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September 21, 2022

By Electronic Mail

Toni Mooradd, Chair
Ipswich Planning Board
Ipswich, MA 01938

Re: 55 Waldingfield Road – Legal Memorandum

Dear Chair Mooradd and Members of the Board:

Two weeks ago, on September 6, 2022, my colleague Doug McGarrah and I submitted the enclosed legal memorandum to the Director of Planning.

The memorandum identifies two fundamental legal vulnerabilities in the current Draft Decision. The memorandum also provides extensive citations to the decades of appellate precedent on statutory and bylaw interpretation, which will govern any judicial review of the Board's decision. You may be interested to learn that the Supreme Judicial Court reaffirmed these principles of bylaw interpretation as recently as *this past Friday*, in *Williams v. Board of Appeals of Norwell*, 490 Mass. 684 (Sept. 16, 2022).

As these issues are both inherently legal and outside the Board's discretion, we encouraged the Planning Department to obtain legal advice from Town Counsel on these points when preparing its Draft Decision. We understand the Planning Department has not as of yet sought or received Town Counsel's advice on the memorandum, nor explained to the Board that adopting the current Draft Decision will expose the Town to real (and unnecessary) legal risk.

We urge the Board to obtain Town Counsel's opinion on the positions and precedents contained in the memorandum before the Board contemplates granting a special permit on grounds that will be facially vulnerable on appeal.

Sincerely,

Thaddeus Heuer

Cc (by email): Ethan Parsons, Director of Planning and Development
Andrea Bates, Assistant Town Planner
Mary Gallivan, Interim Town Manager
Tammy Jones, Chair, Select Board

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Memo

Date:	September 6, 2022
To:	Ethan Parsons, Director of Planning, Town of Ipswich
cc:	George Hall, Esq., Anderson & Krieger LLP
From:	Tad Heuer & Douglas McGarrah
Regarding:	Legal Analysis — 55 Waldingfield Road Draft Decision

In correspondence between November 2022 and present, Foley Hoag has brought to the attention of the Planning Board and Planning Department numerous legal inconsistencies, oversights, and concerns regarding Ora, Inc.'s application for a special permit under the Great Estate Preservation Development ("GEPD") provision of the Ipswich Protective Zoning Bylaw.

We understand that as staff to the Planning Board, the Planning Department has been preparing draft decisions for the Board to utilize as a framework for any final vote. Although many of the findings included in these drafts are of an inherently legal nature, it is unclear the extent to which Town Counsel has been consulted in formulating these findings, particularly with respect to 1) the threshold gross floor area qualifications of 55 Waldingfield Road under the GEPD Bylaw, and 2) the prohibition in the GEPD Bylaw on new construction (with the exception of gatehouses) within 250 feet of the public way.

For the reasons below, we strongly encourage you and the Planning Board to obtain written advice from Town Counsel on at least these two legal issues, before the Board contemplates granting a special permit on grounds that will be facially vulnerable on appeal.

I. "GROSS FLOOR AREA" DOES NOT INCLUDE CELLARS OR BASEMENTS AS A MATTER OF LAW

The August 8, 2022 Draft Decision ("Draft Decision") proposes findings that 55 Waldingfield "includes more than 30,000 sq. ft. of floor area within existing buildings" and that the mansion "contains more than 12,500 sq. ft. of floor area." The Draft Decision bases these findings on the unverified measurements provided by Ora in its June 3, 2022 Summary at B2, which declares that "[t]he total of all floors at Waldingfield and as illustrated in the

table below is 30,900 [Gross Square Feet]." Ora's table concedes that the alleged 30,900 gross square feet *includes* 6,557 of basement.[1]

Unless basements are counted, Ora cannot meet the minimum gross square footage threshold. Yet as detailed below, there is no legal basis for interpreting the Ipswich Protective Zoning Bylaw as including basements or cellars in the key undefined term "gross floor area" (or "GFA"). As a consequence, 55 Waldingfield does not qualify as a Great Estate as a matter of law.

A. The Legal Standard for Establishing the Meaning of Undefined Zoning Terms

On October 20, 1997, Ipswich Town Meeting adopted the GEPD Bylaw, including relevant language about GFA that remains unchanged today. Section IX.3.a.iii provides that "[f]or 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" (emphasis supplied).

There is no dispute that the Ipswich Protective Zoning Bylaw *does not define the term* "*gross floor area.*" Nor has the Board or Planning Department ever disclosed in writing the definition of "gross floor area" that is being applied here, despite repeated requests that the Board or Department furnish that definition.

In precisely such circumstances, where "there is no explicit definition of a word or phrase used in a local zoning bylaw, the meaning of that word or phrase is to be determined using ordinary principles of statutory construction," *Nextsun Energy LLC* v. *Fernandes*, 29 LCR 52, 58 (Land Ct. Feb. 16, 2021). *Accord Shirley Wayside Ltd. P'ship v. Board of Appeals of Shirley*, 461 Mass. 469, 477 (2012); *Framingham Clinic, Inc. v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981).

The Supreme Judicial Court has held that in the absence of a statutory definition, undefined phrases are given their "usual and accepted meanings from sources presumably known to the bylaw's enactors, such as their use in other legal contexts and dictionary definitions." *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369, 361 N.E.2d 1239 (1977). The Land Court has elaborated upon how it implements this process when evaluating zoning bylaws in specific, holding that it applies the "ordinarily accepted meaning and, in addition, look[s] at bylaws from other Massachusetts towns for corroboration." *Pelullo v. Hickey*, 20 LCR 467, 468 (Land Ct. Oct. 3, 2012).

If the Land Court is asked to apply these statutory construction principles and precedents to determine the meaning of the undefined term "gross floor area" in the GEPD Bylaw, it will do two things. First, it will look to the "usual and accepted meanings from sources presumably know to the bylaw's enactors." Second, it will look at the "bylaws from other Massachusetts towns for corroboration."

[1] Ora already revised its supposedly "certified" number once (*compare* Ora Exhibit 4 (Sept. 22, 2021) certifying 32,871 square feet of gross flor area *with* Ora Summary (June 3, 2022) asserting 30,900 square feet of gross floor area), demonstrating on the record before the Planning Board that even *Ora* does not know what is or is not included in "gross floor area."

Under both of these prevailing standards of review, 55 Waldingfield lacks the requisite 30,000 square feet of gross floor area within existing buildings, or 12,500 square feet of gross floor area within the mansion.

B. The Bylaw Definition Known to Ipswich Town Meeting in 1997 Excluded Cellars and Basements

There is no more reliable source "known to the bylaw's enactors" than the definition contained in the Protective Zoning Bylaw in 1997, when Town Meeting adopted the GEPD Bylaw.

In 1997, the Protective Zoning Bylaw defined floor area as "the **aggregate *gross* area of all floors** within a principal building, **excluding cellars, basements, garages** . . . not designed or human occupancy and excluding any area in accessory buildings" (emphasis supplied). Put plainly, any Town Meeting voter in 1997 who wanted to know what gross floor area meant under the new proposed GEPD provisions had a straightforward answer, from the Bylaw itself: gross floor area excluded cellars and basements.

Indeed, even when Town Meeting amended that definition of floor area in 2017, the Select Board and Planning Board informed Town Meeting in the Warrant itself that the proposed amendment — which moved the language about cellars and basements elsewhere in the Bylaw (and curiously, deleted the word "gross" without explanation) was merely a "non-substantive" clarification intended to "remove [an] existing ambiguity":

> As the Planning and Building Department staff work with the Zoning Bylaw and apply it to real world situations, they occasionally discover ambiguities, omissions or inadequacies in the language. The Planning Board's Miscellaneous zoning article seeks to rectify these non-substantive issues. (Emphasis supplied).[2]

Given the Planning Board's express written commitment to Town Meeting that the 2017 amendment was "*non-substantive*," the legal consequence cannot be to have furtively effected a *substantive* change in how gross floor area is defined. It is presumed that Town officials do not mislead their Town Meetings. *See Boss v. Leverett*, 484 Mass. 553, 564 (2020) (warrant language is "misleading if the language included or excluded in the warrant substantially alters the article's meaning, or if the warrant fails to sufficiently state the nature of the matter.").

As a consequence, the definition of gross floor area known to Town Meeting voters in 1997 when the GEPD provisions were enacted — and to which the Planning Board itself confirmed in 2017 that no "substantive" change was being made — expressly *excludes* cellars and basements from the definition of gross floor area.

[2] 2017 Ipswich Special Town Meeting Warrant, at https://www.ipswichma.gov/ArchiveCenter/ViewFile/Item/548.

Excluding the 6,557 square feet of cellars and basements from the buildings at 55 Waldingfield indisputably means the property fails to meet the minimum eligibility threshold for a GEPD special permit. Where a project does not meet the jurisdictional thresholds established in the Bylaw, the Board lacks legal authority to issue a special permit.

C. The "Usual and Accepted" Meaning of GFA Excludes Cellars and Basements

Second, a court asked to determine the "usual and accepted meaning" of gross floor area will look at the "bylaws from other Massachusetts towns," whether in the first instance or for corroboration. *Pelullo v. Hickey*, 20 LCR 467, 468 (Land Ct. Oct. 3, 2012). Were the Land Court asked to do so here, it would find overwhelming evidence that the "usual and accepted meaning" of gross floor area in other municipal bylaws *excludes* cellars and basements.

Essex County has 34 municipalities, including Ipswich. Of those, **eighteen** have zoning bylaw definitions that would expressly *exclude* from the calculation of GFA the Barn cellar, Farmhouse cellar, Mansion basement, or some combination thereof. Additionally, one municipality excludes cellar space less than 5' high, one includes basements but is silent on cellars, and two only count floors if within the "outside walls" (and here it is not clear the Barn has an "outside wall" on its bank side). Nine have no definition. Crucially, only **three** affirmatively include basements in the definition of GFA.

Put differently, of the 25 municipalities that have affirmatively established their own definitions of GFA, in at least 72% and up to 84% of them Ora would *not* meet the GEPD GFA threshold. In other words, the empirically predominant practice in Essex County is to exclude basements and cellars from GFA. This is strong and significant corroborating evidence of the "usual and accepted meaning" of the term GFA.

Moreover, if Ipswich actually intended its Protective Zoning Bylaw to be interpreted *contrary* to this "usual and accepted meaning" (for instance, to include cellars and basements), the Town easily could have adopted such a definition at Town Meeting. *See Higgins v. Coote*, 10 LCR 1, 3 (Mass. Land Ct. 2001) ("Had the drafters of the By-Laws wanted to include the area covered by principal and accessory buildings within the definition of lot coverage, the Reading Town Meeting could have done so.") That Ipswich has chosen not to — and has chosen not to with full knowledge of how Massachusetts courts derive the "usual and accepted meaning" of undefined terms in zoning bylaws — only confirms the Town's willingness to have the "usual and accepted meaning" of GFA bind the Town should the matter come into dispute (as it now has).

D. *Ad Hoc* and *Ex Post* Subjective Definitions Are Strongly Disfavored

Neither the Planning Board nor Building Inspector can now simply adopt *ex post* a new definition of "gross floor area" consistent with whatever would allow Ora's application to meet the minimum threshold. As the United States Supreme Court has held, statements "made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n. 11 (1979).

Nor does any municipality in Essex County (or, to our knowledge, any of the other 350 municipalities in the Commonwealth) employ a definition of GFA that even remotely resembles the *ad hoc* and *ex post* subjective definition suggested by the Building Department during a December 2021 Planning Board meeting: that GFA comprises all areas of a structure that are "functional or accessible." And Massachusetts courts have repeatedly disapproved of building officials relying on their subjective historical practice rather than on objective and uniform standards in interpreting zoning bylaws. *See Pelullo v. Croft*, 86 Mass. App. Ct. 908, 910 (2014) ("Even weaker is the building inspector's bald assertion of an established practice using a diagonal line to measure the depth of lots regarded as oddly shaped."); *Higgins v. Coote*, 10 LCR 1, 3 (Mass. Land Ct. 2001) (where "building inspector testified that it was his practice to include an accessory garage area in the calculation to determine the maximum lot coverage percentage," Land Court held "such practice has no legal basis and is legally untenable.").

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). 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, 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 under Section IX.2.b.ii. The Draft Decision would lead precisely such unreasonable results.

* * *

In short, the Draft Decision proposes to find that 55 Waldingfield meets the GFA threshold in the GEPD Bylaw, by relying upon a secret and unstated definition that is inconsistent with both the meaning of that term as known to Town Meeting, and its usual and accepted meaning as found in the vast majority of surrounding zoning bylaws.

If the Planning Board fails to utilize a definition of gross floor area consistent with Ipswich's *own previous definition* and the majority of Massachusetts municipalities — both of which expressly exclude cellars and basements from the definition of gross floor area — its decision will be vulnerable on appeal.

II. ALLOWING ORA'S PROPOSED CONSTRUCTION WITHIN THE 250-FOOT SETBACK WOULD CONTRADICT NUMEROUS SUPREME JUDICIAL COURT PRECEDENTS

The GEPD Bylaw could not be clearer: "Newly constructed buildings in a GEPD, other than gatehouses, shall be setback at least two hundred fifty (250) feet from a public way." Section IX.H.5.d.vi.

In direct contravention of this prohibition, Ora proposes constructing new buildings and new additions to existing buildings closer to Waldingfield Road than Section IX.H.5.d.vi

allows. Yet rather than require Ora to comply with Section IX.H.5.d.vi, the Draft Decision contends that Ora's new construction is exempt from the express prohibition.

In specific, the Draft Decision justifies this conclusion as follows: "The Planning Board does not consider the rehabilitation and expansion of the single family home and barn to qualify as newly constructed buildings in a GEPD, as that term is not intended to apply to additions to existing buildings." The Draft Decision goes on to state that it is also permissible for the Board to ignore this prohibition because "doing so is consistent with [the] purposes" of the GEPD Bylaw.

These justifications appears to misunderstand the Supreme Judicial Court's precedents for interpreting bylaws and statutes. We strongly encourage you and the Planning Board to obtain written advice from Town Counsel before the Board contemplates granting a special permit on grounds that will be facially vulnerable on appeal.

A. The Board Lacks Discretion to Disregard the Definition of "Building" in the Zoning Bylaw

First, Section III of the Zoning Bylaw expressly mandates that anywhere the word "building" appears in the Zoning Bylaw, it "*shall* be construed where the context allows as though followed by the words '*or parts thereof.*'" (Emphasis supplied). Section III of the Bylaw states that "the word 'shall' is mandatory." *See also Hashimi v. Kalil*, 388 Mass. 607, 609 (1983) ("The word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation.").

Indisputably, Section III of the Zoning Bylaw defines a "building [or parts thereof]" as "a combination of any materials, whether portable or fixed, having a roof, the purpose of which is the shelter of persons, animals, property, or processes."

For the "guest house," Ora expressly proposes "construction of additional space at the rear for meeting rooms and lodging for business guests to the property."[3] For the barn, Ora proposes "adding more program and storage space for the equestrian use."[4]

What Ora therefore proposes is (i) a combination of materials, (ii) with a roof, (iii) for purpose of sheltering persons, animals, and/or property. The Bylaw unambiguously defines what Ora seeks approval to construct as a "building." There is no dispute that these constructions are "proposed" — they do not physically exist now. As the Supreme Judicial Court has held, "we start with the language of the statute itself and presume, as we must, that the Legislature intended what the words of the statute say," *Commonwealth v. Rossetti*, 489 Mass. 589, 593 (2022). Given the presumption that Town Meeting intended what the Bylaw plainly says, an addition to an existing building is itself a "building," whether in its own right or because it is "a part thereof."

Crucially, if that addition is newly-constructed and within 250' of the public way, it is expressly prohibited on a Great Estate. This is precisely what Ora proposes for both the guest

[3] Ora Project Summary (June 3, 2022) at B4.
[4] *Id.*

house and the barn. The Supreme Judicial Court has ruled that "respect for the Legislature's considered judgment dictates that we interpret the statute to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation." *Meshna v. Scrivanos*, 471 Mass. 169, 173 (2015). There is no legally defensible interpretation of the Bylaw that exempts the construction of 11,000 square feet of guest house that does not currently exist, or 5,000 square feet of barn that does not currently exist,[5] from the express and intentional *prohibition* in the GEPD Bylaw on *precisely such construction* within 250 feet of Waldingfield Road.

Where language of a bylaw is clear, is it is well-established that a board lacks discretion to depart from that language, or to assert that it has the authority to "correct" what it may genuinely believe was a poor policy choice of Town Meeting. *See King v. Viscoloid Co.*, 219 Mass. 420, 425 (1914) ("we have no right to . . . read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.").

Put more directly, it is legally irrelevant whether the Board believes the Bylaw's 250-foot setback provision was "not *intended* to apply to additions to existing buildings," as the Draft Decision asserts. A legislative body — here, Town Meeting — "is presumed to understand and intend all consequences" of its enactments. *Rambert v. Commonwealth*, 389 Mass. 771, 774 (1983). Unintended outcomes and consequences that result from those enactments are for Town Meeting, not the Planning Board, to rectify if it sees fit. Indeed, the principle that a legislative enactment must be applied as written — even if doing so "causes an unusually harsh result," *Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 242 (2003) — has been reiterated by the SJC on numerous occasions.

Nor does the Board have the legal authority to disregard express requirements of the Bylaw simply because the Board believes an alternative configuration would be preferable in this particular instance, or on these particular facts, or for this particular applicant. Whether the Board believes Ora's proposal would "avoid the need for building this additional floor area and associated parking areas . . . elsewhere on the site," would "make efficient use of buildings and previously developed areas," or would generate any other such potentially salutary result, is legally immaterial. Such exemptions are for Town Meeting—and Town Meeting alone—to decide. "Where, as here, that language is clear and unambiguous, it is conclusive as to the intent of the Legislature." *Comm'r of Corr. v. Superior Court Dep't of the Trial Court*, 446 Mass. 123, 124 (2006).

B. The Purposes of the GEPD Bylaw Are Consistent With — Not Contrary to — the Express Prohibition on New Construction Within the 250-Foot Setback

The Draft Decision attempts to bolster its reasoning by asserting that abiding by the express prohibition on new construction in the setback would be inconsistent with one of the six stated purposes of the GEPD Bylaw, to "encourage the preservation and appropriate development of the building and lands of the large estate properties." This logic is legally flawed. The very fact that Town Meeting intentionally *and simultaneously* established an

[5] Ora Project Summary (June 3, 2022) at Figure 1 to Letter of Chip Nylen.

express prohibition on new construction in the setback in Section IX.H.5.d.vi demonstrates Town Meeting's opinion that encouraging "appropriate development" does *not* extend to allowing new construction in the prohibited setbacks.

That opinion must be respected. The Supreme Judicial Court requires that "statutes or bylaws dealing with the same subject should be interpreted harmoniously," *Bellalta v. Zoning Bd. of Appeals of Brookline*, 481 Mass. 372, 387 (2019). Put more directly, sections of a bylaw "must be interpreted so as to give meaning to all sections and so that no one section shall be meaningless." *Lasell College v. Newton*, 1 LCR 80, 82 (Mass. Land Ct. 1993).

The Draft Decision's rationale *would* render legally meaningless the 250-foot setback prohibition, and as such will be received with significant skepticism from a reviewing court. This is particularly true given that the GEPD Bylaw can easily be read harmoniously to *both* encourage "appropriate development" of the entire Great Estate site — which by law must be at least *sixty acres — and* still preclude new construction in a comparatively small subset of that area (the portion within 250 feet of the road).

These two provisions are in no way mutually exclusive and indeed, are entirely complimentary, particularly given another express Purpose of the GEPD Bylaw (which the Draft Decision fails to reference). That Purpose states that a Great Estate development should "Protect natural features which are important to the character of the town *including the vistas of the main corridor roads*" which indisputably includes the Scenic Road-designated Waldingfield Road. Section IX.1.f. Prohibiting new construction within 250 feet of the public way is entirely consistent with this Purpose. For the Board to assert that one Purpose (protecting vistas of the main corridor roads) must to yield to another (encouraging appropriate development) in this situation is entirely inconsistent with prevailing Supreme Judicial Court precedent that all sections of the Bylaw must be given meaning and be read harmoniously.

C. The Existence of an Express Exception for Gatehouses Demonstrates No Other Exceptions Were Intended by Town Meeting

Finally, the intent of Town Meeting to exclude new construction like Ora's proposed farm house and barn additions from the 250-foot setback is evident not only from the plain language stating as much. It is also independently bolstered by the fact that Town Meeting demonstrably knew how to make an exception to this prohibition — it made one for "gatehouses" — but did not make an exception for additions, expanded rehabilitations, or any other variation thereof.

In such situations, Supreme Judicial Court precedent is clear: "The fact that the Legislature specified one exception . . . strengthens the inference that no other exception was intended." *LaBranche v. A.J. Lane & Co.*, 404 Mass. 725, 729 (1989). Indeed, the Court has uniformly held for decades that "statutes must be interpreted as enacted and statutory omissions cannot be supplied by the court." *Modern Cont. Constr. Co.* v. *Lowell*, 391 Mass. 829, 839-40 (1984); see also *Doe* v. *Bd. of Reg. in Med.*, 485 Mass. 554, 562 (2020) ("It is not our place to amend a statute's clear language to add language the Legislature chose to omit."); *see also Murray v. Board of Appeals of Barnstable*, 22 Mass. App. Ct. 473, 479

(1986) ("if an omission from a statute was intended (e.g., a specific cross reference), no court can supply it; if the omission was due to inadvertence, an attempt to supply it would be tantamount to adding to a statute a meaning not intended by the Legislature.").

The Board is not empowered to rewrite the bylaw to create an exception for additions, or to recharacterize newly-constructed buildings as "rehabilitations", regardless of how meritorious or compelling the Board believes a particular request to be. Additions are buildings under the Bylaw, and if newly-constructed — as Ora's will be — they are prohibited in the 250-foot setback under the Bylaw's plain language.

* * *

In short, this is simply not a circumstance where the Board has discretion. A permit granting authority "is entitled to interpret its authorizing legislation, but not to ignore it when the meaning of the enactment is plain." *Ling Yi Liu v. Cambridge Board of Zoning Appeal*, 23 LCR 272, 275 (Mass. Land Ct. 2015). If the Board nonetheless elects to depart from well-established Supreme Judicial Court precedent, its decision will be legally vulnerable on appeal.