STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. AP-15-35

MERRILL WOODWORTH,
Personal Representative for the
ESTATE OF MERRILL P. ROBBINS,

Plaintiff

v.

INHABITANTS OF THE TOWN
OF CUMBERLAND,

Defendant

and

TOWN OF CUMBERLAND,

Party-in-Interest

ORDER ON PLAINTIFF'S
MOTION FOR A
PRELIMINARY INJUNCTION

Before the court is the motion for preliminary injunction filed by plaintiff Merrill Woodworth, as Personal Representative of the Estate of Merrill P. Robbins. Plaintiff asks the court to enjoin the Town of Cumberland from constructing a proposed beach facility on land adjacent to land owned by plaintiff. For the following reasons, the motion is denied.

FACTS

The Town filed an application with the Cumberland Planning Board (the "Planning Board") for a permit to construct and operate the facility in Cumberland, Maine. (Compl. ¶ 9; Shane Aff. ¶ 15.) The Town proposed to construct the facility on land it owns adjacent to plaintiff's property.[1] (Compl. ¶ 6.) Both properties are subject to a conservation easement. (Compl. ¶ 7; Anderson Aff. ¶ 3; Pl.'s Ex. A.) Plaintiff has filed

[1] The proposed facility is a distance from plaintiff's property. (Pl.'s Ex. C, Site Overview Plan.)

a separate action, currently pending in the Law Court, in which he asserts that the conservation easement prohibits construction of the facility. (Compl. ¶ 8.)

On June 16, 2015, plaintiff submitted comments to the Planning Board stating that the facility is an Outdoor Recreational Facility. (Compl. ¶ 18; Anderson Aff. ¶ 6; Pl.'s Ex. C.) The Town property is located in a Low Density Residential zoning district (LDR Zone). (Compl. ¶ 14.) An Outdoor Recreational Facility, defined as a "place designed and equipped primarily for the conduct of nonmotorized outdoor sports, leisure time activities, and other customary and usual recreational activities," is not permitted in the LDR Zone. (Compl. ¶ 15; Anderson Aff. ¶ 5; Pl.'s Ex. D, §§ 315-4, 315-7.) On July 16, 2015, the Cumberland Code Enforcement Officer submitted comments and stated that the facility is a Municipal Use, defined as "any use or building maintained by the Town of Cumberland." (Compl. ¶ 19; Anderson Aff. ¶ 5; Pl.'s Ex. C, § 315-4.) Municipal Uses are permitted in the LDR Zone. (Compl. ¶ 19; Anderson Aff. 5; Pl.'s Ex. C, § 315-7.)

The Planning Board concluded that the CEO is responsible for determining zoning classifications. (Compl. ¶ 21.) As a result, the Planning Board did not decide whether the facility is an Outdoor Recreational Facility or a Municipal Use. (Compl. ¶ 21.) On July 21, 2015, the Planning Board voted to issue a permit for the facility. (Compl. ¶ 22; Anderson Aff. ¶ 8; Pl.'s Ex. F.) The Planning Board considered whether to include, as a condition of the permit, a stay to prevent the Town from beginning construction until the Law Court action was resolved. (Compl. ¶ 23.) The Planning Board decided not to include this condition. (Compl. ¶ 25.) The Town plans to begin construction on or after September 7, 2015. (Compl. ¶ 46.)

On July 30, 2015, plaintiff appealed to the Cumberland Board of Adjustments and Appeals (Board of Appeals). (Compl. ¶ 26; Anderson Aff. ¶ 4; Pl.'s Ex. B.) The

Board of Appeals upheld the CEO's determination that the facility is a Municipal Use. (Compl. ¶ 27.) Plaintiff then appealed to this court and moved for a preliminary injunction to enjoin the Town from constructing the facility.

DISCUSSION

1. Standing

Standing to pursue an appeal under M.R. Civ. P. 80B from a decision of a zoning board of appeals is governed by 30-A M.R.S. § 2691(3)(G). Witham Family Ltd. v. Town of Bar Harbor, 2011 ME 104, ¶ 7, 30 A.3d 811. "Any party may take an appeal, within 45 days of the date of the vote on the original decision, to Superior Court from any order, relief or denial . . . ." 30-A M.R.S. § 2691(3)(G) (2014). A "party" is defined as one who has appeared before the board of appeals and is able to demonstrate a particularized injury as a result of the board's action. Sahl v. Town of York, 2000 ME 180, ¶ 8, 760 A.2d 266. When the appeal involves land use and the party's land abuts the land at issue, the party "need only allege 'a potential for particularized injury' to satisfy the standing requirement." Sproul v. Town of Boothbay Harbor, 2000 ME 30, ¶ 6, 746 A.2d 368 (quoting Pearson v. Town of Kennebunk, 590 A.2d 535, 537 (Me. 1991)). An allegation that the abutting property violates a zoning ordinance meets this minimal standard. See Rowe v. City of S. Portland, 1999 ME 81, ¶ 4, 730 A.2d 673 (allegation that abutting property violated setback requirement sufficient to establish standing). Here, plaintiff appeared before the Board of Appeals and his land abuts the Town's property. Plaintiff alleges that construction of the facility is an unpermitted use under the zoning ordinance. The court finds that this allegation satisfies the minimal threshold of a potential for particularized injury.

2. Preliminary Injunction

For preliminary injunctive relief to be granted, the movant must demonstrate that (1) it will suffer irreparable harm without an injunction, (2) any harm to the opposing party if an injunction is granted is outweighed by the harm to the movant if an injunction is not granted, (3) there is a likelihood of success on the merits, and (4) the public interest will not be adversely affected by such relief. Ingraham v. Univ. of Me., 441 A.2d 691, 693 (Me. 1982). The court must weigh all of these factors together. Dep't of Envtl. Prot. v. Emerson, 563 A.2d 762, 768 (Me. 1989). The court will not grant an injunction if the movant cannot meet all four criteria. Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res., 2003 ME 140, ¶ 10, 837 A.2d 129. When the injunction is against a governmental body, the court should proceed with restraint. Me. Human Rights Comm'n v. City of Auburn, 425 A.2d 990, 995 (Me. 1981).

a. Irreparable Harm to Plaintiff

A party seeking injunctive relief must show he will suffer irreparable harm. Ingraham, 441 A.2d at 693. Irreparable harm is an "injury for which there is no adequate remedy at law . . . ." Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74, 79 (Me. 1980). Plaintiff has alleged that the facility will require significant clearing for a 44-space parking lot, disturbance of an acre of undeveloped land, construction of 17,700 square feet of paved areas, construction of a parking area near the water, and relocation of a bathroom facility. (Compl. ¶ 10.) Plaintiff states that these activities will result in "irreparable and permanent harm to these resources and to the Plaintiff." (Compl. ¶ 47.)

Environmental harm often cannot be adequately remedied by money damages, but plaintiff has not alleged facts to establish that these activities will cause irreparable harm to him. See Bangor Historic Track, Inc., 2003 ME 140, ¶ 12, 837 A.2d 129 (noting

that "vague generalities" suggesting harm were insufficient to support a finding of irreparable harm). At the hearing on the motion, plaintiff argued the fact of a zoning violation that involves physical alteration of the Town's property constitutes irreparable harm to plaintiff. Plaintiff relies particularly on De Schamps v. Bd. of Zoning Appeals. In that case, the Zoning Board of Appeals sought an injunction against a business owner who operated an automobile wrecking yard on his property without a permit from the Board. De Schamps v. Bd. of Zoning Appeals, 174 N.E.2d 581, 583 (Ind. 1961). The Indiana statute involved specifically provided the Board could institute a suit for injunctive relief based on a violation of the ordinance. Id., at 582-83. Other cases cited by plaintiff do not support his irreparable harm argument. See, e.g., Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 552-53 (1987) (reversing grant of injunctive relief because Alaska National Interest Lands Conservation Act did not apply to the Outer Continental Shelf); Buckeye Forest Council v. U.S. Forest Serv., 337 F. Supp. 2d 1030, 1035-36 (S.D. Ohio 2004) (Forest Council obtained preliminary injunction based on statute that permits citizens to sue to enforce compliance with the Endangered Species Act); Green Harbour Homeowners' Ass'n v. Ermiger, 889 N.Y.S.2d 687, 688-89 (N.Y. App. Div. 2009) (grant of preliminary injunction affirmed when defendant cut trees on plaintiff's property); Hunsaker v. Kersh, 991 P.2d 67, 68 (Utah 1999) (denial of preliminary injunction reversed; movants alleged damage to crops and trees if defendants interfered with irrigation water flowing to movants' land); Emerson, 563 A.2d at 764 (Department of Environmental Protection and State of Maine obtained an injunction to enforce environmental and fire safety laws); Little Joseph Realty, Inc. v. Babylon, 363 N.E.2d 1163, 1167-68 (N.Y. 1977) (grant of injunctive relief affirmed when plaintiff's property was invaded by great quantities of dust and soot from defendant's plant); Stanton v. Trs. of St. Joseph's Coll., 233 A.2d 718, 722 (Me. 1967) (dismissal of

landowners' action for injunctive relief vacated because "[T]he riparian owner of a non-navigable stream has an interest in the preservation of the quality of its water which is private property."); Gilbert v. Elder, 144 P.2d 194, 195-96 (Idaho 1943) (order staying temporary injunction prohibiting defendant from cutting timber from plaintiffs' land annulled). Plaintiff has not demonstrated he will suffer irreparable harm in the absence of injunctive relief.

b. Balance of Harm

Plaintiff has not demonstrated irreparable harm. The Town has invested significant resources, both in terms of time and money, to this project. (Shane Aff. ¶¶ 4-19.) Further, as discussed below with regard to the public interest, the preliminary work proposed by the Town includes installation of handicapped parking on public land and control of erosion and storm water runoff. (Shane Aff. ¶¶ 15, 18; Defs.' Ex. A; Pl.'s Ex. C.) Any injury to plaintiff does not outweigh the harm to defendants if injunctive relief is granted.

c. Likelihood of Success on the Merits

The issue is whether the facility is a Municipal Use, as the CEO determined, or an Outdoor Recreational Facility, as plaintiff contends. "Whether a proposed use falls within the terms of a zoning ordinance is a question of law . . . ." Peregrine Developers, LLC v. Town of Orono, 2004 ME 95, ¶ 9, 854 A.2d 216. The court examines first "the plain language of the provisions to be interpreted." Gensheimer v. Town of Phippsburg, 2005 ME 22, ¶ 22, 868 A.2d 161. A municipal determination as to how to characterize a use "will only be overturned if it is not 'adequately supported by evidence in the record.'" Jordan v. City of Ellsworth, 2003 ME 82, ¶ 8, 828 A.2d 768 (quoting Goldman v. Town of Lovell, 592 A.2d 165, 169 (Me. 1991)). The municipality's decision "as to what meets ordinance standards will be accorded 'substantial

deference.'" Rudolph v. Golick, 2010 ME 106, ¶ 8, 8 A.3d 684 (quoting Jordan, 2003 ME 82, ¶ 9, 828 A.2d 768).

The Cumberland zoning ordinance defines "Municipal Use" as "[a]ny use or building maintained by the Town of Cumberland." (Anderson Aff. ¶ 5; Pl.'s Ex. C; Cumberland, Me., Zoning Ordinance § 315-4 (Aug. 28, 2015).) The ordinance defines "Outdoor Recreational Facility" in relevant part as "[a] place designed and equipped primarily for the conduct of nonmotorized outdoor sports, leisure-time activities, and other customary and usual recreational activities, excluding boat launching facilities, amusement parks, and campgrounds . . . ." (Anderson Aff. ¶ 5; Pl.'s Ex. C; Cumberland, Me., Zoning Ordinance § 315-4 (Aug. 28, 2015).)

In its application, the Town states that the facility is for "low-impact passive recreation," including "walking and hiking, boating, swimming, shell fishing, picnicking, cross country skiing and snowshoeing." (Compl. ¶ 11; Anderson Aff. ¶ 4; Pl.'s Ex. B subsection C 1.) These uses are consistent with the outdoor sports, leisure-time activities, and recreational activities included in the definition of "Outdoor Recreational Facility." The Town will maintain the facility, however, which is consistent with the definition of "Municipal Use."

Plaintiff argues that the court should apply the "specific" term "Outdoor Recreational Facility" instead of the "general" term "Municipal Use" because of the principle that specific statutory terms control over general ones. That principle applies when there is a conflict between the two terms:

> Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.

Butler v. Killoran, 1998 ME 147, ¶ 11, 714 A.2d 129 (citation omitted). The cases on which plaintiff relies can be distinguished. See, e.g., Sullivan v. City of Augusta, 511 F.3d 16, 26 (1st Cir. 2007) (parade ordinance regulated the conduct in which plaintiff intended to engage and not the mass outdoor gathering, which makes no particular mention of conduct; not a zoning ordinance); Camps Newfound/Owatonna Corp. v. Town of Harrison, 1998 ME 20, ¶ 19, 705 A.2d 1109 (specific statute that addressed the precise issue involved was applied; not a zoning issue); Cumberland Farms, Inc. v. Town of Scarborough, 1997 ME 11, ¶¶ 5-6, 688 A.2d 914 (plain language of zoning ordinance required restrictive treatment of gasoline filling stations, regardless of whether gasoline is sold as a principal or accessory use); Armstrong v. Town of Cape Elizabeth, 2000 Me. Super. LEXIS 275, at *15-16 (Dec. 21, 2000) (conflicting provisions in a zoning ordinance required application of the more specific provision).

Here, there is no conflict between the terms "Outdoor Recreational Facility" and "Municipal Use." The facility will both be maintained by the Town and used for recreational activities, making it appropriate to classify the facility under either term. The Board decided to classify it as a Municipal Use, and the court gives that decision substantial deference. As a result, plaintiff has not demonstrated a likelihood of success on the merits.

d. Public Interest

Plaintiff argues that the injunction will advance the public interest because it will ensure that public funds are not expended on a project that may violate the zoning ordinance. In addition, plaintiff urges that it would be prudent to halt construction on the facility until the Law Court has decided whether the conservation easement prohibits construction. "A plaintiff acting to vindicate the public interest has a lighter burden of establishing entitlement to an injunction than would be the case if strictly

private interests were involved." Horton & McGehee, Maine Civil Remedies § 5-3(c) at 105 (4th ed. 2004). In addition, the preliminary work proposed by the Town includes installation of handicapped parking on public land and control of erosion and storm water runoff. (Shane Aff. ¶¶ 15, 18; Defs.' Ex. A; Pl.'s Ex. C.) Plaintiff has not demonstrated the public interest will not be adversely affected by the grant of injunctive relief.

CONCLUSION

Plaintiff has not demonstrated a likelihood of success on the merits, irreparable harm if injunctive relief is not granted, and the absence of an adverse effect on the public if injunctive relief is granted.

The entry is

Plaintiff's Motion for a Preliminary Injunction is DENIED.

Date: September 15, 2015

Nancy Mills
Justice, Superior Court

SCOTT ANDERSON ESQ
VERRILL & DANA
PO BOX 586
PORTLAND ME 04112-0586

NATALIE BURNS ESQ
JENSEN BAIRD GARDNER & HENRY
PO BOX 4510
PORTLAND ME 04112