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January 6, 2022

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:

On December 10, 2021, the Friends of Waldingfield expressed concerns to the Planning Board regarding whether the proposed project at 55 Waldingfield Road meets the Gross Floor Area (GFA) threshold of the Great Estate Preservation Development (GEPD) bylaw. Unlike most Massachusetts municipalities, the Protective Zoning Bylaw does not define this essential term. As such, the Friends encouraged the Planning Board to utilize a definition of GFA consistent with both the intent and purpose of the GEPD Bylaw and the definitions utilized by other Massachusetts municipalities, in which basements and uninhabitable space are excluded from GFA.

The Friends understand that the Building Inspector has now recommended that the Planning Board instead calculate GFA as comprising all areas of a structure that are “functional or accessible”, including potentially counting cellars, basements, subterranean earthen cavities that lack defined walls, crawl spaces, and root cellars, regardless of their habitability or even a minimum ceiling height.

The Friends respectfully observe that this recommendation lacks any legal basis and, as it is contrary to the legal standards established by the Supreme Judicial Court for establishing the meaning of an undefined term in a zoning bylaw — as well as inconsistent with the definition of GFA *Ipswich itself* previously adopted in the Protective Bylaw — is vulnerable to challenge on appeal. For the following reasons, it should not be adopted by the Planning Board.

First, the Protective Bylaw currently contains no definition of Gross Floor Area.¹ While the Protective Bylaw does define “Floor Area” on page 12, the GEPD provision expressly substitutes a *different* definition of “Floor Area” for GEPD purposes – “defined as the aggregate gross floor area of all floors within all principal and accessory buildings.” In other words, Ipswich Town Meeting has affirmatively chosen to use the specific and undefined term “gross floor area” in its definition of “floor area” for purposes of the GEPD bylaw, and has also affirmatively chosen to define the term “floor area” for GEPD purposes *differently* than the general definition on page 12. In such circumstances, the term “gross floor area” is required by law to have independent substantive meaning. The only question is how that meaning is determined.

Second, as the Friends explained in their December 10, 2021 letter, the Supreme Judicial Court has decreed that “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). The SJC has further held that “[w]e derive the words’ usual and accepted meanings from sources presumably known to the [by-law’s] enactors, such as their use in other legal context and dictionary definitions.” *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369 (1977).²

Examining how the term “gross floor area” is used in other similar legal contexts requires *excluding* cellars and uninhabitable basement areas from the calculation for the purposes here. As detailed in the Friend’s December 10 letter, most Massachusetts zoning ordinances and bylaws define GFA as excluding cellars and uninhabitable basements — including Ipswich’s near neighbors of Topsfield, Wenham, and Rowley. Yet it is not even necessary to look that far afield for legal context, since **Ipswich’s own Protective Zoning Bylaw expressly defined GFA for many years as excluding cellars:**

GROSS FLOOR AREA: The total area on all floors of a building as measured from the exterior faces of the walls. **It does not include cellars, unenclosed porches, or attics not used for human occupancy,** or any floor space in accessory buildings or in the principal buildings intended and designed for the parking of motor vehicles.

Ipswich Protective Zoning Bylaw (1977), at 6 (emphasis supplied).³

¹ Ora’s January 4, 2022 letter makes the confusing contention that the Friends have attempted to “substitute” their own definition of GFA for that in the bylaw. There is nothing to substitute when a definition does not exist. The only relevant issue here is how to establish the meaning of an *undefined* term; the legal standards for this process are explained below.

² As Ora appears to recognize, the Friends’ approach — following the principles established by the SJC by looking to how the term is used in other legal contexts — is vastly more defensible than Ora’s ad hoc approach, which is apparently to endorse any definition of gross floor area that would enable its undersized project to meet the 30,000 square foot threshold.

³ The Friends are unaware of when the Protective Bylaw was amended to render the term “gross floor area” undefined.

In interpreting what Ipswich Town Meeting meant when it used the now-undefined term “gross floor area” in the GEPD Bylaw, how Ipswich Town Meeting *itself* chose to define the term “gross floor area” previously must be the starting point under *Framingham Clinic* and *Zone Book*, and is entitled to significant deference. Indeed, when deriving “words’ usual and accepted meanings from sources presumably known to the [by-law’s] enactors,” there is hardly a better source “known to” Ipswich Town Meeting than the definition *Town Meeting itself previously adopted*.

Third, the Friends are unaware of *any* other Massachusetts zoning bylaws that define GFA in the uncommon manner apparently proposed by the Building Inspector (as “functional or accessible” space), nor does this proposed definition find support anywhere in the text of the Protective Bylaw itself. This should be of particular concern to the Planning Board, given that the SJC’s holding in both *Framingham Clinic* and *Zone Book* is that a key tool for determining the meaning of undefined zoning terms is to look to their use in other legal contexts. Indeed, even Ora appears to agree that the Building Inspector’s proposed interpretation is questionable. Ora’s January 4 letter admits that Ora does not “see any restrictive language in the Bylaw” that suggests GFA is defined by whether space is or is not “functional or accessible.”

Finally, the Supreme Judicial Court has held that “[z]oning by-laws must be construed reasonably. . . . Such by-laws should not be so interpreted as to cause absurd or unreasonable results when the language is susceptible of a sensible meaning.” *Green v. Board of Appeal of Norwood*, 358 Mass. 253, 258 (1970). Put simply, the Friends submit it would come as a significant surprise to the Ipswich’s Town Meeting voters to learn that they had apparently authorized developers to count subterranean earthen cavities (often colloquially known as “holes”), root cellars, crawl spaces, and dugout pig stys as “gross floor area,” and thereby granted developers the ability to leverage those rudimentary spaces to quintuple the amount of new contemporary office space they could construct on a great estate site.⁴ As articulated in the Friend’s December 10 letter, the interpretation proposed by the Building Inspector would lead precisely such unreasonable results.

* * *

In short, the Building Inspector’s recommended interpretation of the undefined term “gross floor area” is inconsistent with how the term is used in other zoning bylaws. It is also inconsistent with how the Town of Ipswich itself has previously defined the term in the Protective Zoning Bylaw. Lacking any legal foundation, adoption of the ad hoc “functional and accessible” definition would render any decision of the Planning Board vulnerable on appeal. The Friends encourage the Planning Board to instead utilize a definition consistent with Ipswich’s *own previous definition* and the majority of Massachusetts municipalities, which expressly exclude cellars and uninhabitable basement spaces from the definition of gross floor area.

⁴ It remains puzzling how Ora can continue to contend that its “comprehensive process” of calculating GFA included “verification from the property cards on file in the Town Assessor’s Office,” given the undisputed fact that *the Barn does not appear on any Assessor’s property card*.

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,

A handwritten signature in black ink, appearing to read 'Thaddeus Heuer', with a long horizontal flourish extending to the right.

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