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By Electronic Mail

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

Re: 55 Waldingfield Road — Ora, Inc. Proposed Development

Dear Chair Britt and Members of the Board:

I write on behalf of the Friends of Waldingfield to reiterate the request in my November 22 letter that the Board obtain ***independent third party verification*** of the gross floor area of the structures at 55 Waldingfield, so as to determine whether the minimum amount of square footage required by law under the GEPD Bylaw is indeed present.

Far from clarifying the GFA matter, Ora's presentation on December 2, 2021 only further illustrated how muddled this crucial threshold jurisdictional question is. First, it was clear that there is no common understanding or definition of GFA for purposes of the GEPD Bylaw, making it impossible to know what should (or should not) be counted as GFA as a matter of law. Second, it was clear from the different numbers asserted by Ora and the Ipswich Assessor that there is not even a common agreement on how many square feet of GFA exist on the site as a matter of fact.

To be clear: The amount of GFA on the site is not subjective. It is a question with a definitive answer. There should be no discrepancies whatsoever. The Board must establish an unambiguous definition of what does and does not count as GFA for purposes of the GEPD Bylaw, and then obtain an independent third party determination of the amount of GFA on the site utilizing that definition.

I. In the Absence of a Definition of "Gross Floor Area" in the Bylaw, the Board Must Establish One.

There is no dispute that "Gross Floor Area" is undefined in either the GEPD Bylaw specifically or the Protective Zoning Bylaw generally. Unhelpfully, the GEPD Bylaw merely states that "floor area is defined as the aggregate gross floor area of all floors within all

principal and accessory buildings." Without an express definition of "gross floor area," however, it is impossible to know what is or is not to be counted under the GEPD's definition of "floor area".

The Supreme Judicial Court has established a rule for precisely this situation: "In the absence of an express definition, the meaning of a word or phrase used in a local zoning enactment is a question of law and is to be determined by the ordinary principles of statutory construction." *Framingham Clinic Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981). Yet even if the Zoning Bylaw's definition of "Floor Area" in Section III is used as a starting point ("The aggregate area of all floors within a building, including interior space measured from the surface of the building's exterior walls"), there is no evidence that even that definition includes sub-height uninhabitable basement space, much less whether such space (in the Barn, Farm House, or elsewhere) is included in the definition of "gross floor area" for GEPD purposes under Section IX.

As explained in the Friends' November 22 letter, in the absence of any express definition of "gross floor area," the most reasonable construction of the term for GEPD purposes is that it counts only habitable floor area (which under the Massachusetts State Building Code, 780 CMR 51.00 (R305.1 Minimum Height) counts basements only if they are at least 6' 8" high). This is because Section IX.H.3.b allows developers to obtain bonus "floor area" based on renovation of those same qualifying buildings.[1] 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 — whether root cellars, crawl spaces, or dugout pig stys or sheep enclosures — to obtain quintuple the amount of *habitable* new floor area for contemporary office space in new buildings on the great estate site.

The Friends' position that GFA is limited to habitable space for GEPD purposes is further bolstered by the fact that the Bylaw does *not* require Ora to actually renovate the Mansion, Barn, or Farm House basements in order for Ora to leverage that basement floor space into bonus habitable development space elsewhere on the property. Section IX.H.b.ii merely states that "new floor area developed on the lot may be increased by 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 is simply the *building* that must be renovated to unlock the ability to leverage its *entire* floor space (including basements) for bonus purposes — it is *not* a square-foot-for-square-foot match.[2] This fact further confirms why only habitable basements should be counted toward GFA in the first instance.

[1] As a matter of law, the term "floor area" must be read as having the same meaning throughout the GEPD Bylaw. "[W]here words are used in one part of a statute in a definite sense, they should be given the same meaning in another part of the statute." *Beeler v. Downey*, 387 Mass. 609, 617 (1982).

[2] Ora asserted on December 2 that because it is relying on the maximum density provision in Section IX.H.3.b.iv of 8% of lot area, the provisions about calculating "new floor area" and "additional floor space" are somehow irrelevant. The Bylaw says otherwise: the 8% calculation is expressly *based* on "the application of the formulae described in sub-paragraphs (1) and (2) above", which are the "new floor area" and "additional floor space for rehabilitation of existing buildings" sections.

Moreover, Ora's admission at the December 2 hearing in response to a question from the Board — that it was *not* counting as GFA its proposed grade-level under-building parking in subsequent phases — was striking, and underscores the essential importance of a uniform and objective definition of GFA for GEPD purposes. Ora's position — that it can *count* the unfinished Barn and Farm House basements as GFA in order to meet the minimum GFA threshold under Section IX.H.3.a.ii, but that it can *exclude* finished underbuilding parking from the aggregate maximum GFA it asserts it is entitled to construct under Section IX.H.3.a.iv — should be highly concerning to the Board. Ora is not entitled to both have its cake and eat it.

Finally, at the December 2 meeting one Planning Board member suggested that some municipalities may include basements in GFA, and therefore Ipswich's Bylaw should be construed similarly. However, in most Massachusetts municipalities that define GFA, *the exact opposite is true*. Indeed, if Ipswich follows the approach prevalent in other communities, that would *exclude* uninhabitable basement areas from GFA. For instance, both Gloucester and Beverly include "areas used for *human occupancy* in basements" in GFA but expressly *exclude* "cellars, unenclosed porches, or attics not used for human occupancy. . . ."[3] In terms of Ipswich's near neighbors, Topsfield has the same exclusion for cellars not used for human occupancy,[4] as does Wenham,[5] and Rowley excludes "basements and attics not designed for human occupancy."[6] Hamilton, Essex, and Boxford have no GFA definition at all. And further afield, the City of Cambridge expressly excludes from GFA "Basement and cellar spaces with less than seven (7) feet of ceiling height measured from the floor to the line of the bottom of the floor joists . . . ."[7] In short, the existence of these bylaws only further affirms that *excluding* uninhabitable basements from GFA is the most rational, reasonable, and common approach.

II. After Establishing a Definition of GFA, the Board Must Obtain an Independent Third Party Determination of the Site's GFA.

Ora's apparent position — that the notable discrepancy between Ora's number and the Assessor's number is not relevant because both calculations exceed 30,000 square feet — warrants significant skepticism by the Board. This is because both Ora and the Assessor

[3] City of Gloucester Zoning Ordinance, Section VI (Definitions) (Floor Area, Gross), *available at* https://library.municode.com/ma/gloucester/codes/zoning_ordinance?nodeId=SVIDE; City of Beverly Zoning Ordinance, Section 300-5 (Terms Defined) (Floor Area, Gross), *available at* https://ecode360.com/29283347.

[4] Town of Topsfield Zoning Bylaw, Section 1.42 (Floor Area, Gross), *available at* https://www.topsfield-ma.gov/sites/g/files/vyhlif5086/f/uploads/article_1_i_and_preamble_050719.pdf.

[5] Town of Wenham Zoning Bylaw, Section 2.00 (Definitions) (Floor Area, Gross), *available at* https://cms4files1.revize.com/wenhamma/Final_Zoning_Bylaws_2015.pdf.

[6] Town of Rowley Zoning Bylaw, Section 2.0 (Floor Areas), *available at* https://www.townofrowley.net/sites/g/files/vyhlif4956/f/uploads/zbl_all_updated_to_atm-stm_june_22-2020_1.pdf.

[7] City of Cambridge Zoning Ordinance, Section 2.00 (Definitions) (Floor Area, Gross), *available at* https://library.municode.com/ma/cambridge/codes/zoning_ordinance?nodeId=ZONING_ORDINANCE_ART2.000DE).

have natural incentives (for entirely different reasons) to *maximize* the calculated GFA on the site. Coupled with obvious discrepancies in the calculations and numerous troubling questions about methodology, as well as the lack of a controlling definition of what constitutes GFA in the first place, there is a significant likelihood that *neither* Ora's nor the Assessor's number is correct, whether as a matter of law or a matter of fact.

Ora's own chart presented at the December 2 hearing makes clear that there is no consensus on the GFA of the structures, even between Ora and the Ipswich Assessor. Indeed, Ora's chart shows that of the six buildings on the site, the respective calculations differ for *five* of them, with an overall gap of *over 1,000 square feet.* In one sense this is hardly surprising, since without a controlling definition of GFA, there will be no consensus as to what to count.

Yet even setting that critical point aside for a moment, the *methods* both Ora and the Assessor used to calculate their numbers warrant also significant skepticism and raise numerous serious questions.

As to Ora's methods, according to its September 22, 2021 letter to the Planning Board, Ora used an instrument survey to "locate[] and verif[y] building footprints," then used the "current property cards for 55 Waldingfield Road which included floor levels for several *but not all buildings*." Then they "site measure[d] each building to verify overall dimensions and areas" — which Ora's architect stated on December 2 was made with "a tape measure" — resulting in a total of 32,781 GSF. Put differently, Ora started with incomplete records that are not maintained for zoning purposes, and then supplemented that information by using a tape measure (rather than the standard laser distance measurement technology used today), all while using its own bespoke and self-serving definition of what constitutes GFA under the GEPD Bylaw. Moreover, Ora now belatedly claims that despite this, it *still* somehow missed a second floor Barn apartment of 468 square feet (while apparently also *counting* other square footage that the Assessor *missed*, since Ora's chart shows a net difference for the total Barn calculations of 155 square feet, not 468 square feet). None of this inspires confidence in either Ora's methodology or the accuracy of its calculations.

The Assessor's methodology is even more opaque. As a purely legal matter, the Assessor's calculations of square footage for *taxation* purposes under G.L. c. 59 are legally irrelevant to how square footage is calculated for *zoning* purposes under G.L. c. 40A and the Protective Zoning By-Law (including Section IX). Furthermore, in her November 22, 2021 email to the Town Planner, the Assessor admitted that she "<u>did not have access to the interior of any of the buildings</u> and therefore <u>utilized the information from the architect regarding the second/third floor information</u>." Merely copying the calculations of the applicant is obviously a far cry from verifying them.

In short, the Assessor concedes that she had no access to the basements and conducted no independent measurements of the interior space, but rather merely accepted without verification Ora's own calculations (which indeed, makes it challenging to understand how the Assessor arrived at significantly *different* numbers from Ora). Given that she had no access to the interiors, it is curious how (among other things) Ora contends that

the Assessor nonetheless managed to discover an additional 468-square-foot dwelling unit within the Barn that Ora itself apparently missed (see page 12 of Ora's December 2 presentation), or how the Assessor verified Ora's contention (as shown on the diagram accompanying its September 22 letter) that the *entire* second story of the Barn has a floor, thereby warranting counting the full 2,937 square feet of the Barn's second story as floor area. None of this inspires confidence in either the Assessor's methodology or the accuracy of her calculations.

* * *

Whether 55 Waldingfield has sufficient GFA under the GEPD Bylaw is a basic threshold legal question going to the heart of whether the Board has the jurisdiction to hear Ora's application. It is also a question with a definitive answer, which is objectively unknown at present.

To definitively obtain this answer, the Friends request that the Board take two immediate steps. **First**, establish an unambiguous definition of what does and does not count as GFA for purposes of the GEPD Bylaw. And **second**, obtain an independent third party determination of the amount of GFA on the site, utilizing that definition. Only at that point should the Board consider proceeding further in its review of the application.

Thank you for your consideration of this letter. 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