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MEMORANDUM

TO: City of Gardiner Planning Board

FROM: Mark A. Bower, Esq.

RE: Gardiner Green Project; 150-152 Dresden Avenue

DATE: November 16, 2021

I am filing this memorandum on behalf of my client, Hathaway Holdings, LLC ("Hathaway"), which is the applicant and developer of the proposed Gardiner Green subdivision at 150-152 Dresden Avenue (the "Project"). The purpose of this memorandum is to respond to the 15-page public comment document that was signed and submitted by several individuals (the "Neighbors") on October 12, 2021, and provided to the applicant just a few hours before the Planning Board met that day. This is intended as a thoughtful response to those comments, informed by the provisions of the Gardiner Land Use Ordinance ("LUO"), with the goal of aiding the Board's overall review of the Project at the December 14, 2021 meeting.

1. Hathaway's plan for a phased development is not prohibited under the LUO.

Hathaway is proposing to develop Gardiner Green in three phases, which City Staff has already acknowledged is permissible under the LUO, "provided sufficient and detailed conditions are stated in a final written decision ensuring compliance with all applicable and relevant LUO standards within the scope of the condition(s) and underlying base approval." (4/9/21 Staff Memo. at 8.)

The Project's phases are as follows:

Phase 1 will create 34 apartment units in the structure labeled on the Phase 1 Site Plan as "Former Medical Building," with 7 of the units designated as affordable housing. Hathaway is applying for both site plan and subdivision approvals, due to the fact that the Former Medical Building will be developed into multiple dwelling units. *See* 30-A M.R.S. § 4401 (defining subdivision to include "the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period," whether by sale, lease, development, buildings or otherwise).

Phase 2 will create 4 townhouse condominium units in the former hospital's south annex building (labeled Building #5 on the Site Plan), and 2 townhouse condominium units in the former boiler room building, as shown on the Phase 2 Site Plan, for a total of 6 dwelling units.

Phase 3 will rehabilitate the former Gardiner Family Medicine building into 8 townhouse condominium units, and will create 8 townhouse condominium units in 4 new structures to be built, as shown on the Phase 3 Site Plan, for a total of 16 units.

In summary, the three phases will result in the creation of 56 total dwelling units (49 market rate units and 7 affordable housing units) in the High-Density Residential (HDR) zoning district. Contrary to the Neighbors' assertion, there is nothing in the LUO that prohibits apartment units and condominium units from being located on the same lot, provided the density requirements are met; that is, the LUO does not require separate "lots" for each apartment and condo unit, contrary to the Neighbors' apparent belief. The calculation of density for this Project, based on the lot size of 5.43 acres (236,531 square feet) is included in the subdivision and site plan applications that Hathaway has submitted. In accordance with the City Staff's guidance (4/9/21 Staff Memo. at 8), Hathaway will submit elevation drawings and materials submissions as a condition of compliance filing prior to beginning work on Phases 2 and 3 of the Project, and such condition of compliance filings will follow the normal notice and hearing process under the LUO.

2. The Project qualifies as an "Open Space Development," and meets the open space design criteria under LUO § 10.23.

The Project is being proposed as an "open space development" under the LUO,[1] and Hathaway has previously demonstrated compliance with each of the open space design criteria under LUO § 10.23.2. (*See* 4/6/21 Applicant Memo.) The Project further qualifies for a density bonus under LUO § 10.23.5.1.1: "The number of dwelling units may be increased by 20% over the number of units allowed in the district in which the development is located provided that at least one of the following conditions is met: . . . At least 10% of the dwelling units are affordable housing as defined by 30-A M.R.S.A. Section 4301." This incentive to create affordable housing provides the Project with a 9-unit increase from 47 units to 56 total units.

The Neighbors do not actually argue that the Project fails to meet any of the design requirements in LUO § 10.23.2, only that a "total site plan for structures" has not been

[1] LUO § 17-23 defines an open space development as: "A land development project comprehensively planned as a self-contained, integrated, unified development which exhibits flexibility in building siting, clustering, usable open space and the preservation of significant natural features, and which meets the Open Space Design Standards of this Ordinance."

submitted under § 10.23.2.2. There is no merit to that argument. LUO § 10.23.2.2 requires an applicant to "illustrate the placement of buildings and the treatment of spaces, roads, services, and parking," which mirrors the LUO definition of the term site plan: "A plan, drawn to scale, showing uses and structures proposed for a parcel of land as required by municipal ordinance. It includes lot lines, building sites, reserved open spaces, buildings, and major landscape features, both natural and man-made." Hathaway has fulfilled this obligation, as the application includes not only an overall site plan, but also separate, detailed site plans for each of the three phases of the proposed development. The Neighbors take an unduly expansive interpretation of the term "site plan," contending that a site plan must include elevation drawings, photographs and other materials, which is inconsistent with the LUO definition of the term.

3. The Project site meets the minimum land area necessary for an open space design.

To begin with, it is important to note that MaineGeneral Medical Center made a single conveyance to Hathaway on October 12, 2021, of a 5.43-acre parcel that included a few pieces of land, including the 0.9-acre portion that is the source of the Neighbors' complaint. The 0.9-acre portion was included in order to facilitate the development in anticipation of setback needs and other dimensional issues. The Neighbors next contend that the Planning Board was wrong in its initial finding that the Project does not involve a "flag-shaped" or "odd-shaped" lot, under the Neighbors' mistaken belief that the 0.9-acre portion conveyed from MaineGeneral's abutting parcel meets that definition. This argument is flawed for two reasons.

First, there is nothing in the LUO that indicates that odd-shaped lots are "not suitable for development," as the Neighbors allege. Under LUO § 10.23.2.5, the "area suitable for development shall be calculated by subtracting the following: **wetlands, rivers, streams, brooks, stormwater drainage features, resource protection district areas, areas within the 100-year floodplain and areas within roads and other rights-of-way.**"[2] Therefore, the only portions of a parcel that the LUO deems "unsuitable" for development are those highlighted in the quoted passage, which notably does not include "flag lots." The 5.43-acre parcel obtained from MaineGeneral is undoubtedly suitable for development.

Second, the Neighbors' argument shows a misunderstanding of the intent underlying the "flag lot" provision. LUO § 8.1.4 provides: "Flag lots and other odd-shaped lots in which narrow strips are joined to other parcels to meet minimum lot-size requirements are prohibited except for rear lots meeting the requirements of 8.3." Contrary to what the Neighbors appear to believe, the proper analysis is whether the <u>resulting</u> lot is flag-shaped, and is such a shape only to

[2] In the developable land calculations, Hathaway properly subtracted 1,230 square feet of land needed for the stormwater improvement, in accordance with LUO § 10.23.2.5.

meet minimum lot size requirements. That is not the case here. As is typical in real estate developments, Hathaway acquired additional acreage from a willing seller (MaineGeneral) to merge with the existing parcel to allow for its development. The resulting lot where Hathaway will develop the Project is neither flag-shaped nor odd-shaped. Therefore, the Neighbors have failed to identify any violation of the LUO.

4. The portion of the Project site to be dedicated as open space is suitable for that purpose under the LUO.

To meet ordinance requirements, Hathaway will dedicate 56,000 square feet of the parcel—located in the currently wooded section of the lot—as a continuous tract of open space in accordance with LUO § 10.23. Notably, the LUO specifically lists "existing undeveloped forest areas" and "significant wildlife and plant habitat areas" as land areas that are eligible for open space designation. LUO § 10.23.3.1. Hathaway will designate this common open space area upon approval of the project, under LUO § 10.23.4.1.

The Neighbors have not established that any of the proposed open space area would be "unsuitable for development" under the LUO. Even if it were, however, "[t]he open space land may utilize or feature areas designated as unsuitable for development...." LUO § 10.23.3.3. Moreover, contrary to the Neighbors' assertion, there is nothing in the LUO to support their claim that dedicated open space areas must be handicap-accessible in order to comply with the Federal Fair Housing Act. Indeed, it would be surprising if any other development in the City of Gardiner has been required to meet such a stringent standard, particularly when undeveloped wooded areas are regularly used to meet open space requirements.

The Neighbors also point to the LUO's requirement that open space must consist of a "yard, garden or playground area." LUO § 10.16.3.9. However, the term "yard" is defined in the LUO simply as "the area of land on a lot not occupied by the principal building." LUO § 17.2.1. The wooded areas to be designated as open space meet that definition. Therefore, the Project will satisfy the 1,000 square-foot-per-unit requirement for open space dedication. It is important to keep in mind that, generally speaking, the purpose of an ordinance's open space requirement is to make sure that the overall development in a particular region of the City does not become too dense. By setting aside more than an acre of land (20% of the lot) as open space that cannot be developed, the Project accomplishes that goal.

5. The Project meets the affordable housing requirement that determines eligibility for the density bonus under LUO § 10.23.5.

As mentioned previously, the Project qualifies for a density bonus under LUO § 10.23.5, which allows for an increase in the number of dwelling units by 20% over the number of units

allowed in the district if a qualifying feature is met—here, "at least 10% of the dwelling units are affordable housing as defined by 30-A M.R.S.A. Section 4301." That section of the LUO does not dictate whether the dwelling units must be rental units or ownership units.

The Neighbors have argued, unpersuasively, that the Planning Board should require Hathaway to designate both rental units and ownership units (*i.e.*, condominium units) as affordable, but they fail to point to any provision under the LUO that requires both types of units to be designated affordable in order to obtain the density bonus. The definition of "affordable housing" that the Neighbors cite, from LUO § 17.2.1, merely takes into account the fact that affordable housing could be rental units, could be ownership units, or could be both types. The Planning Board should not accept the Neighbors' invitation to unilaterally amend the LUO by rewriting the affordable housing requirement. If the Neighbors believe there is merit to their position, they can channel their efforts in a proposed amendment to the LUO directed to the City's legislative body.

In addition, the Neighbors contend that the Project's proposal to offer affordable rental units does not comply with the objectives of the City of Gardiner Comprehensive Plan ("Comp Plan"). However, the Comp Plan notes that, while home prices were stable, rental prices had increased significantly, which "led to an increase in the percentage of rental households who are unable to afford the average rent." (Comp Plan at 178-79.) The Project's addition of 7 affordable rental units directly addresses that concern as expressed in the Comp Plan.[3] Moreover, because the affordable rental units will be provided in Phase 1 of the Project (the rehab of the Former Medical Building into 34 apartment units), all 7 of the affordable units will be available much sooner than if the townhouse condo units—from later phases of the Project—were designated as affordable, as the Neighbors would like. We assume that the City would prefer to have affordable dwelling units available sooner rather than later.

As for the duration of the affordability covenant, we reiterate prior discussions concerning this question and oppose the idea of an indefinite term, proposing instead a requirement that the affordability covenant remain in effect for a period of 25 years. Such a term is consistent with that seen in other covenants by state and local permitting entities in Maine, and strikes a balance between encouraging the creation of affordable housing and limiting the restriction on future transfers of property.

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[3] Note that only 6 affordable units are required in order to get the density bonus, but the Project includes an additional affordable unit above the LUO's minimum requirement.

6. The Project is consistent with the Comp Plan.

The Neighbors next allege that the Project is inconsistent with the Comp Plan. Under LUO § 14.4.9, a proposed subdivision must conform to "all the applicable standards and requirements of this Ordinance, the Comprehensive Plan, and other local ordinances." The Project is consistent with various provisions of the Comp Plan:

- **Objective 1.9 (Expand the opportunities for infill housing in established residential neighborhoods)**: *"The City's current housing stock offers a limited range of housing options. Much of the current housing stock is either owner-occupied, single-family homes or rental apartments in older, multifamily buildings or larger apartment complexes for specific population groups. To broaden the appeal of Gardiner to a wide range of household types, the City should assure that its development regulations allow a wider range of housing in the developed residential neighborhoods while at the same time maintaining the livability of these neighborhoods. These types of uses have the potential for expanding the tax base without increasing the demand for public services."* (Comp Plan at 70.)

- **Objective 1.11 (Facilitate the construction of good-quality residential development)**: *"Over the past decade, the City has experienced limited residential development. While residential development may increase the City's service costs over the long-term, there are opportunities to create a framework that may entice the private development community to undertake residential projects in Gardiner."* (Comp Plan at 73.)

- **State Goal #8 (Housing)**: *"To encourage and promote affordable, decent housing opportunities for all Maine citizens."* (Comp Plan at 86.)

- **Action 1.10-4 (Provide opportunities for the creative reuse of large older buildings)**: *"There are a number of existing large buildings within the City's residential neighborhoods that are no longer being used for the designed purpose. Finding appropriate uses for these buildings that are both economically viable and suitable for the neighborhood can be problematic. The City should revise its zoning to create a mechanism to allow the creative reuse of these buildings on a case-by-case basis as long as they maintain the character of the neighborhood. This could be done through the creation of an overlay district or the use of contract zoning that would allow the specifics of each redevelopment proposal to be carefully reviewed and negotiated. Where the building is historic, the City should work with the property owner to explore designating the property as a historic resource and using historic rehabilitation tax credits in the renovation of the property."* (Comp Plan at 72.)

By providing both rental units (affordable and market-rate) and ownership units, the Project exemplifies the above goals and actions from the Comp Plan by adding dwelling units, improving affordability, and redeveloping existing large buildings within residential

neighborhoods. The Neighbors' chief complaint appears to be a belief that certain provisions of the LUO are inconsistent with the Comp Plan. However, to the extent that the Neighbors dislike some of those provisions of the LUO, their remedy is to propose ordinance amendments, not to deny this project, which does comply with both the Comp Plan and the applicable LUO requirements.

7. The Project meets all site plan review criteria, including the "character of the neighborhood" requirement cited by the Neighbors.

LUO § 6.5.2.1 is a site plan review standard that requires the applicant to show that the "proposal will be sensitive to the character of the site, neighborhood and the district in which it is located including conformance to any zoning district specific design standards."

To begin with, the Project complies with this review standard. As an entirely residential development located within the High-Density Residential (HDR) zoning district of the City, the Project will integrate with the surrounding residential neighborhood, will include vegetative buffers from abutting properties, will significantly improve upon the poor aesthetics of the existing buildings on the Property, and will be a far less intense use than the prior healthcare use of the Property. Moreover, this review standard should not be applied in a vacuum, as the Neighbors would like. The Planning Board must consider the fact that the Project involves the renovation of existing structures, which will greatly enhance their appearance and function, and that the proposed residential use will be far more compatible with the neighborhood than the prior intensive healthcare use.[4]

Although the Project does comply with LUO § 6.5.2.1, we do have concerns about the constitutionality of this ordinance provision due to the vagueness of the language. The Maine Law Court has repeatedly invalidated ordinance standards that fail to provide cognizable, quantitative standards, holding that, "in order to withstand attack as an impermissible legislative delegation of authority, ordinances that establish criteria for acceptance of a conditional use must specify sufficient reasons why such a use may be denied." *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898, 900 (Me. 1993). This is because "[d]evelopers are entitled to know with reasonable clarity what they must do under state or local land use control laws to obtain the permits or approvals they seek." *Kosalka v. Town of Georgetown*, 2000 ME 106, ¶ 12, 752 A.2d 183; *see also Cope v. Town of Brunswick*, 464 A.2d 223, 227 (Me. 1983) (invalidating a provision that "the use requested will not tend to devaluate or alter the essential characteristics of the surrounding

[4] We would note that the Property could simply be developed into 23 single-family house lots based on the 10,000-square-foot lot minimum in the LUO. However, that approach would likely be far more disruptive and intensive than the current proposal, and would not achieve the same policy goals of creating dwelling units and encouraging the development of affordable housing.

property"). A good illustration of this rule is *Wakelin v. Town of Yarmouth*, 523 A.2d 575 (Me. 1987), where the local board denied the applicant's request for a special exception permit for a multi-family dwelling, finding that the proposed use was "not in keeping with the neighborhood." One of the town's review criteria was whether the proposed use is "compatible with existing uses in the neighborhood, with respect to physical size, visual impact, intensity of use, proximity to other structures and density of development." On appeal, the Law Court invalidated that ordinance provision on constitutional grounds because the provision lacked quantitative standards to produce "specific criteria objectively usable by both the Board and the applicant in gauging the compatibility of a proposed use with existing uses in the surrounding area." Simply put, the provision left both the developer and the local board guessing, and "[s]uch uncertainty is impermissible."

In summary, the Law Court has instructed that planning boards are not free to express legislative-type opinions about what is appropriate for the community, which is exactly what LUO § 6.5.2.1 allows for. It is impossible for a potential developer to know what constitutes being "sensitive to the character of the . . . neighborhood," or what "sensitive" actually means, and therefore the language is unconstitutionally vague. To apply this provision as the Neighbors propose produces the same result as in *Wakelin*—the lack of specific standards that creates a state of uncertainty depriving Hathaway of the use of its property.

If the Planning Board were to agree with the Neighbors' suggestion that the Project must be "consistent with the predominant pattern in the neighborhood"[5]—in other words, establishing an aesthetic requirement, the only apparent option for Hathaway would be to tear down all of the existing structures and rebuild them from scratch, which would render the Property substantially useless and strip it of all practical value—in other words, a regulatory taking of land. *See MC Associates v. Town of Cape Elizabeth*, 2001 ME 89, ¶ 11, 773 A.2d 439. We urge the Planning Board to avoid that result.

8. Hathaway has demonstrated sufficient financial capacity to carry out the project, as required under LUO § 14.6.7.

Lastly, the Neighbors contend that Hathaway has not shown financial capacity by providing a "letter from a financial institution such as a bank or other lending institution that states that the applicant has the necessary funds available or a loan commitment from this institution to complete the proposed development within the time period specified by the applicant." LUO § 14.6.7.1.3.

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[5] The Neighbors' submission of photos of houses on Dresden Avenue suggests that they would like the Planning Board to require the Project's structures to match that aesthetic.

Hathaway intends to fund the Project's development through bank financing, not cash on hand, and therefore submitted a letter from John Butera at Skowhegan Savings Bank, who expressed the bank's enthusiasm in working with Hathaway to finance the Project.[6] As the City Staff has aptly pointed out, "obtaining committed financing generally requires an applicant to first obtain all necessary permits, licenses, and governmental approvals." (4/9/21 Staff Memo. at 8.) In other words, it is a "chicken and egg" dilemma – you need the approval before you can get the loan commitment from a reputable financial institution. Therefore, we request the Board to follow the City Staff's guidance on this question, and condition its approval of the application upon Hathaway's submission of a more detailed financing letter to the satisfaction of City Staff prior to obtaining any building permits or commencing work in any phase of the Project. To require more than this would be imposing a higher standard for this application than other projects reviewed by this Board, which would not withstand a legal challenge.

Conclusion

In summary, the above discussion demonstrates that none of the public comments advanced by the Neighbors would justify denying an approval of the Project's application. The Property is zoned for this use and the application meets all of the review standards set forth in the LUO for site plan and subdivision approvals. Hathaway looks forward to partnering with the City in revitalizing the Property, which will be a win for the City by producing high-quality housing units to meet the City's goals, and restoring the productive use of the Property.

[6] Hathaway also submitted a prior letter of reference, dated January 8, 2021, from Jim Delamater, who can attest to Hathaway's "professionalism and overall ability to perform relative to overall goals and objectives."