts that practicable alternatives exist that are less damaging to the environment.

E. REQUEST FOR HEARING

The appellants requested that the Board hold a hearing regarding the appeal in accordance with Chapter 2 § 7(B). The decision to hold a hearing is discretionary with the Board, Chapter 2 § 24(A). The Board may conduct a hearing if there is credible conflicting technical information regarding a licensing criterion and it is likely that a hearing will assist the Board in understanding the evidence. As a basis for the hearing request, the appellants reiterate their contentions that they were denied the opportunity to comment or to testify at a hearing during the Department's processing. Neither appellant has supplied an offer of proof of the additional evidence that would be brought before the Board or described the evidence he would offer at a hearing, as required pursuant to

Chapter 2, § 24(B)(4). In addition, both appellants state that they do not plan to call expert or technical witnesses likely to introduce credible conflicting technical information. Appellants' arguments, based on research, personal and common knowledge can be adequately considered by the Board without requiring an adjudicatory hearing.

Contrary to the appellants' assertions, the record, including the application and comments made by reviewing state agencies, was available for public comment during the Department review of the application. The Board finds that there was the opportunity for members of the public to review the licensees' evidence and submit responsive comments and evidence while the application was pending. To the extent appellant's access to the record or ability to comment was inhibited by miscommunication or lack of communication from Department staff, the Board finds that the Board process provides an adequate opportunity for the appellants to raise their concerns. To that end, in light of possible miscommunication or misunderstanding about the opportunity to submit comments during the Department's processing of the application, Mr. Houseal's and Mr. Denbow's factual assertions underlying their appeals will be considered by the Board. With these comments, the Board finds that the record is adequately developed, and a hearing is not warranted for the Board's understanding of the evidence. Accordingly, the Board denies the appellants' request for a public hearing.

F. REMEDY REQUESTED

Appellants request that the Board grant the appeal, reverse the Department's decision, and issue a denial to Fall Brook Development, LLC.

G. BOARD ANALYSIS AND FINDINGS OF FACT

1. Public Process.

Appellants contend that insufficient process for public participation warrants a reversal of the Department's decision. Appellants state that the Department provided no opportunities for public comment on the application, and that no public meeting or hearing was provided, offered, or held. The appellants also claim each was denied access to application information. Chapter 2, §§ 7, 8, 14, and 16 of the Department's Rules, govern public hearings, meetings, public notice of applications, and public comment. Appellants' contentions invoking Maine's Freedom of Access Act (FOAA) are controlled by 1 M.R.S. §§ 401-414.

The Department has discretion in the decision whether to hold a public hearing on a pending permit application. Public hearings are held in instances where there is credible conflicting technical information regarding a licensing criterion, and it is likely the hearing will assist the Department in understanding that evidence. In accordance with Chapter 2 §7(A), requests for public hearing must indicate the interest of the person filing the request and specify the reasons why a hearing is

warranted. It is unclear whether the appellants claim to have requested a hearing or interpreted a public hearing as a prerequisite for public comment. In either case, for the reasons discussed below, the Board finds the Department's processing of the application without holding a hearing was not an error.

Appellant Houseal's February 11, 2020 email to Department staff requests he be notified upon receipt of an application; it does not request a hearing. Appellant Denbow's March 3, 2020 email to Department staff requests he be notified if and when a Department hearing was to be held, but similarly does not request a hearing and, if broadly interpreted as intending to make a request for a hearing, it does not provide the rationale necessary to support such a request. Because the Board finds that neither appellant formally requested a hearing, the Department committed no error in failing to make a formal determination on a request to hold a hearing. As discussed in Section E above, neither appellant provides conflicting technical information on the NRPA licensing criteria in their correspondence during the permitting process which would have assisted the Department in understanding the evidence. Accordingly, to the extent the correspondence could be interpreted as having been requesting a hearing, the Board finds that no error was committed when the Department, exercising its discretion, did not hold a hearing.

Appellant Houseal further asserts on appeal that the Department's process was insufficient because no public comments were solicited. 38 M.R.S. § 344 requires the Department to solicit comments "in a manner prescribed by the [B]oard in the rules." The rules adopted by the Board solicit public comment through a notice process. Notice of the upcoming filing of a permit application must be provided by the applicant to abutting property owners, and that notice informs them of their rights and responsibilities regarding requesting a hearing and submitting comments. Chapter 2, §14 outlines the required components of a notice of intent to file an application. In the required Notice of Intent to File applicants must inform abutters, such as the appellants, of their opportunity to request a public hearing and include a statement that public comments on the application may be provided to the Department. The notice is also sent to the municipality and published in the local newspaper. The Notice facilitates the submission of comments or a request for a hearing by including the name and email address of the Department contact person and the mailing address of the Department. The evidence before the Board reflects that a copy of the Notice of Intent to File was provided as part of the application and includes the required statements pertaining to requesting a public hearing and submitting comments. Both appellants referenced receiving the Notice of Intent to File in correspondence with Department staff and, based on supplemental evidence submitted by the licensee, attended a required public information meeting conducted by the licensee. Therefore, the Board finds that the Licensee provided the required notice of intent

to file to abutters and the appellants received notice informing them of their rights and giving them the opportunity to comment on the application.

To the extent appellants equate public hearings during the Department's review of an application with the opportunity to provide public comments on the pending application, Chapter 2 and the notice of intent to file clearly distinguish the two. A hearing is a formal proceeding in which an applicant, any intervenors, and members of the public provide oral testimony under oath and witnesses are cross-examined on the substance of their testimony. Public comment, in contrast, is submitted in writing and allowed at any time during the processing of the application, absent the Department imposing a deadline, and is not taken under oath or subject to cross-examination.

Lastly, abutters raise issues concerning access to the application during the comment period and during the period prior to filing the appeal. Mr. Denbow asserts an additional claim that the Department denied him rights to public records in accordance with FOAA. While the application, in conformance with Chapter 2, was available for review after its receipt by the Department, Mr. Houseal initially contacted the Department following receipt of the notice, but prior to the Department's receipt of the application. Mr. Houseal directed the Department to inform him upon the receipt of the application; however, was not contacted until days prior to the decision.

The Board notes that Department rules do not require any additional notice such as that requested by the appellant. In specific circumstances the Department does provide additional notices to interested persons. As a person who requested, in writing, receipt of materials related to a particular application, Mr. Houseal qualifies for additional communications entitled to interested persons. Interested persons, pursuant to Chapter 2 requirements, receive notice of public meetings, notice of significant new updates or substantial modifications to the application, copies of draft decisions if requested or if a hearing was held, and, in applications requiring determinations of Board jurisdiction, copies of the Commissioners recommendation. None of these circumstances occurred in this proceeding. The Board acknowledges that lack of Department communication may have acted to the detriment of the appellants in formulating their public comments, but Chapter 2 does not require the additional notice sought. The appellants arguments are adequately considered in the Board's independent review of the Department's findings. Because the Board finds that the Department did not commit any procedural error and because any harm upon the appellants is cured by the Board's process, the Board finds insufficient basis for overturning the Commissioner's decision as a result of the process below.

Concerning appellant Denbow's assertions regarding FOAA, the proper venue for appeals of Department FOAA responses is the Superior Court pursuant to 1

M.R.S. § 409. To the extent the Department's response is relevant to the arguments discussed above, the Board finds that the Department did not err in its response or in providing appellant Denbow requested records. Mr. Denbow submitted his request to the Department verbally on June 10, 2020. The Department confirmed and distributed the request on June 11, 2020. That same day, Department provided a rough estimate, based on experience handling requests similar to Mr. Denbow's, of one to six months; however, given the urgency of the appeal window, staff indicated to Mr. Denbow that the Department would make every effort to attempt to reduce that estimate closer to two weeks. Mr. Denbow's appeal is dated June 28, 2020, a Sunday, and was filed with the Board June 30, 2020. The Department provided its FOAA response to Mr. Denbow on June 29, 2020, prior to Mr. Denbow filing the appeal and a week prior to the July 6, 2020 appeal deadline. Accordingly, Mr. Denbow had access to the records prior to submitting the appeal and within a reasonable period of time before the deadline for submitting an appeal; therefore, to the extent the FOAA response is relevant to the appeal, the Board finds Mr. Denbow's contentions without merit.

2. Scenic & Aesthetic Uses

Pursuant to 38 M.R.S. § 480-D (1), NRPA applicants must demonstrate that a project does not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the affected resource. While Mr. Denbow challenges the conclusion in the permit decision that no recreational or navigational uses would be unreasonably impacted by the project, he does not point to any specific evidence to support that contention with regard to recreational or navigational uses. His appeal focuses on impacts to scenic and aesthetic uses, citing to Chapter 315 as well as section 480-D (1) of the NRPA, and states that the project will have a significant impact on scenic beauty.

The Board notes that Chapter 315, *Assessing and Mitigating Impacts to Existing Scenic and Aesthetic Uses*, does not apply to applications qualifying for Tier 2 freshwater wetland review under 38 M.R.S. § 480-X, such as the one in this proceeding; Tier 2 applications, which have lower levels of wetland impacts, are categorically excluded in Chapter 315, §3. Instead, the Department analyses such Tier 2 NRPA applications using its Visual Field Survey Checklist, as well as photographs submitted by the applicant or others and site visits conducted by staff, to identify potential scenic resources for review under the NRPA criterion, section 480-D (1).

The applicant submitted the required checklist with its application and identified all potential scenic resources as greater than 1 mile away from the project area. Department staff confirmed information submitted in the checklist through review of photographs submitted by the applicant and on-site analysis of the general

character of the site and the area surrounding the impacted wetlands. The Board recognizes that most every locale has scenic value to local residents; however, given the relative size of the impact to the wetlands and the lack of public use of the wetland at issue, the Board finds the project will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.

3. Wildlife Habitat

Both appellants challenge the outside agency review comments and the Department findings concerning wildlife habitat issues. Mr. Houseal lists types of wildlife observed in the area and argues that the approval should be vacated because the Department failed to adequately consider this habitat. Mr. Denbow asserts that because "significant wildlife resides in this forested area" it is "significant wildlife habitat." Appellant Denbow raises issues with the Department of Inland Fisheries and Wildlife (DIFW) and Maine's Natural Areas Program (MNAP) using maps as the primary sources of data in reviewing the site for significant wildlife habitat. Mr. Denbow contends that those agencies' reviews were based on out of date data and are incorrect in failing to consider those areas as potentially significant wildlife habitat for deer wintering, bats, hawks, eagles, and salamanders among other species.

Applicants for NRPA permits must demonstrate, pursuant to 38 M.R.S. § 480-D (3), that an activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life. Appellants' contentions concerning "significant wildlife" and "important habitat" go to the Department's review of "significant wildlife habitat." As used in the NRPA, the term "significant wildlife habitat" is not synonymous with "important habitat" or an area used by "significant wildlife." To be regulated and protected under the NRPA, significant wildlife habitat is defined in 38 M.R.S. § 480-B to include very specific habitats, each of which must be mapped as that particular habitat or must fit the definition of that type of habitat. The legislature, in the NRPA, gives this special protection to select habitats, including: "habitat, as defined by the Department of Inland Fisheries and Wildlife, for species appearing on the official state or federal list of endangered or threatened animal species; [and] high and moderate value deer wintering areas and travel corridors as defined by the Department of Inland Fisheries and Wildlife…" In addition, significant vernal pool habitat; high and moderate value waterfowl and wading bird habitat, including nesting and feeding areas; and shorebird nesting, feeding and staging areas are also defined as "significant wildlife habitat" when they meet the regulatory definitions. The Department, in conjunction with its sister agencies, has developed a database identifying habitat defined and mapped as significant wildlife habitat in accordance with DEP and DIFW regulations. This dataset can be used by

applicants and members of the public to identify significant wildlife habitat applicable to a project. Department rules further specify how an assessment is made whether the NRPA standard that a proposed project will not unreasonably impact significant wildlife habitat is met, as set forth in Chapter 335.

The appellants raise issues concerning the Department's use of maps and other resources to identify significant wildlife habitat. The NRPA authorizes this practice and directly limits the consideration of habitat in some instances to those that have been mapped. The definition of "significant wildlife habitat" in 38 M.R.S. § 480-B includes the qualifying language, "to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife or are within any other protected natural resource." Further, maps are discussed in relation to significant wildlife habitat in 38 M.R.S. §§ 480-J, 480-BB, 480-EE, and 480-FF. DIFW Rule, Chapter 10, *Significant Wildlife Habitat*, was also adopted, pursuant to the NRPA, and sets forth the criteria used to "define and map" significant wildlife habitat. The Board finds that because NRPA expressly authorizes, and in some cases requires, the use of maps as a means for identifying habitat eligible for consideration, the Department and commenting agencies appropriately relied on them, here in conjunction with a site visit and the review of photographs, in making comments, findings and relevant determinations.

The record reflects that the Department's Geographic Information Systems does not identify any mapped Essential or Significant Wildlife Habitats in the project area. The applicant solicited comments from DIFW and MNAP to aid the Department in its assessment. In its November 7, 2019 review, MNAP identified no rare or exemplary botanical features in the project area. In its review of the proposed project, DIFW confirmed that it had not mapped any Essential or Significant Wildlife Habitat in the project area. While deer may be present in the area, the project site has not been mapped as a high or moderate value deer wintering area and evidence does not support a finding that it is a travel corridor. DIFW identified several species of bats that are likely present in the project area either during migration or breeding season and recommended that, if the project was approved, tree clearing be performed when bats would not be present. The Department's order conditions approval on limiting tree clearing to outside the recognized pupping season for tree-roosting bats of June 1 to July 31. Chapter 335 requires applicants to avoid, minimize, and compensate for any impacts to significant wildlife habitat or disturbance to subject wildlife. There is no evidence in the record of any area that meets the NRPA definition of significant wildlife habitat and the approval issued by the Department imposed timing restrictions ensuring disturbance to the wildlife that may be present was minimized. The Board finds the project will not unreasonably harm significant wildlife habitat.

4. Wetlands & Waterbodies Protection

Chapter 310 further specifies the standards set forth in section 480-D of the NRPA that must be met by applicants proposing regulated activities in, on, over or adjacent to a wetland or water body. To allow the Department to assess the reasonableness of any impacts, Chapter 310 requires applicants to conduct an alternatives analysis and provide evidence regarding whether a less environmentally damaging practicable alternative to the proposed alteration, which meets the project purpose, exists. Appellants contend that practicable alternatives exist that meet the project purpose and that the Department made several errors in its review and acceptance of the alternatives analysis, including: ignoring the redevelopment of St. Josephs Manor as a practicable alternative; relying on convenience in determining practicability; and, considering more impactful alternatives in relation to the applicant's proposed alternative.

The Department considers whether practicable alternatives exist and whether a proposal avoided and minimized impacts and compensated for impacts as part of its determination of whether the project would have an unreasonable impact under the 480-D standards. Chapter 310 defines "practicable" as "available and feasible considering cost, existing technology and logistics based on the overall purpose of the project." Chapter 310, § 9 provides several factors an applicant must consider including: (1) utilizing, managing or expanding one or more other sites to avoid the wetland impact; (2) reducing the size, scope, configuration or density of the project as proposed, thereby avoiding or reducing the wetland impact; (3) developing alternative project designs, such as cluster development, that avoid or lessen the wetland impact; and (4) demonstrating the need, whether public or private, for the proposed alteration.

The applicant's alternatives analysis considered four alternatives: (1) do not build; (2) redevelopment at the St. Joseph's Manor site; (3) building a single-story facility at the proposed site; and (4) building a facility incorporating a second story at the proposed site. The applicant determined option 4 was the least environmentally damaging practicable alternative that met the project purpose. Appellants primarily dispute the elimination of option 2, which they characterize as convenience based. The Board has found, in certain circumstances, practicable alternatives exist when convenience is the sole factor relied on by applicants, for instance, elimination of nearby marinas or boat launches compared to a preferred dock. Similar facts are not present here. Ownership and, in this case, proximity are intervening factors and reasonable considerations with which an applicant may apply to its analysis. In the context of elderly care facilities, the Board finds the narrowing of sites to the same general area to be an acceptable consideration in determining whether alternative sites meet the project's purpose. The Board also finds that eliminating alternatives currently owned by other entities not interested in developing at a particular site falls within the logistical and cost

considerations authorized by Chapter 310 when evaluating whether a practicable alternative exists. Finally, the Board finds that the licensee's elimination of a more damaging alternative meets the purpose of this analysis under the NRPA and Chapter 310. The applicant considered alternative site layouts, including proposing a most practical single-story alternative, but avoided and minimized impacts by incorporating a less convenient second story and reduced the size of the impact in accordance with Chapter 310, § 9. Thus, the Board finds that the proposed project represents the least environmentally damaging practicable alternative that meets the project purpose. This finding supports the findings under the statutory criteria regarding the reasonableness of the impacts to protected resources.

H. CONCLUSIONS

Based on the Board's analysis and findings of fact above, the Board makes the following conclusions.

1. The appellants filed timely appeals in accordance with Chapter 2, § 24(A).

2. The appellants are aggrieved persons pursuant Chapter 2, § 1(B) and have standing to bring their appeals before the Board.

3. The Department did not err in failing to hold a hearing and a public hearing is not warranted for this appeal.

4. The appellants have received adequate opportunity to comment on the application.

5. The proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses.

6. The proposed activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life.

All other findings, conclusions and conditions of Department Order L-11219-TE-H-N are incorporated herein.

THEREFORE, the Board DENIES the appeals of IAN HOUSEAL and MICHAEL DENBOW and AFFIRMS the Department Order L-11219-TE-H-N.

DONE AND DATED AT AUGUSTA, MAINE, THIS_____ DAY OF _____, 2021.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Mark C. Draper, Chair