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October 31, 2025

Ann V. Fisk, Town Clerk
Town of Wrentham
79 South Street
Wrentham, MA 02093

Re: Wrentham Annual Town Meeting of June 2, 2025 -- Case # 11976
Warrant Articles # 24 and 25 (Zoning)
Warrant Articles # 16, 17 and 18 (General)[1]

Dear Ms. Fisk:

Article 24 - Under Article 24, the Town voted to amend it's zoning by-laws regarding Accessory Dwelling Units ("ADUs") by adding a new Section 390-4.11, "Accessory Dwelling Units," 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").[2]

We partially approve Article 24 because the approved text does not conflict with state law. However, we disapprove and delete[3] the following provisions adopted under Article 24 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)):

- Several references to "single-family" throughout Section 390-4.11;

[1] In a decision issued October 1, 2025, we approved Articles 16, 17, 18 and 25 and by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended our deadline for a decision on Article 24 for 30 days until October 31, 2025.

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

[3] The use of the term "disapprove" collectively means "disapprove and delete" such that any text disapproved by the Attorney General (shown in bold and underline) by virtue of such disapproval is also deleted from the Town's zoning by-law and does not take effect under G.L. c. 40 § 32.

- a portion of Section 390-4.11 (C) (1) (c)'s imposing size limitation on ADUs;
- Section 390-4.11 (C) (1) (d)'s bedroom limitation for ADUs;
- Section 390-4.11 (C) (1) (i)'s dimensional requirements for ADUs; and
- a portion of Section 390-4.11 (D) (2)'s grant of discretion to the building inspector regarding ADU zoning approval requirements.

In this decision we summarize the by-law amendments adopted under Article 24; 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;[4] and then explain why, based on our standard of review, we partially approve the zoning by-law amendments adopted under Article 24. In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 24.

I. Summary of Article 24

Under Article 24, the Town voted to amend Section 390-2.2, "Terms defined," to include a definition of "Accessory Dwelling Unit." In addition, the Town amended Section 390-4.2, "Use Regulation Schedule," allowing ADUs as of right in the R-30, R-43, and R-87 zoning districts, subject to the requirements of Section 390-4.11, and prohibiting ADUs in all other zoning districts.[5] Last, the Town added a new Section 390-4.11, "Accessory dwelling units" that imposes requirements on ADUs.

The new Section 390-4.11 imposes restrictions on ADUs, including allowing only one ADU by right [Section 390-4.11 (C) (1) (a)] and prohibiting an ADU from being used as a short-term rental [Section 390-4.11 (C) (2) (d)]. The by-law also imposes dimensional requirements including size limitations [Section 390-4.11 (C) (1) (c)], limits an ADU to a maximum of two bedrooms [Section 390-4.11 (C) (1) (d)], and imposes a site plan review requirement [Section 390-4.11 (D) (2)].

[4] 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."

[5] General Laws Chapter 40A, Section 3 allows a Protected Use ADU "in a single-family residential zoning district," defined in the Regulations as "[a]ny Zoning District where Single-family Residential Dwellings are permitted or an allowable use, including any Zoning District where Single-family Residential Dwellings are allowed as-of-right or by Special Permit." According to the Town's existing Use Regulation Schedule, single-family dwellings are prohibited in the B-1, B-2, C-1, C-2, C-3, CRSP, VZ-A and VZ-B Zoning Districts. For this reason, we approve the amendments to the Use Regulation Schedule allowing ADUs as-of-right in certain zoning districts and prohibiting ADUs in the remaining districts. However, the Town must ensure that Protected Use ADUs are allowed in any Single-family Residential Zoning District in the Town.

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

Our review of Article 24 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 24, 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."[6] The Regulations define key terms and prohibit certain "Use and Occupancy Restrictions" defined in Section 71.02 as follows:

[6] See the following resources for additional guidance on regulating ADUs: (1) EOHLC's ADU FAQ section

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"[7] 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."[8] 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.[9] In addition, while municipalities may impose dimensional requirements related to setbacks, lot coverage, open space, bulk and

(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).

[7] 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.

[8] 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).

[9] 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.

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.[10] Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 24.

IV. Text Disapproved from Article 24 Because it Conflicts with G.L. c. 40A, § 3 and the Regulations

A. References to Single-Family Dwelling

Throughout Section 390-4.11, the Town refers to an ADU in the context of a "single-family" dwelling, residence or structure as follows (with emphasis added):

> Section 390-4.11 (C) (1), "Design Requirements":
> The ADU shall be designed to maintain the appearance and essential character of a **single-family** dwelling with accessory structures…
>
> Section 390-4.11 (C) (1) (a)
> Only one ADU may be created within a **single-family** dwelling.
>
> Section 390-4.11 (C) (1) (g)
> The ADU shall be designed so that the appearance of the building remains that of a **single-family** residence…Any exterior change made must conform with the **single-family** character of the neighborhood.
>
> Section 390-4.11 (C) (2) (b)
> ADUs are only allowed in or as an accessory structure to **single-family** dwellings.
>
> Section 390-4.11 (C) (2) (c)
> ADUs are allowed within or attached to an **existing single-family** structure or detached accessory building with a permanent foundation and that is an accessory to the **existing single-family** dwelling.

[10] 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 390-4.11 (E)
If an ADU is proposed for a pre-existing, non-conforming **single-family** primary residence, the requirements of Section §390-3.4.C of this Zoning Bylaw shall apply…

We disapprove the text "single-family," as shown above in bold and underline, that defines an ADU only in the context of a "single-family" dwelling because these provisions conflict 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 one-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, 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 "single-family" text shown above in bold and underline. The Town should consult with Town Counsel with any questions.

In addition to disapproving the references to "single-family" in Section 390-4.11 (C) (2) (c), we also disapprove the text "existing" that allows an ADU only with an "existing" dwelling because this provision conflicts with G.L. c. 40A, § 3 and the Regulations. General Laws Chapter 40A, Section 3 provides in relevant part that:

> No zoning ordinance or by-law shall prohibit, unreasonably restrict or require a special permit or other discretionary zoning approval for the use of land or structures for a single accessory dwelling unit, or the rental thereof, in a single-family residential zoning district; provided, that the use of land or structures for such accessory dwelling unit under this paragraph may be subject to reasonable regulations…

General Laws Chapter 40A, Section 3 protects ADUs by providing that zoning by-laws shall not prohibit, unreasonably regulate or require the special permit or other discretionary zoning

approval for the use of land or structures for a single ADU in a single-family residential zoning district but authorizes municipalities to impose reasonable regulations on the creation and use of ADUs, if it so chooses. The Regulations, 760 CMR 71.02, defines a "Protected Use ADU" in relevant part (with emphasis added) as: "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…."

Neither G.L. c. 40A, § 3 or the Regulations limit an ADU to only an existing principal dwelling but instead allows an ADU "on the same lot as a Principal Dwelling." An ADU could be constructed at the same time a new principal dwelling is constructed. Therefore, limiting an ADU to only a lot with an existing dwelling, as opposed to a lot with a principal dwelling, conflicts with the statute and Regulations.

For this reason we also disapprove the words "existing" in Section 390-4.11 (C) (2) (c), shown above in bold and underline.

B. Section 390-4.11 (C) (1) (c) – Size Limitations

Section 390-4.11 (C) (1) (c) limits the size of ADUs in relation to "residential space" and "gross square feet" as follows (with emphasis added):

> The ADU shall be clearly secondary in nature to the principal dwelling**, and it shall not exceed 50% of the existing total residential space or 900 gross square feet in area (including additions), whichever is less**.

We disapprove Section 390-4.11 (C) (1) (c), shown above in bold and underline, because it restricts the size of an ADU in a manner that conflicts with G.L. c. 40A, §§ 1A and 3 and the Regulations, as explained below.

General Laws Chapter 40A, Section § 3 allows an ADU as of right, defined in G.L. c. 40A, § 1A as "not larger in gross floor area than 1/2 the gross floor area of the principal dwelling or 900 square feet, whichever is smaller." Under the Regulations, 760 CMR 71.02, "Definitions," "Gross Floor Area" is defined 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.

Section 390-4.11 (C) (1) (c)'s limitation on an ADU to "50% of existing total residential space" (as opposed to the gross floor area) of the primary dwelling, or "900 gross square feet" (as opposed to 900 square feet), whichever is less, conflicts with the as-of-right protections given to all ADUs that fall within the statutory size limits under G.L. c. 40A, § 3 and the Regulations. We therefore disapprove this portion of Section 390-4.11 (C) (1) (c) shown above in bold and

underline. The Town should consult with Town Counsel with any questions regarding the allowed size of a Protected Use ADU.

C. Section 390-4.11 (C) (1) (d) – Bedroom Limits

Section 390-4.11 (C) (1) (d) limits ADUs to two bedrooms as follows (with emphasis added):

> **There shall be no more than 2 bedrooms in the ADU.**

We disapprove the text in Section 390-4.11 (C) (1) (d) that imposes a bedroom limitation on ADUs, as shown above in bold and underline, because the text conflicts with G.L. c. 40A, § 3's prohibition on regulating the interior area of a single-family residential building. General Laws Chapter 40A, Section 3 provides in pertinent part as follows:

> No zoning . . . by-law shall regulate or restrict the interior area of a single family residential building . . . provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. . . .

General Laws Chapter 40A, Section 3, prohibits the regulation or restriction of the interior area of single-family residences. 81 Spooner Road, LLC v. Town of Brookline, 452 Mass. 109, 113 (2008). In 81 Spooner Road, the court concluded that a Brookline by-law creating a maximum gross floor area to lot size ratio was not inconsistent with G.L. c. 40A, § 3. The court concluded that the language of G.L. c. 40A, § 3, prohibiting the regulation of interior space prohibits only 'direct' regulation of interior area, and not incidental effects of reasonable dimensional, bulk, and density requirements." 81 Spooner Road, 452 Mass. at 116; see also, White v. Armour, 2008 WL 4946478 (Mass.Land Ct.) (Weston's prohibition against a Residential Gross Floor Area the "greater of 3,500 s.f. or 10% of the lot area up to a maximum of 6,000 s.f." was a valid regulation of bulk and height of structures and not a violation of G.L. c. 40A, § 3).

As the court in 81 Spooner Road, explained,

> Construing the prohibition in s. 3, second par., to mean direct regulation of interior area is sensible. It is based on a sound method of analysis used to resolve similar internal conflicts in other statutes, and it would make s. 3, second par., with its proviso a coherent and internally consistent piece of legislation. It permits municipalities to effectuate the legislative purpose of zoning, as set forth in St. 1975, c. 808, s. 2A, while simultaneously preserving the legislative policy against snob zoning and another stated purpose of zoning: "to encourage housing for persons of all income levels.

81 Spooner Road, 452 Mass. at 117.

An ADU is defined under G.L. c. 40A, § 1A and the Regulations as a "self-contained housing unit." An ADU is not defined under state law to be a two-family or a multi-family dwelling. Therefore, we determine an ADU is a single-family residential building for purposes of G.L. c. 40A, § 3 and therefore Section 390-4.11 (C) (1) (d)'s two-bedroom limitation regulates the

interior space of an ADU in violation of Section 3's prohibition against regulating interior space. We therefore disapprove this Section shown above in bold and underline.

Section 390-4.11 (C) (1) (d)'s bedroom limitation is also an impermissible use and occupancy restriction under the statute. The Regulations define "Use and Occupancy Restrictions" as:

> A Zoning restriction, Municipal regulation . . . zoning approval or other requirement imposed by the Municipality that limits the current, or future, use or occupancy of the Protected Use ADU to individuals or households upon the characteristics of, or relations between, the occupants, 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.

For these reasons, Section 390-4.11 (C) (1) (d)'s two-bedroom limitation conflicts with G.L. c. 40A, § 3 and the Regulations' prohibition against regulating the interior of a single-family residential building and we disapprove this text as shown above in bold and underline.[11]

D. Section 390-4.11 (C) (1) (i) – Dimensional Requirements

Section 390-4.11 (C) (1) (i) imposes dimensional requirements for ADUs as follows (with emphasis added):

> **The ADU shall conform to the same dimensional requirements as the principal dwelling unit but may be no closer to the side and rear lot line as an accessory structure of the height of the structure, so long as the height is no greater than the setback. Notwithstanding the foregoing, for lots which are less than, 10,000 square feet, the setback requirements for the rear or side yard shall be five (5) feet.**

We disapprove the text shown above in bold and underline that requires an ADU to comply with the same dimensional regulations "as the principal dwelling" because this provision conflicts with the Regulations, 760 CMR 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards." The Regulations prohibit a town from imposing a more restrictive dimensional standard on an ADU than that imposed on the Principal Dwelling, a Single-Family Residential Dwelling or an accessory structure in the Zoning District where the ADU is located, whichever is most permissive, 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

[11] Although not a basis of our disapproval, we note that a bedroom limitation for ADUs, would likely be found, on a full factual record, to be (1) an unreasonable regulation under 760 CMR 71.03 (3)(a); (2) violate the Dover Amendment protections given to ADUs under G.L. c. 40A, 3; and (3) violate Fair Housing laws that prohibits discrimination in providing housing based on a protected class, including family status (i.e., the presence of children in the household.) See 44 U.S.C. § 3604 (the Fair Housing Act [FHA]) and G.L. c. 151B, § 4, ¶ 6.

> 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.

Because Section 390-4.11 (C) (1) (i) would impose dimensional requirements that are the same as that for the principal dwelling, as opposed to that which is the more permissive regulation as between the Principal Dwelling, or a Single-family Residential Dwelling or an accessory structure in the Zoning District in which the Protected Use ADU is located, we disapprove Section 390-4.11 (C) (1) (i) shown above in bold and underline as it conflicts with the Regulations.

E. Section 390-4.11 (D) (2) – Submissions to the Building Inspector

Section 390-4.11 (D) (2) requires an applicant for approval of an ADU to submit documents to the Building Inspector as follows (with emphasis added):

> **At a minimum,** the Applicant shall submit a site plan and architectural drawings to the Bulidng Commissioner which are consistent with the submission requirements of the Rules and Regulations of the Zoning Board of Appeals.

We disapprove the words "At a minimum" because this provision would allow the Building Inspector to require unlimited additional information, including additional zoning approvals, in the discretion of the Building Commissioner. This discretion conflicts with G.L. c. 40A, § 3 and the Regulations. General Laws Chapter 40A, Section 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 as follows:

> Municipalities shall not prohibit, impose a Prohibited Regulation, or Unreasonable Regulation, or except as provided under 760 CMR 71.03 (5) and 760 CMR 71.03 (c), require a special permit, wavier, variance or other zoning relief or discretionary zoning approval for the use of land or structures for a Protected use ADU, including 12 the rental thereof, in a Single-family Residential Zoning District; provided that Municipalities may reasonably regulate a Protected Use ADU, subject to the limitations under 760 CMR 71.00.

Section 390-4.11 (D) (2) does not define the meaning of "at a minimum" nor does it provide the Building Commissioner with any standards or criteria to guide them in determining when and what type of additional zoning information or approvals would be required. Absent any standards or criteria, "at a minimum" provides the Building Commissioner with broad discretion and is the type of discretionary zoning approval prohibited under G.L. c. 40A, § 3 and the Regulations.
For these reasons, we disapprove the text from Section 390-4.11 (D) (2) shown 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 24 to ensure that the Town applies these provisions consistent with G.L. c. 40A, § 3 and the Regulations.

A. Section 390-4.11 (E) – Relationship to non-conformities

Section 390-4.11 (E) imposes requirements related to ADUs in non-conforming principal dwellings as follows:

> If an ADU is proposed for a pre-existing, non-conforming single-family primary residence, the requirements of Section §390-3.4.C of this Zoning Bylaw shall apply provided that, in the event a special permit is required, no such special permit may consider the ADU use or impose conditions on such use.

Although Section 390-4.11 (E) requires compliance with Section 390-3.4C and references a special permit requirement, Section 390-3.4C does not require a special permit. Section 390-3.4C provides as follows:

> Change, extension, reconstruction or alteration. As provided in MGL c. 40A, § 6. Such preexisting nonconforming structure or use may be changed, extended, reconstructed or altered with the approval of the Building Commissioner if such change, extension, reconstruction or alteration would not increase the habitable floor area by 25% or more and if the Building Commissioner determines that the nonconforming nature of the structure would not be increased per Subsection C (2) below. Once changed to a conforming use, no structure or land shall be permitted to revert to a nonconforming use.

It appears that Section 390-4.11 (E) may intend to reflect the requirements of G.L. c. 40A, § 6 regarding pre-existing nonconforming structures that provides: "Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood."

Because Section 390-4.11 (E) incorporates Section 390-3.4C and Section 390-3.4C does not require a special permit, we approve this provision. However, to be clear, the Town cannot require a special permit for a Protected Use ADU including an ADU proposed for a pre-existing non-conforming structure. We encourage the Town to consult with Town Counsel to determine if this section should be amended at a future Town Meeting to make it clear that Section 390-3.4C does not require a special permit and therefore there is no special permit requirement imposed upon the ADU.

Moreover, to the extent that Section 390-4.11 (E) intends to require a finding (since it does

not require a special permit), we offer additional comments for the Town's consideration to ensure Sections 390-4.11 (E) and 390-3.4C are applied consistent with the Regulations.

ADUs are a Dover Amendment protected use, so only in limited circumstances may it be appropriate for the Town to require even a Section 6 *finding* for an ADU associated with a nonconforming structure or lot. See Petrucci v. Bd. of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998) (no Section 6 "finding" required where applicant successfully demonstrated the unreasonableness of the application of the dimensional requirements to the structure…").

In circumstances where the regulations creating the increased nonconformity can lawfully be applied to the ADU, the Town may require that the applicant demonstrate that the altered structure use will not be substantially more detrimental to the neighborhood than the existing structure so long as the town applies objective, nondiscretionary criteria and no special permit is required. However, changing the use of a nonconforming structure to an ADU use, a statutorily protected use, cannot trigger scrutiny of the impact on a neighborhood because the ADU is a Dover Amendment protected use and cannot be denied. Moreover, a Protected Use ADU is not "nonconforming" to any zoning rule that cannot lawfully be applied to it under the ADU statute and regulations. See Watros v. Greater Lynn Mental Health and Retardation Ass'n, Inc., 421 Mass. 106, 115 (1995); see also Ellsworth vs. Mansfield, Case No. 08 MISC 382311, 2011 WL 3198174, at *4 (Mass. Land Ct. July 25, 2011) (no Section 6 finding required for Dover-protected educational use because "effectively, G.L. c. 40A, § 3 removes the non-conformity (the lack of frontage) because it would not be a 'reasonable regulation' of the proposed school in these circumstances"). As a result, construction or alteration of a structure for an ADU will not increase a nonconformity unless the nonconformity is created by regulations that can reasonably be applied to the ADU. We strongly suggest that the Town discuss the application of G.L. c. 40A, § 6 and the Section 390-4.11 (E) with Town Counsel.

B. Section 390-4.11 (F) – ADU Existing Before Adoption of By-law

Section 390-4.11 (F) addresses ADUs in existence prior to the adoption of Article 24. Although we approve this provision, the Town must ensure it is applied consistent with the Regulations.

Specifically, if a previously approved ADU is now intended as a Protected Use ADU under G.L. c. 40A, 3, it can no longer remain subject to any unlawful provision previously required for an ADU. We strongly encourage the Town to consult with Town Counsel regarding an amendment to Section 390-4.11 (F) that makes it explicitly clear that any prohibited or unreasonable regulations that were imposed on a previously approved ADU as part of the prior special permit process 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 390-4.11 (F).

VI. Conclusion

We partially approve Article 24, except for: (1) the words "single-family" and "existing single-family" from several provisions; (2) a portion of Section 390-4.11 (C) (1) (c)'s size limitation on ADUs; (3) Section 390-4.11 (C) (1) (d)'s bedroom limitation; (4) Section 390-4.11 (C) (1) (i)'s dimensional requirements; and (5) a portion of Section 390-4.11 (D) (2)'s grant of discretion to the building inspector regarding ADU zoning approval 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 24 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,

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