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November 22, 2021

By Electronic Mail

Carolyn Britt, Chair
Planning Board
Town of Ipswich
25 Green Street
Ipswich, MA 01938

Re: 55 Waldingfield Road — Compliance with Application Requirements

Dear Chair Britt and Members of the Board:

I write on behalf of the Friends of Waldingfield, a group of over two dozen local residents (many of whom live on or near Waldingfield Road) who have deep reservations about both the potential impact of the proposed project on the neighborhood, and the manner in which the proponent has to date engaged with those expressing concerns.

This letter requests clarification on three factual matters relevant to Ora, Inc.'s compliance with the special permit application requirements of the Great Estate Preservation Development Bylaw (the "GEPD Bylaw").

I. Compliance with Minimum Gross Floor Area Requirements

The first matter is whether there is sufficient gross floor area in the existing buildings for the Waldingfield estate to meet the GEPD Bylaw minimum thresholds. It appears there is not. Under Section IX.H.3.a.iii of the GEPD Bylaw, a GEPD must contain

buildings constructed prior to December 31, 1996 which contain in aggregate a minimum of 30,000 square feet of existing floor area, and of which at least 12,500 square feet is located in the Great Estate mansion that was constructed prior to January 1, 1948. For the purposes of this GEPD bylaw, floor area is defined as the aggregate gross floor area of all floors within all principal and accessory buildings.

Ora represented in Exhibit 3 of its letter of October 20, 2021 that the Mansion has an aggregate of 13,970 gross square feet, and that the total gross square footage of all buildings is 32,781 square feet, including basements. That same Exhibit also represented that the basement level of the Mansion contains 3,671 square feet, that the basement level of the

Farm House contains 1,830 square feet, and that the basement level of the Barn contains 2,937 square feet.

However, Exhibit 3 was silent as to whether those basements are of the minimum height necessary to establish them as countable floor area as a matter of law for purposes of the GEPD Bylaw. In historic structures and in outbuildings such as barns, basement heights are frequently lower than those on habitable floors. **Of particular note, our understanding is that the basement of the Barn is an unfinished earthen cavity with a significantly lower ceiling height than six feet, eight inches.**

This fact is critical to the Board's jurisdiction under the GEPD Bylaw. The Ipswich Zoning Bylaw contains neither a definition of "gross floor area," nor a definition of the minimum height required for a space to be considered a "floor." However, to count as habitable floor area under the Massachusetts State Building Code, 780 CMR 51.00 (R305.1 Minimum Height), "Bathrooms, toilet rooms, laundry rooms and habitable space in basements shall have a ceiling height of **not less than six feet, eight inches** (2,032 mm)."¹ (Emphasis supplied).

Moreover, it is clear from the GEPD Bylaw that *only* space meeting the minimum height requirement for habitability is to be counted toward the GEPD minimum threshold square footage requirements. This is because in exchange for rehabilitating the existing historic structures, a developer is expressly entitled under Section IX.H.3.b.ii to "five (5) square feet for every square foot of floor space contained in buildings and supporting structures certified by the Historical Commission as having historic or architectural significance that are rehabilitated or renovated." It would be entirely contrary to the intent and purpose of the GEPD Bylaw to allow developers to leverage space designated *uninhabitable* as a matter of law under the State Building Code to obtain quintuple the amount of *habitable* new floor area in new buildings on the great estate site.

If basement ceiling heights (in part or in whole) in any of the Mansion, Farm House, or Barn are less than six feet eight inches, such areas cannot be counted toward either the minimum 12,500 square feet for the Mansion, or the minimum 30,000 square feet in aggregate across all structures. If removing such areas from the square footages shown in Exhibit 3 reduces either the Mansion or the aggregate across all structures below the GEPD Bylaw thresholds, as a matter of law the applicant lacks the minimum amount of square footage required to proceed.

The Friends respectfully request that the Board require Ora to provide the Planning Department with the existing basement heights in all structures, and that the Board independently verify those figures, so as to determine whether the minimum amount of square footage required under the GEPD Bylaw is indeed present.

¹ <https://www.mass.gov/doc/ninth-edition-residential-code-amendments-0/download>

II. Compliance with Historical Commission Certification Requirements

The second matter is that it does not appear Ora's submission is in compliance with the application requirements of Section IX.H.6. This section specifically requires that the special permit application "shall also be accompanied by a certification from the Historical Commission of all historically and/or architecturally significant buildings, **landscape features** and supporting structures located on the site" (Emphasis supplied)

The correspondence Ora has provided from the Ipswich Historical Commission (Exhibit 4 to Ora's letter of October 20, 2021), indicates that Ora did not request a certification from the Historical Commission under Section IX.H.6, but instead requested a more limited "certification of historically and architecturally significant buildings as required in the Great Estates Zoning bylaw of the Town of Ipswich, Section H(3)(b)(ii). . . ." Confusingly, Section H.3.b.ii is the provision that allows the Planning Board to *waive* the requirement to renovate all the buildings certified by the Historical Commission. It is indisputably not the certification required under Section IX.H.6.

Regardless, as Ora's request to the Historical Commission appears to have cited the wrong section of the GEPD Bylaw and been limited to *buildings*, it does not appear the Historical Commission has ever been asked for its determination of historically significant *landscape features* — natural or otherwise — much less provided certification in this regard. Without such a certification, Ora's application is clearly incomplete under the plain requirements of the GEPD Bylaw.

Nor is such an omission merely form over substance. As the Board is aware, there are significant ongoing discussions about the preservation of the paddock areas, which under Ora's current proposal remain legally unprotected. While this discussion has primarily occurred in the context of the open space value of the paddocks, it is equally likely that the paddocks constitute historically significant landscape features of the estate worthy of preservation *separate and in addition to* from their value as open space. This is particularly true in the context of the express purpose of the Bylaw to "recognize and preserve the design integrity of landscape features, both natural and built, which contribute to the character of a Great Estate." Section IX.H.1.b.

The Friends respectfully request that before proceeding further in its review of the application, the Board require Ora to obtain from the Historical Commission a certification fully consistent with the express requirements of Section IX.H.6, including but not limited to the Commission's certification of any historically significant landscape features, both natural and built.

III. Clarification of the Mandatory Nature of the Open Space Conservation Restriction Requirement

The third matter is that the Friends understand that Ora has insisted that any conservation restrictions Ora places on the property must be *voluntary*, and has specifically

asked the Board *not* to impose a mandatory conservation restriction requirement as an express condition of any GEPD special permit.

Such a request is incompatible with the plain language of the GEPD Bylaw. Section III (Definitions) of the Zoning Bylaws (of which the GEPD Bylaw is a part) states that “[f]or the purposes of this bylaw . . . the word ‘shall’ is mandatory.” As such, it is unambiguous that by intentionally using the word “shall,” the Town established that the open space requirements in Section IX.H.5.c of the GEPD Bylaw are *mandatory* obligations imposed upon the applicant, not voluntary ones that the applicant (or the Board) can choose to adopt or ignore (emphases supplied):

A minimum of forty percent (40%) of the land owned by the applicant *shall* either be:

...

Made subject to a conservation restriction prepared in accordance with the provisions of Section 31 and 33, inclusive, of Chapter 184 of the General Laws of the Commonwealth of Massachusetts running in favor of either the Town or, upon the approval of the Planning Board, a non-profit corporation, the principal purpose of which is the conservation of open space. The conservation restriction *shall* provide that such land shall be kept, in perpetuity, in an open or natural state, in accordance with the above-noted sections of Chapter 184 of the General Laws.

Put more directly, a GEPD special permit without an express and enforceable mandatory condition that a minimum of 40% of the land shall be open space would not on its face comply with the requirements of the GEPD Bylaw. Indeed, absent such a mandatory condition in a GEPD special permit, an applicant could promise 40% open space, actually provide only 10%, and contend that because its GEPD special permit contained no condition *requiring* the 40%, it could still proceed with its project. Such an outcome would be absurd.

The Friends respectfully request that the Board clarify during a public hearing that an express and affirmative condition of any GEPD special permit that may issue in this proceeding, enforceable by the Planning Board or its designee, is that all land designated as “open space” for the purpose of meeting the requirements of Section IX.H.5.c shall be either conveyed or made subject to a suitable conservation restriction.

* * *

Thank you for your consideration of these requests. Please do not hesitate to contact me or my colleague Doug McGarrah if you should have any questions.

Sincerely,



Thaddeus Heuer

Cc (by email): Ethan Parsons, Director of Planning and Development
Kristen Grubbs, Town Planner
Anthony Marino, Town Manager
Tammy Jones, Chair, Select Board
Gordon Harris, Chair, Historical Commission
Andrew Brengle, Co-Chair, Open Space Committee
Wayne Castonguay, Co-Chair, Open Space Committee
Molly Shea, Open Space Protection Manager
Beth O'Connor, Open Space Steward