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April 14, 2025

Kathleen J. Cavanagh, Town Clerk
Town of East Bridgewater
P.O. Box 387
East Bridgewater, MA 02333

Re: East Bridgewater Special Town Meeting of October 7, 2024 -- Case # 11579
Warrant Article # 18 (Zoning)[1]

Dear Ms. Cavanagh:

Article 18 - Under Article 18, the Town voted to amend Section 6.D. (7), "Accessory Dwelling Units," by deleting existing text and inserting new text to allow Accessory Dwelling Units ("ADUs") as of right in compliance with G.L. c. 40A, § 3 and the implementing Regulations promulgated by the Executive Office of Housing and Livable Communities ("EOHLC"), 760 CMR 71.00, "Protected Use Accessory Dwelling Units" ("Regulations").[2]

We partially approve Article 18 because it 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). However, we disapprove the following provisions adopted under Article 18 because they conflict with G.L. c. 40A, § 3 and the Regulations:

- Sections 6.D. (7), (7).1, and (7).2 (b) that limits ADUs to single family dwellings;
- Section 6.D (7).1's definition of ADU;
- Section 6.D. (7).2 (d)'s limits on the number of stories for ADUs;
- Section 6.D. (7).2 (g) requiring the Building Commissioner's opinion regarding the ADU plans;
- Section 6.D. (7).2 (h) authorizing the Planning Board to require additional information for site plan approval of ADUs; and

[1] On January 10, 2205, by agreement with Town Counsel we extended our 90-day deadline for Article 18 for an additional thirty days until February 12, 2025. On February 10, 2025, we extended our deadline for an additional sixty days.

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

- Section 6.D. (7) (3) that limits ADUs from being rented for less than one year.

In this decision we summarize the by-law amendments adopted under Article 18; discuss the Attorney General's standard of review of town by-laws and the recent statutory and regulatory changes that allow Protected Use ADUs as of right;[3] and then explain why, based on our standard of review, we partially approve the zoning by-law amendments adopted under Article 18.[4] In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 18.

I. Summary of Article 18

Under Article 18, the Town voted to amend Section 6.D. (7) by deleting text and inserting new text to allow ADUs as-of-right in zoning districts where residential uses are allowed. As amended, the purposes of Section 6.D. (7) are to: (1) provide an opportunity to expand the uses of lots located within a residential zone "and which are currently improved by single-family dwellings;" (2) to diversify housing options and to provide greater accessibility to affordable living spaces; (3) to protect residential stability, enhance property values, and "to preserve the single-family character of neighborhoods;" and (4) to allow the Town to ensure code compliance and safety. Section 6.D. (7), "Purpose." Section 6.D. (7).1 defines the term "Accessory Dwelling Unit ("ADU")" as follows:

> an accessory living unit which is either located within or is attached to an existing single-family dwelling or is a stand-alone structure located on a lot improved by an existing single-family dwelling, that provides accommodations for living, sleeping, eating, cooking and sanitation but which shall not be designed, built, or used as a separate independent dwelling.

Section 6.D (7).2 imposes use and dimensional regulations on ADUs and authorizes the Building Commissioner to issue a building permit if the ADU meets the following requirements:

1) The lot for the ADU is zoned for residential uses;
2) The ADU is accessory to a "single-family dwelling" and only one ADU is allowed on the lot;
3) The location of the stand-alone ADU on a lot complies with all "applicable dimensional requirements" applicable to the zoning district where the lot is located, and the Planning Board approved a site plan showing the location of the ADU and including "other information as the Planning Board may require

[3] 760 CMR 71.02 defines the term "Protected Use ADU" as follows: "An attached or detached ADU that is located, or is proposed to be located, on a Lot in a Single-family Residential Zoning District and is protected by M.G.L. c. 40A, § 3, provided that only one ADU on a lot may qualify as a Protected Use ADU. An ADU that is nonconforming to Zoning shall still qualify as a Protected Use ADU if it otherwise meets this definition."

[4] We acknowledge that the Town adopted Article 18 at its October 2024 Special Town Meeting, which was well before EHOLC finalized its Regulations and therefore the Town did not have the benefit of the Regulations' requirements when it adopted Article 18.

in order to grant such approval;"

4) Stand-alone ADUs are single story in height;
5) The gross floor area of the ADU is no greater than 50% of the primary dwelling's gross floor area or 900 square feet, whichever is smaller;
6) One additional off-street parking space is provided unless the ADU is located within one-half mile of "a bus or commuter rail station;" and
7) A floor plan is submitted to the Building Commissioner showing the existing conditions and proposed changes to the interior and exterior of the building and the Building Commissioner determines that the exterior of the structure retains the characteristics of a "single-family residence;"

Section 6.D. (7).3 prohibits short term rentals of ADUs to persons unrelated to the owner of the lot and defines "short-term rental" as "any rental for a period of less than one (1) year." Section 6.D. (7).4 prohibits an ADU from being further enlarged beyond the square footage allowed under "sub-section (7).2d," which limits stand-alone ADUs to one story in height.[5] Section 6.D. (7).5 authorizes the Town's Zoning Board of Appeals ("ZBA") to hear appeals from the Building Commissioner's denial of a building permit for an ADU and authorizes the ZBA "after a hearing" to "allow such construction upon a finding that the "Application complies in principal with the 2024 'Affordable Housing Act,' so-called." Finally, Section 6.D. (7).6 authorizes the Building Commissioner to administer and enforce the by-law and prohibits the Building Commissioner from issuing "any permit" for an ADU that violates the by-law or violates "the terms and conditions of any Variance affecting the lot on which the ADU would be located."

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

Our review of Article 18 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 18, 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

[5] It is unclear whether Section 6.D. (7).4's reference to "sub-section (7).2d" is a typographical error because Section 6.D. (7).2 (d) limits the height of an ADU to one story and Section 6.D. (7).2 (e) limits the gross floor area to 900 square feet or 50% of the primary dwelling, whichever is smaller. The Town may wish to consult with Town Counsel to determine whether any amendment is needed at a future Town Meeting to clarify this issue.

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. 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. Section 7 of the Act, which took effect on August 6, 2024, by virtue of the Act's emergency preamble, amends G.L. c. 40A, § 1A by striking the definition of "Accessory dwelling unit" and inserting a new definition that provides as follows:

> "Accessory dwelling unit," 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: (1) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet the requirements of the state building code for safe egress; (ii) is not larger in gross floor area than ½ the gross floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as may be imposed by a municipality, including, but not limited to, additional size restrictions and restrictions or prohibitions on short-term rental, as defined in section 1 of chapter 64G; provided however that no municipality shall unreasonably restrict the creation or rental of an accessory dwelling unit that is not a short-term rental.[6]

Section 8 of the Act, which took effect on February 2, 2025,[7] amended 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,

[6] Section 1A previously defined an "Accessory dwelling unit" as 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: (i) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet the requirements of the state building code for safe egress; (ii) is not larger in floor area than 1/2 the floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as may be imposed by a municipality, including but not limited to additional size restrictions, owner-occupancy requirements and restrictions or prohibitions on short-term rental of accessory dwelling units.

[7] Section 8 was exempt from the Act's emergency preamble. See Section 143 of the Act.

unreasonably regulating or requiring a special permit or other discretionary zoning approval for the use of land or structures for a single ADU, as follows:

> No zoning ordinance or by-law shall prohibit, unreasonably restrict or require a special permit or other discretionary zoning approval for the use of land or structures for a single accessory dwelling unit, or the rental thereof, in a single-family residential zoning district; provided, that the use of land or structures for such accessory dwelling unit under this paragraph may be subject to reasonable regulations, including, but not limited to, 310 CMR 15.000 et seq., if applicable, site plan review, regulations concerning dimensional setbacks and the bulk and height of structures and may be subject to restrictions and prohibitions on short-term rental, as defined in section 1 of chapter 64G. 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. For more than 1 accessory dwelling unit, or rental thereof, in a single-family residential zoning district there shall be a special permit for the use of land or structures for an accessory dwelling unit. The executive office of housing and livable communities may issue guidelines or promulgate regulations to administer this paragraph.

The amendment to G.L. c. 40A, § 3, to include ADUs means that ADUs are now entitled to statutory protections from local zoning requirements, as discussed in more detail below.

IV. EOHLC's Regulations of Protected Use ADUs

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." The purpose of the ADU statutory and regulatory changes is to encourage the production of ADUs in the state with the "goal of increasing the production of housing." 760 CMR 71.01 (1). To that end, the Regulations "establish rules, standards and limitations that will assist" towns and landowners in the administration of the statutory changes to G.L. c. 40A, § 3. Id. The Regulations seek to "balance municipal interests in regulating the use and construction of ADUs while empowering property owners to add much needed housing stock." 760 CMR 71.01 (2).

The Regulations define key terms, including "Accessory Dwelling Unit;" "Principal Dwelling;" "Prohibited Regulation;" "Protected Use ADU;" "Single-Family Residential Zoning District;" and "Unreasonable Regulation." See 760 CMR 71.02, "Definitions." In addition. the Regulations 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"[8] 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."

While a town is prohibited from "unreasonably restrict[ing]" a Protected Use ADU, the town may subject the Protected Use ADU to "reasonable regulations." See 760 CMR 71.03 (1). The Regulations extensively address reasonable and unreasonable regulations of Protected Use ADUs. See 760 CMR 71.03 (3). The Regulations set forth the test for determining whether a municipal restriction is unreasonable and sets parameters establishing when such municipal restriction would be deemed unreasonable.[9]

Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, a restriction or regulation imposed "shall be unreasonable" if the regulation or restriction, when applied 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;

[8] 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.

[9] 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).

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.

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 require the site plan review to be clear and objective and prohibit 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).

V. Protected Use ADUs are a "Dover Protected Use"

Central to the analysis of whether a town's regulation of a Protected Use ADU is reasonable and thus allowed under the statute and Regulations, is the fact that the Legislature has added ADUs to G.L. c. 40A, § 3, thereby including this use among the subjects entitled to statutory protections from local zoning requirements, so-called "Dover Amendment" protected uses.

In adopting Section 3, the Legislature determined that certain land uses are so important to the public good that the Legislature has found it necessary "to take away" some measure of municipalities' "power to limit the use of land" within their borders. Attorney General v. Dover, 327 Mass. 601, 604 (1950) (discussing predecessor to G.L. c. 40A, § 3); see Cnty. Comm'rs of Bristol v. Conservation Comm'n of Dartmouth, 380 Mass. 706, 713 (1980) (noting that Zoning Act as a whole, and G.L. c. 40A, § 3, specifically, aim to ensure that zoning "facilitate[s] the provision of public requirements"). To that end, the provisions of Section 3 "strike a balance between preventing local discrimination against" a set of enumerated land uses while "honoring legitimate municipal concerns that typically find expression in local zoning laws." Trustees of Tufts Coll. v. City of Medford, 415 Mass. 753, 757 (1993). Over the years, the Legislature has added to the list of protected uses, employing different language—and in some cases different methods—to limit municipal discretion to restrict those uses, as evidenced by the most recent amendments to Section 3 under Chapter 150 of the Acts of 2024. BAK Realty, LLC v. City of Fitchburg, 2025 WL 938065 n. 6 ("General Laws c. 40A, § 3, was originally enacted to prevent municipalities from restricting educational and religious uses of land, see St. 1975, c. 808, § 3, but the Legislature has expanded G. L. c. 40A, § 3, over time to ensure that other land uses would be free from local interference.")

Section 3 now expressly provides that a town's zoning by-law cannot prohibit, unreasonably regulate or require a special permit or other discretionary zoning approval for the use of land or structures for a single ADU. In addition, the inclusion of ADUs in Section 3 as a

protected use subject to only "reasonable" regulation means that a town cannot impose its zoning rules on an ADU if doing so would "nullify" the use or excessively burden the use without appreciably advancing legitimate zoning goals. Tufts Coll., 415 Mass. at 757, 759. This test is reflected in the Regulations and is applicable to all local regulation of Protected Use ADUs.

Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 18.

VI. Certain Text Adopted under Article 18 Is Disapproved Because It Conflicts with G.L. c. 40A, § 3 and the Regulations

A. Restriction to Single-Family Dwellings

Section 6.D. 7's Purpose section states that a purpose of the by-law is to provide expanded use of lots "which are currently improved by single-family dwellings" and "to preserve the single-family character of neighborhoods" as follows:

> The purpose of this section is:
>
> (1) To provide an opportunity to expand the uses of lots located within a residential zone **and which are currently improved by single-family** dwellings;
>
> * * *
>
> (3) To protect residential stability, enhance property values**, and to preserve the single-family character of neighborhoods**

In addition, Section 6.D. (7).1, defines the term "Accessory Dwelling Unit ("ADU") with reference to single-family dwellings, as follows:

> an accessory living unit which is either located within or is attached to an existing **single-family** dwelling or is a stand-alone structure located on a lot improved by an existing **single-family** dwelling, that provides accommodations for living, sleeping, eating, cooking and sanitation **but which shall not be designed, built, or used as a separate independent dwelling**.

Section 6.D (7).2 (b) also requires an ADU to be accessory to a single-family dwelling as follows:

> The ADU must be accessory to a **single-family** dwelling and only one ADU may be created on any eligible lot.

We disapprove all references to "single-family" in Section 6.D. (7), "Purpose;" Section 6.D. (7).1's definition of ADU; and Section 6.D. (7).2 (b)'s use regulations (shown above in bold and underline), because G.L. c. 40A, § 3 and the Regulations allow Protected Use ADUs as of right on the same lot as any type of "Principal Dwelling," not just a single-family principal

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 heigh, *that contains at least one Dwelling Unit* and it, 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, restricting ADUs to lots with single-family dwellings conflicts with G.L. c. 40A, § 3 and the Regulations. For this reason, we delete the words "single family" from Sections 6.D (7), (7).1, and (7).2 as shown above in bold and underline.[10]

B. Section 6.D. (7).1's Definition of ADU

As quoted above, Section 6.D. (7).1's defines the term "ADU" as a structure that provides accommodations for living sleeping, eating, cooking, and sanitation, "but which shall not be designed, built, or used as a separate independent dwelling." We disapprove the text "but which shall not be designed, built, or used as a separate, independent dwelling" from Section 6.D. (7).1 (shown above in bold and underline) because it conflicts with G.L. c. 40A, § 3 and the Regulations.

As an initial matter, it is unclear what is meant by the by-law's statement that an ADU cannot "be designed, built, or used as a separate, independent dwelling." By its own terms the by-law's definition of ADU requires that the ADU shall be equipped with all that is needed to be a self-sufficient housing unit, e.g., accommodations for living, sleeping, eating, cooking, and sanitation. Notwithstanding this internal conflict with the definition of ADU, G.L. c. 40A, § 3 and the Regulations define a Protected Use ADU as an attached or detached "self-contained housing unit" that has its own sleeping, cooking and sanitary facilities. Therefore, a Protected Use ADU is, by definition, a separate, independent dwelling unit. Moreover, the Regulations prohibit towns from requiring a Protected Use ADU to be attached to or detached from the Principal Dwelling. Therefore, the Town cannot prohibit an ADU from being a separate detached structure. For these reasons, the prohibition of a "separate independent dwelling" contained in Section 6.D (7).1,'s definition of the term "ADU" conflicts with G.L. c. 40A, § 3 and the Regulations, and we disapprove this text.

[10] The Town's existing zoning by-laws define "Dwelling" as a "permanent structure designed for human habitation and containing one or more dwelling units. This shall not include a dormitory, lodging house, or structure for transient occupancy." See Section 3, "Definitions." The Town should discuss the existing definition of "Dwelling" with Town Counsel to ensure it does not exclude uses that qualify as a "Principal Dwelling" under the Regulations and that are allowed to have a Protected Use ADU as-of-right.

In addition, as discussed in more detail in Section IV above, G.L. c. 40A, § 3 and the Regulations prohibit a Town from "unreasonably restrict[ing]" a Protected Use ADU, though the Town may subject the Protected Use ADU to "reasonable regulations." See 760 CMR 71.03 (1).

We cannot readily discern a legitimate municipal interest that is served by the Town's prohibition of ADUs being designed, built, or used as a separate independent dwelling, and it is unclear how this limitation on ADUs is rationally related to any legitimate municipal interest that the Town may advance. Moreover, even if the Town could satisfy 760 CMR 71.03 (3)(a)(1) and (2) by demonstrating that the restriction furthers a legitimate municipal interest, 760 CMR 71.03 (3)(a)(3) prohibits the imposition of a regulation when it results in: (a) complete nullification of the use or development; (b) imposes excessive costs without significantly advancing the development of the Protected Use ADU without appreciably advancing the municipality's legitimate interest; or (c) substantially diminishes or interferes with the use or development of a Protected Use ADU without appreciably advancing the municipality's legitimate interest. In addition, Section 71.03 (3)(b) prohibits a Town from imposing a design standard that "unreasonably increases the cost of the use or construction of a Protected Use ADU." Based on this test, we conclude that the prohibition in Section 6.D. (7).1 - that the ADU cannot be a separate independent dwelling - would result in the nullification of the use or increase the cost of obtaining approval to build a Protected Use ADU. For this reason, we conclude that the text in Section 6.D. (7).1's definition of ADU "but which shall not be designed, built, or used as a separate independent dwelling" constitutes an unreasonable regulation in violation of Section 71.03 (3), and we therefore disapprove this text (as shown above in bold and underline).

C. Section 6.D. (7).2 (d)'s ADU Height Limitation

Section 6.D. (7).2 (d) limits stand-alone ADUs to a "**single story in height**." We disapprove and delete Section 6.D. (7).2 (d) because this height limitation conflicts with 760 CMR 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards," which provides as follows (with emphasis added):

> (b) Municipality shall apply the analysis articulated in 760 CMR 71.03 (3)(a) to establish and apply reasonable Zoning or general…by-laws, or Municipal regulations for Protected Use ADUs, but in no case shall a restriction or regulation be found reasonable where it exceeds the limitations, or is inconsistent with provisions, described below, as applicable:…(2) Dimensional Standards. Any requirement concerning dimensional standards, such as dimensional setbacks, lot coverage, open space, bulk and height, and number of stories, that are more restrictive than is required for the Principal Dwelling, or a Single-family Residential Dwelling or accessory structure in the Zoning District in which the Protected Use ADU is located, whichever results in more permissive regulation, provided that a Municipality may not require a minimum Lot size for a Protected Use ADU.

The Regulations prohibit the Town from imposing dimensional standards related to the number of stories or height that are more restrictive than those required for the Principal Dwelling, which by definition includes multi-family dwellings, or a Single-family Residential Dwelling or

Accessory Structure in the zoning district in which the Protected Use ADU is located. See 760 CMR 71.03 (3)(b)(2). The Town's existing by-laws, Section 6.A, "Lot Requirements for All Principal Buildings," Table 6.A, provides that the maximum height for buildings is: two and one half stories in the Town's Residential districts; two stories or forty feet for buildings in the Town's Business districts; and forty feet in the Town's Industrial and Municipal Districts. In addition, the existing text of Section 6.D, "Accessory uses and Accessory Buildings," does not impose a separate maximum height requirement for accessory uses and buildings. Therefore, Section 6.D. (7).2 (d)'s prohibition of ADUs greater than one story imposes a dimensional requirement that is more restrictive than those allowed for any other buildings in the Town. For this reason, the number of stories limitation in Section 6.D. (7).2 (d) (shown above in bold and underline) conflicts with Section 71.03 (3)(b)(2), and we therefore disapprove it.

D. Section 6.D. (7).2 (g)'s Building Commissioner's Opinion

Section 6.D. (7).2 (g) requires an applicant for an ADU to submit a floor plan showing the existing conditions and proposed changes to the interior and exterior of the building and requires the exterior of the structure to retain, in the opinion of the Building Commissioner, the characteristics of a single-family residence as follows:

> A floor plan is submitted showing both existing condition and proposed changes to the interior and exterior of the building. **The exterior of the structure does in the opinion of the Building Commissioner retain the characteristics of a single-family residence . . .**

Although Section 6.D. (7).2 (g) does not limit its application to a specific type of ADU (e.g. within or attached to an existing principal dwelling, a detached ADU, or both), requiring the exterior of the structure to retain, *in the opinion of the Building Commissioner*, the characteristics of a single-family residence conflicts with the G.L. c. 40A, § 3 and the Regulations as discussed below.

General Laws Chapter 40A, Section 3 prohibits a zoning by-law from requiring discretionary zoning approvals for a single ADU, in relevant 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…

In addition, 760 CMR 71.03 (1) prohibits the Town from requiring a discretionary zoning approval for the use of land or structures for a Protected Use ADU as follows:

> Municipalities shall not prohibit, impose a Prohibited Regulation, or Unreasonable Regulation, or except as provided under 760 CMR 71.03 (5) and 760 CMR 71.03 (c), require a special permit, wavier, variance or other zoning relief or discretionary zoning approval for the use of land or structures for a Protected use ADU, including

the rental thereof, in a Single-family Residential Zoning District; provided that Municipalities may reasonably regulate a Protected Use ADU, subject to the limitations under 760 CMR 71.00.

Section 6.D. (7).2 does not define the meaning of "retain the characteristics of a single-family residence" nor does it provide the Building Commissioner with any standards or criteria to guide them in determining whether the exterior of the structure retains the characteristics of a single- family residence. Absent any standards or criteria, the Building Commissioner's "opinion" is the type of discretionary zoning approval prohibited under G.L. c. 40A, § 3 and the Regulations.[11] In addition, because Section 6.D. (7).2 does not define the text "characteristics of a single-family residence" it also conflicts Section 71.02's definition of "Design Standards" that requires design standards to be "clear, measurable and objective" zoning provisions. For these reasons, we disapprove the text in Section 6.D. (7).2 requiring the exterior of the structure to retain, in the opinion of the Building Commissioner, the characteristics of a single-family residence (as shown above in bold and underline).

Finally, as discussed in more detail above in Section VI (A) of this decision, the Regulations allow Protected Use ADUs on a lot with a principal dwelling that includes one or more dwelling units. See Section 71.02's definitions of "Principal Dwelling" and "Protected Use ADU." An ADU that is part of a Principal Dwelling that includes, for example a multi-family dwelling, could not comply with Section 6.D. (7).2's requirement that the ADU retain the "characteristics of a single-family residence." In those instances, such a requirement would result in a prohibition of the Protected Use ADU in violation of the Regulations. See, e.g., 760 CMR 71.03 (3).

For these reasons, we disapprove and delete the text from Section 6.D. (7).2 (g) shown in bold and underline.

E. Section 6.D. (7).2 (h)'s Site Plan Review Requirements

Section 6.D. (7).2 (h) requires the Planning Board to approve a site plan for stand-alone ADUs that details the location of the ADU and contains "such other information as the Planning Board may require" as follows:

> If the ADU is to be a stand-alone structure, the Planning Board has approved a site plan detailing the location of the ADU on the lot **and containing such other information as the Planning Board may require in order to grant such approval**.

We disapprove the text in Section 6.D (7).2 (h) as shown above in bold and underline, because it conflicts with 760 CMR 71.03 (3)(b)(5), "Site Plan Review," which requires site plan

[11] We note that even if the by-law provisions provided standards and criteria to guide the Building Commissioner's determination, the requirement that the ADU "retain the characteristics of a single-family residence" may still be deemed unreasonable under 760 CMR 71.03 (3) if the Town cannot satisfy the standard for determining that the regulation is reasonable under Section 71.03 (3).

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.[12] Section 6.D. (7).2 (h)'s requirement that the site plan, in addition to including details of the ADU's location on the lot, must also contain "such other information that the Planning Board may require" does not satisfy the standard to provide "clear and objective" site plan review requirements, and therefore conflicts with the Regulations.[13] Without any further details on what information an applicant for site plan approval must provide, Section 6.D (7).2 (h) does not provide a site plan review process that is "clear" or "objective." Rather, the by-law allows for the Planning Board to impose any terms and conditions it chooses, including those that may be 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). Absent "clear and objective" site plan requirements for the Planning Board's approval of site plan review, Section 6.D (7).2 (h) results in the type of discretionary zoning approval prohibited under G.L. c. 40A, § 3, and the Regulations. For this reason, the text in bold and underline above in Section 6.D (7).2 (h) conflicts with G.L. c. 40A, § 3, and the Regulations, including 760 CMR 71.03 (3)(b)(5), that requires site plan review to be clear and objective and we disapprove it.

F. Section 6.D. (7).3's Prohibition on ADUs Used as Short-Term Rentals

Section 6.D. (7).3 prohibits ADUs from being used a short-term rental ("STR"), and defines STR as follows:

> **For purposes hereof, "short term rentals" shall mean any rental for a period of less than one (1) year.**

We disapprove and delete the above-quoted text from Section 6.D (7).3 because it conflicts with G.L. c. 40A, § 3 and the Regulations that provide only limited authorization to towns to prohibit ADUs from being used as a "Short-term Rental *as defined* in section 1 of chapter 64G" (emphasis added). Here, the Town's STR prohibition exceeds the occupancy limits for STRs in G.L. c. 64G, § 1, that defines the "Occupancy" of a STR as follows (with emphasis added):

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

[12] 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."

[13] The Town's existing Section 13, "Site Plan Approval" provides specific site plan review requirements for uses "zoned business or industrial (and certain specific uses in other zoning districts)" but Section 6.D. (7).2 (h) does not require site plan review for ADUs to follow the Town's existing Section 13.

Because Section 6.D. (7).3 prohibits ADUs from being rented as a STR for a period "less than one (1) year," it conflicts with G.L. c. 40A, § 3 and the Regulations that allows towns to prohibit ADUs as STRs only for a period of 31 days or less. By referring to G.L. c. 64G, the Room Occupancy Excise statute, G.L. c. 40A, §§ 1A and 3 and the Regulations define a STR as the rental of an ADU with stays of not more than 31 consecutive calendar days. See G.L c. 64G, § 1's definition of "Occupancy" as quoted in pertinent part above. Moreover, though G.L. c. 40A, § 3 and the Regulations authorize a Town to prohibit ADUs from being rented as STRs, Section 3 and the Regulations explicitly prohibit towns from prohibiting or unreasonably regulating the rental of ADUs. Therefore, any prohibition on the rental period of ADUs other than as allowed under G.L. c. 64G, would be an unreasonable regulation in violation of Section 3 and the Regulations, unless the Town could satisfy the requirements of Section 71.03 (3). Here, the Town has not satisfied the reasonableness test because there is no apparent legitimate municipal interest that is served by the Town prohibiting a rental of an ADU for less than one year. For this reason, we disapprove and delete the text in Section 6.D (7).3 that defines STR as a period of less than one year, as shown above in bold and underline.

VII. The Remaining Approved ADU Requirements Adopted Under Article 18 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 18 to ensure that the Town applies these provisions consistent with G.L. c. 40A, § 3 and the Regulations.

A. Section 6.D. (7).2 (d)'s Compliance with Existing Dimensional Requirements

Section 6.D. (7).2 (d) requires stand-alone ADUs to be located on the lot so that the ADU complies with "*all applicable* dimensional requirements for property located within the corresponding residential zone." (with emphasis added).

First, to be clear, Section 71.03 expressly prohibits minimum lot size requirements for a Protected Use ADU. Therefore, any minimum lot size requirements in the Town's zoning by-laws (including its existing dimensional table) do not and cannot apply to a Protected Use ADU. See the Town's existing Section 6.A "Lot Requirements for All Principal Buildings," imposing minimum lot size requirements for all lots with a principal dwelling. The Town cannot apply Section 6.A's, minimum lot size requirements to Protected Use ADUs because such an application would conflict with 760 CMR Section 71.03 (2).

In addition, 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 more permissive. Section 6.A of the Town's existing zoning by-law includes a Table that imposes dimensional requirements, including minimum lot area, minimum lot frontage, minimum side, rear and front yard setbacks, open space, and maximum height requirements for principal uses based on the zoning district in which the lot is located. Section 6.D imposes additional dimensional requirements for accessory uses and buildings,

including setback requirements. The Town must ensure that its existing dimensional requirements, including setbacks, lot coverage, open space, bulk and height, as applied to a Protected Use ADU, 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 Protected Use ADU is located, whichever is more permissive.

Moreover, 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, the dimensional regulations may be deemed to 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.

Finally, and 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 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.

We strongly suggest that the Town discuss Section 6.D. (7).2 (d) with Town Counsel to ensure that it is applied consistent with the protections given to ADUs under G.L. c. 40A, § 3 and the Regulations. In addition, the Town may wish to discuss with Town Counsel whether Section 6.D. (7).2 (d) should be amended to specifically include text that Protected Use ADUs are not subject to minimum lot size requirements (as required by the Regulations) and that Protected Use ADUs may only be subject to "reasonable regulations" (under the test set forth in Section 760 CMR 71.03 (3) of the Regulations) because they are a Dover Amendment protected use under G.L. c. 40A and because the Regulations prohibit towns from unreasonably regulating Protected Use ADUs. Finally, we encourage the Town to discuss with Town Counsel whether the dimensional requirements for ADUs should be included in the Town's ADU by-law, rather than the ADU by-law referencing other sections of the Town's existing zoning by-laws, to ensure that those utilizing the ADU by-law have clear information regarding any required dimensional standards.

B. Section 6.D. (7).2 (f)'s Parking Requirements

Section 6.D. (7).2 (f) requires one additional off-street parking space for an ADU unless the property where the ADU is located is within one-half mile of a bus or commuter rail station.[14,15]

[14] Section 3, "Definitions" of the Town's zoning by-laws defines "Parking Space" as "[a]n off-street space for the exclusive use as a parking area for one motor vehicle, having not less than ten feet in width and twenty feet in length.

[15] Section 6.D. (4).2 (a) of the Town's existing zoning by-laws requires residential uses in all zoning districts to provide off-street parking, including two off-street parking spaces for each single dwelling unit.

General Law Chapter 40A, § 3 and the Regulations, 760 CMR 71.03 (2) (b) prohibit towns from requiring any additional parking spaces for a Protected Use ADU that is within one half mile of a Transit Station. Transit Station is defined in the Regulations as including a "Bus Station." See 760 CMR 71.02. Section 71.02 defines "Bus Station" as "[a] location serving as a point of embarkation for any bus operated by a Transit Authority" and this definition includes fixed stops located along the bus route. The Town must apply Section 6.D 7.2 (f)'s parking requirements consistent with Section 71.03 (2)(b). The Town should consult with Town Counsel with any questions on this issue.

VIII. Conclusion

We partially approve Article 18, except for the following provisions that we disapprove because these provisions conflict with G.L. c. 40A, § 3 and the Regulations:

- Section 6.D. (7), (7).1, and (7).2 (b) that limits ADUs to single family dwellings;
- Section 6.D (7).1's definition of ADU;
- Section 6.D. (7).2 (d)'s limits on the number of stories for ADUs;
- Section 6.D. (7).2 (g) requiring the Building Commissioner's opinion regarding the of ADU plans;
- Section 6.D. (7).2 (h) authorizing the Planning Board to require additional information for site plan approval of ADUs; and
- Section 6.D. (7) (3) that limits ADUs from being rented for less than one year.

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 18 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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