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November 4, 2025

Jessica Colpitts, Town Clerk
Mashpee Town Clerk's Office
16 Great Neck Rd North
Mashpee, MA 02649

RE: Mashpee Annual Town Meeting of May 6, 2025 - Case # 11758
Warrant Article # 24 (Zoning)
Warrant Article # 25 (General) [1]

Dear Ms. Colpitts:

Article 24 – Under Article 24, the Town amended its zoning by-laws regarding 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").[2]

We partially approve the amendments adopted under Article 24 because the approved text does not conflict with G.L. c. 40A, § 3 and the Regulations. However, we disapprove and delete[3] the following provisions because this text conflicts with G.L. c. 40A, § 3 and 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)):

- Sections 174-45.4 (B) and (D)'s references to "single-family" dwellings;

[1] In a decision issued August 5, 2025 we approved Article 25 and by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended the deadline for our review of Article 24 for 60-days until October 5, 2025. We subsequently extended our deadline for review of Article 24 for an additional 30 days until November 4, 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.

- the portion of Section 174-45.4 (B) that prohibits ADUs less than 400 square feet;

- the portion of Section 174-45.4 (B) that defines "Gross Floor Area";

- the portion of Section 174-45.5 (D) that authorizes the Building Inspector to require additional information to show that the ADU does not negatively impact abutting properties;

- the portion of Section 174-45.5 (E) requiring "at least" one off-street parking space for an ADU; and

- the portion of Section 741-45.4 (H) that prohibits ADUs from being used for boarding and lodging.

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 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.

I. Summary of Article 24

Under Article 24, the Town amended several sections of its zoning by-laws to allow ADUs by right in compliance with G.L. c. 40A, § 3 and the Regulations. Specifically, the Town amended Section 174-3, "Terms Defined," to delete the definition of "Accessory Apartment," and insert a new definition for "Accessory Dwelling Unit." In addition, under Article 24 the Town amended Section 174-25, "Table of Use Regulations," to allow ADUs as of right in the Town's residential zoning districts. Lastly, the Town made specific changes to Section 174-45.4, "Accessory Dwelling Units," by adding new text and deleting existing text. As amended Section 174-45.4, imposes dimensional, design, and other use requirements on ADUs.

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

[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."

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."[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

[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).

> 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 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

Two sections of Section 174-45 refer to ADUs in the context of single family homes, as follows (with emphasis added):

> The design, installation and use of an accessory dwelling unit shall be secondary and incidental to the principal use of the structure as a **single family** home.

In addition, Section 174-45.4 (D) pertains to the exterior design of the ADU and provides as follows:

> Modifications to the exterior of an existing principal structure resulting from the installation of an accessory dwelling unit located within the same structure as the applicant's home shall be consistent with the principal structure's predominant character as a **single-family** home.

We disapprove the text "single family" as shown above in bold and underline that references 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):

[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."

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 single-family homes 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 174-45.4 (B)'s Prohibition on ADUs Less than 400 Square Feet

Section 174-45.4 (B) prohibits ADUs that are less than 400 square feet in pertinent part as follows:

The gross floor area of an accessory dwelling unit shall not be less than four hundred (400') square feet unless the gross floor area of said structure is less than eight hundred (800') square feet.

We disapprove and delete the text shown above in bold and underline that prohibits ADUs under 400 square feet in size unless the gross floor area of the principal structure is less than 800 square feet because this prohibition conflicts with G.L. c. 40A, § 3 and the Regulations that require the Town to allow ADUs that are no larger in gross floor area than one-half the gross floor area of the principal dwelling or 900 square feet, whichever is smaller, as of right, but permit no other limitation on the minimum size of an ADU. See West Street Associates, LLC, 488 Mass. at 324.

General Laws Chapter 40A, Section 3 and the Regulations require municipalities to allow Protected Use ADUs as of right up to half the gross floor area of the principal dwelling or 900 square feet, whichever is smaller. See 760 CMR § 71.02's definitions of "Accessory Dwelling Unit (ADU)" (defining the size of an ADU as no "larger in gross floor area than one-half the gross floor area of the principal dwelling or 900 square feet, whichever is smaller.") 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."). Limiting ADUs to no smaller than 400 square feet 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, and we therefore disapprove the text shown in bold and underline above from Section 174-45.4 (B).

In addition, the prohibition on ADUs smaller than 400 square feet unless the principal dwelling is less than 800 square feet conflicts with 760 CMR 71.03 (b)(2)(a) that prohibits towns from imposing dimensional requirements that are more restrictive than required for the Principal Dwelling, Single-Family Dwelling or other accessory structure in the zoning district where the Protected Use ADU is located, whichever is most permissive. Based on our review of the Town's dimensional requirements, the Town does not prohibit other structures less than a certain size, include a number of square feet. By imposing a minimum size requirement on ADUs that is not imposed on other structures, the Town is imposing a dimensional standard that is more restrictive

than what is required for principal dwelling, single-family dwelling or accessory dwelling in violation of 760 CMR 71.03 (b) (2) (a).

Further, by imposing a minimum size requirement for ADUs, Section 174-45.4 (B) constitutes an unreasonable regulation in conflict with the Regulations. See, 760 CMR 71.03 (3) (a restriction or regulation "shall be unreasonable" if, when applied to a Protected Use ADU it "[d]oes not serve a legitimate Municipal interest sought to be achieved by local Zoning" or "[s]ubstantially diminish[es] or interfere[s] with the use or development of a Protected Use ADU without appreciably advancing the Municipality's legitimate interest."). State law, including the State Sanitary and Building Codes, establishes minimum dwelling and room sizes necessary for habitability. Size restrictions beyond the minimum requirements set by state law function as an impermissible Use and Occupancy Restriction in violation of the Regulations. See 760 CMR 1.03 (2) (c) (prohibiting regulations that impose use and occupancy restrictions on ADUs) and 760 CMR 71.02's "Use and Occupancy Restriction" definition (defining a Use and Occupancy restriction as a zoning restriction that limits the type or number of occupants beyond what is required by applicable state codes). For these additional reasons, we disapprove the Section 174-45.4 (B)'s prohibition on ADUs less than 400 square feet.

C. Section 174-45.4 (B)'s Definition of Gross Floor Area

Section 174-45.4 (B) defines "Gross Floor Area" as follows:

> Gross Floor Area shall be the sum of the areas of all floors of the building, including basement, cellars, mezzanine and intermediate floored tiers and penthouses of headroom height, measured from the exterior faces of exterior walls or from the centerline of walls separating buildings, but excluding: (1) covered walkways, open roofed-over areas, porches and similar spaces; and (ii) pipe trenches, exterior terraces or steps, chimneys, roof overhands [sic] and similar features.

We disapprove Section 174-45.4 (B)'s definition of "Gross Floor Area," as quoted above because by including a definition different than the Regulations, Section 174-45.4 restricts the gross floor area 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 and the Regulations require municipalities to allow ADUs as of right up to half the gross floor area of the principal dwelling or 900 square feet, whichever is smaller. See 760 CMR § 71.02's definitions of "Accessory Dwelling Unit (ADU)" (defining the size of an ADU as no "larger in gross floor area than one-half the gross floor area of the principal dwelling or 900 square feet, whichever is smaller.") 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 "Gross Floor Area" 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.

The by-law's definition of "Gross Floor Area" does not match the definition provided in the current Regulations. [10] By defining "Gross Floor Area" differently than the Regulations, the by-law limits the size of an ADU than otherwise allowed as of right under G.L. c. 40A, §§ 1A and 3, and for this reason we disapprove Section 174-45.4 (B)'s definition of "Gross Floor Area."

E. Section 174-45.4 (D)'s Requirement for Additional Information

Section 174-45.4 (D) requires an applicant for an ADU to provide additional information showing that an ADU does not negatively impact abutting properties as follows:

> Appropriate landscaping may be required in order to provide a buffer between the applicant's lot and abutting properties. **The Building Inspector, if circumstances dictate, may request additional information from the applicant to demonstrate that the accessory dwelling unit will not negatively impact abutting property**.

We disapprove and delete the text shown above in bold and underline because it conflicts with G.L. c. 40A, § 3 and the Regulations. Specifically, the Regulations prohibit a Town from imposing zoning relief or discretionary zoning approval and conditions that are unreasonable or inconsistent with an as-of-right process. See 760 CMR 71.01 (2) and 71.033 (1). Under Section 174-45.4 (D) the Building Inspector is given discretion to require additional information from an ADU applicant to show that the ADU will not negatively impact abutting property. Whether an ADU will negatively impact abutting property and when and what information the applicant must provide to show no negative impact results in the type of discretionary zoning approval prohibited under G.L. c. 40A, § 3 and the Regulations. For these reasons, we disapprove the text shown above in underline from Section 174-45.4 (D).

F. Section 174-45.5 (E)'s Parking Requirement

Section 174-45.5 (E) imposes parking requirements for ADUs, including requiring "at least" one parking for ADU as follows (with emphasis added):

> Notwithstanding the provisions of § 174-39, **at least** one (1) off-street parking space for accessory dwelling units more than 0.5 miles from a transit station.

We disapprove the text "at least" (as shown above in bold and underline), because as written, it allows the Town to impose more than one parking space for ADUs not located within a 0.5 mile radius of a transit station, which conflicts with the G.L. c. 40A, § 3 and the Regulations. General Laws Chapter 40A, Section 3 prohibits a municipality from requiring more than one parking space and from requiring a parking space for any ADU located within 0.5 miles of a transit station, as follows:

[10] The definition of "Gross Floor Area" appears to match the definition provided in the draft version of the Regulations.

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

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

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

The Regulations, 760 CMR 71.02, define "Transit Station" as: "[a] Subway Station, Commuter Rail Station, Ferry Terminal, or Bus Station." The regulations further define each of these terms, including the term "Bus Station," defined as: "[a] location serving as a point of embarkation for any bus operated by a Transit Authority."

Because Section 174-45.4 (E) requires "at least" one parking space for ADUs not located within a 0.5 mile radius of a transit station, this provision conflicts with G.L. c. 40A, § 3 and 760 CMR 71.03 (2) (b) and we therefore disapprove it (as shown above in bold and underline). The Town is authorized by statute and the Regulations to require one additional parking space for a Protected Use ADU that is not located within a 0.5 mile radius of a Transit Station. However, the Town cannot, as it has done here, require "at least" one parking space for ADUs not located within 0.5 miles of a transit station because as written, that requirement conflicts with the statute and Regulations. See West Street Associates, LLC, 488 Mass. 319, 324.

G. Section 174-45.4 (H)'s Prohibition on ADUs Being Used for Boarding and Lodging

Section 174-45.4 (H) limits the rental of an ADU as follows (with emphasis added):

> **An accessory dwelling unit shall not be used for boarding and lodging, or other commercial.** An accessory dwelling unit and principal dwelling unit to which it is accessory may be rented for periods of at least 30 consecutive days at a time and are prohibited from any use as rental units on a weekly or daily basis.

We disapprove Section 174-45.4 (H)'s prohibition on ADUs being used for boarding, lodging, and other similar commercial uses because this text conflicts with G.L. c. 40A, § 3 and the Regulations, which limit the Town's ability to regulate the rental of ADUs, as explained below.

General Laws Chapter 40A, Section 3 and the Regulations authorize a Town to prohibit ADUs from being rented as STRs and explicitly prohibit towns from prohibiting or unreasonably regulating the rental of ADUs. Section 3 provides in pertinent part as follows:

> No zoning...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, including...restrictions and prohibitions on short-term rental, as defined in section 1 of chapter 64G.

In addition, as to the rental of ADUs, G.L. c. 40A, § 1A and the Regulations, 760 CMR 71.02, define "Accessory Dwelling Unit," provide as follows:

> A self-contained housing unit, inclusive of sleeping, cooking and sanitary facilities on the same Lot as a Principal Dwelling, subject to otherwise applicable dimensional and parking requirements, that...(c) is subject to such additional restrictions as may be imposed by a municipality including but not limited to...prohibitions on Short-term Rental as defined in M.G.L. c. 64G, § 1; provided, however, that no Municipality shall unreasonably restrict the creation or rental of an ADU that is not a Short-term Rental.

And further, 760 CMR 71.03, "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts," prohibits a town from requiring "a special permit, waiver, variance or other zoning relief or discretionary zoning approval for the use of land or structures for a Protected Use ADU, including the *rental thereof*, in a Single-family Residential Zoning District..."

As an initial matter, the Town's by-laws do not define the terms "boarding," "lodging," or "other commercial use." However, under Section 174-45.4 (H) the Town expressly prohibits ADUs from being short-term rentals (STRs). Therefore, by including a prohibition on ADUs from being used for boarding, lodging, and other commercial use, the Town is seeking to prohibit the rental of ADUs other than as STRs. By granting municipalities express permission to prohibit only the rental of ADUs as STRs, G.L. c. 40A, § 3 and the Regulations disallow prohibitions of other types of rentals, including landlord/tenant rentals. See Harborview Residents' Comm., Inc. v. Quincy House. Auth., 368 Mass. 425, 432 (1975) ("a statutory expression of one thing is an implied exclusion of other things omitted from the statute"). Any prohibition on the rental of ADUs other than as STRs would be an unreasonable regulation in violation of Section 3 and the Regulations, especially in light of the statutory purpose. See 760 CMR 71.01 (1) (goal of ADU provisions of G.L. c. 40A, § 3 is to "encourage the production of accessory dwelling units throughout the Commonwealth with the goal of increasing the production of housing to address statewide, local, and individual housing needs for households of all income levels and at all stages of life"). For this reason, we disapprove and delete the text in Section 174-45.4 (H) that prohibits ADUs from being rented for boarding, lodging, and other similar commercial uses 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 24 to ensure that the Town applies these provisions consistent with G.L. c. 40A, § 3 and the Regulations.

A. Section 174-45.4 (D)'s Dimensional Requirements

Section 174-45.4 (D) requires ADUs to meet Section 174-31's dimensional requirements. Section 174-31 is the Town's "Land Space Requirements Table" that imposes minimum lot size, minimum frontage, setbacks, building height, and lot coverage requirements based on the zoning district where the ADU is located. We approve the Section 174-45.4 (D) because it does not conflict with state law. However, the Town must ensure these provisions are applied consistent with the statutory protections for ADUs and the Regulations.

The Regulations, 760 CMR 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards," that 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.

Because Section 174-31 imposes dimensional requirements based on the zoning district where the structure is located, the same dimensional requirements apply to ADUs that apply to other buildings and structures in the zoning districts. For this reason and based on our standard of review, we cannot conclude that Section 174-45.4 (D)'s dimensional requirements conflict with the Regulations. However, the Town the must apply the dimensional requirements consistent with 760 CMR 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards."

As an initial matter, the Town cannot impose Section 174-31's minimum lot area requirement on ADUs because the Regulations prohibit towns from imposing minimum lot area requirements on ADUs. In addition, 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.

Lastly, in applying the by-law's dimensional requirements, the Town must ensure that any imposed dimensional requirements (which cannot include minimum lot size requirements) 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.

B. Section 174-45.4 (I)'s Prohibition on Separate Ownership

Section 174-45.4 (I) prohibits the ADU from being sold separately and requires the ADU and the principal dwelling to stay in "common and single ownership." 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 174-45.4 (I) conflicts with state law.

In reviewing this provision, we have considered the question whether the by-law's requirement that the ADU and the principal dwelling remain in common ownership 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 174-45.4 (I)'s ownership requirements 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 174-45.4 (I)'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.

VI. Conclusion

We partially approve Article 24, except for: (1) Section 174-45.4 (B) and (D)'s references to "single-family" dwellings; (2) the portion of Section 174-45.4 (B) that prohibits ADUs less than 400 square feet; (3) the portion of Section 174-45.4 (B) that defines "Gross Floor Area"; (4) the portion of Section 174-45.5 (D) that authorizes the Building Inspector to require additional information to show that the ADU does not negatively impact abutting properties; (5) the portion of Section 174-45.5 (E) requiring "at least" one off-street parking space requirement for an ADU; and (6) the portion of Section 741-45.4 (H) that prohibits ADUs from being used for boarding and lodging or other commercial use.

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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