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June 2, 2025

Gwendolyn Lay Sabbagh, Town Clerk
Town of Merrimac
2 School Street
Merrimac, MA 01860

Re: Merrimac Special Town Meeting of October 21, 2024 -- Case # 11639
Warrant Article # 3 (Zoning)
Warrant Article # 5 (General)[1]

Dear Ms. Sabbagh:

Article 3 - Under Article 3, the Town voted to amend several sections of Article 17, "Accessory Dwelling Units and Conversion of Existing Single-Family Dwellings," to allow ADUs as-of-right in compliance with G.L. c. 40A, § 3 and the implementing Regulations promulgated by the Executive Office of Housing and Livable Communities ("EOHLC"), 760 CMR 71.00, "Protected Use Accessory Dwelling Units" ("Regulations").[2]

We partially approve Article 3 because the approved text does not conflict with state law. However, we disapprove the following provisions adopted under Article 3 because they conflict with G.L. c. 40A, § 3 and the Regulations (see Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the Constitution for the Attorney General to disapprove a by-law)):

- The words "single-family" in Section 17.3.8;
- Section 17.3.5.2's requirement that all utilities servicing a detached ADU be independent and separate from the utilities serving the primary dwelling unit; and
- Section 17.3.7's off-street parking requirements for ADUs.

[1] In a decision issued February 28, 2025, we approved Article 5 and by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended our deadline for review of Article 3 for 60-days until Saturday May 3, 2025. By agreement with Town Counsel, we further extended our deadline for Article 3 for an additional and final 30 days until June 2, 2025.

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

In this decision we summarize the by-law amendments adopted under Article 3; 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 3.[4] In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 3.

I. Summary of Article 3

Under Article 3, the Town amended several sections in Article 17. Section 17.3 imposes dimensional, design, and other requirements on attached and detached ADUs. Section 17.3.1 states that the intent of Article 17 is to ensure that the accessory unit remains subordinate to the principal living quarters. Section 17.3.4 imposes design requirements for attached ADUs, including requiring the attached ADU to be "a structurally integral part of the SINGLE-FAMILY DWELLING in which it is contained." Section 17.3.5 imposes design requirements for detached ADUs, including requiring detached ADUs to have separate utilities as follows:

> All utilities servicing the Detached Accessory Dwelling Unit shall be new municipal services independent and separate from the utilities servicing the primary dwelling unit.

Section 17.3.7 imposes parking requirements on ADUs as follows:

> A minimum of one (1) off street parking space shall be provided for the Accessory Dwelling Unit, addition to the two (2) parking spaces required for the SINGLE FAMILY DWELLING.

Section 17.3.8 prohibits lots with an ADU and a single-family dwelling from being further subdivided. Section 17.3.9 requires site plan review for ADUs and sets forth the information that must be included in the site plan and limits site plan review to tree and soil removal; whether the ADUs architectural style is completable with the principal dwelling; whether the ADU will be serviced by adequate water and sewer or septic services; parking; and setback requirements for the zoning district in which the ADU is located. Finally, Section 17.3.11 prohibits ADUs from being used at short-term rentals as defined in G.L. c. 64G, §1, "or otherwise rented for a period shorter than thirty-one (31) days."

[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 3 at its October 2024 Special Town Meeting, which was well before EOHLC finalized its Regulations and therefore the Town did not have the benefit of the Regulations' requirements when it adopted Article 3.

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

Our review of Article 3 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 3, 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:

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

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

While a municipality may reasonably regulate a Protected Use ADU in the manner authorized by 760 CMR 71.00, such regulation cannot prohibit, require a special permit or other discretionary zoning approval for, or impose a "Prohibited Regulation"[6] or an "Unreasonable Regulation" on, a Protected Use ADU. See 760 CMR 71.03, "Regulation of Protected Use ADUs in Single-Family Residential Zoning Districts."[7] Moreover, Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, certain restrictions or regulations "shall be unreasonable" in certain circumstances.[8] In addition, while municipalities may impose dimensional requirements related to setbacks, lot coverage, open space, bulk and height and number of stories (but not minimum lot size), such requirements may not be "more

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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 (3) MassGIS Addressing Guidance regarding address assignments for ADUs (https://www.mass.gov/info-details/massgis-addressing-guidance-for-accessory-dwelling-units-adus).

[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.

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.[9] Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 3.

IV. Certain Text is Deleted from Article 3 Because It Conflicts with G.L. c. 40A, § 3 and the Regulations

A. References to "single-family"

Section 17.3.8 prohibits lots with an ADU and a single-family dwelling from being further subdivided as follows:

> There shall be no further subdivision of the lot containing the **single family** dwelling and the Accessory Dwelling Unit.

We disapprove and delete the words "single family" as shown above in bold and underline because limiting ADUs to a "single family" dwelling conflicts 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 tow'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 single-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, limiting ADUs to "single family" dwelling conflicts with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the word "single family " as shown above in bold and underline from Section 17.3.8.[10]

B. Section 17.3.5's Requirement that Detached ADUs have Separate Utility Connections

Section 17.3.5 requires detached ADUs to have separate utility connections as follows:

> All utilities servicing the Detached Accessory Dwelling Unit shall be new municipal services independent and separate from the utilities servicing the primary dwelling unit.

We disapprove Section 17.3.5 because it conflicts with the Regulations, 760 CMR 71.03 (3)(b)(3) that prohibits towns from requiring separate utility connections as follows:

> A Municipality may not require a separate utility connections, such as water, sewer, electric, provided that a separate connection may be required by a Municipal or regional utility, investor-owned utility; by state law; by a local, regional, or state board or commission; or by court order.

The Regulations prohibit towns from requiring a separate utility connection, except in certain limited circumstances (e.g., when required by a municipal utility). Because Section 17.3.5 requires all detached ADUs to provide separate utility connections, this provision conflicts with 760 CMR 71.03 (3)(b)(3) and we therefore disapprove it (as shown above in bold and underline). See West Street Associates, LLC, 448 Mass at 324.

C. Section 17.3.7's Parking Requirements

Section 17.3.7 requires ADUs to have a minimum of one off-street parking as follows:

[10] Although not subject to any changes under Article 3, Section 17.3.1 states that the intent of the by-law is to ensure the "single-family" character of the neighborhood will be maintained and Section 17.3.4 states that attached ADUs shall be a structurally integral part of the "SINGLE-FAMILY DWELLING." Because these sections are not amended under Article 3, they are not before us for review and approval. Therefore, we cannot disapprove the words "single family" from these sections. However, the words "single family" conflict with G.L. c. 40A, § 3 and the Regulations for the same reasons discussed in Section A. Therefore, the Town should delete the words "single family" from these sections at a future Town Meeting.

A minimum of one (1) off street parking space shall be provided for the Accessory Dwelling Unit, if addition to the two (2) parking spaces required for the SINGLE FAMILY DWELLING.

We disapprove Section 17.3.7's minimum of one parking space requirement for an ADU (as shown above in bold and underline) because as written, this text requires all ADUs to provide a minimum of one additional off-street parking space in conflict 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 for an ADU and prohibits requiring any parking space for an ADU located within 0.5 miles of a transit station, as follows:

> 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 17.3.7 as amended requires *all* ADUs to provide a minimum of one additional off-street parking space, including a Protected Use ADU that is 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 can require an 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 all Protected Use ADUs to provide at least one additional parking space because as written, that requirement could require more than one parking space for an ADU and encompasses an ADU that is located within a 0.5-mile radius of a Transit Station, in conflict with the statute and the Regulations. Id.

Should the Town wish to amend Section 17.3.7 at a future Town Meeting to impose a

parking requirement on an ADU, we encourage the Town to consult with Town Counsel to ensure that it only requires one space for an ADU, and that requirement explicitly exempts an ADU located within a 0.5-mile radius of a Transit Station. We would be happy to work with the Town to review any new proposed parking provision to ensure it complies with G.L. c. 40A, § 3 and the Regulations.

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 3 to ensure that the Town applies these provisions consistent with G.L. c. 40A, § 3 and the Regulations.

A. ADU's Allowed-As-Right in Single-Family Residential Zoning District

As amended under Article 3, the intent of Article 17 is to allow ADUs as-of-right in "residential districts." See Section 17.3. It is unclear what the Town means by "residential districts." However, the Regulations state that a town cannot prohibit, unreasonably restrict, or require a special permit or other discretionary zoning approvals for ADUs in a single-family residential zoning district. See 760 CMR 71.01 (2) and 71.03 (1). A "Single-family residential zoning district" is defined in the Regulations as a zoning district where single-family residential dwellings are allowed as-of-right or by special permit. See 760 CMR 71.02.

Based on our review of the Town's existing zoning by-laws, single-family dwelling are allowed in the Town's Village Residential, Suburban Residential, Agricultural Residential, Lake Attitash, Rural Highway, Rural-Agricultural Preservation Overlay, and Water Resource Protection Districts. Therefore, ADUs must be allowed as-of-right in these districts where single-family dwellings are allowed. We suggest that the Town discuss this issue with Town Counsel.

B. Section 17.3.8's Prohibition on Subdividing a Lot with an ADU

Section 17.3.8 prohibits the subdivision of a lot containing a dwelling and an ADU as follows:

> There shall be no further subdivision of the lot containing the dwelling and the Accessory Dwelling Unit. [11]

As discussed in more detail in Section III 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). It appears that Section 17.3.8 is intended to ensure that the ADU remains subordinate or accessory to the principal dwelling. See Section 17.3.1 ("The intent of Article 17 is to ensure that the accessory unit remains subordinate to the principal living quarters.") However, if Sections 17.3.1 or 17.3.8 are used to deny an 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

[11] In Section IV (A) above, we disapproved the words "single family" from Section 17.3.8.

Regulations. The Town should consult with Town Counsel to ensure Sections 17.3.1 and 17.3.8 are applied consistent with the Regulations, as discussed herein.

In addition, Section 17.3.8 must be applied consistent with General Laws Chapter 41, Sections 81K through 81GG, the Subdivision Control Law, which governs the subdivision of land. Under the Subdivision Control Law, a town must approve a subdivision that otherwise comply with the Town's subdivision rules and regulations. See G.L. c. 41, § 81M; see also Wall St. Dev. Corp. Planning Bd. of Westwood, 72 Mass. App. Ct. 844, 854 (2008) (planning boards must approve proposed subdivision plans that conform to local subdivision rules and regulations and to the recommendations to the local board of health) The Town cannot deny a subdivision plan under Section 17.3.8 that otherwise complies with the Town's subdivision rules and regulations and recommendation of its board of health.

Based upon our standard of review, we cannot determine that Section 17.3.8 is an unreasonable regulation under 760 CMR 71.03 (3) or conflicts with the Subdivision Control Law and we therefore approve it. However, the Town must apply Section 17.3.8 consistent with G.L. c. 41, § 81M. The Town should consult closer with Town Counsel on this issue.

C. Section 17.3.9's Site Plan Review Requirements

Section 17.3.9 requires an ADU to obtain site plan review, imposes requirements on what information must be submitted as part of the site plan, and limits the site plan review criteria. In applying Section 17.3.9's site plan review requirements, the Town must ensure that its site plan review 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.

D. Section 17.3.9.3.5's Dimensional Requirements

A part of the site plan review process, Section 17.3.9.3.5 requires an ADU to comply with the setback requirements for the zoning district in which the ADU is located. We approve Section 17.3.9.3.5's setback requirements, however the Town the must apply the setback requirements consistent with 760 CMR 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards."

The Regulations provide as follows with regards to dimensional standards, 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.

In applying Section 17.3.9.3.5's setback requirements for an ADU the 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 the application of the by-law's setback requirements is 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.

In addition, in applying these dimensional requirements, the Town must ensure that any imposed setback requirements, serve, and 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. The Town should consult with Town Counsel to ensure the proper application of these provisions to a Protected Use ADU.

E. Section 17.3.11's Prohibition on ADUs as Short-Term Rental

Section 17.3.11 prohibits ADUs from being used as short-term rentals as they are defined in G.L. c. 64G, § 1 "or otherwise rented for a period shorter than thirty-one (31) days."

We approve Section 17.3.11 prohibiting an ADU from being used as a STR because G.L. c. 40A, § 3 and the Regulations that authorize towns to prohibit ADUs from being used as a "Short-term Rental *as defined* in section 1 of chapter 64G" (emphasis added). General Laws Chapter 64G, Section 1, 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

However, it is unclear what the Town means when it prohibits ADUs from otherwise being rented for less than thirty-one days. General Laws Chapter 40A, Section 3 and the Regulations provide a limited authorization on the Town's ability to regulate the rental of ADUs. If Section 17.3.11 is applied to prohibit the rental of ADUs other than as STR, then it would conflict with G.L. 40A, §3 and the Regulations. See Section 71.03 (2)(c)'s prohibition on use and occupancy regulations and Section 71.03 (3)'s prohibition on unreasonable regulations. Therefore, any prohibition on the rental period of ADUs other than as allowed under G.L. c. 64G, would violate of Section 3 and the Regulations. We suggest that the Town discuss this issue in more detail with Town Counsel.

VI. Conclusion

We partially approve Article 3 except the text below that conflicts with G.L. c. 40A, § 3 and the Regulations:

- The words "single-family" in Section 17.3.8;
- Section 17.3.5.2's requirement that all utilities servicing a detached ADU be independent and separate from the utilities serving the primary dwelling unit; and
- Section 17.3.7's off-street parking requirements for ADUs.

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 3 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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cc: Town Counsel Lisa L. Mead