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June 18, 2025

Ben Kaufman, Town Clerk
333 Washington Street
Brookline, MA 02445

**Re: Brookline Special Town Meeting of November 19, 2024 --- Case # 11678
Warrant Articles # 8, 10, and 15 (Zoning)
Warrant Articles # 5 and 16 (General)¹**

Dear Mr. Kaufman:

Article 15 - Under Article 15, the Town voted to amend several sections of its zoning by-laws to allow Accessory Dwelling Units (“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”).²

We partially approve Article 15 because the approved text does not conflict with state law. However, we disapprove the following provisions 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)):

- Section 4.05.3.b.2’s references to “Single-Family” Dwellings;
- Section 4.05.3.b.2’s floor area ratio requirements;
- Section 4.05.3.b.2.b’s requirement that ADUs comply with dimensional requirements applicable to the principal dwelling;
- Section 4.05.3.b.2.c’s ADU height requirement and maximum ADU footprint requirement;
- Section 4.05.3.b.2.d’s requirement for converting an accessory building to an ADU;
- Section 4.05.3.b.2.f’s façade and window design requirements;

¹ On March 19, 2025, we approved Articles 5, 8, 10, and 16 and by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended our deadline for review of Article 15 for 90-days until June 18, 2025.

² The Regulations can be found here: <https://www.mass.gov/doc/760-cmr-7100-protected-use-adus-final-version/download>

- Section 4.05.3.b.2.j’s requirement that a primary dwelling be in existence for five or more years before applying for an ADU; and
- Section 4.05.3.b.6’s conversion of garage space for an ADU.

In this decision we summarize the by-law amendments adopted under Article 15; 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;³ and then explain why, based on our standard of review, we partially approve the zoning by-law amendments adopted under Article 15.⁴ In addition, we offer comments for the Town’s consideration regarding certain approved provisions adopted under Article 15 and we offer comments on existing text that is not subject to any changes under Article 15 and therefore not subject to our review and approval.

I. Summary of Article 15

Under Article 15, the Town amended Section 4.05.3, “Accessory Uses in Residence Districts; Accessory Dwelling Units” by making specific changes to allow ADUs as of right in the Town’s Residence Districts. The Town also amended Section 4.07, “Table of Use Regulations,” Use 51B, “Accessory Dwelling Units (ADUs)” to allow ADUs in the Town’s Office (“O”) District where single-family dwellings are allowed.

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

Our review of Article 15 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 15, 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

³ 760 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.”

⁴ We acknowledge that the Town adopted Article 15 at its November 19, 2024, Special Town Meeting, which was well before EOHLC finalized its Regulations and therefore the Town did not have the benefit of the Regulations’ requirements when it adopted Article 15.

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.”⁵ 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

⁵ 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 (3) MassGIS Addressing Guidance regarding address assignments for ADUs (<https://www.mass.gov/info-details/massgis-addressing-guidance-for-accessory-dwelling-units-adus>).

discretionary zoning approval for, or impose a “Prohibited Regulation”⁶ 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.”⁷ Moreover, Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, certain restrictions or regulations “shall be unreasonable” in certain circumstances.⁸ 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 # 11579.⁹ Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 15.

⁶ 760 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.

⁷ 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).

⁸ 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.

⁹ 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.”

IV. Certain Text is Disapproved from Article 15 Because It Conflicts with G.L. c. 40A, § 3 and the Regulations

A. Section 4.05.3.b.2's References to "Single-Family" Dwellings

Section 4.05.3.b.2 references "single-family" dwellings as opposed to principal dwellings in relevant part as follows (with emphasis added):

2. Building envelope and setbacks. An ADU may be created within an existing or new **single-family detached** Dwelling, or in an existing or new detached Accessory Building on the same lot as a **single-family detached** Dwelling if any increase in FAR stemming from the creation of the accessory dwelling unit does not produce a total resultant FAR greater than 130% of the allowed FAR in Table 5.01 of the current Zoning By-Law. An ADU is subject to the following, but for the exceptions provided in 4.05.3.b.1:

a) An ADU attached to or within a new or an existing detached **single-family** Dwelling shall comply with the dimensional requirements of Table 5.01.

We disapprove and delete the words "single-family detached" and "single-family" as shown above in bold and underline that limits ADUs as accessory to a single-family dwelling or a single family detached dwelling because limiting ADUs to a single-family dwelling 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, 448 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 ways 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 one dwelling unit. For example, Protected Use ADUs are allowed on lots containing a two-family dwelling or a multi-family dwelling. Therefore, the above quoted

provisions Section 4.05.3.b.2 that state that ADUs are allowed only on lots with a “single-family detached” dwelling or a “single-family” dwelling conflict with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the words “single-family detached” and “single-family” as shown above in bold and underline.

B. Section 4.05.3.b.2’s Floor Area Ratio Requirements

Section 4.05.3.b.2 allows an ADU as long as any increase in the FAR (Floor Area Ratio) from the creation of the ADU does not result in a FAR greater than 130% of the allowed FAR as shown in Table 5.01 as follows:

Building envelope and setbacks. An ADU may be created within an existing or new single family detached Dwelling, or in an existing or new detached Accessory Building on the same lot as a single- family detached Dwelling if any increase in FAR stemming from the creation of the accessory dwelling unit does not produce a total resultant FAR greater than 130% of the allowed FAR in Table 5.01 of the current Zoning By-Law. An ADU is subject to the following, but for the exceptions provided in 4.05.3.b.1:

Table 5.01 is the Town’s Table of Dimensional Requirements that imposes various dimensional requirements for single-family dwellings that are part of a cluster development, single-family dwellings that are not in a cluster development, and all other principal structures and uses based on the district in which the structure and use is located. Table 5.01 imposes floor area ratio requirements, which is defined as the ratio of gross floor area to lot area. See Section 5.20, “Floor Area Ratio,” of the Town’s existing zoning by-laws. Section 4.05.3.b.2 would prohibit an ADU that results in a FAR greater than 130% of the required FAR in Table 5.01. We disapprove Section 4.05.3.b.2 as shown in bold and underline above because this provision results in the prohibition of ADUs in violation of G.L. c. 40A, § 3 and the Regulations.

As an initial matter, FAR is determined by dividing the gross floor area by the lot area. However, the Regulations (760 CMR 71.03 (3)(b)(2)) prohibit towns from imposing lot area requirements on ADUs. Because the Town cannot impose a lot area requirement on an ADU, it cannot determine the FAR for an ADU. But more importantly, Section 4.05.3.b.2’s FAR requirement conflicts with G.L. c 40A, § 3 and the Regulations as discussed in more detail below.

General Laws Chapter 40A, Section 3, allows one ADU to be built as of right up to 900 square feet or ½ the gross floor area of the principal dwelling, whichever is smaller. Section 4.05 (3) (b) (2)’s FAR requirement would prohibit an ADU that is allowed as of right from being built if it increases the FAR greater than 130% of the FAR allowed in Table 5.01. In addition, because such requirement would nullify an ADU, it is also an unreasonable regulation. See 760 CMR 71.03 (3). For these reasons, we disapprove Section 4.05.3.b.2’s FAR requirement as shown above in bold and underline.

C. Section 4.05.3.b.2.b’s Requirement that ADUs Comply with Dimensional Requirements Applicable to the Principal Dwelling

Section 4.05.3.b.2.b imposes the following dimensional requirements on ADUs:

New detached ADU or the expanded areas of a detached ADU shall comply with the side yard setback and half of the rear yard setback prescribed **for the principal Dwelling**, and shall not be permitted within required front yards.

We disapprove and delete the words “for the principal Dwelling,” as show above in bold and underline they conflict 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,” provides 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:... (2) Dimensional Standards. Any requirement 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.

The Regulations specifically prohibit the Town from imposing dimensional standards related to the number of stories or height that are more restrictive than those 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. See 760 CMR 71.03 (3)(b)(2). Requiring ADUs to comply with the dimensional requirements applicable to a “principal dwelling” imposes dimensional requirements that are more restrictive than allowed under the Regulations. For this reason, we disapprove the words “**for the principal Dwelling**,” as show above in bold and underline above.

D. Section 4.05.3.b.2.c’s ADU Height Requirement and Maximum ADU Footprint Requirement

Section 4.05.3.b.2.c imposes a 22 feet and one ½ story height requirement on detached ADUs and also imposes a maximum ADU footprint requirement of no more than 600 square feet in the Town’s S-0.75P, S-4, S-7, SC-7, T, F, and M districts and no more than 700 square feet in the S-10 and SC-10 districts as follows:

A new or expanded area of a detached ADU may be up to 22 feet in height and one-and-a- half Stories as defined under§ 2.19. In S-0.75P, S-4, S-7, SC-7, T, F, and M districts, the maximum allowed ADU footprint shall be no more than 600 square feet. and in S-10 and SC-10 districts no more than 700 square feet.

We disapprove and delete the 22 feet height requirement and 1 ½ stories requirement because the height and story limitations conflict with the Regulations, as explained below.

As provided in more detail above, the Regulations, 760 CMR 71.03 (3)(b)(2), specifically prohibit the Town from imposing dimensional standards related to the number of stories or height that are more restrictive than those 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. See 760 CMR 71.03 (3)(b)(2). Table 5.01 allows a range of height requirements from 35 feet in the S-40 District to 40 feet in the S-25 Districts, for example. Therefore, Section 4.05.3.b.2.c's 22 feet and 1 ½ stories requirement for ADUs impose dimensional requirements that are more restrictive than those allowed for any other structures and uses. For this reason, the height and the number of stories limitations in Section 4.05.3.b.2.c conflict with 760 CMR 71.03 (3)(b)(2), and we therefore disapprove it, as shown in bold and underline above.

We also disapprove Section 4.05.3.b.2.c's maximum ADU footprint requirement because it conflicts with G.L. c 40A, § 3 and the Regulations that allows one ADU to be built as-of-right up to 900 square feet or ½ the gross floor area of the principal dwelling whichever is smaller. Section 4.05.3.b.2 prohibits an ADU unless the footprint is no more than 600 square feet or no more than 700 square feet depending on the district in which the ADU is located. Similar to the FAR prohibition discussed above, the maximum footprint provision would take away the right to build an ADU up to 900 sq ft right. In addition, because such requirement would nullify an ADU, it is also an unreasonable regulation. See 760 CMR 71.03 (3). For these reasons, we disapprove Section 4.05.3.b.2.c's maximum ADU footprint requirement, as shown in bold and underline above.

E. Section 4.05.b.2.d's Requirement for Converting an Accessory Building to an ADU

Section 4.05.b.2.d allows an accessory building to be converted to a detached ADU that does not conform to the certain dimensional requirements as long as the accessory building's envelope is not expanded as follows (with emphasis added):

An Accessory Building may be converted into a detached ADU not in conformance with the setbacks, height, and footprint requirements of this section if the Accessory Building envelope (including without limitation footprint, height and volume) is not expanded. A special permit may be granted to expand an Accessory Building to be converted into an ADU, provided that any exterior additions comply with the provisions of 4.05.3.b.2.

We disapprove Section 4.05.3.b.2.d (shown above in bold and underline) because it conflicts with the Regulations, 760 CMR 71.03 (3)(b)(9) that prohibits a town from prohibiting ADUs in an existing structure or principal dwelling due to nonconformance as follows:

Pre-existing Nonconforming Structures. A Municipality may not prohibit the development of a Protected Use ADU in an existing structure or Principal Dwelling, or Lot due to nonconformance, that could be used for, or converted into, a Protected Use ADU in conformance with the Building Code, 760 CMR 71.00, and state law.

Because Section 4.05.3.b.2.d prohibits ADUs from being constructed in an accessory building that does not conform to certain dimensional requirements (i.e. a pre-existing nonconforming structure), unless the building envelope is not increased, Section 4.05.3.b.2.d

conflicts with the 760 CMR 71.03 (3)(b)(9). In addition, Section 4.05.3.b.2.d's special permit requirement conflicts with G.L. c. 40A, § 3 and the Regulations' prohibition on requiring a special permit for an as-of-right ADU as discussed further in this decision. For these reasons we disapprove Section 4.05.3.b.2.d

F. Section 4.05.3.b.2.f's Façade and Window Design Requirements

Section 4.05.3.b.2.f restricts the length of a façade for an ADU that is located less than ten feet from an abutting property line and prohibits "transparent and operable" windows along such façade as follows:

For a facade of a new detached ADU or an ADU converted from an existing Accessory Building, where any part of such facade is less than 10 feet from the abutting property line and faces the abutting property, the total length of such facade shall not exceed 30 feet (not including the depth of any recesses), and such facade shall not contain windows that are transparent or operable (except by special permit when required by the Building Code and no design alternatives complying with this provision are available).

The Regulations, 760 CMR 71.03 (3)(b)(1) prohibit the Town from imposing any design standard that "[a] [w]ould not be applied to a Single-Family Residential Dwelling in the Single-family Residential Zoning District in which the Protected Use ADU is located or [b] [i]s so restrictive, excessive, burdensome, or arbitrary that it prohibits, renders infeasible, or unreasonably increases the costs of the use or construction of a Protected Use ADU." The Regulations, 760 CMR 71.02 define the term "Design Standards" as "[c]lear, measurable and objective provisions of Zoning, or general ordinances or by-laws, which are made applicable to the exterior design of, and use of materials for an ADU."

Section 4.05.3.b.2.f imposes design standards that are not imposed on Single-Family Residential Dwelling in the Single-family Residential Zoning District in which the ADU is located and additionally, are so restrictive, excessive, burdensome, or arbitrary that it prohibits, renders infeasible, or unreasonably increases the costs of the use or construction of an ADU. For these reasons, Section 4.05.3.b.2.f conflicts with 760 CMR 71.03 (3)(b)(1) and we disapprove it, as shown above in bold and underline.

G. Section 4.05.3.b.2.j's Requirement that a Primary Dwelling be in Existence for Five or More Years Before Applying for an ADU

Section 4.05.3.b.2.j prohibits the conversion or expansion of a building to create an ADU unless the building was constructed five or more years prior to the date of application for the ADU. We disapprove Section 4.05.3.b.2.j because it conflicts with G.L. c. 40A, § 3 and the Regulations. See West Street Associates, LLC v. Planning Board of Mansfield, 448 Mass 319, 324 (2021)

As discussed in more detail in previous portions of this decision, G.L. c. 40A, § 3 allows ADUs to be built as of right, regardless of whether a town has a by-law regulating them. Because the statute establishes the effective date of the protections given to ADUs (February 2, 2025), the Town cannot delay an ADU allowed as of right by requiring a primary dwelling to wait five years

before it can construct an ADU. Moreover, because ADUs are a Dover protected use, ADUs are a use allowed as of right, and the Town cannot prohibit them, even temporarily as it sought to do under Section 4.05.3.b.2.j.

In addition, while a municipality may regulate a Protected Use ADU in the manner authorized by 760 CMR 71.00, the Town cannot impose an “Unreasonable Regulation” on a Protected Use ADU. See 760 CMR 71.03, “Regulation of Protected Use ADUs in Single-Family Residential Zoning Districts.” As discussed in more detail above, G.L. c. 40A, § 3 and the Regulations prohibit a Town from “unreasonably restrict[ing]” a Protected Use ADU, though the Town may subject the Protected Use ADU to “reasonable regulations.” See 760 CMR 71.03 (1).

In addition, as discussed in other sections above, the five year limitation on ADUs is a nullification of the use and increases the cost of obtaining approval to build an as-of-right ADU. For this reason, we conclude that Section 4.05.3.b.2.j. constitutes an unreasonable regulation in violation of Section 71.03 (3), and we therefore disapprove it.

H. Section 4.05.3.b.6’s Conversion of Garage Space for an ADU

Section 4.05.3.b.6 requires conversion of garage space for an ADU to provide an off-street parking plan to the Building Commissioner for approval as follows (new text in underline, deleted text in strikethrough and disapproved text in bold and underline):

Conversion of garage space. An ADU ~~accessory dwelling unit~~ that is created by conversion of a pre-existing garage, including an existing garage in a separate structure from the primary residential building, **shall provide an off-street parking plan subject to the approval of the Building Commissioner.** ~~may be approved only by Special Permit. Garage space eligible for conversion to an accessory dwelling unit must have been constructed five or more years prior to the date of application for a permit to construct an accessory apartment as evidenced by an original building permit or other documentation satisfactory to the Board of Appeals. The provisions of Section 5.22, Exceptions to Maximum Floor Area Ratio Regulations for Residential Units i.e prohibiting replacement of garage parking to a location exterior to the house does not apply to this subsection.)~~

Requiring ADUs that are created by conversion of a pre-existing garage to submit an off-street parking plan that is subject to Building Commissioner’s approval conflicts with the G.L. c. 40A, § 3 and the Regulations. As discussed in more detail above, G.L. c 40A, § 3 prohibits a zoning by-law from requiring discretionary zoning approvals for a single ADU. In addition, 760 CMR 71.03 (1) prohibits the Town from requiring a discretionary zoning approval for the use of land or structures for a Protected Use ADU

Section 4.05.3.b.6 does not include any details on what information must be included in an off-street parking plan nor does it provide the Building Commissioner with any standards or criteria to guide them in determining whether to approve the off-street parking plan. Absent any standards or criteria, the Building Commissioner’s “opinion” is the type of discretionary zoning approval prohibited under G.L. c. 40A, § 3 and the Regulations. In addition, the Regulations prohibit towns from requiring more than one parking space for an ADU and also prohibit towns from imposing any additional parking spaces for ADU located within 0.5- miles of a transit station,

as that term is defined in the Regulations. Therefore, any parking requirements imposed other than as allowed under G.L. c. 40A, § 3 and the Regulations would conflict with state law. For these reasons, we disapprove the text in Section 4.05.3.b.6 (“**shall provide an off-street parking plan subject to the approval of the Building Commissioner**”), as shown above in bold and underline.

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 certain approved provisions adopted under Article 15 to ensure that the Town applies these provisions consistent with G.L. c. 40A, § 3 and the Regulations.

A. Section 4.07’s Table of Use Regulations

Under Article 15, the Town amended Section 4.07, the Town’s Table of Use Regulations (“Table”) to allow ADUs as of right in the Town’s O District as follows as follows (new text in underline and deleted text in strikethrough):

Accessory Uses	Residence					Business			Ind.
	S	SC	T	F	M	L	G	O	I
51B. Within <u>the same lot as a detached single-family owner occupied dwelling in all zoning or within an existing garage accessory to that dwelling</u> , an Accessory Dwelling Unit as further defined and limited in <u>Section</u> § 4.05, paragraph 3.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No <u>Yes</u>	Yes

The only text amended in the Table is the text shown in underline and strikethrough above and therefore it is the only text before us for review. We approve the changes to the Table because they do not conflict with state law, including the change allowing ADUs as of right in the Business and Professional Office (“O”) District, which is a district where single family dwellings are allowed as of right. However, the existing text allows ADUs on the same lot as “a detached single-family dwelling.” Although not subject to any change under Article 15 and therefore not subject to our review, allowing ADUs only to “detached single-family dwelling[s],” as shown by the text in the Table, conflicts with G.L. c. 40A, § 3 and the Regulations as discussed in more detail above in Section IV (A) of this decision. The Town should consult with Town Counsel regarding an amendment to the Table at a future Town Meeting to address this issue. In the interim, the Town cannot apply this provision in a manner that conflicts with G.L. c. 40A, § 3 or the Regulations. The Town should discuss the proper application of this provision with Town Counsel.

B. Section 4.05.3.b’s ADU Dimensional Requirements

We offer the following comments on Section 4.05.3.b’s dimensional requirements.

1. Section 4.05.3.b.1’s Maximum Square Footage Requirement

As amended, Section 4.05.3.b.1 provides as follows (new text in underline and deleted text in strikethrough):

1. Maximum square footage. An ADU ~~accessory dwelling unit~~ may be created with up to 40 ~~50~~ percent of the existing habitable space of the principal dwelling on the property or 900 square feet of habitable space, whichever is less.

a) An ADU ~~Accessory dwelling unit~~ which exceeds 900 square feet of habitable space or 40 ~~50~~ percent of the existing habitable space of the principal dwelling on the property, whichever is less, may be approved by Special Permit, provided that it does not exceed 950 square feet of habitable space.

The only text amended in Section 4.05.3.b.1 is the text shown in underline and strikethrough above and therefore it is the only text before us for review. We approve the changes to Section 4.05.3.b.1 because they do not conflict with state law. However, we point out the Section 4.05.3.b.1's maximum square footage requirement is determined based on the principal dwelling's "habitable space." General Laws Chapter 40A, Section 3 and the Regulations allows one ADU to be built as of right up to 900 square feet or ½ of the *gross floor area* of the principal dwelling, whichever is smaller. The Regulations, 760 CMR 71.02 define "Gross Floor Area (GFA)" and excludes crawl spaces, garage parking areas, attics, enclosed porches and similar spaces, as follows:

The sum of the areas of all stories of the building of compliant ceiling height pursuant to the Building Code, including basements, lofts, and intermediate floored tiers, measured from the interior faces of exterior walls or from the centerline of walls separating buildings or dwelling units but excluding crawl spaces, garage parking areas, attics, enclosed porches and similar spaces. Where there are multiple Principal Dwellings on the Lot, the GFA of the largest Principal Dwelling shall be used for determining the maximum size of a Protected Use ADU.

While the Regulations do not define "habitable space," the Town's zoning by-laws define it as:

HABITABLE SPACE - Space in a structure for living, sleeping, eating, or cooking; otherwise used for human occupancy; or finished or built out and meeting the State Building Code requirements for height, light, ventilation and egress for human habitation or occupancy. Bathrooms, toilet compartments, closets, halls, storage or utility space and similar areas shall not be excluded because excluded [sic] from the definition of habitable space under the State Building Code.¹⁰

By allowing ADUs to be 900 square feet of habitable area, the Town may allow ADUs

¹⁰ It appears that there is a typographical error in the Town's definition of "Habitable Space," and it is unclear whether the Town intend for bathrooms, toilet compartments, closets, halls, storage or utility space and similar areas to be excluded from the definition of "Habitable Space." However, for purposes of the State Building Code, "Habitable area" is generally defined to include those areas used for living, sleeping and cooking. See, e.g., 780 CMR 5202's definition of "Habitable Space."

to be built larger than authorized under G.L. c. 40A, § 1A and 3 and the Regulations. In such a case, it would appear to be adopting “more permissive Zoning...than would be allowed under 760 CMR 71.03.” See 760 CMR 71.03 (7). However, we encourage the Town to consult with Town Counsel to ensure the proper application of Section 4.05.3.b.1 because the Town cannot prohibit ADUs that are allowed as of right under G.L. c. 40A and the Regulations. The Town should also consult with Town Counsel to determine if Section 4.05.3.b.1 should be amended at a future Town Meeting to refer to “gross floor area” and in the meantime, the Town must apply this provision consistent with G.L. c. 40A, §§ 1A, 3 and the Regulations.

In addition, Section 4.05.3.b.1.a authorizes an ADU to be constructed up to 950 square feet (which is in excess of 900 square feet). While we approve Section 4.05.3.b.1.a’s authorization that an ADU may be built up to 950 square feet in area by special permit, it is not clear whether the larger ADU authorized by special permit constitutes the Protected Use ADU as authorized under G.L. c. 40A, § 3 or relates to a second ADU (in addition to the as-of-right ADU allowed under G.L. c. 40A, § 3.)¹¹

General Laws Chapter 40A, § 3A allows one ADU to be built as-of-right up to 900 square feet or ½ the gross floor area of the principal dwelling whichever is smaller. In circumstances where a Town chooses to allow the Protected Use ADU to be built larger (for example, “up to 1200 square feet”), it would likely be interpreted that the larger ADU constitutes the G.L. c. 40A, § 3 Protected Use ADU because Towns are authorized under 760 CMR 71.03 (7) to “adopt[] more permissive Zoning...than would be allowed under 760 CMR 71.03.” However, in the circumstances present here, it is not clear whether the larger ADU allowed under Section 4.05.3.b.1 by special permit is a substitute for the as-of-right ADU allowed under G.L. c. 40A, § 3 and the Regulations or constitutes a second ADU in addition to the Protected Use ADU.

For this reason, we encourage the Town to consult with Town Counsel to ensure the proper application of Section 4.05.3.b.1. In addition, to the extent that a larger ADU constructed by special permit under Section 4.05.3.b.1.a constitutes the Protected Use ADU authorized by G.L. c. 40A, § 3, the Town must ensure that it does not impose any “Prohibited Regulations” or “Unreasonable Regulations,” as part of the special permit process. See 760 CMR 71.03. Finally, the decision to seek a larger ADU by special permit must be a voluntary decision by the applicant and the applicant must be free to withdraw from the special permit process at any time and construct a Protected Use ADU as of right as authorized by G.L. c. 40A, § 3 if they so choose. The Town should consult with Town Counsel and EOHLC with any questions on these issues.

2. Section 4.05.3.b.2.a’s Dimensional Requirements

Section 4.05.3.b.2.a requires attached or detached ADUs to comply with Table 5.01’s dimensional requirements. Based on our standard of review, we approve Section 4.05.3.b.2.a’s dimensional requirements; however, the Town must apply the dimensional requirements consistent with 760 CMR 71.03 (3)(b)(2), “Regulation of Protected Use ADUs in Single-family

¹¹ See 760 CMR 71.03 (5) (“if a Municipality chooses to allow additional ADUs on the same Lot as a Protected Use ADU in a Single-family Residential Zoning District, Zoning shall require a Special Permit for the use of land or structures for the additional ADUs.”)

Residential Zoning Districts;” “Dimensional Standards.”

First, in applying Section 4.05.3.b.2.a, the Town cannot impose the Table’s minimum lot size requirement on an ADU. In addition, as discussed above, 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 it applies dimensional requirements that are no 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 ADU is located, whichever is more permissive.

In addition, in applying these dimensional requirements, the Town must ensure that any imposed setback requirements, serve, and are rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification of, impose an excessive cost on 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 dimensional regulations would be unreasonable as applied 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. Further, an important additional requirement, because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose “reasonable regulations” on a Protected Use ADU. If the by-law provisions, including the Town’s existing dimensional requirements, are used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul of the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3.

3. Section 4.05.3.b.2.b’s Requirement that ADUs Comply with Dimensional Requirements Applicable to the Principal Dwelling and Prohibition on ADUs in Front Yards

Section 4.05.3.b.2.b imposes the following dimensional requirements on ADUs:

New detached ADU or the expanded areas of a detached ADU shall comply with the side yard setback and half of the rear yard setback prescribed for the principal Dwelling¹² and shall not be permitted within required front yards.

Based on our standard of review, we cannot conclude that Section 4.05.3.b.2.b’s prohibition against an ADU within front yards is unreasonable and therefore we approve this provision. However, we reiterate to the Town that 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 these requirements are 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. In addition, the Town must ensure that the application of this prohibition serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification,

¹² We note that the words “principal dwelling” were deleted above in Section IV (C).

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, then the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of these provisions to a Protected Use ADU

4. *Section 4.05.3.b.2.b.1's Side Yard Requirement and Section 4.05.3.b.2.b.2's Rear Yard Requirement*

Section 4.05.3.b.2.b.1's side yard requirement imposes side yard requirements on ADUs as follows:

The side yard setback may be reduced by a special permit to no less than 10 feet, except in S-0.75P, S-4, S-7, SC-7, SC-10, T, F, and M districts where side yard setbacks shall be no less than 7.5 feet.

Section 4.05.3.b.2.b.2 imposes rear yard requirement on ADUs as follows:

The rear yard setback may be reduced by special permit no less than 15 feet in S-15 and S-0.5P districts and 20 feet in S-25 and S-40 districts.

We approve Sections 4.05.3.b.2.b.1's provision allowing a side yard setback of less than 7.5 feet or 10 feet by special permit. We also approve Section 4.05.3.b.2.b.2's rear yard setback of no less than 15 feet and 20 feet because the Town is allowing a side and rear yard setbacks that is more permissive than what would be applicable under Table 5.01. Table 5.01 requires a side yard setback ranging from 7.5 feet in S-7 District to the 30 feet in the S-40 District. Table 5.01 requires rear yard setbacks ranging from 50 feet to 60 feet in the S-25 and S-40 districts, respectively, for example. Therefore, these provisions allowing smaller dimensional requirements do not conflict with state law. However, we again remind the Town that 760 CMR 71.03 (b)(2)(a) prohibits towns from imposing dimensional requirements, such as setbacks, 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. Therefore, the Town cannot require a special permit to decrease the side yard setback to 7.5 feet or ten feet, if the 7.5 feet or ten feet is the more permissive side yard dimensional requirement in the zoning district where the ADU is located. See, e.g., the Table's 7.5 feet side yard setback requirement single-family detached dwelling in the S-7 District. Moreover, because ADUs are a Dover Amendment protected use, if a side or rear yard requirement is unreasonable as applied to a particular ADU, then the Town cannot require a special permit to change the side or rear yard requirements.

C. Sections 4.05.3.b.2.e's Screening Requirements

Sections 4.05.3.b.2.e's imposes screening requirements on certain ADUs as follows:

Detached ADUs that do not meet the required by-right height and setbacks shall provide screening from the side and rear lot lines in the form of a strip of densely planted shrubs or trees of a type that may be expected to form a year-round dense screen at least 7 feet high within three years, walls, fences, or a combination. *

As discussed in more detail above, G.L. c. 40A, § 3 and the Regulations prohibit a Town from “unreasonably restrict[ing]” a Protected Use ADU, though the Town may subject the Protected Use ADU to “reasonable regulations.” See 760 CMR 71.03 (1). Based on our standard of review, we cannot conclude that Section 4.05.3.b.2.e’s screening requirements are an unreasonable regulation and for that reason we approve them. However, in applying this provision, we reiterate that 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 these screening requirements are 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. In addition, the Town must ensure that the application of this provision 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, then the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of these provisions to a Protected Use ADU

D. Section 405.3.b.7’s Egress Requirements

Section 405.3.b.7 imposes egress requirements as follows:

Allowable means of egress. An accessory dwelling unit must have two means of egress that conform to the applicable requirements of the Building Code. If a ~~second~~ required means of egress from an ADU requires an exterior stairway, any such stairway will require a Special Permit and may not exceed more than ~~one story~~ two stories in height nor be visible from a public way.

The only text amended in Section 4.05.3.b.7 is the text shown in underline and strikethrough above and therefore it is the only text for us for review. We approve the changes to Section 4.05.3.b.7 because they do not conflict with state law. However, requiring a special permit for an ADU conflicts with the as-of-right protections given to ADUs G.L. c. 40A, § 3 and the Regulations. In addition, limiting a stairway to two stories and requiring it to not be visible from a public way may be unreasonable and therefore prohibited under 760 CMR 71.03. In applying these provisions, because an ADU is a Dover Amendment protected use, the Town can only impose “reasonable regulations” on an ADU. Therefore, if these requirements are 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. In addition, the Town must ensure that the application of these requirements serve, and are 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, then the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of these provisions to a Protected Use ADU.

E. Section 4.05.3.b.5's Parking Requirement

Section 4.05.3.b.5 imposes parking requirements for single-family properties with an ADU as follows (new text in underline and deleted text in strikethrough):

Parking. A single-family property with a by right ADU ~~accessory dwelling unit~~ will conform to parking requirements as applicable to single-family homes with no accessory dwelling unit. Existing setback requirements will apply to all parking.

As discussed further above, G.L. c. 40A, § 3 and the Regulations prohibits a municipality from: (1) requiring more than one parking space for an ADU and (2) requiring any parking space for an ADU that is located within a 0.5-mile radius of a transit station.

The existing text in Section 4.05.3.b. 5 that was not amended under Article 15 and is therefore not before us now for review and approval, requires single-family properties with an ADU to comply with the parking requirements of a single-family property without an ADU. This existing text in Section 4.05.3.b.5 will require more parking for an ADU than is allowed under G.L. c. 40A, § 3 and Regulations, and therefore conflicts with them. We suggest that the Town discuss Section 4.05.3. b.5 with Town Counsel and amend it at a future Town Meeting to make the provision consistent with G.L. c. 40A, § 3 and Regulations' parking requirement. And in the meantime, the Town must apply Section 4.05.3. b. 5. consistent_with_ G.L. c. 40A, § 3 and Regulations.

F. Section 4.05.3.b.9 Ownership of the ADU and Principal Dwelling

Section 4.05.3.b.9 provides in relevant part that no ADU shall be held in separate ownership from the principal structure or dwelling unit nor shall the building or ADU be deeded as a condominium. Although the Regulations prohibit a municipality from imposing "owner-occupancy" requirements on either the ADU or the principal dwelling, the Regulations are silent on the issue of whether the ADU and the principal dwelling must remain in single ownership. In addition, both the statute and 760 CMR 71.02's definition of ADU authorize a municipality to impose "additional restrictions" on an ADU. Based upon our standard of review, we cannot conclude that Section 4.05.3.b.9 is in conflict with state law.

In reviewing Section 4.05.3.b.9 we have considered the question whether the by-law's requirement that the ADU "remain in common ownership with" the principal dwelling amounts to an unlawful exercise of the Town's zoning power because it is based on ownership and not use. "A fundamental principle of zoning [is that] it deals basically with the use, without regard to the ownership, of the property involved or who may be the operator of the use." CHR Gen., Inc. v. City of Newton, 387 Mass. 351, 356, (1982) (internal quotations and citations omitted). In some instances, therefore, municipal condominium bans have been deemed unlawful. Id. at 356-58 (ordinance regulating conversion of residential units to condominiums was invalid regulation based on ownership because "a building composed [of] condominium units does not 'use' the land it sits upon any differently than an identical building containing rental units."); see also Bannerman v. City of Fall River, 391 Mass. 328 (1984) (city not authorized to adopt condominium ban pursuant to municipal powers to operate water/sewer, regulate traffic, or supervise public health).

It appears that Section 4.05.3.b.9 is not intended to restrict *who* can own the ADU but is instead targeted at ensuring that the ADU remains an accessory use to the principal dwelling. Use, but not ownership, may be regulated through zoning. Goldman v. Town of Dennis, 375 Mass. 197, 199 (1978); Gamsey v. Bldg. Inspector of Chatham, 28 Mass. App. Ct. 614 (1990). Thus, “[a]lthough the limitation is phrased in terms of the type of ownership,” we cannot conclude that Section 4.05.3.b.9 conflicts with the Town’s zoning power. Goldman, 375 Mass. at 199.

For these reasons, and based upon our standard of review, we cannot determine that Section 4.05.3.b.9’s provisions are in conflict with the Regulations or are an unreasonable regulation under 760 CMR 71.03 (3). However, the Town should be prepared to satisfy the requirements of 760 CMR 71.03 (3) if this provision, as applied to a particular person, is challenged in the Court as unreasonable. The Town should consult closer with Town Counsel on this issue.

G. Section 4.05.3.b.11’s Six Month Rental Requirement

Section 4.05.3.b.11 requires the ADU or the primary dwelling to be rented for not less than six months, is amended under Article 15 as follows (new text in underline and deleted text in strikethrough):

Minimum rental period. Nothing shall prohibit the rental, other than the short-term rental, of the principal dwelling unit, the ADU, or both. Rental of either the ADU ~~accessory dwelling unit~~ its associated primary dwelling unit shall be for a term of not less than six (6) months and shall be subject to a written rental or lease agreement. No Short-Term Rentals shall be allowed in the primary dwelling unit or the ADU.

The only text amended in Section 4.05.3.b.11 is the text shown in underline and strikethrough above and therefore it is the only text for us for review. We approve the changes to Section 4.05.3.b.11 because they do not conflict with state law. However, G.L. c. 40A, § 3 and the Regulations allow towns to prohibit ADUs from being used as a “Short-term Rental *as defined* in section 1 of chapter 64G” (emphasis added), but not to otherwise “unreasonably restrict the...rental of an accessory dwelling unit that is not a short-term rental.” G.L. c. 40A, § 1A. Here, the existing text imposes a short-term rental (STR) prohibition that exceeds the occupancy limits for STRs in G.L. c. 64G, § 1, that defines the “Occupancy” of a STR as follows (with emphasis added):

the use or possession or the right to the use or possession of a room in a short term rental normally used for sleeping and living purposes for a period of not more than 31 consecutive calendar days, regardless of whether such use and possession is as a lessee, tenant, guest or licensee

By referring to G.L. c. 64G, the Room Occupancy Excise statute, G.L. c. 40A, §§ 1A and 3 and Regulations define a Short-term Rental as the rental of an ADU with stays of not more than 31 consecutive calendar days. See G.L. c. 64G, § 1’s definition of “Occupancy” as quoted in pertinent part above. Moreover, though G.L. c. 40A, § 3 and the Regulations authorize a Town to prohibit ADUs from being rented as STRs, Section 3 and the Regulations explicitly prohibit towns from prohibiting or unreasonably regulating the rental of ADUs. It is unclear what the apparent

legitimate municipal interest is that is served by the Town prohibiting a rental of an ADU to not less than six months. Therefore, any prohibition on the rental period of ADUs other than as allowed under G.L. c. 64G, would be an unreasonable regulation in violation of Section 3 and the Regulations, unless the Town could satisfy the requirements of Section 71.03 (3). We suggest that the Town discuss Section 4.05.3.b.11 with Town Counsel and consider amending this existing text at a future Town Meeting.

H. Section 4.05.3.c's Requirement for Pre-Existing ADUs

Section 4.05.3.c's imposes requirement for pre-existing ADUs as follows:

Pre-existing unauthorized ADUs ~~accessory dwelling units~~ may be approved by the Building Commissioner subject to the following requirements:

1. The property owner shall submit an application request in a form prescribed by the Building Commissioner;
2. The pre-existing ADU ~~accessory dwelling unit~~ must comply with all requirements of the ADU accessory dwelling unit section of the Zoning Bylaw; however, provided all other provisions of such section are met, the Building Commissioner may approve an ADU ~~accessory dwelling unit~~ with habitable space not exceeding the lesser of 950 square feet or 50 percent of the floor area of the principal building.

The only text amended in Section 4.05.3.c is the text shown in underline and strikethrough above and therefore it is the only text for us for review. We approve the changes to Section 4.05.3.c because they do not conflict with state law. However, the Town must ensure that a previously approved ADU that is now intended as a Protected Use ADU under G.L. c. 40A, 3, no longer remains subject to any provision previously required for the ADU that would now conflict with G.L. c. 40A, § 3 and the Regulations, for example, owner-occupancy requirements previously found in Section 4.05.3.b.2, as some of these prior provisions in Section 405.3 are in conflict with G.L. c. 40A, § 3 and 760 CMR 71.00.

We strongly encourage the Town to consult with Town Counsel regarding an amendment to Section 4.05.3.c that makes it explicitly clear that any prohibited or unreasonable regulations that were imposed on a previously approved accessory apartment or ADU "lawfully in existence prior to February 2, 2025" are unenforceable to a Protected Use ADU. See 760 CMR 71.03 (4) ("A Municipality shall not enforce any Prohibited Regulation or Unreasonable Regulation that was imposed as a condition for the approval of the use of land or structures for a Protected Use ADU prior to the effective date of 760 CMR 71.00, regardless of whether such Protected Use ADU complies with the Municipality's Zoning, including, but not limited to, use requirements and dimensional requirements, such as setbacks, bulk, and height."). The Town should consult with Town Counsel with any questions regarding the proper application of Section 4.05.3.c.

VI. Comments on Existing Text in Section 4.05.3 That is Not Subject to Any Changes under Article 15

There are many provisions in Section 4.05.3 that were not subject to any changes under

Article 15 and therefore are not subject to review by this Office under Article 15. However, if these provisions were before this Office for review and approval, we would be compelled to disapprove them because they conflict with the protections given to ADU under G.L. c. 40A, § 3 and the Regulations. See, e.g., Section 4.05.3.4, “Exterior appearance.” We strongly suggest that the Town discuss Section 4.05.3 as a whole with Town Counsel and amend it at a future Town Meeting to ensure it complies with the protections given to ADUs under G.L. c. 40A, § 3 and the Regulations. And in the meantime, the Town must apply Section 4.05.3 consistent with G.L. c. 40A, § 3 and the Regulations.

VII. Conclusion

We partially approve Article 15 except:

- Section 4.05.3.b.2’s References to “Single-Family” Dwellings;
- Section 4.05.3.b.2.b’s requirement that ADUs comply with dimensional requirements applicable to the principal dwelling;
- Section 4.05.3.b.2’s floor area ratio requirements;
- Section 4.05.3.b.2.c’s ADU height requirement and maximum ADU footprint requirement;
- Section 4.05.b.2.d’s requirement for converting an accessory building to an ADU;
- Section 4.05.3.b.2.f’s façade and window design requirements;
- Section 4.05.3.b.2.j’s requirement that a primary dwelling be in existence for five or more years before applying for an ADU; and
- Section 4.05.3.b.6’s conversion of garage space for an ADU.

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 15 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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