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April 1, 2026

Tara J. Whiting-Wells, Town Clerk
Town of West Tisbury
P.O. Box 278
West Tisbury, MA 02575

Re: West Tisbury Annual Town Meeting of April 8, 2025 -- Case # 11740
Warrant Articles # 28, 29, 30, 31, 32, 33, and 34 (Zoning)
Warrant Articles # 11, 40, and 41 (General)[1]

Dear Ms. Whiting-Wells:

Articles 28, 29, 30, 31, 32, 33, and 34 – We approve Articles 28, 29, 30, 31, 32, 33, and 34 from the April 8, 2025 West Tisbury Annual Town Meeting. Our comments on Articles 29 and 32 are provided below.

Articles 29 and 32 – Under Article 29 and Article 32, the Town voted to amend its zoning by-laws regarding Accessory Dwelling Units ("ADUs") by adding a new Section 4.4-9 and amending Section 14.1 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]

[1] In a decision issued July 23, 2025, we approved Articles 11 and 40, we extended our deadline for a decision on Article 41 for 60 days until September 21, 2025 by agreement with Town Counsel as authorized by G.L. c. 40, § 32, and we placed Articles 28, 29, 30, 31, 32, 33, and 34 on "HOLD" pending receipt of information from the Town in order to complete our review. On September 17, 2025 we extended our deadline on Article 41 for an additional 30 days and issued a decision on this Article on October 20, 2025. On November 3, 2025, we placed Articles 28, 29, 30, 31, 32, 33, and 34 on "299 hold" under G.L. c. 40, § 32 due to a procedural defect in their adoption. On March 23, 2026, the Town Clerk certified that the Town had followed all notice and publishing requirements of G.L. c. 40, § 32 and no claims were received for these Articles. The Attorney General is therefore authorized to, and does, waive the procedural defect for Articles 28, 29, 30, 31, 32, 33, and 34.

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

We approve Article 29 and Article 32 because the approved text does not conflict with state law. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the Constitution for the Attorney General to disapprove a by-law). In this decision we summarize the by-law amendments adopted under Articles 29 and 32; 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 approve the zoning by-law amendments adopted under Articles 29 and 32.

I. Summary of Articles 29 and 32

Under Article 29, the Town voted to amend its zoning by-laws to add a new Section 4.4-9 that imposes requirements on ADUs, including allowing ADUs as of right in the zoning districts where single-family residential dwellings are a permitted or allowed use.[4] The by-law imposes additional restrictions on ADUs including allowing only one ADU by right [Section 4.4-9 (1)], requiring compliance with the Town's general by-laws and state building codes [Section 4.4-9 (3)], parking requirements [Section 4.4-9 (8)], and prohibiting an ADU from being used as a short-term rental [Section 4.4-9 (11)].

Under Article 32 the Town voted to amend its zoning by-laws to make specific changes to Section 14.1, "Definitions," to include a new definition for ADU, Protected Use ADU and Short Term Rental.

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

Our review of Articles 29 and 32 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

[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] The Town's zoning districts include the Rural ("RU"), Village Residential ("VR"), Mixed-Use Business "MB"), Light Industrial ("LI"), and Light Industrial (Airport) ("LI 2") districts. 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 Table, single-family dwellings are allowed in the RU, VR, and MB zoning districts and prohibited in the LI and LI 2 zoning districts. The Town must ensure that Protected Use ADUs are allowed in any Single-family Residential Zoning District, and we encourage the Town to consult with Town Counsel on any questions on this issue.

sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973). "

Articles 29 and 32, as amendments 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."[5] The Regulations define key terms and prohibit certain "Use and Occupancy Restrictions" defined in Section 71.02 as follows:

[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 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).

> 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"[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).

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[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.

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 Articles 29 and 32.

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

A. Section 4.4-9 (8) - Parking

Section 4.4-9 (8) imposes parking requirements for an ADU as follows: "A maximum of two additional parking spaces, in addition to the spaces provided for the Principal Dwelling, may be provided for the ADU."

Although we approve this provision allowing for a "maximum" of two parking spaces for an ADU, the Town cannot require more than one parking space for an ADU and cannot require any parking space for an ADU located with 0.5-mile radius of a transit station. See 760 CMR 71.02 (2) (b) regarding minimum parking space requirements. It appears that Section 4.4-9 (8) is not requiring two parking spaces, but is allowing the property owner to choose to have more than one parking space if they so elect.

Based on our standard of review, we cannot conclude that Section 4.4-9 (8) allowing a maximum of two parking spaces for an ADU conflicts with G.L. c. 40A, § 3 and the Regulations. However, the Town must ensure this provision is applied consistent with G.L. c. 40A, § 3 and the Regulations and that this provision is not used by the Town to require the property owner to provide more than one parking space or provide any parking spaces for a Protected Use ADU that is located within a 0.5 mile radius of a Transit Station. The Town should consult with Town Counsel with any questions on this issue.

V. Conclusion

We approve Article 29 and Article 32. The Town should consult closely with Town Counsel when applying the 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 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,"

[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."

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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