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M E M O R A N D U M

TO: City of Gardiner Board of Appeals

FROM: Mark A. Bower, Esq.

RE: Initial Comments on Administrative Appeal
Gardiner Green Project; 150-152 Dresden Avenue

DATE: October 24, 2023

I am filing this memorandum on behalf of my client, Hathaway Holdings, LLC ("Hathaway"), which is the applicant and developer of the approved Gardiner Green subdivision at 150-152 Dresden Avenue (the "Project"). The purpose of this memorandum is to provide Hathaway's initial comments on the Administrative Appeal that was filed by several opponents to the Project (the "Appellants") on September 8, 2023.

1. Introduction

On August 9, 2023, the Planning Board granted final subdivision and site plan approval of Hathaway's plan to renovate the former Maine General Health building on Dresden Avenue into a 34-unit multi-family dwelling (rental apartments). Hathaway submitted its initial application more than three years prior, on June 16, 2020. During the intervening period, Hathaway worked with the Planning Board to respond to the Board's feedback, concerns and requests, as well as input provided by neighbors and abutting property owners. The Planning Board conducted a thorough and exhaustive review of the Project, which occurred over 18 separate meetings and numerous public hearings. The end result is a proposed development that is a responsible reuse and revitalization of a blighted property, and which will add much needed housing units for the City.

2. Appellants' Failure to Follow Land Use Ordinance Procedures

As a threshold issue, this administrative appeal fails to comply with the **mandatory** procedures set forth in City of Gardiner Land Use Ordinance ("LUO") § 2.4.4. Under that section, the Board of Appeals is **required** to hold a public hearing on an appeal within 45 days of the appeal filing date, and the Board must reach a decision on the appeal within 20 days after that. *See* LUO §§ 2.4.4.2, 2.4.4.8. Although this appeal was originally scheduled to be heard on October 17, 2023 (which would have complied with the LUO), the Appellants failed to publish notice of the public hearing in a newspaper at least 14 days in advance, as required by LUO § 2.4.4.2. As a result of this error by the Appellants, they apparently asked the City to postpone the public hearing to a later date.

The appeal procedures and timelines for this case are summarized in the table below:

Planning Board approval	August 9, 2023
Administrative Appeal filed	September 8, 2023

Deadline for Board of Appeals to hold public hearing	November 7, 2023
Deadline for Board of Appeals to reach a decision	November 27, 2023
Deadline for Board of Appeals to issue written decision	December 4, 2023

The re-scheduled date of the hearing, November 7, 2023, is **60 days** after the date that the appeal was filed, and therefore violates the LUO. The procedures in the LUO properly exist to protect an approval holder (like Hathaway) against undue delays resulting from appeals, which is exactly what is occurring in this case. The time frame outlined above would result in a written decision being issued nearly four months after the Planning Board issued its approval of the Project. Moreover, the delay is highly prejudicial to Hathaway, whose approval expires a year after the approval date, and three months of that time period have been used up already—due to the mistake made by the Appellants, not any action taken by Hathaway.

The Board of Appeals only has the ability to take actions that are specifically authorized by statute or ordinance. *See* 30-A M.R.S. § 2691(4); *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 7, 237 A.3d 175 (noting that local zoning boards do not have inherent powers and "are instead limited to those powers conferred upon the town by the State."). The LUO unequivocally states that "the Board of Appeals shall hold a public hearing on the appeal within forty-five (45) days." LUO § 2.4.4.2. Due to the omissions made by the Appellants, the Board will not be able to hold a public hearing that complies with this LUO provision; therefore, Hathaway respectfully requests the Board to dismiss the appeal, which will render moot the remaining issues in the appeal.

3. Standard of Review

In the event that the Board of Appeals decides to reach the merits of this appeal, notwithstanding the significant, threshold procedural issue outlined above, the standard of review is as follows:

For an administrative appeal such as this, the LUO authorizes the Board of Appeals to conduct an appellate review of the Planning Board's decision. That means that this Board reviews the action of the Planning Board within the confines of the record of the hearing that was developed before the Planning Board, and does not take any new evidence. *See* LUO § 2.4.5.2.1. As for the possible outcomes of this appeal, this Board may either affirm the Planning Board's decision or "may modify or reverse the action of the Planning Board . . . **only where** the Board of Appeals finds that the action of the Planning Board . . . is **clearly contrary** to the applicable ordinance." LUO § 2.4.5.2.3. This Board is also permitted to remand the matter to the Planning Board for further proceedings, if necessary. *See* LUO § 2.4.5.2.4. The burden of persuading this Board on the merits of an administrative appeal falls solely on the party or parties appealing the action of the Planning Board.

An appellate review is a very deferential review standard, and the Board should keep in mind the following legal rules governing such appeals, which are derived from Maine case law:

- The Board of Appeals "is not free to make findings of fact independently of those found by the [Planning Board]." *Mack v. Municipal Officers of Town of Cape Elizabeth*, 463 A.2d 717, 719-20 (Me. 1983).

- "[The Board of Appeals] may not substitute its judgment for that of the [Planning Board], but is limited to determining whether, from the evidence of record, facts could reasonably have been found by the [Planning Board] to justify its decision." *Aydelott v. City of Portland*, 2010 ME 25, ¶ 17, 990 A.2d 1024.

- The Board of Appeals shall "accord substantial deference to the Planning Board's characterizations and fact-findings as to what meets ordinance standards." *Bizier v. Town of Turner*, 2011 ME 116, ¶ 8, 32 A.3d 1048.

- If the record contains evidence that reasonably supports the [Planning] Board's findings, the fact that the record contains inconsistent evidence or inconsistent conclusions could be drawn from the evidence does not invalidate the [Planning] Board's holding." *Calpine Corp. v. City of Westbrook*, 2018 Me. Super. LEXIS 149, *4-5 (Oct. 18, 2018).

- The Board may vacate the findings of fact of the Planning Board "only if there is no competent evidence in the record to support [the] decision." *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, ¶ 14, 989 A.2d 1128.

Therefore, in an appellate review, the Appellants face a very heavy burden in order to have this Board reverse findings of fact made by the Planning Board that are supported by substantial evidence in the record.

4. Issues for Appeal

On the appeal form, the Appellants identified two issues that form the basis of their attempt to overturn the Planning Board's decision. We believe that they will be unable to meet their legal burden because the Planning Board's approval was not "clearly contrary to the applicable ordinance."

A. Financial/Technical Capacity

The Appellants first challenge the Planning Board's approval of the Project under two review criteria related to the financial and technical capacity of the developer:

- LUO § 6.5.1.14 (Site Plan): "The applicant has the adequate financial and technical capacity to meet the provisions of this Ordinance."

- LUO § 14.4.10 (Subdivision): "The subdivider has adequate financial and technical capacity to meet all the review criteria, standards, and requirements contained in this Ordinance."

The written decision describes the very practical and common-sense approach that the Planning Board took in this case:

"The Planning Board recognized that it is customary for applicants to have information on both of these items in the permitting stage, but not final complete information that would be associated with project construction. Stated differently, the project costs and team will necessarily be updated as the Project prepares and commences construction activities.

This is because for most projects obtaining committed financing generally requires an applicant to first obtain all necessary permits, licenses, and governmental approvals. From a technical standpoint, there may also be downstream considerations post-permitting to secure further details. Because of these practical considerations, it is typical for any approval to be conditioned upon submission of more detailed and final financial and technical capacity to ensure those standards are met. The Planning Board thus determined that such conditions are necessary predecessors before any construction can be commenced for the Project, as detailed further below in this Decision."

Accordingly, the Planning Board granted approval under these criteria, but with the following conditions of approval:

"1. Prior to commencement of any construction, the Applicant shall submit to the Code Enforcement Officer detailed information on the technical capacity of all project participants for construction of the Project. The Code Enforcement Officer, in consultation with other City Staff, as appropriate, shall review the submitted information to determine if this condition of approval has been satisfied; and

2. Prior to commencement of any construction, and no later than one year from the date of this Decision per LUO 4.4.1 or as may be amended from time to time, the Applicant shall submit to the Code Enforcement Officer detailed information regarding the construction budget and schedule, as well as documentation that demonstrates adequate funds are committed and available to complete construction of the Project. The Code Enforcement Officer, in consultation with the City Manager, City Finance Director, City Solicitor, and any other appropriate City Staff, shall review the submitted information to determine if this condition of approval has been satisfied."[1]

These are very common types of conditions of approval to impose on a development like the Project, and the Applicant takes no issue with them. In fact, the Applicant believes that this was a reasonable way for the Planning Board to ensure that the purposes of the LUO are served while also being fair to the Applicant. By imposing a condition of approval that restricts the Applicant's ability to obtain building permits until it provides further information on financial/technical capacity, the Planning Board has ensured that the public will be protected, and these conditions are not "clearly contrary" to the ordinance.

[1] LUO § 4.4.1 provides: "The applicant shall obtain a permit from the Code Enforcement Officer within one year from the date the Planning Board approved a planning board review or site review application."

B. Open Space

The other issue raised by the Appellants relates to open space. The LUO's open space requirements are contained within the special activity performance standards for new multi-family dwellings. *See* LUO § 10.16.3.9 ("a minimum open space area of 1,000 square feet per dwelling unit consisting of a yard, garden or playground area shall be provided"). With 34 dwelling units, the open space requirement under this section is 34,000 square feet.

The Planning Board found as follows:

> "**The Planning Board by unanimous vote determined the special activity standards applicable to multi-family were satisfied by the Project, as shown in the final site plan depicting the Project site characteristics including yard/garden areas and amenities.** Specifically, the minimum road frontage is 200 feet or more, the minimum side setback is 30 feet or more, there are at least two parking spaces for each dwelling unit (i.e., more than 68 spaces on plan), **and more than 34,000 square feet of yard/garden areas are provided (see as delineated on Open Space Plan, C-1.2, revised March 6, 2023).**"

There is evidence in the record to support the Planning Board's finding that this standard has been met. Sheet C-1.2 of the Site Plan provides a detailed overview and calculation of the open space area in compliance with the ordinance standard. On that plan, the open space areas are depicted with pink cross-hatching and are labeled with square footage calculations. Those areas consist of the grassy areas, courtyards and garden beds around the 34-unit apartment building, as well as the walking trail through the parcel's large wooded area, which will remain undeveloped.

Through this finding, the Planning Board has characterized what it believes is "open space" under the LUO, and has determined that it is sufficient to meet the requirements of LUO § 10.16.3.9. It is not the role of this Board to second-guess the Planning Board, which is entitled to substantial deference as to its characterizations of what meets ordinance standards. The Appellants will not be able to demonstrate that the Planning Board's finding is clearly contrary to the LUO.

5. Conclusion

The threshold issue in this appeal is that, due to the Appellants' procedural error, the public hearing does not meet the mandatory timeframe prescribed in the LUO, and therefore, the appeal must be dismissed. As to the merits, the Planning Board's decision is well-reasoned, practical, and contains appropriate conditions of approval that strike an appropriate balance between protection of the general public and fairness to Hathaway. The Appellants have a very heavy lift in this appeal: they must (1) demonstrate that the Planning Board acted "clearly contrary to the ordinance" when approving the Project and (2) show that there is "no competent evidence" to support the Planning Board's findings on the issues that Appellants have raised. For these reasons, Hathaway respectfully requests that the Board of Appeals affirm the Planning Board's approval of the Project.