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By Electronic Mail

Toni Mooradd, Chair
Ipswich Planning Board
Town Hall
Ipswich, MA 01938

Re: 55 Waldingfield Road – Unavailability of Waiver for 250-foot Setback

Dear Chair Mooradd and Members of the Board:

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 — or in the alternative, asserts that the Board can simply waive this express prohibition.

This is not a situation where the Board has discretion. As a matter of law, the Board can neither disregard the plain language of the Bylaw, nor waive this provision of the Bylaw. The Friends of Waldingfield request that the Planning Board obtain written advice from Town Counsel before the Board contemplates granting a special permit that will be facially vulnerable on appeal.

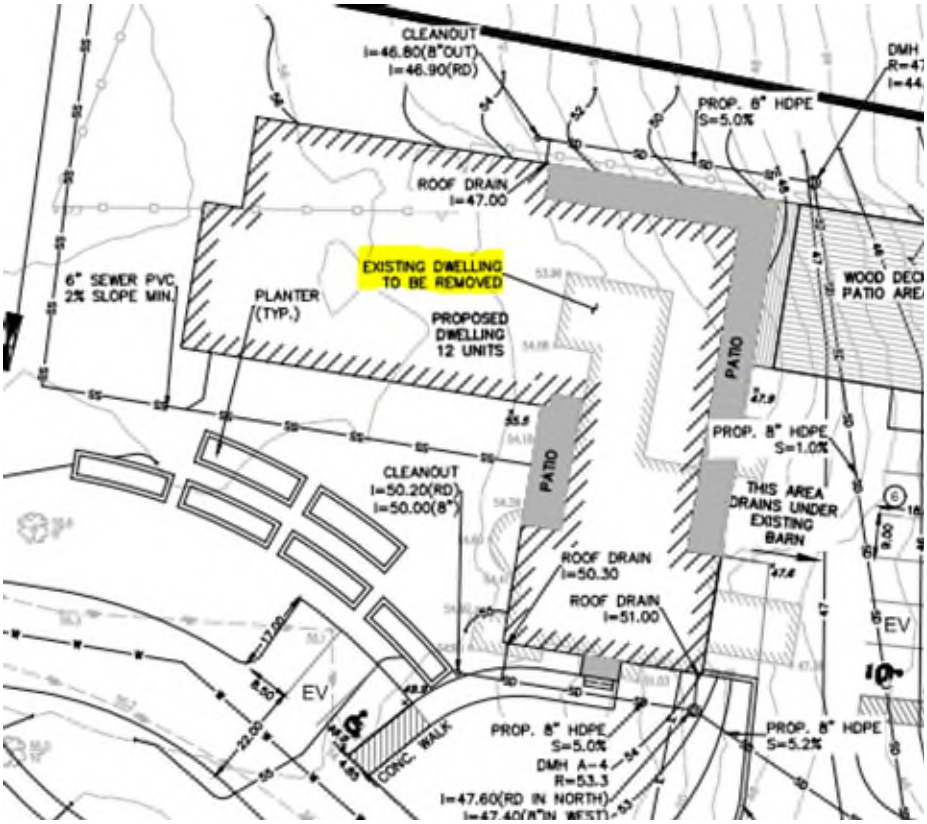
I. The New Guest House, and the Guest House and Barn Additions, are Each "Newly Constructed Buildings" Under the Plain Language of the Bylaw

A. The Guest House Will Be a "Newly Constructed Building"

First, the guest house will be "newly constructed" *because Ora itself says it will be*. Sheet 4 of Ora's June 28, 2022 Site Plan expressly labels the farmhouse as "**Existing Dwelling to be Removed**," and shows a much larger "proposed" building in its place, on a footprint well beyond what exists at present.

A proposed building that is yet to be constructed, particularly when located on the site where a prior building has been "removed," is a "newly constructed building."

It is also directly contrary to the purpose of the GEPD Bylaw to demolish one of the certified historic buildings on a Great Estate. Literally the very first purpose of the GEPD Bylaw is to "encourage the *preservation* and appropriate development of the building and lands of the large estate properties." The farmhouse was certified by the Historical Commission on October 5, 2021 as "historically and architecturally significant."[1]



B. The Guest House and Barn Additions are "Newly Constructed Buildings"

Regardless of whether the new guest house is a "newly constructed building," the guest house additions and barn additions are each independently subject to the 250-foot prohibition. This is because the Bylaw expressly mandates that anywhere the word "building" appears in the Bylaw, it "*shall* be construed where the context allows as though followed by the words 'or parts thereof.'" As a reminder, Section III of the Bylaw states that "the word 'shall' is mandatory."

The 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 proposes "construction of

[1] Ora Project Summary (June 3, 2022) at Appendix 2 (Historical Commission Letter).

additional space at the rear for meeting rooms and lodging for business guests to the property."[2] For the barn, Ora proposes "adding more program and storage space for the equestrian use."[3]

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." As is obvious, Ora labels these additions as "proposed" — meaning they do not physically exist now.

Per the plain language of the Bylaw, a newly constructed addition to an existing building is itself a "building." If the addition is within 250' of the public way, it is expressly prohibited on a Great Estate. This is precisely what Ora proposes for both the guest house and the barn.

C. There is No Legal Argument that Constructing 16,000 New Square Feet of Buildings *That Are Currently Nonexistent* Does Not Result in "Newly Constructed Buildings"

There is no plausible or 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,[4] from the express and intentional *prohibition* in the GEPD Bylaw on *precisely such construction* within 250 feet of Waldingfield Road. Indeed, the Draft Decision does not seriously contend otherwise, nor can it.

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).

II. Waiver Is Legally Unavailable

In the alternative, the Draft Decision proposes allowing Ora to build in the 250-foot setback by simply waiving the prohibition instead. The Board lacks legal authority to waive the 250-foot setback, for three separate reasons.

- First, the GEPD Bylaw already contains an express provision authorizing broad dimensional waivers for GEPD projects. Crucially, this GEPD waiver authority ***does not authorize waiver of the 250-foot setback provision.*** By law, the existence of a specific bylaw provision (like Section IX.H.5.d) supersedes a more general bylaw provision (like Section X.H) that would lead to a conflicting result.

- Second, the Section X.H waiver authority the Draft Decision purports to rely upon is, by its own terms, limited to waiving provisions that may preclude compliance with "this section" — the *site plan review* provisions of Section X. It does not authorize

[2] Ora Project Summary (June 3, 2022) at B4.
[3] *Id.*
[4] Ora Project Summary (June 3, 2022) at Figure 1 to Letter of Chip Nylen.

waiving *special permit* GEPD requirements like the 250-foot setback, with which the applicant must comply under an entirely *different* Section (IX.H).

- Third, even Section X.H were available, it requires the existence of an "undue hardship on the applicant." No undue hardship exists here.

A. The GEPD Bylaw Authorizes Waivers for Every GEPD Dimensional Requirement *Except* the 250-Foot Setback

The GEPD Bylaw contains its own comprehensive waiver requirement. Section IX.H.5.d — "Dimensional Regulations" — establishes detailed minimum setbacks (subsection i), maximum percentages of area for commercial use (subsection ii), and maximum height limits (subsection iv). After enumerating these dimensional requirements, subsection (v) grants the Planning Board certain waiver authority:

> v. Notwithstanding anything to the contrary contained in this zoning bylaw, in granting a special permit and site plan approval for a GEPD, the Planning Board may reduce ***any of the foregoing dimensional requirements***, or increase the height requirement, to a maximum of twenty-five percent (25%), provided that in no instance shall a building contain more than four stories.

This broad subsection (v) authority to waive dimensional requirements applies only to "any of the **foregoing** dimensional requirements." Yet the 250-foot setback prohibition is in the **following** subsection – subsection (vi):

> vi. Newly constructed buildings in a GEPD, other than gatehouses, shall be setback at least two hundred fifty (250) feet from a public way.

There is no definition of the word "foregoing" that is synonymous with its antonym "following." By intentionally placing the 250-foot setback provision after the broad grant of authority to reduce dimensional requirements, the Bylaw clearly, unambiguously, and expressly prohibits the Planning Board from reducing or waiving that *one specific dimensional requirement.* It is a basic tenet of Massachusetts law that a "statute is to be construed as written, in keeping with its plain meaning." *Stop & Shop Supermarket Co. v. Urstadt Biddle Props.*, 433 Mass. 285, 289 (2001).

Nor is the existence of the site plan review waiver provision in Section X.H legally relevant. Even if it were available to the Board here — and for the reasons explained below, it is not — GEPD Section IX.H.5.d details the specific scope of the dimensional waiver authority that Town Meeting has given the Board *specifically and solely for GEPD projects*. The Supreme Judicial Court has repeatedly and uniformly held that as a matter of law, the existence of a specific bylaw provision (like Section IX.H.5.d.v) supersedes a more general bylaw provision (like Section X.H) if applying the general provision would lead to a conflicting result (here, allowing the Planning Board to waive a dimensional requirement that Town Meeting intentionally designed to be non-waivable). *See Monell v. Boston Pads, LLC*, 471 Mass. 566, 577 (2015) (affirming the "familiar canon of construction providing that a specific statute . . . controls over the provisions of a general statute").

The Board does not have the discretion to simply ignore an express limitation imposed upon it by the Bylaw. "The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot thus be set at naught." *McAleer v. Board of Appeals of Barnstable*, 361 Mass. 317, 323 (1972). The robust dimensional waiver authority available to the Board on GEPD projects plainly excludes the authority to waive the 250-foot setback requirement. Approval of the project as proposed would clearly and unambiguously violate the Bylaw.

B. The Section X.H Waiver Authority is Limited to *Site Plan Review* Requirements, and Cannot Waive *Special Permit* Requirements

The Draft Decision asserts that the Board is authorized to waive the 250-foot setback requirement "pursuant to Section X.H. Waiver of the Zoning Bylaw." This is an incorrect statement of law. The Section X.H waiver authority is on its face limited to waiving provisions that may preclude an applicant's compliance with "this section" — the *site plan review* provisions (Section X). It does not authorize waiving *special permit* GEPD requirements like the 250-foot setback, with which the applicant must comply under an entirely *different* section (IX.H). An "incorrect interpretation of a statute . . . is not entitled to deference." *Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley*, 461 Mass. 469, 475 (2012).

Contrary to the presumption of both Ora and the Draft Decision, the waiver authority of Section X.H is limited on its face. It reads, in full:

> The Board may waive, by an affirmative vote of three (3) out of five (5) members, any of the preceding requirements, or any of the dimensional, parking or screening requirements of this bylaw, if it feels that the strict compliance with this section will, because of the size or special nature of the proposed building or structure, create an undue hardship on the applicant and not be in the public interest.

The express reference to compliance "with this section" refers the *site plan review* section of the bylaw (Section X).[5] The 250-foot setback requirement is not one that precludes or even hinders Ora from complying with the site plan review criteria in Section X (and certainly not to the level of an "undue hardship," discussed below). Indeed, meeting the site plan review threshold merely requires that an applicant show that "reasonably adequate provisions" have been made with respect to those criteria.

Undoubtedly, the 250-foot setback provision prevents Ora from complying with an *entirely different section* of the Bylaw – the GEPD Section, which is Section IX.H. But any legal authority to waive a GEPD special permit requirement must derive from the GEPD

[5] This is further confirmed by the fact that the waiver authority can be invoked by "three out of five members". While site plan review is a local procedure that requires only a simple majority vote — here, three of five members — by state law (G.L. c. 40A, § 9), a special permit requires "a vote of at least four members of a five member board."

section (Section IX.H) or the special permit-granting section (Section XI.J) of the Bylaw. Such authority certainly cannot derive from the entirely separate site plan review section, which focuses on different criteria than a special permit (compare Section X.C *with* Section XI.J.2), has a different vote threshold for approval (simple majority versus supermajority), and unlike a special permit, cannot be denied ("Site Plan Review is an administrative review process *that does not provide the Planning Board with discretionary power to deny the proposed use*." Section X.D.4.) Such differences are dispositive. *See Osberg v. Planning Bd. of Sturbridge*, 44 Mass. App. Ct. 56, 59 (1997) (a bylaw that "utilize[es] separate chapters" for site plan review and special permits "clearly differentiates between processing of applications for site plan review and applications for special permits.")

Finally, it is a settled principle of law that courts presume a legislative body (such as Town Meeting) does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns.*, 531 U.S. 457, 468 (2001). Town Meeting has carefully articulated which GEPD special permit dimensional requirements in Section IX.H.5.d can be waived and which cannot. It is directly contrary to *Whitman* to assert that Town Meeting nonetheless intended to give the Planning Board discretion to undermine and fundamentally alter those parameters by wielding a sweeping waiver authority derived from an ancillary bylaw that makes no reference to special permits and which has not been revised since 2002.

C. Even if Section X.H Were Available, There Is No "Undue Hardship"

Finally, even if Section X.H *were* available to waive the 250-foot setback requirement — and it is not — it cannot be invoked unless strict compliance with the site plan review bylaw would "create an undue hardship on the applicant." There is no plausible legal basis to contend that complying with the setback requirement would create an "undue hardship" for Ora, for numerous reasons.

First, "undue hardship" is not a synonym for "inconvenience". Ora has known about the 250-foot setback provision for a year — the issue was discussed at some of the earliest Planning Board meetings in 2021. Ora has thus had a year to redesign its plan to comply with the Bylaw. The fact that Ora chose not to do so, or chose instead to rely on assurances from the Board, the Building Inspector, or other Town officials that turned out to be legally incorrect (even if inadvertently so), does not establish a hardship now. As a matter of law, an applicant for zoning relief "is presumed to have known of the invalidity of the [position] and to have acted at his peril." *Ferrante v. Board of Appeals of Northampton*, 345 Mass. 158, 163 (1962).

Second, the site is 39.9 acres. In one of its many prior iterations of this project, Ora had proposed to construct 15,000 *more* square feet than it proposing is now (90,000 versus 75,000) *yet still contended then that its 90,000 square foot proposal met the all requirements for site plan review*. By definition, Ora thus the physical space to reallocate all the square footage currently proposed to be constructed *inside* the 250-foot setback (between the guest house and barn additions) to a compliant location elsewhere on site, while still complying with the site plan review requirements. No undue hardship exists with respect to the site.

Third, the Draft Decision contends that "requiring the Applicant to move the Farmhouse or construct the addition as a new freestanding building" would be "contrary to the purpose of the GEPD Bylaw." As an initial observation, it is contrary not only to the "purpose" of the GEPD Bylaw, *but also to its actual text*, to authorize Ora to place newly constructed buildings in the 250-foot setback. More specifically, the Board's legal authority does not extend to disregarding express requirements of the Bylaw simply because it believes an alternative configuration would be preferable. That is for Town Meeting—and Town Meeting alone—to decide. *Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 242 (2003) (agreeing that while enforcing the statutory language as written "unquestionably causes an unusually harsh result for the plaintiff and his family" the courts "are, however, bound by the Legislature's determination of the matter.") It is not an undue hardship for Ora to comply with what the law actually says, rather than with what Ora wishes the law said.

Finally, this is an unusual situation where Ora actively participated in the passage of the revised GEPD Bylaw at Town Meeting in Spring 2021, resulting in revisions to various minimum qualification thresholds. These reductions directly enabled 55 Waldingfield to qualify for Great Estate status where it would *not* have qualified under the prior version. In such circumstances, Ora cannot now claim hardship — much less an undue hardship — for having to comply with the dimensional requirements of a revised Bylaw *for which it itself actively advocated*. The appellate courts have consistently observed the "well-established principle in our cases prohibiting self-imposed hardships" as a basis for obtaining zoning relief. *Adams v. Brolly*, 46 Mass. App. Ct. 1, 4 (1998).

* * *

For the reasons explained above, as a matter of law the Board can neither ignore the plain meaning of the 250-foot exclusion provision, nor waive this provision.

The Friends of Waldingfield request that the Planning Board obtain written advice from Town Counsel before the Board contemplates granting a special permit that will be facially vulnerable on appeal.

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
Andrea Bates, Assistant Town Planner
Anthony Marino, Town Manager
Tammy Jones, Chair, Select Board