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M E M O R A N D U M

TO: City of Gardiner Planning Board

FROM: Mark A. Bower, Esq.

RE: Gardiner Green Project; 150-152 Dresden Avenue

DATE: May 9, 2022

This memorandum is submitted on behalf of my client, Hathaway Holdings, LLC, in order to respond to the memorandum of Mark Eyerman dated May 5, 2022 regarding the proposed Gardiner Green subdivision at 150-152 Dresden Avenue (the "Project"). Mr. Eyerman's memo includes four (4) bulleted points that are discussed below. Reference is made to my prior memorandum dated November 16, 2021 (the "November Memorandum").

1. Financial Capacity (LUO § 6.5.1.14).

The Applicant recently submitted to City Staff an updated letter, dated May 6, 2022, from Skowhegan Savings Bank signed by John Butera.

As stated in Section 8 of the November Memorandum, the Applicant intends to fund the Project's development through bank financing, not cash on hand, and therefore submitted the letter from Mr. Butera, who expressed the bank's enthusiasm in working with the Applicant to finance the Project.[1] 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 the Applicant'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.

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

2. "Sensitive to the character of the . . . neighborhood" (LUO § 6.5.2.1).

I have addressed this point at length in Section 7 of the November Memorandum (pages 7-8), which includes a discussion whether the site plan review criterion in § 6.5.2.1 is unconstitutionally vague or a regulatory taking of property.

To summarize our position, the Law Court has instructed that a planning board, when acting as a quasi-judicial body (as the Planning Board is here), is 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. *See, e.g., Kosalka v. Town of Georgetown*, 2000 ME 106, ¶ 12, 752 A.2d 183 ("Developers 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."); *Wakelin v. Town of Yarmouth*, 523 A.2d 575 (Me. 1987) (invalidating an 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."); *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 property").

Here, it is simply impossible for a potential developer to know what constitutes being "sensitive to the character of the . . . neighborhood," or what "sensitive" actually means; therefore, the language is unconstitutionally vague. If the Planning Board were to find that § 6.5.2.1 establishes an aesthetic requirement that would require the Applicant to tear down all of the existing structures and rebuild them from scratch, or substantially rebuild the façade or roofline of the existing structures beyond what is proposed, that would render the Property substantially useless and strip it of all practical value—in other words, it would constitute 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.

3. Building façade facing Dresden Avenue (LUO § 6.5.2.9).

At the Planning Board's request, the Applicant submitted to City Staff an architectural rendering has to show the building façade facing Dresden Avenue in order to address this point. The Applicant does not feel that it is warranted to require the submission of anything additional, especially at this late date.

4. "Compatible with the established character of the neighborhood" (LUO § 7.8.4.3).

This issue involves the High Density Residential (HDR) District review criteria, which only applies to the "construction of a new principal building" or to the "reconstruction of an existing principal building." The threshold question for § 7.8.4.3 is whether the proposed renovation of the building for the Project constitutes a "reconstruction" of that building to require application of this section. The LUO does not define the term "reconstruction," but a dictionary definition of that term is "to build or assemble (something) again." The renovation or alteration of a building, as is proposed here, is distinct from construction or reconstruction. This is evident from the fact that the other factors in § 7.8.4.3 (orientation of building, width of building, orientation of roofline, building height, appearance of front façade) are clearly intended to apply to new construction. 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.

Even if it were applicable, this review standard suffers from the same constitutional problems identified above, as it is overly vague.