JENSEN BAIRD
ATTORNEYS AT LAW

MEMORANDUM

TO: City of Gardiner Board of Appeals

FROM: Mark A. Bower, Esq.

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

DATE: October 31, 2023

These reply comments are filed in response to the initial comments of Appellants, who comprise the neighborhood group that has opposed development of housing units on the site owned by Hathaway Holdings, LLC ("Hathaway"). The Appellants have raised two basic issues for the Board to consider on appeal—financial/technical capacity and open space. Neither issue comes close to grounds for reversal under the LUO, which says that this Board "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." *See* LUO § 2.4.5.2.3. As discussed below, the Appellants have not met that heavy burden of proof.

1. Financial/Technical Capacity

The Appellants begin their comments with a statement that they do not want to see the Project site fall into the same condition as the Merrill Memorial Manor nursing home that is adjacent to Hathaway's property.[1] Hathaway has been clear from the beginning that it wants to avoid the fate of the Merrill building, and therefore is proposing a project that will rehabilitate the former hospital building, improve and beautify the property and neighborhood, and provide much needed dwelling units in this section of the City. The Appellants' efforts throughout the Planning Board process and through this appeal have been aimed precisely at thwarting the Project's residential development, and if successful, would lead to the very same fate as the Merrill building.

On the issue of financial/technical capacity, all of the arguments contained in the Appellants' initial comments were raised by them repeatedly before the Planning Board. The Appellants also make reference to sections of the LUO addressing submission requirements for Site Plan and Subdivision Review (including references to language addressing the sale of lots, which is not applicable here). However, once the Planning Board deemed both applications to be complete, those arguments on submission requirements became moot. The relevant decision for review is the August 9, 2023 decision containing the Planning Board's final findings of fact and conclusions of law, not any prior decision on completeness.

[1] This is a curious statement, as the neighborhood was heavily involved in opposing that project. The Planning Board ultimately denied approval, leaving the parcel undeveloped.

To begin with, it is important to point out that, contrary to the Appellants' arguments in the comments, the LUO specifically authorizes the Planning Board to issue conditions of approval:

- LUO § 6.4.8.1: "Upon consideration of the review criteria, the Planning Board or the Code Enforcement Officer may attach such conditions to the proposed application that it finds necessary to further the purposes of this Ordinance. Conditions are limited to further address items already contained in this Ordinance. A condition may not be imposed to regulate an item not specifically addressed in this Ordinance."

- LUO § 14.5.8.4.3.4: "In issuing its decision, the Planning Board shall make detailed written findings of fact establishing how the activities set forth in the application do or do not meet each of the standards of approval of [Section] 14.4 or that a standard does not apply to the application and that the application meets all other requirements of the City. **The Planning Board shall also identify any conditions of approval necessary to comply with the standards.** The Board shall notify the applicant in writing of the action of the Board, including the findings of fact, and any conditions of approval."

In its findings, the Planning Board acknowledged the "practical considerations" that make it difficult to obtain a firm, binding financial commitment at the outset of the permitting process for a project the size of this one, due to the uncertainty about whether the project will gain approval and whether the scope and cost of the project will change during the course of the permitting process. In fact, the Appellants' own argument bolsters this point, when they point out that the cost estimate for the Project increased significantly while the project was pending (from $3.65 million to $5.18 million).

During its deliberations, the Planning Board took the Appellants' arguments into consideration when fashioning its written findings and conditions of approval. The Planning Board's condition of approval on financial/technical capacity constitutes a substantive safeguard by requiring, prior to the issuance of any building permits, both "detailed information on the technical capacity of all project participants for construction of the Project" and also "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." This information will be reviewed by the Code Enforcement Officer, in consultation with the City Manager, City Finance Director, City Solicitor, and any other appropriate City Staff, to determine that the condition is satisfied. In other words, Hathaway will not be able to move forward with construction of the Project until it has provided all of the information that the Planning Board has required.[2]

The purpose of the financial/technical capacity review criteria is to guard against developers who begin construction on projects and then do not finish them, or hire contractors who do a poor job. In the classic worst-case scenario, a developer obtains approval for a subdivision that involves the construction of certain improvements like a road, utilities and stormwater improvements, and then fails to complete those improvements, leaving the property owners who purchased subdivision

[2] These requirements are far more exacting than what is typically required of a developer that has obtained Planning Board approval. In the normal course, a developer will simply pull permits from the CEO for the work that has already been approved by the Planning Board.

lot high and dry. The Appellants' arguments fail to appreciate that underlying purpose. First, they point to a Hathaway project in Bethel that was approved but not constructed. A developer's decision not to go forward with a project that has been approved is not indicative of a lack of financial/technical capacity; there may be other forces at play, which was true in that case. As Hathaway's principal, Paul Boghossian, explained to the Planning Board, he assembled a proposed project site of 10+ acres in three separate transactions, did an architectural design, secured historic tax credits for the commercial building on the property, and did some site work and interior demolition work to better ready the project for construction. These efforts attracted the interest of a community development fund that purchased the entire holdings with the historic approvals in 2022.

The Appellants also make an argument regarding statements that Hathaway made during the Planning Board's review regarding the number of dwelling units needed for the Project to be financially viable. Those statements are taken out of context, as they related to the larger, phased development that was initially proposed, which was replaced by the smaller project to only renovate the hospital building into 34 dwelling units. Moreover, it is important to remember that the LUO provision requires an applicant to demonstrate financial capacity "to meet the provisions of this Ordinance" (LUO § 6.5.1.14), so an applicant's return on investment is not (and should not) be part of the Planning Board's consideration of the financial/technical capacity review criteria. In other words, whether a project will be financially beneficial for a developer only affects whether a developer will decide to move forward with an approved project, not whether the project meets the requirements of the LUO in the first place.

Regarding technical capacity, the Appellants point to minor typographical errors in the plan set drafts that were submitted to the Planning Board as evidence that Hathaway lacks technical capacity to carry out the Project. However, they do not argue that there are errors or inconsistencies with the final drafts of the documents that were submitted and finally approved by the Planning Board on August 9, 2023.

In summary, the Appellants have failed to prove that the Planning Board's findings on financial/technical capacity, and the related conditions of approval, are clearly contrary to the LUO, as they must prove in order for this Board to reverse the Planning Board's approval. The Appellants' chief complaint is that the "Planning Board granted conditional approval without seeing such evidence of financial capacity." However, that is precisely the point of a condition of approval, and it is permitted under the LUO. With authority from the LUO that allows for the issuance of conditions of approval, the Planning Board's approval is conditioned upon further action on the part of Hathaway and review by City staff before the issuance of building permits for the Project.

2. Open Space

Concerning open space, LUO § 10.16.3.9 requires "a minimum open space area of 1,000 square feet per dwelling unit consisting of a yard, garden or playground area." The Planning Board determined that Hathaway's application met this requirement, along with the other "special activity standards" related to multi-family developments. The Appellants have not shown that the Planning Board's finding on this issue is clearly contrary to the LUO.

Relevant to this issue is Site Plan Sheet C-1.2, which was last modified on March 6, 2023.[3] Hathaway's initial position was that the entire 34,000-square-foot wooded area on the northerly portion of the lot (labeled "wooded area") should be counted as open space, and would have met—on its own—the open space requirement for the 34 dwelling units. However, the Planning Board was not willing to consider the entirety of the wooded area as open space, but did find that the walking path through the area would qualify. Following that finding, the Planning Board requested Hathaway to indicate the other yard and garden areas (which would also be included in calculations of total open space) on the Site Plan with square footage calculations. On the attached Sheet C-1.2, the open space areas are designated with either magenta or light blue cross-hatching, with labels to each area with square footages totaling 34,345 square feet.

The Appellants raise two main points on this issue. First, they argue—for the first time on this appeal[4]—that "no single area smaller than 1,000 square feet should be counted as open space." In other words, they believe that there must be a dedicated 1,000-square-foot area for each dwelling unit. This is an illogical interpretation of the LUO provision, as the nature of an apartment building is that there will be some shared amenities, including parking and open space, that are calculated in the aggregate. *See Desfosses v. City of Saco*, 2015 ME 151, ¶ 8, 128 A.3d 648 (any ordinance interpretation must "avoid any interpretation that creates absurd or illogical results."). There is nothing in the ordinance language quoted above to suggest that the open space areas have to be in segments of at least 1,000 square feet.

Next, the Appellants object to certain areas on the Site Plan that Hathaway has designated as open space—those that are listed on page 8 of their memorandum and broken out by square footage. As a starting point, it appears that the Appellants are working from the wrong version of Site Plan Sheet C-1.2, as they list out open areas that were removed and **do not** appear on the final version of the plan, following the Planning Board's discussion of the issue. As mentioned above, a copy of the correct sheet, which was last updated March 6, 2023, is attached. On that plan, the open space areas are as follows:

1. 22,500 ft^2 – yard area surrounding buildings labeled "Converted Apartment Building" and "Existing Building"

2. 3,145 ft^2 – yard area between circular driveway/parking and Dresden Avenue

3. 510 ft^2 – garden beds and stairway between two buildings[5]

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[3] A copy of this plan is included with this submission.

[4] *Antler's Inn & Rest., LLC v. Dep't of Pub. Safety*, 2012 ME 143, ¶ 9, 60 A.3d 1248 ("an argument . . . that is not raised before an administrative agency may not be raised for the first time on appeal").

[5] The Appellants complain that the stairway portion of this area should not be considered as open space. The stairway is part of the "English garden" that is on the lower level of the approved plan and leads from the upper level to the lower level, integrated with the garden portions. Despite that, it is worth noting that the portion consisting of the stairway is just 250 ft^2; therefore, even if that area were excluded from the open space calculation, the total open space area would still exceed 34,000 ft^2, in compliance with the standard. Furthermore, Sheet C-1.2 does not designate other areas that arguably could be counted as open space, including outdoor patios (which are common features of residential "yards" or "gardens") and the area adjacent to the parking lot buffering the neighboring property.

4. 550 ft^2 – yard area buffering neighboring property

5. 260 ft^2 – yard area between outdoor patios

6. 2,545 ft^2 – yard area adjacent to #4 and buffering neighboring property

7. 4,834 ft^2 – walking trail through large wooded area (10 feet wide)

TOTAL: 34,345 ft^2

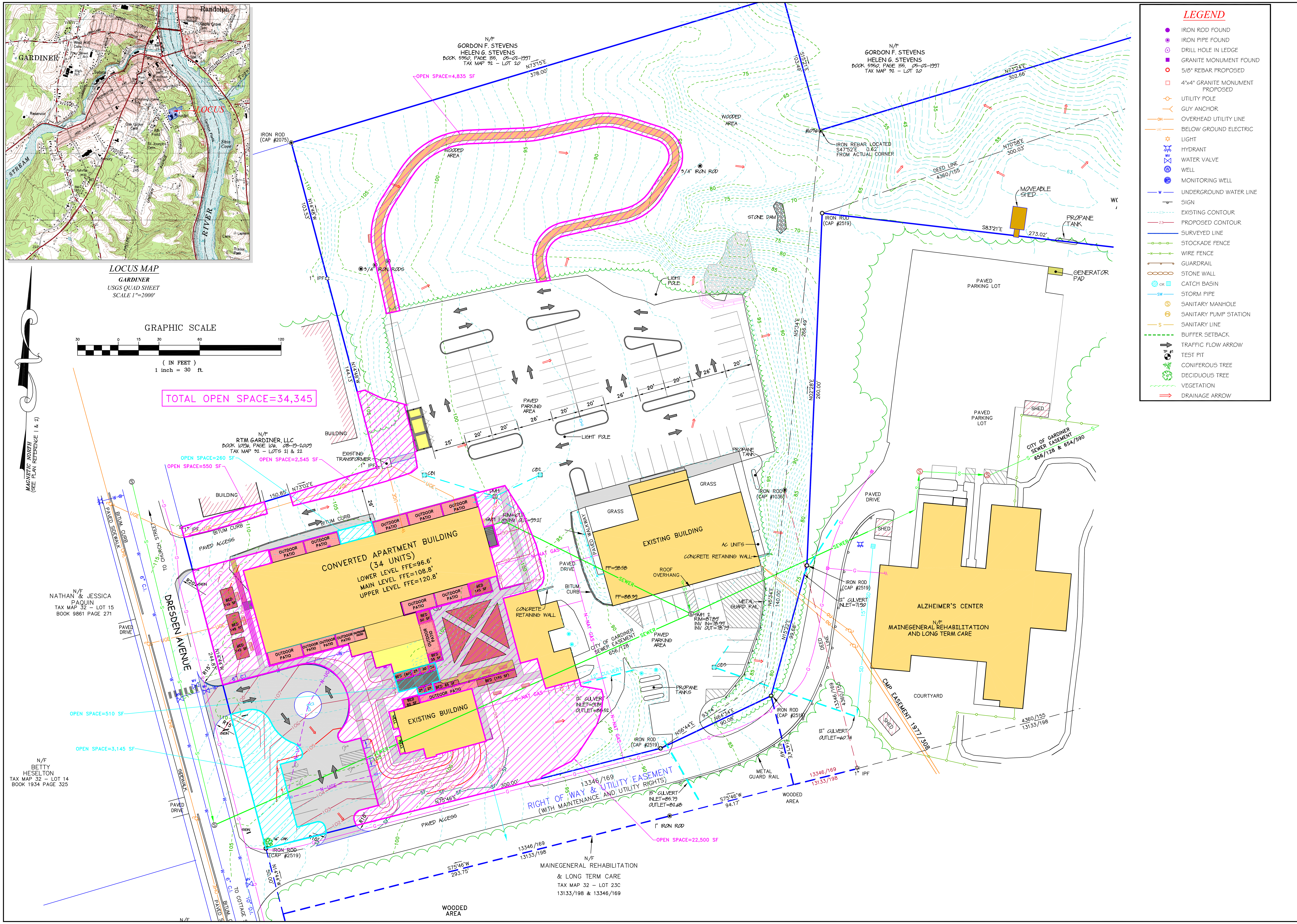
The Appellants focus on the "usability" of the open space areas, even though the plain language of the LUO provision does not support that interpretation. Regardless, the areas that are shown on Sheet C-1.2 are all usable either for walking, congregating, gardening, and overall beautification of the property.

Finally, under the applicable case law for appellate reviews, the Board of Appeals is required to "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. The Planning Board has made findings of fact that are supported by substantial evidence that the application meets the LUO requirement to set aside open space for yard, gardens or playground areas. The Appellants have not demonstrated that the Planning Board's findings on this issue are "clearly contrary" to the LUO.

3. Conclusion

The Appellants have attempted to create an impression that they are not opposed to residential development on this site, or affordable housing in general, but their comments and stiff public opposition to the Project, which is apparent from the administrative record developed over the past three years, contradict that position. Despite their opposition, the Planning Board ultimately approved Hathaway's application, which will create a net positive for the neighborhood and the City, in the form or a rehabilitated building, an improved and beautified landscape, and the addition of 34 much needed dwelling units into a tight housing market.

In the event that the Board of Appeals decides to reach the merits of this appeal, notwithstanding the significant, threshold procedural issue outlined in our initial comments, the two issues raised by the Appellants do not meet the LUO standard for modifying the Planning Board's decision. Therefore, Hathaway respectfully requests the Board to dismiss and/or deny the appeal.



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NO.	REVISIONS	DATE
1	ADJUST OPEN SPACE AREA.	03/06/23

SHEET TITLE: **OPEN SPACE PLAN**

SCALE: 1 INCH=30 FEET
DRAWN BY: TGH
DATE: JANUARY 23, 2023
CHECKED BY: JEC

CLIENT/PROJECT: **GARDINER GREEN HATHAWAY HOLDINGS, LLC.**

LOCATION: 150 DRESDEN AVENUE
TOWN: GARDINER COUNTY: KENNEBEC STATE: MAINE

PROJ. NO. 2020-174

C-1.2