

# ANDERSON KREIGER

## MEMORANDUM

To: Carolyn Britt, Chair  
Ipswich Planning Board

cc: Tony Marino, Town Manager  
Ethan Parsons, Director of Planning and Development

From: George A. Hall, Jr.

Re: 55 Waldingfield Road; Great Estate Preservation Development proposed by Ora, Inc.

Date: February 8, 2022

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You have asked whether the Planning Board, in considering the above application under Section IX.H. of the Ipswich Zoning Bylaw, may allow the applicant to include land that is subject to a Conservation Restriction granted in 1972 toward the minimum open space requirement in § IX.H.5.c. That section requires that a minimum of forty percent (40%) of the lot be conveyed in fee to, or made subject to a Conservation Restriction in favor of, the Town, the Commonwealth, or a non-profit conservation organization. It has been asserted that allowing the applicant to use previously restricted land to meet this 40% minimum is contrary to the guidelines adopted by the Planning Board in May of 1997, entitled “Criteria for Evaluating Proposed Open Space” (the “Guidelines”), a document referenced in the GEPD bylaw. The Guidelines state that “land already protected, such as wetlands, will not count toward the open space to be proposed in the plan.”

For the reasons that follow, it is my opinion that the Board has the discretion to allow the applicant to use previously restricted land to meet the 40% open space requirement.

### Analysis

The GEPD Bylaw includes a number of strict eligibility and design requirements that are set forth in the text of the Bylaw itself, including minimum lot area requirements, gross floor area requirements, maximum density limitations, supplemental setback requirements, and the like. The only thing that the Bylaw says about the open space requirement is that the open space must comprise 40% of the lot.

The question, then, is whether the reference to the Guidelines reflects a clear intention by the Town Meeting<sup>1</sup> to impose an *additional* limitation on what land the Board may consider as eligible to meet the minimum open space requirement, notwithstanding the failure to include such a limitation in the Bylaw. I do not think that would be a reasonable inference to draw from the Bylaw, for several reasons:

- The Bylaw does not actually say that the *Board* is required to apply the Guidelines; it says “the *applicant* shall apply the guidelines [etc.]” While this may seem to be an insignificant difference (the Board has to judge whether the applicant has done so), I think the absence of mandatory language directed to the Board is an indicator that the reference to the Guidelines was not intended to further limit the Board’s discretion.
- The Bylaw refers to the Criteria for Evaluating Proposed Open Space as “guidelines,” and guidelines are generally understood to be an aid to the application of other legal standards, and not to be binding in all their particulars. Consistent with this concept, the Guidelines themselves are not formulaic; they state that the Board “will give particular attention to” a list of ten factors and determine whether the project satisfies “one or more” of them.
- The Guidelines actually preceded the adoption of the GEPD Bylaw and were intended to guide the Board in evaluating proposed open space preservation developments under § IX.A. Indeed, the reference to the Guidelines in § IX.H.5.c. tracks the language in § IX.A.5.c. (although the latter states that “no more than [50%] of the designated open space may be comprised of wetlands,” explicitly overruling the stricter limit in the Guidelines). Section IX.A.5.c. demonstrates that, when the Board intends to impose formulaic caps on the kind of land that can be included in the open space, it puts those in the Bylaw itself. The absence of those limitations in § IX.H.5.c. suggests no such caps or limits were intended.
- The phrase “land already protected, such as wetlands” is not a precise definition. There are a variety of regulatory limits, or title encumbrances, that could arguably be considered protective. (Is land within a subsurface sewer easement “protected?”) The lack of a precise definition is not a problem if the purpose of the sentence is merely to reserve the Board’s right to reject (in its discretion) an OSPZ proposal for being insufficiently protective of open space, but it is a problem if it is intended as a *per se* disqualification of some land from the Board’s consideration. Again, I think the Board and its staff know how to draft strict qualifying (or disqualifying) standards; the fact that

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<sup>1</sup> The interpretation of ambiguous language in a bylaw requires an attempt to discern the apparent intent of the legislative body that enacted it. While that body is the Town Meeting, in cases involving fairly complex zoning bylaws drafted and recommended by the Planning Board, it is fair to assume that the Town Meeting was accepting the Planning Board’s recommendation, and the intent of the Planning Board should also be taken into account.

the Bylaw uses such general language supports the interpretation that the Board is describing its general evaluative approach, and not tying its own hands.

- The purposes of the GEPD Bylaw overlap with those of the OSPZ Bylaw, but they are not identical, and the Guidelines should be considered with the differing objectives of the GEPD Bylaw in mind. The OSPZ bylaw is based on the idea that it is sometimes beneficial to reduce lot sizes if doing so will protect some of the environmentally significant natural features of the land that could not be protected using a conventional subdivision plan. In that context, reserving the right to reject the inclusion of land in the open space that could not be developed under a conventional plan anyway makes perfect sense. It is a bit more complex to apply it to a GEPD proposal where the protection of the existing buildings and formal landscape is an additional objective that may be equally important.

### Conclusion

The standards that are binding on the Board in this matter are those in the Bylaw itself, and the most important review criteria for the approval or disapproval of a GEPD special permit are those set forth in § IX.H.7. Obviously, the extent to which the open space satisfies the Guidelines is *relevant* to the determination of whether clause (a) in the second sentence in § IX.H.7 is satisfied. If, however, the Board determines, based on all of the factors present, that the project meets the requirements of § IX.H.7, I think it has the discretion to approve the project notwithstanding its use of some of the previously restricted land to meet the 40% requirement.