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September 19, 2025

Katherine M. Chretien, Town Clerk
Town of New Marlborough
P.O. Box 99
New Marlborough, MA 01244

Re: New Marlborough Annual Town Meeting of May 5, 2025 – Case # 11755
Warrant Article # 41 (Zoning)

Dear Ms. Chretien:

Article 41 - Under Article 41, the Town voted to amend several sections of its zoning by-laws related to Accessory Dwelling Units ("ADUs") to allow ADUs as of right in compliance with G.L. c. 40A, § 3 and the implementing Regulations promulgated by the Executive Office of Housing and Livable Communities ("EOHLC"), 760 CMR 71.00, "Protected Use Accessory Dwelling Units" ("Regulations").[1]

We partially approve Article 41 because the approved text does not conflict with state law. However, we disapprove the following provisions adopted under Article 41: (1) references to single-family dwellings; and (2) Section 3.3.1.2 (D)(4)'s parking requirements, because they conflict with G.L. c. 40A, § 3 and the Regulations. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the Constitution for the Attorney General to disapprove a by-law).

In this decision we summarize the by-law amendments adopted under Article 41; discuss the Attorney General's standard of review of town by-laws and the recent statutory and regulatory changes that allow Protected Use ADUs as of right;[2] and then explain why, based on our standard of review, we partially approve the zoning by-law amendments adopted under Article 41. In

[1] The Regulations can be found here: https://www.mass.gov/doc/760-cmr-7100-protected-use-adus-final-version/download

[2] 760 CMR 71.02 defines the term "Protected Use ADU" as follows: "An attached or detached ADU that is located, or is proposed to be located, on a Lot in a Single-family Residential Zoning District and is protected by M.G.L. c. 40A, § 3, provided that only one ADU on a lot may qualify as a Protected Use ADU. An ADU that is nonconforming to Zoning shall still qualify as a Protected Use ADU if it otherwise meets this definition."

addition, we offer comments for the Town's consideration regarding certain approved provisions.

I. Summary of Article 41

Under Article 41 the Town amended several sections of its zoning by-laws regarding ADUs. The first change amends Section 3.3.1.2 to delete the existing text and insert a new Section 3.3.1.2, "Accessory Dwelling Unit" that imposes requirements on ADUs. The second change deletes portions of Section 3.4, "Uses by Special Permit only," to delete the special permit requirement for ADUs. The third change amends Sections 4.1 and 4.2 regarding lot size and frontage requirements for ADUs. The next change amends Section 7.3, "Parking" to delete the requirement in Section 7.3.1.4 that an ADU provide "at least" one off street parking space. The last change amends the definition of "Accessory Dwelling Unit" in Article 12.2.

II. Attorney General's Standard of Review of Zoning By-laws

Our review of Article 41 is governed by G.L. c. 40, § 32. Under G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). "

Article 41, as an amendment to the Town's zoning by-laws, must be given deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) ("With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" Id. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. Summary of Recent Legislative Changes Regarding ADUs

On August 6, 2024, Governor Healey signed into law the "Affordable Homes Act," Chapter 150 of the Acts of 2024 (the "Act"). The Act includes amendments to the State's Zoning Act, G.L. c. 40A, to establish ADUs as a protected use subject to limited local regulation including amending G.L. c. 40A, § 1A to add a new definition for the term "Accessory dwelling unit" and

amending G.L. c. 40A, § 3 (regarding subjects that enjoy protections from local zoning requirements, referred to as the "Dover Amendment"), to add a new paragraph that restricts a zoning by-law from prohibiting, unreasonably regulating or requiring a special permit or other discretionary zoning approval for the use of land or structures for a single ADU. The amendment to G.L. c. 40A, § 3, to include ADUs means that ADUs are now entitled to statutory protections from local zoning requirements.

On January 31, 2025, the EOHLC promulgated regulations for the implementation of the legislative changes regarding ADUs. See 760 CMR 71.00, "Protected Use Accessory Dwelling Units."[3] The Regulations define key terms and prohibit certain "Use and Occupancy Restrictions" defined in Section 71.02 as follows:

> Use and Occupancy Restrictions. A Zoning restriction, Municipal regulation, covenant, agreement, or a condition in a deed, zoning approval or other requirement imposed by the Municipality that limits the current, or future, use or occupancy of a Protected Use ADU to individuals or households based upon the characteristics of, or relations between, the occupant, such as but not limited to, income, age, familial relationship, enrollment in an educational institution, or that limits the number of occupants beyond what is required by applicable state code.

While a municipality may reasonably regulate a Protected Use ADU in the manner authorized by 760 CMR 71.00, such regulation cannot prohibit, require a special permit or other discretionary zoning approval for, or impose a "Prohibited Regulation"[4] or an "Unreasonable Regulation" on, a Protected Use ADU. See 760 CMR 71.03, "Regulation of Protected Use ADUs in Single-Family Residential Zoning Districts."[5] Moreover, Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, certain restrictions or

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[3] See the following resources for additional guidance on regulating ADUs: (1) EOHLC's ADU FAQ section (https://www.mass.gov/info-details/accessory-dwelling-unit-adu-faqs\) (2) Massachusetts Department of Environmental Protection's Guidance on Title 5 requirements for ADUs (https://www.mass.gov/doc/guidance-on-title-5-310-cmr-15000-compliance-for-accessory-dwelling-units/download); and https://www.mass.gov/doc/frequently-asked-questions-faq-related-to-guidance-on-title-5-310-cmr-15000-compliance-for-accessory-dwelling-units/download; and (3) MassGIS Addressing Guidance regarding address assignments for ADUs (https://www.mass.gov/info-details/massgis-addressing-guidance-for-accessory-dwelling-units-adus).

[4] 760 CMR 71.03 prohibits a municipality from subjecting the use of land or structures on a lot for a Protected Use ADU to any of the following: (1) owner-occupancy requirements; (2) minimum parking requirements as provided in Section 71.03; (3) use and occupancy restrictions; (4) unit caps and density limitations; or (5) a requirement that the Protected Use ADU be attached or detached to the Principal Dwelling.

[5] For example, a design standard that is not applied to a Single-Family Residential Dwelling in the Single-Family Residential Zoning District in which the Protected Use ADU is located or is so "restrictive, excessively, burdensome, or arbitrary that it prohibits, renders infeasible, or unreasonably increases the costs of the use or construction of a Protected Use ADU" would be deemed an unreasonable regulation. See 760 CMR 71.03 (3)(b).

regulations "shall be unreasonable" in certain circumstances.[6] In addition, while municipalities may impose dimensional requirements related to setbacks, lot coverage, open space, bulk and height and number of stories (but not minimum lot size), such requirements may not be "more restrictive than is required for the Principal Dwelling, or a Single-Family Residential Dwelling or accessory structure in the Zoning District in which the Protected Use ADU is located, whichever results in more permissive regulation…" 760 CMR 71.03 (3)(b)(2). Towns may also impose site plan review of a Protected Use ADU, but the Regulations requires the site plan review to be clear and objective and prohibits the site plan review authority from imposing terms or conditions that "are unreasonable or inconsistent with an as-of-right process as defined in M.G.L. c. 40A, § 1A." 760 CMR 71.03 (3)(b)(5).

We incorporate by reference our more extensive comments regarding these recent statutory and regulatory changes related to ADUs in our decision to the Town of East Bridgewater, issued on April 14, 2025 in Case # 11579.[7] Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 41.

IV. Text Disapproved from Article 41 Because it Conflicts with G.L. c. 40A, § 3 and the Regulations

A. References to Single-Family Dwellings

Throughout Section 3.3.1.2, the Town refers to an ADU in the context of a "single-family," as follows (with emphasis added):

> Section 3.3.1.2 (C)
> In Rural Residential districts and Village Center districts....no zoning bylaw shall prohibit, unreasonably restrict or require a special permit...for the use of land or structures for a single Accessory Dwelling Unit...on a lot with a **single-family** dwelling as long as it meets the following requirements...

[6] Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, a restriction or regulation imposed "shall be unreasonable" if the regulation or restriction, when applicable to a Protected Use ADU: (1) does not serve a legitimate Municipal interest sought to be achieved by local Zoning; (2) serves a legitimate Municipal interest sought to be achieved by local Zoning but its application to a Protected Use ADU does not rationally relate to the legitimate Municipal interest; or (3) serves a legitimate Municipal interest sought to be achieved by local Zoning and its application to a Protected Use ADU rationally relates to the interest, but compliance with the regulation or restriction will: (a) result in complete nullification of the use or development of a Protected Use ADU; (b) impose excessive costs on the use or development of a Protected Use ADU without significantly advancing the Municipality's legitimate interest; or (c) substantially diminish or interfere with the use or development of a Protected Use ADU without appreciably advancing the Municipality's legitimate interest.

[7] This decision, as well as other recent ADU decisions, can be found on the Municipal Law Unit's website at www.mass.gov/ago/munilaw (decision look up link) and then search by the topic pull down menu for the topic "ADUS."

Section 3.3.1.2 (D)(1)(a)
An ADU may be located within, added or attached to, or detached from a **single-family** dwelling or an accessory structure.

We disapprove and delete the text "single-family" as shown above in bold and underline that defines an ADU as being accessory to a "single-family" dwelling because these provisions conflicts with G.L. c. 40A, § 3 and the Regulations that allow ADUs as of right on the same lot as any type of "Principal Dwelling," as explained below. See West Street Associates, LLC v. Planning Board of Mansfield, 488 Mass. 319, 324 (2021) (citing with approval trial judge's ruling that "By limiting medical marijuana facilities to nonprofit entities, the bylaw[,] while not prohibit[ing] those facilities, does restrict them in a way that the [S]tate explicitly determined they should not be limited" and "[a]ccordingly, the town's bylaw is preempted by State law to the extent it requires all medical marijuana dispensaries to be nonprofit organizations.").

General Laws Chapter 40A, Section 3 and the Regulations allow Protected Use ADUs as-of-right on the same lot as any type of "Principal Dwelling," not just a single-family dwelling. See 760 CMR § 71.02's definitions of "Accessory Dwelling Unit (ADU)" (defining an ADU as "[a] self-contained housing unit, inclusive of sleeping, cooking, and sanitary facilities on the same Lot as a Principal Dwelling . . .") and "Protected Use ADU" (defining a "Protected Use ADU" as "[a]n attached or detached ADU that is located, or is proposed to be located, on a Lot in a Single-Family Residential Zoning District."). The Regulations define "Principal Dwelling" as a structure that contains at least one dwelling unit as follows (with emphasis added):

> A structure, regardless of whether it, or the Lot it is situated on, conforms to Zoning, including use requirements and dimensional requirements, such as setbacks, bulk, and height, *that contains at least one Dwelling Unit* and is, or will be, located on the same Lot as a Protected Use ADU.

The Regulations' definition of "Principal Dwelling" contemplates Protected Use ADUs on lots that include more than a single-family dwelling unit. For example, Protected Use ADUs are allowed on lots containing a two-family dwelling or a multi-family dwelling. Therefore, allowing an ADU only in the context of a "single-family" dwelling conflicts with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the text shown above in bold and underline. The Town should consult with Town Counsel with any questions.

B. Section 3.3.1.2 (D)(4) – Parking Requirements

Section 3.3.1.2 (D)(4) imposes parking requirements on ADUs as follows, with emphasis added:

> **Parking for the occupant(s) of an accessory apartment shall be off-street in accordance with Section 7.3.1.4 of these By-laws.**

We disapprove and delete the parking provisions shown above in bold and underline, that requires all ADUs[8] to provide one off-street parking space because it conflicts with G.L. c. 40A,

[8] Section 3.3.1.3, deleted under Article 41, previously regulated "Accessory Apartments." Section 3.3.1.2

§ 3 and the Regulations. General Laws Chapter 40A, Section 3 prohibits a municipality from requiring more than one parking space or requiring any parking space when an ADU is located outside the 0.5-mile radius of a transit station, as follows:

> The use of land or structures for an accessory dwelling unit under this paragraph shall not require owner occupancy of either the accessory dwelling unit or the principal dwelling; provided, that not more than 1 additional parking space shall be required for an accessory dwelling unit; and provided further, that no additional parking space shall be required for an accessory dwelling located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station.

In addition, the Regulations, 760 CMR 71.03 (2) prohibit a Town from imposing any prohibited Regulations on a Protected Use ADU, including the following:

> (b) Minimum Parking Requirements. A requirement of, as applicable:
>
> 1. More than one additional on-street or off-street parking space for a Protected Use ADU if all portions of its Lot are located outside a 0.5 mile radius of a Transit Station; or
>
> 2. Any additional on-street or off-street parking space for a Protected Use ADU if any portion of its Lot is located within a 0.5 mile radius of a Transit Station.

Because Section 3.3.1.2 (D)(4) incorporates the parking provisions in Section 7.3.1.4, "Parking; Accessory Dwelling," and Section 7.3.1.4's parking provisions require *all* ADUs to provide "one off-street parking space," including those ADUs located within a 0.5 mile radius of a transit station, the parking requirements in Section 3.3.1.2 (D)(4) [and Section 7.3.1.4, although those portions of the by-law are existing and therefore not before the Attorney General for review and approval) conflict with G.L. c. 40A, § 3 and 760 CMR 71.03 (2) (b), and we therefore disapprove and delete the text in Section 3.3.1.2 (D)(4) as shown above in bold and underline.

The Town is authorized by the statute and the Regulations to require *one* additional parking space for a Protected Use ADU that is not located within a 0.5-mile radius of a Transit Station. However, the Town cannot, as it has done here, require all ADUs to provide one additional parking space because as written, that requirement would require an ADU located within a 0.5-mile radius of a transit station to provide a parking space and therefore conflicts with the statute and Regulations. See West Street Associates, LLC, 488 Mass. at 324, *supra*. For this reason, we disapprove and delete the text shown above in bold and underline.[9]

(D)(4) however still refers to "accessory apartment." Should the Town wish to amend Section 3.3.1.2 (D)(4) at a future Town Meeting regarding parking requirements, the Town may wish to also amend this reference as well.

[9] The majority of Section 7.3.1.4, "Parking," was not amended under Article 41 and is therefore not before the Attorney General now for review and approval. This existing text provides in relevant part that: "one off street parking space for the accessory dwelling" is required, but like Section 3.3.1.2 (D)(4) it does not include an exemption for ADUs located within 0.5-mile radius of a transit station. The Town cannot apply

V. The Remaining Approved ADU Requirements Must be Applied Consistent with G.L. c. 40A, § 3 and 760 CMR 71.00

We offer comments for the Town's consideration regarding Section 4, "Lot Size and Frontage," to ensure these provisions are applied consistent with the Regulations. Under Article 41, the Town amended Section 4 to add only certain text, shown in italic as follows (with emphasis added in underline):

> 4.1 In the Rural Residential District, no dwelling or accessory Building shall be erected or placed on a lot <u>having less than one (1) acre in the area</u> or having less than one hundred and fifty (150) feet in frontage or be placed closer than forty (40) feet to the street line or twenty five (25) feet from the side or rear lot line. No more than one (1) dwelling *and one Accessory Dwelling Unit* shall be erected or placed on any such lot.
>
> 4.2 In the Village Center Residential District, no dwelling or accessory building shall be erected or placed on a lot <u>having less than one (1) acre in the area</u> or having less than seventy-five (75) feet in frontage or be placed closer than twenty (20) feet to the street line or twenty five (25) feet from the side or rear lot line. No more than one (1) dwelling *and one Accessory Dwelling Unit* shall be erected or placed on any such lot.

Under Article 41, the only amendments adopted to Section 4 was to add in text that states "and one Accessory Dwelling Unit," such that only one dwelling and one ADU may be placed on a lot. However, the existing text in Sections 4.1 and 4.2, not amended under Article 41 and therefore not now before the Attorney General for review and approval, require dwellings and accessory buildings to meet certain dimensional requirements, including that they be placed on a lot not "having less than one (1) acre in area." However, towns cannot apply this minimum lot size requirement to an ADU. The Town should consult with Town Counsel to ensure the proper application of Sections 4.1 and 4.2 as well as whether these provisions should be amended at a future Town Meeting to explicitly exempt an ADU from this minimum lot size requirement.

With regards to the remainder of the existing text in Sections 4.1 and 4.2 imposing dimensional requirements on "accessory buildings," that appear to include ADUs, the Town must apply these requirements consistent with the Regulations, as explained below.

The Regulations, 760 CMR 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards," require the Town to apply the most permissive dimensional standard, in relevant part as follows, with emphasis added:

> (b) Municipality shall apply the analysis articulated in 760 CMR 71.03 (3)(a) to establish and apply reasonable Zoning or general…by-laws, or Municipal regulations for Protected Use ADUs, but in no case shall a restriction or regulation be found reasonable where it exceeds the limitations, or is inconsistent with provisions, described below, as applicable:…<u>(2) Dimensional Standards. Any requirement</u>

Section 7.3.1.4's parking requirements to an ADU located within a 0.5 mile radius of a transit station because that application would conflict with the Regulations. We encourage the Town to consult with Town Counsel to ensure the proper application of Section 7.3.1.4 as well as whether it should be amended at a future Town Meeting to address this issue.

concerning dimensional standards, such as dimensional setbacks, lot coverage, open space, bulk and height, and number of stories, that are more restrictive than is required for the Principal Dwelling, or a Single-family Residential Dwelling or accessory structure in the Zoning District in which the Protected Use ADU is located, whichever results in more permissive regulation, provided that a Municipality may not require a minimum Lot size for a Protected Use ADU.

Therefore, with regards to the dimensional requirements (other than minimum lot size, which the Town cannot impose on ADUs) in Sections 4.1 and 4.2, the Town should be mindful that 760 CMR 71.03 (b)(2)(a) prohibits towns from imposing dimensional requirements, such as setbacks, lot coverage, open space, bulk and height, and number of stories that are more restrictive than required for the Principal Dwelling, Single-Family Dwelling (as defined in 760 CMR 71.02) or other accessory structure in the zoning district where the Protected Use ADU is located, whichever is most permissive. The Town must ensure that these dimensional standards are not more restrictive than those required for a Principal Dwelling, Single Family Dwelling or other accessory structure (as defined in 760 CMR 71.02) in the zoning district where the Protected Use ADU is located, whichever is more permissive.

In addition, in applying these dimensional requirements to an ADU, because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose "reasonable regulations" on a Protected Use ADU. Therefore, if a dimensional requirement is used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. Moreover, the Town must ensure that these requirements are analyzed on a case by case basis as it relates to a particular property because in some circumstances the provisions could be unreasonable as applied to a particular property. In addition, the Town must ensure that the application of these requirements serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification, impose an excessive cost or substantially diminish or interfere with the use or development of a Protected Use ADU. See 760 CMR 71.03 (3)(a). If the Town cannot satisfy this standard, the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of any dimensional requirements to a Protected Use ADU. The Town should consult with Town Counsel to ensure the proper application of these provisions to a Protected Use ADU.

Finally, we encourage the Town to discuss with Town Counsel whether any dimensional requirements for ADUs should be included in the Town's ADU by-law, rather than in a separate section of the zoning by-laws to make it clear what dimensional requirements apply to the ADU and to ensure that those utilizing the ADU by-law have clear information regarding any required dimensional standards.

VI. Conclusion

We partially approve Article 41, except for: (1) references to single-family dwellings; and (2) Section 3.3.1.2 (D)(4)'s parking requirements; that we disapprove and delete as shown in Section IV in bold and underline.

The Town should consult closely with Town Counsel when applying the remaining approved ADU provisions to ensure that they are applied consistent with G.L. c. 40A, § 3 and 760 CMR 71.00. If the approved provisions in Article 41 are used to deny a Protected Use ADU, or otherwise applied in ways that constitute an unreasonable regulation in conflict with 760 CMR 71.03 (3), such application would violate G.L. c. 40A, § 3 and the Regulations. The Town should consult with Town Counsel and EOHLC to ensure that the approved by-law provisions are applied consistent with G.L. c. 40A, § 3 and the Regulations, as discussed herein.

Finally, we remind the Town of the requirements of 760 CMR 71.04, "Data Collection," that requires municipalities to maintain certain records, as follows:

> Municipalities shall keep a record of each ADU permit applied for, approved, denied, and issued a certificate of occupancy, with information about the address, square footage, type (attached, detached, or internal), estimated value of construction, and whether the unit required any variances or a Special Permit. Municipalities shall make this record available to EOHLC upon request.

The Town should consult with Town Counsel or EOHLC with any questions about complying with Section 71.04.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute.

Very truly yours,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

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