BERN
STEIN
SHUR

Bernstein, Shur,
Sawyer & Nelson, P.A.
100 Middle Street
PO Box 9729
Portland, ME 04104-5029

T (207) 774 - 1200
F (207) 774 - 1127

Rachael M Becker McEntee
rmcentee@bernsteinshur.com

Via electronic mail only

September 25, 2020

Mark C. Draper, Chair
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017
Ruth.a.burke@maine.gov

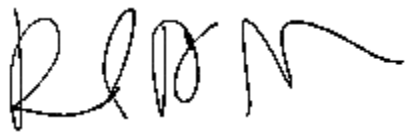
Re: Fallbrook Commons #L-11219-TE-H-N, Appeals by Ian Houseal and Michael Denbow
Brief of Appellee Fallbrook Commons Development, LLC

Dear Chair Draper

Attached please find the brief for Attached for filing please find the brief of Fallbrook Commons Development, LLC in the above captioned matter.

Please do not hesitate to contact me if there are any questions.

Sincerely,



Rachael M Becker McEntee

Enclosure
cc: Service List

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN RE:

FALLBROOK COMMONS DEVELOPMENT, LLC	)	APPLICANT'S RESPONSE TO APPEALS OF DEPARTMENT ORDER GRANTING NRPA PERMIT
#L-11219-TE-H-N	)	

Fallbrook Commons Development, LLC ("Fallbrook") hereby submits this response to the appeals filed by Ian Houseal and Michael Denbow (collectively the "Appellants") of an Order issued by the Department of Environmental Protection (the "Department") granting Fallbrook a Tier 2 Natural Resources Protection Act ("NRPA") Permit for the alteration of 38,461 square feet of freshwater wetlands. For the reasons set forth below, the appeals and Appellant Denbow's request for a hearing should be denied.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Fallbrook contracted to purchase approximately 8.24 acres of undeveloped land adjacent to Merrymeeting Drive and Ray Street in Portland to construct a new 90-bed licensed nursing care center located next to the existing Fallbrook Woods assisted living facility (the "Proposed Project"). The Proposed Project would include a single two-story building with parking and has been designed to minimize its impact on the environment to the greatest extent practicable.[1] After providing proper notice, including to the Appellants, Fallbrook applied for a Tier 2 NRPA permit because the Proposed Project would include the alteration of 38,461 square feet of freshwater wetlands. The Department found that the Proposed Project met all of the standards of review for NRPA and approved Fallbrook's application on June 4, 2020.

[1] For example, the Proposed Project will retain as much existing vegetation as practicable, and use largely native species in the planned landscaping in order to support wildlife habitat at the site. *See* Fallbrook NRPA application, Attachment 1.

Mr. Houseal appealed the Department's decision on June 27, and Mr. Denbow appealed the Department's decision on June 30, 2020. On July 15, 2020, the Board of Environmental Protection (the "Board") determined that the appeals presented similar arguments and that it would process the appeals together. Mr. Denbow's appeal contained proposed supplemental evidence, specifically a Maine Threatened and Endangered Species Listing Handbook dated January 22, 2009 (the "Handbook") and water quality information relating to the Proposed Project's sanitary sewer and stormwater runoff. Fallbrook filed comments on July 30, 2020 regarding the admissibility of that supplemental evidence and included its own proposed supplemental evidence, including a copy of the sign in sheet for the February 18, 2020 public informational meeting regarding the Proposed Project and a copy of the certified mail receipt indicating Mr. Denbow received the meeting notice 10 days before the meeting ("Licensee Attachment 1").

On September 8, 2020, the Chair ruled that the Handbook would be admitted into evidence, but that the water quality information submitted by Mr. Denbow would not be admitted (the "September 8 Ruling"). The Chair also admitted Fallbrook's Licensee Attachment 1, determining it "is relevant to the issue of adequate notice that has been raised by Mr. Denbow in his appeal." September 8 Ruling at 3. The Chair determined that Mr. Denbow's stormwater management and sanitary waste disposal information is "not relevant to the NRPA permit" and that the "City of Portland is conducting an in-depth review of these criteria as part of the Site Location of Development (Site Law) application which is pending," and in which the Appellants can participate. *Id.*

The appeals raised questions regarding the details of Fallbrook's Site Location of Development Act ("Site Law") permit application currently pending with the City of Portland.

Id. As recognized in the Chair's September 8 Ruling, these challenges are irrelevant to the question of whether the Department properly issued the NRPA permit at issue in these appeals.

ARGUMENT

1. Fallbrook and the Department Complied with All Public Notice and Comment Requirements

Appellants collectively allege that they lacked adequate notice of Fallbrook's application and were not afforded an opportunity to provide public comments. Chapter 2 of the Department's Rules establishes the public notice and comment requirements for applicants and the Department. These rules required Fallbrook to provide public notice and abutter notice of its intent to file its NRPA application. *See* 06-096 C.M.R. ch. 2, § 13. Fallbrook published a public notice in the Portland Press Herald and mailed the same notice regarding its intent to file a NRPA application to all abutters, including Appellants (the "Notice"). *See* Fallbrook NRPA Application, Attachment 11. These notices also contained the requisite language instructing interested persons on how to contact the Department to comment on the application, how to review the application, and how to request a public hearing. Fallbrook was not required under Chapter 2 to hold an informational meeting for the NRPA application, although it did hold such a meeting and included the time, date, and location in the required public and abutter notices. *See* 06-096 C.M.R. ch. 2 § 10. Pursuant to Chapter 2, while there is an *opportunity* for any interested person to request a formal hearing, but the Department's decision to hold such a hearing is discretionary. *See* 06-096 C.M.R. ch. 2, § 7. Fallbrook and the Department complied with all applicable public notice and comment requirements and Appellants had every opportunity to request a hearing and otherwise provide comments on Fallbrook's NRPA application.

Fallbrook held the informational public meeting described in the Notice on February 18, 2020 to discuss the Proposed Project. As Licensee Attachment 1 indicates, Mr. Denbow not only

received the Notice via certified mail but also attended that public informational meeting. Mr. Denbow's appeal also states that he had "been in contact with the Department of Environmental Protection since late February of 2020." Denbow Appeal at 2. Likewise, Mr. Houseal does not dispute that he received Fallbrook's Notice in the mail, which notice is reflected in Fallbrook's NRPA application materials. The evidence before the Board, therefore, indicates that Fallbrook and the Department complied with all notice and public comment obligations.

Appellants do not allege – nor does the administrative record indicate – that they made a request for a formal public hearing. *See* Denbow Appeal at 2 ("I sent an email to Mr. Green [at the Department] and asked to be notified *in case of* a public hearing." (emphasis added)). The record is clear, however, that the Notice informed them of the right and opportunity to make such a request. *See* Fallbrook NRPA Application, Attachment 11; Licensee Attachment 1. The Department's Rules place the burden squarely on the public to request a public hearing when one is not already required. *See* 06-096 C.M.R. ch. 2, §§ 7, 16. If Appellants wanted a formal public hearing on Fallbrook's NRPA application, the record indicates Fallbrook's Notice provided clear instructions on the manner and timeline in which to request a hearing and the Department afforded them that opportunity. The Department's Rules require no more. Appellants' failure to make such a request does not retroactively render Fallbrook's NRPA application deficient or the Department's consideration and approval of Fallbrook's NRPA application unlawful or unfair. Accordingly, Appellants' contentions that the Board should reverse the Department approval because there was "no allowance for public hearing given or expressed to the public," Denbow Appeal at 2, and that "[n]o public meeting was held or offered, or considered," Houseal Appeal at 2, are without merit and otherwise contrary to the administrative record now before the Board.

Mr. Denbow's additional contentions regarding the Department's alleged failure to

respond to his June, FOAA request are also irrelevant to Fallbrook's NRPA permit. There is nothing in the record to suggest that the Department failed to comply with FOAA, and furthermore, the question of the Department's compliance with its obligations under FOAA, as opposed to its obligations under NRPA and Chapter 2, are outside the scope of the Board's review of the NRPA approval. In any event, Mr. Denbow's own Appeal indicates that he did not make a FOAA request to the Department until *after* the Department granted Fallbrook's NRPA application. *See* Denbow Appeal at 2 ("I contacted DEP on June 10th 2020 and was referred to the Freedom of Information Officer"). Mr. Denbow appears to take issue with the fact that the Department did not keep him apprised of the progression of its consideration of Fallbrook's application. *See* Denbow Appeal at 1 ("I have been in contact with the Department . . . since late February of 2020 in an attempt to determine the application process for the project . . . ."). The Department's Rules and NRPA, however, do not require the Department to keep members of the public informed of every aspect of a NRPA permit approval, unless they make a written request to be considered an interested person, which Mr. Denbow did not do. Adequate notice and a meaningful opportunity to participate and provide public comments are the standard. The record is clear that the Department afforded Appellants these opportunities. The Board should give no weight to Mr. Denbow's assertion that the Department violated its public notice and comment obligations and should deny the Appeals.

2. Fallbrook Proved that the Project Would Not Unreasonably Interfere with Existing Scenic, Aesthetic, or Recreational Uses.

Mr. Denbow contends that the Board should reverse the Department's NRPA permit because of unreasonable interference with existing scenic and aesthetic uses. Pursuant to 38 M.R.S. § 480-D(1), the Department must determine that a proposed activity "will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses." The

Law Court has recognized that "whether a proposed activity will unreasonably interfere with an existing scenic or aesthetic use will necessarily depend on the specific circumstances of a given case." *Uliano v. Bd. of Envtl. Prot.*, 2009 ME 89, ¶ 23, 977 A.2d 400, 410. The Board's review of the Department's decision is confined to the administrative record and any supplemental evidence on appeal. *See* 06-096 C.M.R. ch. 2, § 24(G). Fallbrook provided sufficient evidence in its application to prove that the Proposed Project would not unreasonably interfere with existing uses and the Department's findings are, therefore, supported by the record.

First, the Department's finding that the project site was "not a scenic resource visited by the general public," is supported by the record and the Department's Rules. Fallbrook also included a completed Visual Evaluation Field Survey Checklist as Appendix A to its application that indicated there would be no adverse impacts to any existing scenic resources. A "Scenic Resource" is defined as "*[p]ublic natural resources or public lands* visited by the general public, in part for the use, observation, enjoyment, and appreciation of natural or cultural visual qualities." 06-096 C.M.R. ch. 315, § 5(H) (emphasis added). Appellants have not identified, and Fallbrook is unaware of, any evidence in the record to suggest that the freshwater wetland addressed in the NRPA application is a protected scenic or aesthetic resource. Quite the contrary, as the freshwater wetland addressed in Fallbrook's NRPA application are not on "public lands" and do not constitute "public natural resource[s]" – they are on private property. *See id.*

Second, the record supports the Department's finding that "no existing recreational or navigational uses of the resource would be unreasonably impacted." Fallbrook's Wetlands Functions and Values Assessments included with its application indicated that the freshwater wetlands offered "no recreational opportunities." Fallbrook NRPA Application, Attachment 4. Department staff also visited the project site on March 12, 2020, which would have afforded

them the opportunity to confirm that the Proposed Project would not unreasonably interfere with existing uses. Order at 2. Appellants did not offer supplemental evidence otherwise identifying existing recreational or navigational uses for these wetlands, nor is there any evidence in the record that the Proposed Project would unreasonably interfere with any such existing uses. Accordingly, the record supports the Department's fact specific inquiry and determination that the Proposed Project will not unreasonably interfere with existing recreational or navigational uses. Therefore, the Board should deny the Appeals.

3. Fallbrook Presented Sufficient Evidence that the Project would not Unreasonably Harm Significant Wildlife Habitat

Appellants argue that the Department did not adequately consider the impact to wildlife that reside in the area of the Proposed Project. Pursuant to 38 M.R.S. § 480-D(3), an applicant must demonstrate that a proposed project will not "unreasonably harm" significant wildlife habitat. NRPA defines "significant wildlife habitat" as "areas *to the extent that they have been mapped* by the Department of Inland Fisheries and Wildlife" that include "habitat . . . for species appearing on the official state or federal list of endangered or threatened animal species . . . ." 38 M.R.S. § 480-B(10)(A) (emphasis added). To determine whether or not an activity will result in unreasonable harm, "the [D]epartment may consider proposed mitigation," including avoiding an impact, minimizing an impact and compensation for harm. 38 M.R.S.A. § 480-D(3); 06-96 C.M.R. Ch. 310, § 3(N). Fallbrook's application materials met its burden to demonstrate there would not be any unreasonable harm to significant wildlife habitat and the record supports the Department's findings.

As part of its NRPA application, Fallbrook submitted information requests to the Maine Department of Inland Fisheries and Wildlife ("DIFW") and the United States Department of the Interior. DIFW determined that the project area did not include any known (i.e. "mapped")

significant wildlife habitats. Mr. Denbow raised concerns regarding the use of "maps" to determine if significant wildlife habitat existed at the project site. Denbow Appeal at 5. NRPA, however, expressly permits the use of such maps to determine if significant wildlife habitat exists at a project site. Indeed, such habitats exist "to the extent they have been mapped by" DIFW. *See* 38 M.R.S. § 480-B(10)(A). The record before the Department and now the Board, therefore, supports the Department's finding that no known significant wildlife habitat existed at the site of the Proposed Project.

In response to Fallbrook's request for information, DIFW did raise concerns regarding potential impacts to endangered or threatened bat populations. No other threatened or endangered species were identified at the project site.[2] In response to DIFW's concerns, Fallbrook agreed to mitigate the potential impact to these bat populations by not performing any tree cutting on the property in June and July – the bats pupping and tree-roosting seasons. The Department, appropriately, considered this proposed mitigation when it found that the Proposed Project would not result in "unreasonable harm" to any significant wildlife habitat. Order at 3; *see also* 38 M.R.S.A. § 480-D(3); 06-96 C.M.R. Ch. 310, § 3(N). The record before the Department, therefore, supports its finding that the Proposed Project would not result in any unreasonable harm to any "significant wildlife habitat" and the Board should deny the Appeals.

4. <u>Appellants' Concerns Regarding Water Quality Are Not Relevant to Fallbrook's NRPA Permit</u>

The appeals raise water quality concerns focused on the Proposed Project's sanitary sewer and stormwater runoff to Fall Brook, an urban impaired stream. Appellants' water quality contentions on appeal are, however, not relevant considerations as to whether Fallbrook should

[2] Mr. Denbow raises concerns regarding the Red-Tailed Hawk. Denbow Appeal at 4. The Red Tailed Hawk is not, however, listed as a threatened or endangered species pursuant to the Federal Endangered Species Act or the Maine Endangered Species Act. *See* 12 M.R.S. § 12803(3) (listing state endangered or state threatened species).

receive a NRPA permit. As the Chair acknowledged in the September 8 Ruling: "Stormwater management and provisions for the disposal of sanitary wastes are not relevant to the NRPA permit." September 8 Ruling at 3. Fallbrook submitted applications pursuant to Site Law and the Maine Stormwater Law to the City of Portland, which has delegated authority to review these applications pursuant to 38 M.R.S.A. § 489-A. These laws – not NRPA – regulate the design and operation of sanitary sewer and stormwater systems. The Chair noted that the City of Portland is currently "conducting an in-depth review of these criteria as part of its review of the [Site Law] application" the "appellants are able to participate in the City's review of the project." September 8 Ruling at 3.

The relevant consideration under NRPA is whether the project will cause unreasonable erosion of soil or sediment. 38 M.R.S. § 480-D(2). Fallbrook submitted an erosion control plan with its application that proved there would be no unreasonable soil erosion as a result of the Proposed Project. To the extent Appellants' water quality arguments relate to issues under NRPA jurisdiction, the record indicates that the Proposed Project will not cause unreasonable soil erosion or otherwise violate the State's water quality laws. The Board should, therefore, deny the Appeals.

5. Fallbrook Demonstrated Compliance with NRPA and the Department's Wetlands Protection Rules

Appellants allege that the Proposed Project will cause too great an impact to wetlands and Fallbrook did not appropriately consider alternatives. Pursuant to NRPA and Chapter 310 of the Department's Rules, an applicant must demonstrate that the project will not cause an unreasonable impact to freshwater wetlands by avoiding adverse impacts, minimizing impacts that cannot be practicably avoided, and compensating for unavoidable impacts. *See* 38 M.R.S. § 480-D(3); 06-096 C.M.R. § 310, § 5. An applicant must avoid alteration of freshwater wetlands

"to the extent feasible considering cost, existing technology, and logistics based on the overall purpose of the project [and alterations] must be limited to the minimum amount necessary to complete the project." 38 M.R.S.A. § 480-X(3)(A). Pursuant to 38 M.R.S. § 480-Z, to avoid any loss of wetland function, an applicant has the option to participate in the wetland compensation In-Lieu Fee Program to compensate for unavoidable impacts.

An applicant must also submit an alternatives analysis to demonstrate the lack of practicable alternatives that would result in less impact to wetlands. Contrary to Appellants contentions, there is no statutory or regulatory provision requiring an applicant to submit, or the Department to consider, an alternatives analysis that does not meet the overall purpose of the project or is not practicable given the overall purpose of the project. *See* Denbow Appeal at 6; Houseal Appeal at 2-3. Rather, the alternatives analysis determines whether "a less environmentally damaging practicable alternative to the proposed alteration, *which meets the project purpose*, exists." 06-96 C.M.R. Ch. 310, § 9(A) (emphasis added). Avoiding an impact may be achieved by "not taking a certain action or parts of an action" and minimizing an impact may be achieved by "limiting the magnitude or duration of an activity". 06-96 C.M.R. Ch. 310 § 3(N).

Here, the overall purpose of the Proposed Project is to replace the services provided at the existing St. Joseph's Manor facility, which is owned by another entity and is scheduled to be closed, with a new, state-of-the-art nursing home located to provide those services to the same geographic vicinity as St. Joseph's Manor. Fallbrook's alternatives analysis considered all possible locations for the Proposed Project and configurations that would achieve that overall purpose. Contrary to Appellants' contentions, Fallbrook's application did consider building a new facility at the St. Joseph's Manor property. Fallbrook NRPA Application, Attachment 3.

Denbow Appeal at 6 ("A viable option with less environmental impact would be to have the site moved back to the St. Joseph's Manor site . . . ."); Houseal Appeal at 2 ("Redevelopment of the existing St. Joseph's Manor property must be considered."). This alternative, however, was not a practicable – or even possible – alternative. Fallbrook does not own St. Joseph's Manor and the current owner was not willing to construct a new facility at that property. The chosen parcel was the only location that met the Proposed Project's purpose while avoiding more significant impacts.

Fallbrook also considered constructing a single story facility, but that facility would result in a larger building footprint and a greater wetland impact. Fallbrook ultimately chose an alternative partial two-story building that avoided and minimized wetland impacts to the greatest extent practicable while still serving the overall purpose of the project. Fallbrook proposed to participate in the In-Lieu Fee Program to compensate for those wetland impacts that proved unavoidable by making a payment of $165,382.20. Fallbrook, therefore, avoided and minimized impacts to wetlands to the satisfaction of the Department and in accordance with NRPA and the Department's Rules.

8. <u>Appellants' Request for a Hearing Should be Denied.</u>

The Board has the discretion to determine whether to conduct a hearing on these Appeals. 06-96 C.M.R. ch. 2, §24(A). Because Appellants have presented no credible conflicting technical information, nor any indication that a hearing would assist the Board in its review of these appeals, the Board should deny these requests.

Section 7 of Chapter 2 of the Department's Rules provides that the Board can hold a hearing in those instances where it determines that "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. 06-96 C.M.R. ch. 2, §7(B). Appellants have not presented any credible conflicting technical information in their Appeals. Rather, they have challenged the Department's application of existing standards and regulations to the technical information provided by Fallbrook. Appellants also state in their Appeals that they would not offer any "expert or technical witnesses." Houseal Appeal at 3, *see* Denbow Appeal at 7 ("I will not rely on expert witnesses other th[a]n my own testimony from common knowledge and research.").

It is precisely the lack of any technical information from Appellants to support their arguments that must lead to a denial of their request for a hearing.

CONCLUSION

For the reasons set forth above, Fallbrook Commons Development, LLC respectfully requests that the Board deny the Appeals.

Submitted this 25th day of September 2020

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FALLBROOK COMMONS DEVELOPMENT, LLC

By: 

Rachael M. Becker McEntee, Maine Bar No. 5825
Katherine A. Joyce, Maine Bar No. 9521
Patrick Marass, Maine Bar No. 6001
Attorneys for Fallbrook Commons Development, LLC
Bernstein Shur
100 Middle Street
P.O. Box 7929
Portland, ME 04104-5029
207-774-1200

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