

## MEMORANDUM

**TO:** Roland Bartl, Town Planner  
Brian Bendig, HDC Chairman

**FROM:** Stephen D. Anderson, Town Counsel

**RE:** ACT/Gen-ZBA: Zoning Bylaw's Floor Area Ratio Provisions  
Applicable to the South Acton Village District

**DATE:** October 13, 2008

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### **BACKGROUND**

On August 28, 2008, the Chairman of the Acton Historic District Commission ("HDC") (on behalf of the Commission and "Members the South Acton Neighbors Association")<sup>1</sup> submitted to the Acton Board of Appeals a "joint appeal" pursuant to M.G.L. Ch. 40A, §§ 8, 14 and 15 and the Acton Zoning Bylaw seeking to overturn the Zoning Enforcement Officer's ("ZEO") interpretation of the Zoning Bylaw's Floor Area Ratio provisions applicable to the South Acton Village District (the "Appeal").

The ZEO's interpretation was set forth in a Memorandum dated July 29, 2008, issued in response to a letter from the HDC Chairman dated July 14, 2008. The July 14 letter had asked the Interim Building Commissioner to "advise us as to which is the applicable FAR (.40 or .20) for projects in the SAV [District] proposing 100 percent residential usage." The ZEO responded that the "FAR limit for strictly residential uses in the SAV District is 0.40," setting forth his reasons for that interpretation.

### **ADVISORY NATURE OF REQUEST, RESPONSE, AND APPEAL**

As a threshold matter, it is doubtful that the Board of Appeals has jurisdiction to hear the Appeal.

Thus, the HDC's July 14 letter asked the Interim Building Commissioner to "advise us as to which is the applicable FAR (.40 or .20) for projects in the SAV proposing 100 percent residential usage." The ZEO's response provided that advice. Neither the HDC's letter nor the ZEO's response was tied to a particular project, a particular building permit, or a particular enforcement request as to an alleged project-

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<sup>1</sup> Assuming that the South Acton Neighbors Association is a private association not affiliated with the Town, I would caution the Chairman of the HDC to observe the requirements of the State Ethics Act by not purporting to take any action on behalf of the South Acton Neighbors Association. See G.L. c. 268A, § 17(c) ("No municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.")

specific violation of the Floor Area Ratio provisions in the South Acton Village Zoning District. As such, the HDC sought and the ZEO issued an advisory opinion, and the Appeal seeks a similar advisory opinion from the Board of Appeals.

The Board of Appeals “has no power to issue advisory opinions ....” *Weld v. Board of Appeals of Gloucester* 345 Mass. 376, 379, 187 N.E.2d 854, 856 (Mass.1963). The fact that a ZEO may give zoning advice to a person on request does not “give him the right to appeal to the ZBA.” *Commonwealth Trust v. Smith*, 2008 WL 275196, 5 (Mass.Land Ct.,2008). Rather, there are certain jurisdictional prerequisites to filing an appeal of a decision of the Zoning Enforcement Officer with the Board of Appeals, none of which is present here (*id.*):

The ZBA is authorized to review on appeal certain decisions of the Zoning Enforcement Officer of a city or town. One who unsuccessfully applies for a building permit may appeal the denial thereof to the board. Likewise, a party aggrieved by the issuance of a permit to an abutter has the right to appeal that decision, as does a party who writes to the building inspector seeking enforcement of the zoning by-law and either receives no response or is not satisfied by the response he gets. The present case, however, does not come under any of these criteria. Mr. Costello sought “relief” which the Zoning Enforcement Officer was not authorized to give, and took umbrage when Mr. George advised him that he would have to deal with the Planning Board. This did not give him the right to appeal to the ZBA. “An appeal to the zoning board pursuant to § 8 has, as a jurisdictional prerequisite, action by an administrative officer ...” *Cumberland Farms, Inc. v. Planning Board of Bourne*, 67 Mass.App.Ct. 67, 69 (2006). G.L. 40A, § 8. Here, the only “action” was George's advice to file a plan with the Planning Board. Plaintiff was not denied relief and did not even apply for a building permit.

See also *Chisholm v. First Parish Rd. Co., Inc.*, 2007 WL 2822215, 14 (Mass.Land Ct., 2007) (“Contrary to the plaintiffs' arguments, G.L. c. 40A, § 7 is not a vehicle for advisory opinions on projects still in their formative stages. It is a mechanism for action against specific structures whose parameters are fully known either through the details in the building permit or because they already have been constructed.”); *Peterson v. Cargill*, 2006 WL 1984166, 6 (Mass.Land Ct.,2006), citing *Maini v. MacDonald*, 7 LCR 114 (1999) (“In *Maini*, the plaintiffs sought building permits from the building inspector, who wrote a letter stating that he would be inclined to deny any request for a building permit. The plaintiffs did not apply for a building permit, but instead appealed the building inspector's determination. The Land Court found that ‘the inspector's opinion was advisory at best. It lacked finality, and perhaps as important, was expressed without reference to a particular proposal or application. The lack of formal action by a building inspector is a jurisdictional defect fatal to an appeal under G.L. c. 40A, § 8, though it disappears if ignored by the board of appeals.’”); *Keating v. Tsanotelis*, 2003 WL 22097979, 2 (Mass.App.Ct.,2003) (“Absent any pending application to build on the subject lot, there is no concrete controversy involving the legal issue whether the variance lapsed for want of its exercise. Hence, there is no justiciable controversy”); *Apache Bldg.*

*and Development, Inc. v. Town of Barre*, 2001 WL 1763953, 2 (Mass.Super.,2001) (“Jurisdictionally, the legislature has granted the Land Court the exclusive power to render advisory opinions in the area of interpretation of by-laws concerning zoning and planning board issues. Massachusetts General Law chapter 240, § 14A allows declaratory judgment in cases where a landowner seeks a decision on the applicability of a zoning by-law to her land, without regard to the existence of a controversy or the right otherwise to declaratory relief.”); *Rattigan v. Wile*, 1995 WL 17215050, 6 (Mass.Land Ct.,1995) (“The statute does not confer jurisdiction to render advisory opinions as to dimensional nonconformity of neighboring land.”).

If asked by the ZBA, I would recommend that the Board dismiss the Appeal for want of jurisdiction.

### **MERITS OF THE APPEAL**

Despite this technicality, the Appeal indicates that a good faith disagreement exists between the ZEO and the HDC as to the proper application of the Zoning Bylaw’s Floor Area Ratio provisions applicable to the South Acton Village District. As Town Counsel, I offer the following views on the conflicting interpretation of those provisions.

- **Rules of Bylaw Interpretation**

In interpreting the Zoning Bylaw, the primary task is to determine Town Meeting’s legislative intent in enacting the provision. *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339 (1973); *see also APT Asset Management, Inc. v. Board of Appeals of Melrose*, 50 Mass. App. Ct. 133, 138 (2000); *Advanced Dev. Concepts Inc. v. Town of Blackstone*, 33 Mass. App. Ct. 228 (1992). The Bylaw’s “legislative history” is relevant to construe the meaning and understand the intent of an ambiguous bylaw provision. *See, e.g., Farmer v. Billerica*, 381 Mass. 775 (1980); *Heald v. Zoning Bd. of Appeals of Greenfield*, 7 Mass. App. Ct. 286, 289 (1979).

A court will give substantial deference to the construction of an ordinance by the agency charged with its administration. *See Manning v. Boston Redevelopment Auth.*, 400 Mass. 444, 452-53 (1987) (“[w]e give substantial deference to the construction placed on ... an ordinance by the agency charged with its administration”); *Duteau v. Zoning Bd. of Appeals of Webster*, 47 Mass. App. Ct. 664, 669 (1999) (“[A]lthough interpretation of the by-law is in the last analysis a judicial function, deference is owed to a local zoning board's home grown knowledge about the history and purpose of its town's zoning”); *Livoli v. Zoning Bd. of Appeals of Southborough*, 42 Mass. App. Ct. 921, 923 (1997) (“[a] reasonable interpretation of its own zoning bylaw by a local board, such as a board of appeals, is entitled to deference”); *Murray v. Board of Appeals of Barnstable*, 22 Mass. App. Ct. 473, 479 (1986) (“[a] local board, of course, has an 'intimate understanding' not only of conditions within a town but also 'of the background and purposes of the entire [zoning] bylaw'”) (citing *Fitzsimonds v. Board of Appeals of Chatham*, 21 Mass. App. Ct. 53, 57 (1985)).

“Significance in interpretation may be given to a consistent, long continued administrative application of an ambiguous statute [or bylaw] ... especially if the interpretation is contemporaneous with the enactment.” *Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 343 (1964) (citations omitted); *Green v. Board of Appeal of Norwood*, 358 Mass. 253, 259 (1970) (“There was evidence that, prior to the present case, on ten occasions, the Norwood authorities had construed the by-law provision as we do.”). However, a building inspector's or planning board's interpretation of an unambiguous bylaw provision is not controlling. *See, e.g., Hebb v. Lamport*, 4 Mass. App. Ct. 202 (1976) (rejecting the building inspector's "longstanding construction" of a lot area requirement in the Stoughton zoning bylaw; “In reaching this conclusion we have obviously attached no weight to the building inspector's long standing construction of the formula, apparently concurred in by the planning board. We see no ambiguity in the formula when it is considered in context, or any real cause for doubt as to the proper conclusion.”).

- **The SAV FAR Requirement**

The Zoning Bylaw's Table of Standard Dimensional Regulations states “0.20 (13)” under the column entitled “Maximum Floor Area Ratio” for the South Acton Village District. The referenced note (13) states that as follows:

The maximum Floor Area Ratio may be increased to .40, provided that for every square foot of non-residential NET FLOOR AREA built above FAR .20 an equal amount or more of habitable residential NET FLOOR AREA is provided simultaneously, and set aside for exclusive residential USE.

The HDC takes the position that the Bylaw establishes a Maximum Floor Area Ratio for the SAV District of 0.20, which can be increased up to 0.40 if and only if both non-residential and residential floor area are added in equal amounts in the delta between 0.20 and 0.40. If there is no non-residential floor area added in the delta between 0.20 and 0.40, there can be no additional residential floor area above 0.20.

The ZEO takes the position that the Bylaw establishes a Maximum Floor Area Ratio for the SAV District of 0.20, which can be increased up to 0.40 as long as any non-residential floor area is matched by residential floor area in the delta between 0.20 and 0.40. If there is no non-residential floor area added in the delta between 0.20 and 0.40, the entire delta can be comprised of residential floor area, to a maximum FAR of 0.40.

The HDC's interpretation appears more consistent with the literal language of the Bylaw. The Table of Standard Dimensional Regulations establishes 0.20 as ordinarily the Maximum Floor Area Ratio for the SAV District. Footnote 13 is an exception to the rule which, read literally, requires both non-residential and residential floor area to be added in equal amounts to exceed an FAR of 0.20, capped at an FAR of 0.40. If there is no non-residential floor area added in the delta between 0.20 and 0.40, the word “simultaneously” would arguably be rendered superfluous.

However, Footnote 13 is susceptible to multiple good faith interpretations and may therefore be considered ambiguous. For example, the placement of the comma after the first clause (“The maximum Floor Area Ratio may be increased to .40, ...”) suggests flexibility in the Maximum FAR for the SAV District. The proviso clause (“provided that for every square foot of non-residential NET FLOOR AREA built above FAR .20 an equal amount or more of habitable residential NET FLOOR AREA is provided simultaneously, and set aside for exclusive residential USE”) may be read as a unilateral limitation: if there is non-residential net floor area, it must be matched with residential net floor area at the same time; however, if there is no non-residential net floor area, the delta between .2 and .4 can be consumed by additional residential net floor area (an interpretation emphasizing the phrase “an equal amount *or more*” of habitable residential FAR and the mathematical permutations which this phrase suggests).

This ambiguity is sufficient to justify a look at the legislative history and prior interpretation of this provision as a guide to its construction.

- **Legislative History of the SAV FAR Requirement: Warrant Summary**

The SAV FAR provision was adopted as part of Article 37 at the 1995 Annual Town Meeting, which in turn was one of six articles (36 to 41) considered by that Town Meeting arising out of the South Acton Village Plan released by the South Acton village Planning Committee and adopted by the Planning Board in March of 1995.

The entire Summary of Article 37 presented to the Town Meeting in the Warrant provided as follows (emphasis added):

Most of the current dimensional zoning requirements in the South Acton Village district, such as the requirements for minimum lot size, maximum building size, or minimum building setbacks mirror contemporary suburban residential and commercial zoning standards. These are ill suited for the South Acton Village area where, as opposed to contemporary suburban areas, many buildings are on small lots, close together, large relative to the lot they are on, and close to the street. Development, rehabilitation and building additions according to these zoning standards are extremely difficult in any village setting. Where possible in the South Acton Village District, the result would be inconsistent in scale and placement with the surrounding older buildings. New construction and site development would thus severely disrupt the existing village character. The changes to the dimensional regulation as proposed in part A of this article will cure this problem: Requirements for minimum lot area, frontage, lot width and open space would be removed, the minimum front yard requirement would be reduced from 30 to 10 feet, with a new maximum limit of 20 feet for new construction. Minimum side and rear yards would be reduced from 30 feet to 10 feet. **The maximum Floor Area Ratio (FAR), which defines the size of the**

**building relative to its lot, would be increased from 0.20 to 0.40 if the property has residential uses on it in addition to commercial uses. The requirement for residential uses with an increased floor area of a building is intended to encourage a mixture of residential and commercial uses in the SAV district, which is generally desirable in village areas such as South Acton.** As a new requirement, a minimum building height of 20 feet would be established. Very similar dimensional regulation changes have been adopted by Town Meeting for West Acton Village in 1994.

The current regulations for the South Acton Village district already set certain size limits for individual business establishments. This is largely consistent with the small village character. It prevents large scale business operations and focuses instead on small businesses more suitable in scale to the village setting. Part B of this article would change a number of the size limits, and add new limits for business uses not currently regulated by size limits. These size restrictions are not limits on building size but only on the size of individual business operations. Several small businesses may occupy space inside one larger building. Part B will also remove a general restriction in the SAV district which prohibits any building to exceed a total of 8000 sq. ft. of floor area.

This article is one of six articles (36 to 41) proposed in the South Acton Village Plan, which was released by the South Acton village Planning Committee and adopted by the Planning Board in March of 1995. These articles are intended to adjust zoning requirements to be more suitable for the South Acton Village area by better reflecting the historic pattern of land use, settlement and placement of buildings in the village, and to encourage improvements in the village area. The Planning Board does not anticipate any immediate municipal fiscal impact resulting from the adoption of this article.

This legislative history supports the interpretation that the maximum Floor Area Ratio can be increased from 0.20 to 0.40 “if the property has residential uses on it in addition to commercial uses” and that the provision “is intended to encourage a mixture of residential and commercial uses in the SAV district, which is generally desirable in village areas such as South Acton.” This legislative history appears to support the HDC’s interpretation of the bylaw provision.

- **Other Legislative History: The South Acton Village Plan**

Leading up to the zoning articles proposed and approved at the 1995 Annual Town Meeting, the South Acton village Planning Committee released and the Acton Planning Board approved the South Acton Village Plan in March of 1995. That Plan, referenced in the Summary to Warrant Article 37 and other SAV articles brought before

Town Meeting at the time, contained a several somewhat conflicting and ambiguous descriptions of the intention of the new SAV FAR provision (emphasis added):

At Page 39: “The minimum lot area requirement of 10,000 square feet and the minimum open space requirement of 35% would be eliminated so that no specific requirements would exist for these two dimensions. This would result in greater flexibility to allow appropriately scaled new construction. The minimum lot area that would have to remain with a building or buildings would then be controlled by the size of the buildings, and vice versa, the size of the buildings would be controlled by the available lot area. **With the proposed limit on the building Floor Area Ratio (FAR) of 0.40 (see below) a building's floor area could not be larger than 40% of the area of the lot on which it is located. For instance, an average house with a floor area of two thousand square feet would require a minimum lot area of five thousand square feet. On the other hand, a new building as large as the Exchange Hall (±10000 square feet) would require at least a 25,000 square foot lot, or slightly more than a one half acre. Similarly, reasonable open space on a lot would be ensured since a building or structure could not occupy more than 40% of the lot area.**”

The above excerpt from the legislative history appears to support the ZEO's interpretation of the bylaw provision because it provides one or more specific examples of a 0.40 FAR used entirely for residential purposes.

At Page 40: “To encourage development more consistent with existing patterns of settlement in the village area and to allow some business growth to occur while ensuring a desirable mixture of residential and commercial land uses, the South Acton Village Planning Committee proposes to increase the maximum allowed Floor Area Ratio (FAR). FAR is a measure of the size of the building relative to the size of the lot on which it is located. **The FAR would increase from its current limit of 0.20 (the building floor area may measure up to 20% of the developable lot area) to 0.40. However, at least half of the additional floor area over 0.20 must be used for residential purposes.** This means that dwellings or mixed use buildings with at least one quarter of their floor space in residential use could be twice as large as purely commercial buildings.”

The above excerpt from the legislative history could be used to support either the ZEO's or the HDC's interpretation of the bylaw provision.

At Page 89: “In addition, regulations affecting land use and density within the SAV District would be substantially revised under the proposed Regulatory Plan. **A mixture of residential and nonresidential uses would be encouraged with the goal of raising the number of**

**residences over existing levels. The maximum Floor Area Ratio (FAR = buildings floor area divided by land area of parcel upon which buildings are located), which would be the primary zoning limitation, could be increased to 0.40, whereby one quarter of the floor area must be dedicated to residential uses.**

This above excerpt from the legislative history again could be used to support either the HDC's or the ZEO's interpretation of the bylaw provision.

- **History of Projects Approved under the SAV FAR Requirements**

The Town's implementation of the SAV FAR provision supports the ZEO's interpretation of the bylaw.<sup>2</sup> Thus, since the adoption of Article 37 in 1995, the Building Commissioner and the Board of Selectmen have consistently approved building permits and foundation permits, on the one hand, and site plan special permits on the other for projects within the South Acton Village District with floor area ratios in excess of 0.20 where *all* of the floor area in the project was used or proposed solely for residential purposes and none was used or proposed for non-residential, commercial purposes. These projects are as follows:

1. 9-13 Railroad Street (Approved FAR .356, All Residential)

In October 2001, the Town issued building permits for a project at 9-13 Railroad Street consisting of 12 residential units in 3 buildings with a floor area ratio of .356, all of which was for residential purposes. The Board of Selectmen approved Site Plan Special Permit No. 04/13/01-376 for the proposed project. The land use data table on the approved plan lists the maximum floor area ratio as "0.2 (0.4 Residential)" and indicates that the total net floor area proposed was 11,652 square feet compared to the net floor area allowed of 13,106 square feet (0.4 times the developable site area of 32,764 square feet). The Board of Selectmen found that the proposed project "is in harmony with the purpose and intent of this bylaw" and "is appropriate for the site and complies with all applicable requirements of this bylaw." The project has been completed.

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<sup>2</sup> The Zoning Bylaw contains a similar FAR provision for the WAV District. It would also be instructive to see how the Town has interpreted this provision of the Bylaw over time and whether these interpretations predated the adoption of the SAV FAR provision. If they did, these interpretations may provide additional legislative history from which to glean the intent of the SAV FAR provision. Thus, the Zoning Bylaw's Table of Standard Dimensional Regulations states "0.40 (11)" under the column entitled "Maximum Floor Area Ratio" for the West Acton Village District. The referenced note (11) states that as follows:

The FLOOR AREA RATIO may be increased to .70 provided that for every 1000 square feet of non-residential NET FLOOR AREA built above a FLOOR AREA RATIO of .40 an at-least-equal amount of residential NET FLOOR AREA is provided simultaneously.

2. 4 High Street (Approved FAR .283, All Residential)

By Decision dated February 28, 2005, the Board of Selectmen approved a Site Plan Special Permit No. 09/24/04-399 for a proposed project consisting of 30 residential apartments at 4 High Street, having a total floor area ratio of .283, all of which was for residential purposes.<sup>3</sup> The Board of Selectmen found that the proposed project "is in harmony with the purpose and intent of this bylaw" and "is appropriate for the site and complies with all applicable requirements of this bylaw." The developer did not proceed with this project.

3. 19 Railroad Street (Approved FAR .243, All Residential)

In November of 2005, the Town approved building permits for a project at 19 Railroad Street consisting of 15 units in 3 buildings with a floor area ratio of .243, all of which was for residential purposes. The Board of Selectmen approved Site Plan Special Permit No. 04/30/04-398 for the proposed project. The land use data table on the project plan lists the maximum floor area ratio as 0.4 and the proposed floor area ratio as 0.243 (10,473 net floor area divided by 43,123 developable site area), being less than 0.4. The Board of Selectmen found that the proposed project "is in harmony with the purpose and intent of this bylaw" and "is appropriate for the site and complies with all applicable requirements of this bylaw." The project has been completed.

4. 140 Main Street (Approved/Pre-Existing FAR .49, All Residential)

In July 2006, the Town issued a building permit for a project at 140 Main Street consisting of 6 residential condominium units in one existing building previously used for commercial purposes. The Board of Selectmen approved Site Plan Special Permit No. 12/29/05-406 for the proposed project. The project site plan contains a zoning table indicating the maximum floor area required of 0.20 and the proposed/existing floor area of .49. The latter was described as "an existing condition [which] will be maintained with the proposed development." No commercial floor area was preserved in the building. The Board of Selectmen found that the proposed project "is in harmony with the purpose and intent of this bylaw" and "is

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<sup>3</sup> Prior to and in further support of this project, the 2004 Annual Town Meeting adopted additional zoning amendments for the SAV District under Warrant Article 39. The Summary of Article 39 indicated that it would by special permit "allow the construction of larger residential buildings that are more consistent with or reminiscent of South Acton's history and architectural heritage as a 19th century manufacturing center," furthering an intention to encourage residential development in South Acton Village.

appropriate for the site and complies with all applicable requirements of this bylaw." The project has been completed.

5. 83-87 River Street (Approved GFAR .3994, All Residential)

In December 2007, the Town issued building permits for a project at 83-87 River Street consisting of 3 single family detached residential units on one lot with a gross floor area ratio of .3994, all of which was for residential purposes. An ANR Plan was signed in connection with the project on December 10, 2007, and the building permits were issued on December 18, 2007. The total gross lot size is 33,427 square feet (including wetlands and flood plan). The total gross square footage of the homes is 13,352 square feet. The project is under construction.

6. 4 High Street (Approved FAR .267, All Residential)

In July 2008, the Town approved foundation permits for four units within a project at 4 High Street consisting of 20 two-family units in 10 buildings with a floor area ratio of .267, all of which is residential. The project is considered to be a by-right development

This consistent, contemporaneous, long continued application of the SAV FAR provision by the Building Commissioner and the Board of Selectmen argues in favor of the ZEO's interpretation of the Bylaw.

### **RECOMMENDATION**

Given the intramural debate over the meaning of the current SAV FAR provision, the conflicting inferences to be drawn from various references in the Warrant Summary and the South Acton Village Plan, and the pattern of implementation of this bylaw provision to date, this issue calls for a clarifying amendment to be presented by the Planning Board to the next Annual Town Meeting. Assuming the Town intends to follow the interpretation of the Bylaw consistently applied to date, the clarifying amendment could be as simple as the following:<sup>4</sup>

1. In the Zoning Bylaw's Table of Standard Dimensional Regulations, change "0.20 (13)" to "0.40 (13)" under the column entitled "Maximum Floor Area Ratio" for the South Acton Village District.
2. Change the referenced note (13) so that it reads as follows:

Within the Maximum FAR of 0.40, a project can consist entirely of habitable residential NET FLOOR AREA, or it can consist of a mix of habitable residential and non-residential

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<sup>4</sup> For consistency, a similar amendment may be advisable for the WAV district. See note 2, supra.

NET FLOOR AREA; provided, however, that for every square foot of non-residential NET FLOOR AREA built above the FAR of 0.20, an equal amount or more of habitable residential NET FLOOR AREA must be provided simultaneously and set aside exclusively for residential USE.

If the amendment passes, the ambiguity should be eliminated and the meaning of the SAV FAR provision “as applied” will remain the same as it has been applied by the Town since its initial adoption.

If the amendment fails to pass, that does not control the future interpretation of the current SAV FAR provision.<sup>5</sup> Rather, the ZEO will apply the SAV FAR provision to specific projects as he reads it going forward, and a party with standing would be entitled to bring a timely appeal to the Board of Appeals from a case-specific (non-advisory) application of the provision to a particular project.

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<sup>5</sup> An unsuccessful amendment to a statute or bylaw is generally not probative of the meaning of a previously enacted statute or bylaw. See *Suffolk Const. Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 444, 459 (2007) (“[I]n legislative inaction gives no instructive signal concerning the construction of a statute enacted by a prior Legislature...”), citing *Klingel v. Reill*, 446 Mass. 80, 86, 841 N.E.2d 1256 (2006), quoting *Polaroid Corp. v. Commissioner of Revenue*, 393 Mass. 490, 496, 472 N.E.2d 259 (1984).