

December 14, 2022

Dear Chair Willis and Members of the City of Gardiner Planning Board:

We understand that the public hearing on the applications by Hathaway Holdings LLC and Paul Boghossian (“Applicant”) for site plan review and subdivision approval of “Gardiner Green” has closed, and that you are now in the midst of deliberations. However, the Applicant continues to submit new materials, and he and his attorney and consultants have had multiple opportunities to present to the Board since the public hearings closed. As abutters and residents of the immediate neighborhood directly affected by this project, we ask that you also consider these additional comments which focus on the most recent changes reflected in the Applicant’s submissions, dated December 1, 2022.

**A. Errors and inconsistencies persist in the Applicant’s December 1, 2022 submissions**

The Applicant’s latest submissions continue to reflect a failure to pay attention to detail and to address the issues raised by the Planning Board in previous meetings. Here is a brief list of the inconsistencies we’ve identified in the December 1, 2022 filing:

1) The descriptions of the parking lot in the Dec. 1 Applications for Site Plan Review and Final Subdivision approval have not been updated to match what is shown on the Site Plan (C-1.1) or the Recording Plat (Rec-1). Both Applications still refer to 103 parking spaces, whereas C-1.1 and Rec-1 show a redesign with 79 spaces and added vegetation at the “end caps” of each parking block.

2) Almost the entire second page of the timeline for the project (which was omitted from the version previously submitted -- *see* Planning Board’s August 25, 2022 meeting packet) describes a schedule for development of other buildings on the property which are not part of this Application and should not be included. Indeed, the Board clearly indicated months ago that all references to “phases” and changes to buildings that are not part of this Application must be removed, yet the Applicant has repeatedly failed to comply with that directive.

3) Floor plans still show changes to the Annex even though the Annex is not part of this project and should only be shown in its current condition (as the Board has noted repeatedly). The Site Plan submitted on Dec. 1<sup>st</sup> also shows some site work in front of the Annex, with yellow areas signifying new concrete, none of which is described in this Application or included in the scope of the project currently before the Board.

4) Outdoor patios are not shown on the Lower Level elevations for the north façade and yet they appear on the floor plans.

5) At the Board’s meeting on September 14, 2022, the Applicant clarified that the wood siding he planned to use was actually cedar, not cypress as indicated on the elevations he had submitted for review at that meeting. The updated elevations submitted two and a half months later, on December 1, 2022, still identify the exterior wall material as cypress, except for one section of the west wall which shows “cedar wood panels.” Which one reflects his actual plan?

6) The artistic rendering submitted on Dec. 1 is inconsistent with the Site Plan and Recording Plat as well as descriptions in both Applications – for example:

- Flower beds along the west façade have been added on Site Plan C-1.1 and Rec-1 but are not described in the Applications or depicted on the rendering, making it impossible to know how large or tall the beds are, or what materials they are made of, etc.
- The benches that have been added along the west façade as shown on Site Plan C-1.1 are not on the Rec-1 plat. They are also not described at all in the Applications, in terms of size, shape or materials.
- A canopy tree shown in the middle of the north wall on Site Plan C-1.1 appears to be directly under the Upper Level balcony, which makes no sense. This tree also is not shown at all on the rendering.
- A walled patio depicted on the rendering at the Lower Level on the north side does not appear on the north wall elevation.
- The tree shown in the rendering at the NW corner of the building is listed on the Site Plan as a 2.5 inch diameter (dbh) tree, yet it appears on the rendering as closer to 6-8 inches in diameter, which is larger than anything the Applicant is proposing to plant (*see* Landscape Legends on C-1.1).
- The rendering shows a green vegetated area between the north side of the building and the driveway that does not exist on the Site Plan, and there does not appear to be space for it on the ground. (*See* attached photos.)
- The spruce tree shown on the rendering to the north of the driveway does not exist, and a tree that size would have to be in large part on the abutter's property. It is depicted in the rendering as being much larger than anything that the Applicant is proposing to plant according to the Landscape Legends on C-1.1. It does not appear at all on C-1.1.
- A “150 Dresden” sign has been added on top of the west façade in the artistic rendering. This is neither described in the Applications, nor shown on the west elevation. No information is provided regarding its size, or construction materials, let alone what purpose it is intended to serve aesthetically.
- It is unclear from the rendering whether the horizontal cables on the balconies have been removed and replaced with vertical slats, even though vertical treatment appears on the north wall elevations. The Applicant has not updated the photographic depictions of building materials, submitted for the September 14, 2022 Board meeting, which included horizontal cables as the balcony railing. Since the City’s Code Enforcement Officer told the Applicant at the last Board meeting that the horizontal cables would not meet the building code (or the LUO), this is important to address.

The above-listed issues are not minor technicalities. Internal inconsistencies and conflicts within the application materials make it impossible to determine what the Board is being asked to approve or what the Applicant is actually proposing to construct.

The Board has received and reviewed six sets of application materials or amendments since the development of this 34-unit project was first proposed --see packets for the Board meetings on March 8, May 10, August 25, September 14, October 13, and December 1, 2022. The neighbors and abutters have found errors and inconsistencies in each of those submissions. Each time the Applicant has made a change to one aspect of his proposal, he has left some other parts unchanged and therefore inconsistent.

The persistent pattern demonstrates the Applicant's complete lack of attention to detail as well as his failure to follow through on promises that he has made orally to the Board on multiple occasions. The Applicant bears the burden of proof here, which means it is his obligation to present a coherent, internally consistent plan for the Board's review. By failing to do so (repeatedly), he has failed that standard.

**B. The Applicant's latest plans do not include a designation of open space usable by apartment dwellers as a yard, garden or playground in accordance with LUO § 10.16.3.9, despite the Board identifying this as an important issue at the meeting on October 13, 2022.**

The Board had a long colloquy with the Applicant at your last meeting on October 13, 2022, regarding what sorts of open space would meet the requirements of LUO § 10.16.3.9. This section of the LUO requires the total land area designated as open space to be at least 34,000 square feet for a 34-dwelling unit development and requires that it "consist[] of a yard, garden or playground area" – i.e., an area usable by residents of the proposed development as either a yard, garden or playground. Board members observed that it appears likely that sufficient land area exists on the lot to meet the 34,000 SF requirement but that the areas usable as a yard, garden or playground needed to be clearly designated on the plans. City Solicitor Pottle suggested the information could be included as a tabulation on the Site Plan.

At the October 13 meeting, the Board expressly refrained from making any findings about compliance with LUO § 10.16.3.9 in order to give the Applicant an opportunity to address this issue. As far as we can determine from reviewing the December 1 submissions, however, the Applicant has done nothing in response.

**C. The Applicant's newly stated request for a "credit against a future density increase" as part of the Application to develop 34 apartment units in Building #6 is not authorized by the Land Use Ordinances and should be rejected.**

In his latest submissions on Dec. 1, 2022, the Applicant asks the Board to grant a "credit against a future density increase if one is sought in the future" based on his plan to designate 7 of these 34 apartments as "affordable." (See p. 1 of the Site Plan Review Application and p. 1 of the Final Subdivision Plan Application, dated Dec. 1, 2022.) As City Solicitor Pottle and the City's planning consultant Mark Eyeran have advised, a density bonus may only be requested for a project being considered under the provisions for Open Space Design in LUO § 10.23, which this Application is not. It would be completely inappropriate and beyond the Board's legal authority to make factual

findings or conclusions relating to a density bonus that is legally irrelevant to this application. In his most recent memorandum, dated December 9, Mark Eyeran has advised that recent changes to state law offer additional reasons that the Board should not address affordable housing in acting on this application.

**D. Changes to the west and north facades of the building as depicted in the new artistic rendering do not make the project sensitive to or compatible with the established character of the neighborhood, based on an objective analysis of key design elements.**

The Applicant has made extremely minor changes to the west and north facades since the Board's last meeting, despite suggestions by Board members that more was needed to demonstrate compliance with the standards in LUO §§ 6.5.2.1 and 7.8.4. Indeed, the only discernable differences between the Applicant's December 1 and September 14 renderings are: 1) the windows and doors on the west side of the building are now slightly recessed with a balcony in front (though the window and door pattern remains the same), 2) a sign saying 150 Dresden has been stuck on top of the west facade, 3) the siding on the west wall to the north of the new balcony is now cedar instead of the existing ribbed CMU, 4) the screening of the Lower Level balconies on the north side has been raised and altered slightly and small evergreens that appear to be boxwoods have been added to the top edge, and 5) a line of horizontal window panes has been added above the vertical panes along the north wall.

The Applicant's attorney makes a number of claims about these changes in his memo to the Board of November 30, 2022, that do not hold up under scrutiny:

1) recessing the block of windows and doors on the west façade while retaining the same arrangement of windows and doors does little to alter the appearance of the west façade and is not in keeping with any architectural features of the surrounding properties;

2) the addition of a "new vestibule and landscaped patio (on the first floor)" does not even appear on the rendering or the plans for the west side of the building;

3) the north windows contain one row of additional horizontal lights/panes as shown on the Dec. 1 rendering, but the facade retains a strong vertical design that is inconsistent with surrounding buildings. Indeed, these extra lights almost enhance their vertical appearance;

4) the boxwoods cited by the attorney as additional screening on the north side are not large enough to screen anything; and

5) the balconies are not at all similar to the porches and landscape features of nearby residential properties, and the flat roof is glaringly inconsistent with the peaked and/or hipped roofs of all other buildings in the surrounding neighborhood as shown in photographs in the record.

In short, the December 1<sup>st</sup> changes are miniscule and do nothing to "soften" the look of these façades, as the Applicant's attorney asserts, nor do they alter the commercial/industrial appearance of this proposed residential development.

The Applicant’s attorney argues that the former hospital building “arguably is the dominant feature in the neighborhood” for the purposes of applying the standards under LUO sections 6.5.2.1 and 7.8.4.3. This argument misapplies these sections and is inconsistent with the “character” of the HDR zone expressly defined in the LUO. The HDR zone is defined in LUO § 7.5.5 as being “predominantly residential in character,” and the HDR standards in LUO § 7.8.4.3 echo this definition by express reference to “predominate pattern in the immediate neighborhood” of various measurable architectural details. Thus, when a non-residential structure is reconstructed for residential purposes in the HDR, the LUO plainly requires compatibility with that “predominantly residential in character,” not with the character of the former non-residential building that is being reconstructed.

Furthermore, the established character of the Dresden Avenue neighborhood is residential as a matter of fact—as shown by the substantial evidence and photographs submitted by the people who live there. Building #6 is the only commercial/industrial style building in the neighborhood and it has never fit into the established “predominantly residential” character of this neighborhood. (Moreover, its existence predates adoption of Gardiner’s Land Use Ordinance on April 1, 2010.) The Applicant is trying to say that any proposed appearance for this building is necessarily consistent with the established character of the neighborhood simply because Building #6 already exists, but that is incorrect. He is proposing to reconstruct it for residential use, and sections 6.5.2.1 and 7.8.4.3 therefore require him to show that his proposed work will make the resulting residential building fit with the established residential character of this neighborhood in accordance with those standards.

As City Solicitor Pottle has advised the Board, the LUO standards in sections 6.5.2.1 and 7.8.4.3 can be applied objectively by comparing the architectural features of the proposed building – including its roof style, placement of windows and doors, and the appearance of the walls – to the predominate patterns in the surrounding neighborhood as shown in photographs. This requires the application of considered judgment by the Board in its fact-finding, but it is not a subjective determination.<sup>1</sup> As such, it meets the requirements of due process articulated by the Maine Courts.

Thank you for considering these comments. We will attend the meeting on December 15, 2022, ready to answer any questions you may have for us.

Sincerely,

*Phyllis Gardiner      Lisa St. Hilaire*

Phyllis Gardiner and Lisa St. Hilaire  
on behalf of Dresden Avenue neighbors  
and abutters

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<sup>1</sup> The Applicant’s attorney fails to note that in *Ouellette v. Saco River Corridor Comm’n*, 2022 ME 42, ¶ 13, 278 A.3d 1183, the Maine Law Court not only upheld an aesthetic standard against a vagueness challenge but also upheld the application of that standard to a fence because “whether any given fence unreasonably interferes with the scenic view is a fact-specific determination within the Commission’s role as fact finder.”

Existing north and west facades as viewed from Dresden Avenue:

