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November 12, 2025

Susan C. Kelley, Town Clerk
Town of Duxbury
878 Tremont Street
Duxbury, MA 02332

Re: Duxbury Special Town Meeting of June 16, 2025 – Case # 11967
Warrant Articles # 1, 2, and 3 (Zoning)

Dear Ms. Kelley:

Article 2 - Under Article 2, the Town amended its zoning by-laws by deleting Section 410.6, "Accessory Apartment Special Permit and Restrictions," and inserting a new Section 410.6, "Protected Use Accessory Dwelling Units (ADUs)," to allow ADUs as of right in compliance with G.L. c. 40A, § 3 and the implementing Regulations promulgated by the Executive Office of Housing and Livable Communities ("EOHLC"), 760 CMR 71.00, "Protected Use Accessory Dwelling Units" ("Regulations").[1,2]

We partially approve the amendments adopted under Article 2 because the approved text does not conflict with G.L. c. 40A, § 3 and the Regulations. However, we disapprove the references to "single-family" in Section 410.6 (3) and Section 410.6 (6)'s dimensional requirements that conflict with the Regulations, as explained below. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the Constitution for the Attorney General to disapprove a by-law).

In this decision we summarize the by-law amendments adopted under Article 2; 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

[1] In a decision issued on September 29, 2025, we approved Articles 1 and 3 and by agreement with Town Counsel pursuant to G.L. c. 40, § 32 extended our deadline for Article 2 for 45-days until November 12, 2025.

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

[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.

of review, we partially approve the zoning by-law amendments adopted under Article 2. In addition, we offer comments for the Town's consideration regarding certain approved provisions.

During the course of our review of Article 2 we received correspondence from a Duxbury resident urging us to disapprove several provisions in Section 410.6 contending that the provisions are unreasonable or otherwise in conflict with G.L. c. 40A, § 3 or the Regulations. We appreciate these communications as they have aided our review. However, the issues asserted in the opposition do not provide us with grounds to disapprove certain ADU provisions. Rather, we offer comments below for the Town's consideration to ensure that the provisions are applied consistent with G.L. c. 40A, § 3 and the Regulations.

I. Summary of Article 2

Under Article 2, the Town amended its zoning by-laws by deleting Section 410.6, "Accessory Apartment Special Permit and Restrictions," and inserting a new Section 410.6, "Protected Use Accessory Dwelling Units (ADUs)," to allow Protected Use ADUs as of right in single family residential zoning districts. The new Section 410.6 defines ADU related terms, including definitions for ADUs, Gross Floor Area, Protected Use ADU, and Transit Station. The new Section 410.6 also imposes requirements on ADUs, including design, dimensional, use, and parking requirements. Finally, the new Section 410.6 imposes site plan review for a Protected Use ADU in a new structure or building.

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

Our review of Article 2 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 2, 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

An ADU that is nonconforming to Zoning shall still qualify as a Protected Use ADU if it otherwise meets this definition."

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."[4] The Regulations define key terms and prohibit certain "Use and Occupancy Restrictions" defined in Section 71.02 as follows:

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

While a municipality may reasonably regulate a Protected Use ADU in the manner authorized by 760 CMR 71.00, such regulation cannot prohibit, require a special permit or other discretionary zoning approval for, or impose a "Prohibited Regulation"[5] or an "Unreasonable

[4] 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).

[5] 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

Regulation" on, a Protected Use ADU. See 760 CMR 71.03, "Regulation of Protected Use ADUs in Single-Family Residential Zoning Districts."[6] 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.[7] 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.[8] Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 2.

Dwelling.

[6] 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).

[7] 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.

[8] 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. Text Disapproved from Article 2 Because it Conflicts with G.L. c. 40A, § 3 and the Regulations

A. Section 410.6 (3)'s References to "Single-Family" Dwelling

Section 410.6 (3) requires the Protected Use ADU to maintain the single-family characteristics of the principal dwelling as follows:

> Preservation of **single-family** characteristics. Any attached or detached Protected Use ADU shall retain the **single-family** characteristic of the Principal Dwelling, except for the provision of an additional access or egress.

We disapprove the text "single-family" as shown above in bold and underline that references Protected Use ADUs in the context of single-family dwellings 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, requiring an ADU to keep the "single-family" characteristics of the principal dwelling conflicts with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the text shown above in bold and underline.

B. Section 410.6 (6) "Setbacks and Height"

Section 410.6 (6) requires a Protected Use ADU within a principal dwelling to comply with the setback and height requirements applicable to the "primary structures" and requires a Protected Use ADU within a newly constructed detached structure to comply with the setbacks, height, and separation requirements applicable to accessory structures.

We disapprove Section 410.6 (6)'s dimensional requirements because this provision conflicts with the Regulations as explained below.

The Regulations require that any dimensional requirements imposed upon an ADU be the most permissive requirements between the *principal dwelling*, a single-family dwelling or an accessory structure. Specifically, 760 CMR 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards," requires the Town to apply the most permissive dimensional standard, in relevant part as follows, with emphasis added:

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

Section 410.6 (6) requires a Protected Use ADU within a principal dwelling to comply with the setback and height requirements of the "primary structure." "Primary Structure" is not defined in the new Section 410.6 (6) nor in the Town's existing by-laws. Therefore, it is unclear exactly what setback and height requirements a Protected Use ADU must comply with. Regardless, the Regulations require that the dimensional requirements must be the most permissive between the *principal dwelling*, a single-family residential dwelling, or an accessory structure in the zoning district where the ADU is located. Because Section 410.6 (6) requires a Protected Use ADU within a principal dwelling to comply with the setback and height requirements for a "primary structures" and requires a detached Protected Use ADU to comply with the dimensional requirements for accessory structures, Section 410.6 (6) does not impose most permissive dimensional requirements on a Protected Use ADU as set forth in the Regulations. For this reason, Section 410.6 (6) conflicts with the Regulations.

IV. Additional Comments Regarding Text Approved Under Article 2

We approve the remaining amendments adopted under Article 2 and offer comments for the Town's consideration regarding certain provisions to ensure they are applied consistent with G.L. c. 40A, § 3 and the Regulations.

A. Section 410.6 (5) "Legal Ownership"

Section 410.6 (5) provides that the ADU shall not be legally separated or conveyed from the principal dwelling and requires that the ADU remain an accessory use. 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 410.6 (5) is in conflict with state law.

In reviewing this provision, we have considered the question whether the by-law's requirement that the ADU not be separated or conveyed from 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 410.6 (5)'s provisions are 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 this provision 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 410.6 (5)'s ownership 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.

B. Section 410.6 (8) (a) "Site Plan Review"

Section 410.6 (8) (a) requires site plan review for Protected Use ADUs in newly constructed building and structures. Sections 410.6 (8) (a) (a) through (f) lists the information that must be included in the site plan, including plans showing the location of structures, easements, and landscaping on the property. In addition, Sections 410.6 (8) (a) (g) through (i) require the site plan to address certain features of the ADU as follows:

> g. The detached Protected Use ADU's exterior lighting shall not cast a glare onto adjacent properties.
>
> h. Any exterior decks and or patios shall be located so as not to intrude upon or generate excessive noise to adjoining properties.
>
> i If the detached Protected Use ADU incorporates an upper-story balcony or roof deck, such balcony or roof deck shall not be oriented to face any abutting residential use so as not to intrude upon the privacy of adjoining properties.

During the course of our review, we received input urging our disapproval of these site plan review provisions because they are unreasonable and therefore conflict with the Regulations. As discussed in more detail below, we cannot, based on our standard of review, conclude that Section 410.6 (8)'s site plan review provisions are unreasonable and in conflict with the Regulations.

The Regulations, 760 CMR 71.03 (3)(b)(5), "Site Plan Review," require site plan review requirements for Protected ADUs to be "clear and objective" and not impose terms and conditions that are unreasonable or inconsistent with the G.L. c. 40A, § 1A's definition of the as-of-right process.[9] Moreover, 760 CMR 71.03 (3), "Unreasonable Regulations," Section (b)(1), "Design Standards," prohibits a Town from imposing any design standard on an ADU that "(a) Would 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) Is 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 Standard" as: "Clear, 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."

In applying these site plan review requirements, and in particular to the provisions quoted above, the Town must ensure that its site plan approval requirements are not unreasonable or inconsistent with the site plan review process for Dover Amendment protected uses. See The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 33 (1979) (town cannot require applicant to submit site plan and "informational statement" with details about its landscaping plans, projections about the increased impact on municipal services, and other details outside the scope of what the town could lawfully regulate under the Dover Amendment). Although 760 CMR 71.03 (3)(5) allows site plan review for a Protected Use ADU, it requires that such site plan process be "clear and objective" and not impose terms or conditions that are "unreasonable or inconsistent" with an as-of-right process. Therefore, any site plan process that the Town imposes upon an ADU must be limited in its scope to only those requirements that are permissible under the Regulations as applied to a Dover Protected ADU. The Town should consult with Town Counsel with any questions on this issue.

Further, as to the requirements regarding the location of exterior decks, patios, roof-decks, and balconies, based on our standard of review, we cannot conclude that these requirements are unreasonable and therefore prohibited under 760 CMR 71.03, and for that reason we approve them. However, in applying these provisions, 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, these requirements should be analyzed on a case by case basis as it relates to a particular property because in some circumstances the provisions could be unreasonable as applied to a particular property. If these requirements, or any requirements in Section 410.6 (8) (a) 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

[9] General Laws Chapter 40A, Section 1A defines "As of right" as a "development that may proceed under a zoning ordinance or by-law without the need for a special permit, variance, zoning amendment, waiver or other discretionary zoning approval."

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.

Lastly, Section 410.6 (8) (a) (j) requires compliance with Section 615.7 of the Town's existing zoning by-law regarding the procedures for site plan review, including Section 615.7 (5) that authorizes the Planning Board to deny site plan review as follows:

> Within thirty (30) days after receipt of a completed site plan by the Planning Director, the Planning Board shall review said Site Plan in a public meeting, together with any comments received from Town agencies or departments on said plan. Site Plans shall be reviewed for consistency with zoning and other applicable regulations and standards. Within forty (40) working days of receiving a Site Plan, the Planning Board shall notify the applicant and state reasons for any approval, conditional approval or disapproval.

The Town must apply Section 615.7 (5) consistent with the limited use of site plan review for as of right (such as a Protected Use ADU). For as of right uses, site plan review is limited to the regulation of the use rather than its prohibition. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). The scope of site plan approval for as of right uses is therefore limited to imposing reasonable terms and conditions on the use. Id. citing SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 107-110 (1984). "[W]here the proposed use is one permitted by right the planning board may only apply substantive criteria consistent with Prudential Ins. Co. v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278 (1986) (i.e., it may impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use)." Osberg v. Planning Bd. of Sturbridge, 44 Mass. App. Ct. 56, 59 (1997). "[I]f the specific area and use criteria stated in the by-law [are] satisfied, the board [does] not have discretionary power to deny…[approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use." Prudential, 23 Mass. App. Ct. at 281-282 (internal quotations and citations omitted). The Town should consult closely with Town Counsel when applying the existing Section 615.7 (5) site plan requirements, to ensure the requirements are not applied in a manner that conflicts with the Dover protections afforded to an ADU.

C. Section 410.6 (9)'s Requirements for Nonconforming Property

Section 410.6 (9) imposes requirements on ADUs added to pre-existing nonconforming structures and lots as follows:

> If the principal dwelling to which an ADU will be added is a pre-existing nonconforming structure or is located on a nonconforming lot, and the alteration or extension to add an ADU will increase such nonconformity or create a new nonconformity, said extension or alteration shall be subject to G.L. c. 40A, Section 6 and Section 401 of the Zoning Bylaw, provided however, that a special permit shall not be required but a majority of the Zoning Board of Appeals shall make a finding that the proposed alteration of the structure is not substantially more detrimental to the neighborhood than the existing structure or use.

We approve Section 410.6 (9) because it does not conflict with state law. See Amherst, 398 Mass. at 795-96. However, we offer comments for the Town's consideration to ensure this Section 410.6 (9) is applied consistent with the Regulations, as explained below.

The Regulations, 760 CMR 71.02's, definition of a "Protected Use ADU" addresses the issue of non-conformity and states as follows: "An ADU that is nonconforming to Zoning shall still qualify as a Protected Use ADU if it otherwise meets this definition." In addition, 760 CMR 71.03 (9), "Pre-existing Nonconforming structures," prohibits a Town from prohibiting an ADU in a nonconforming existing structure as follows: "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." In light of these provisions in the Regulations, the Town should consult with Town Counsel regarding the proper application of Section 8410.6 (9).

Section 410.6 (9) reflects 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." Section 410.6 (9) makes it clear that a "finding" by the Zoning Board of Appeals will be required and not a special permit. For this reason, we approve Section 410.6 (9). However, in applying Section 410.6 (9), because ADUs are a Dover Amendment protected use, 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 encourage the Town to consult with Town Counsel regarding an amendment to Section 410.6 (9) at a future Town Meeting to explicitly state that special permit is not required. In the interim, the Town must ensure that Section 410.6 (9) is applied consistent with the Regulations, as explained herein.

V. Conclusion

Except for text in Section 410.6 (3) and all of Section 410.6 (6) that we disapprove, we approve the remainder of the amendments adopted under Article 2. However, the Town should consult closely with Town Counsel when applying these provisions to ensure they are applied consistent with G.L. c. 40A, § 3 and 760 CMR 71.00. If the provisions adopted under Article 2 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
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cc: Town Counsel Jeffrey T. Blake