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September 26, 2025

Carol Greene, Town Clerk
Town Clerk's Office
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Norfolk, MA 02056

Re: Norfolk Annual Town Meeting of May 14, 2025 -- Case # 11784
Warrant Articles # 21, 23, 24, 25, 26, and 34 (Zoning)
Warrant Articles # 27 and 28 (General)

Dear Ms. Greene:

Article 21 – Under Article 21, the Town voted to amend its zoning by-laws to make specific changes 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").[1] We approve Article 21 because it does conflict with the G.L. c. 40A, § 3 and 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). However, we offer comments for the Town's consideration regarding certain approved provisions.[2]

I. Summary of Article 21

Under Article 21, the Town amended Section 310-2.1, "Definitions and word usage" to add a definition for "Accessory dwelling unit." Another change adds a new Section 310-6.15, "Accessory dwelling units," that imposes use, dimensional, design, and site plan review requirements on ADUs to be consistent with the Town's authority to regulate ADUs under state law. Lastly, the Town amended Section 310-4.2, "Schedule of Use Regulations," to add "Accessory Dwelling Unit" and allow ADUs as of right in the Residence 1, 2, and 3 Districts, and the Business 3 and 4 Districts where single family dwellings are allowed and to add "2 Accessory

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

[2] In a decision issued on August 14, 2025, we approved Articles 23, 24, 25, 26, 27, 28, and 34 and by agreement with Town Counsel extended our deadline for Article 21 for an additional 45 days until September 27, 2025.

Dwelling Units" where a second ADU is allowed by special permit in the same Districts as an ADU.

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

Our review of Article 21 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 21, 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."[3] The Regulations define key terms and prohibit certain "Use and Occupancy Restrictions" defined in Section 71.02 as follows:

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

While a municipality may reasonably regulate a Protected Use ADU in the manner authorized by 760 CMR 71.00, such regulation cannot prohibit, require a special permit or other discretionary zoning approval for, or impose a "Prohibited Regulation"[4] 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."[5] Moreover, Section 71.03 (3)(a) provides that

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[3] 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).

[4] 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.

[5] For example, a design standard that is not applied to a Single-Family Residential Dwelling in the Single-

while a town may reasonably regulate and restrict Protected Use ADUs, certain restrictions or regulations "shall be unreasonable" in certain circumstances.[6] In addition, while municipalities may impose dimensional requirements related to setbacks, lot coverage, open space, bulk and height and number of stories (but not minimum lot size), such requirements may not be "more restrictive than is required for the Principal Dwelling, or a Single-Family Residential Dwelling or accessory structure in the Zoning District in which the Protected Use ADU is located, whichever results in more permissive regulation…" 760 CMR 71.03 (3)(b)(2). Towns may also impose site plan review of a Protected Use ADU, but the Regulations requires the site plan review to be clear and objective and prohibits the site plan review authority from imposing terms or conditions that "are unreasonable or inconsistent with an as-of-right process as defined in M.G.L. c. 40A, § 1A." 760 CMR 71.03 (3)(b)(5).

We incorporate by reference our more extensive comments regarding these recent statutory and regulatory changes related to ADUs in our decision to the Town of East Bridgewater, issued on April 14, 2025 in Case # 11579.[7] Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 21.

IV. Comments on Approved Portions of Section 310-6.15's ADU Requirements That Must be Applied Consistent with G.L. c. 40A, § 3 and 760 CMR 71.00

We offer comments for the Town's consideration regarding the new Section 310-6.15 to ensure the by-law is applied consistent with the Regulations.

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).

[6] 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.

[7] 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. Section 310-6.15 (B) (2)'s Ownership Requirement

Section 310-6.15 (B) (2) prohibits an ADU from being held in separate ownership from the principal dwelling. 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 310-6.15 (B) (2) 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 310-6.15 (B) (2)' 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 310-6.15 (B) (2)'s ownership provisions are in conflict with the Regulations or are an unreasonable regulation under 760 CMR 71.03 (3). However, the Town should be prepared to satisfy the requirements of 760 CMR 71.03 (3) if this provision, as applied to a particular person, is challenged in the Court as unreasonable. The Town should consult closer with Town Counsel on this issue.

B. Section 310-6.15 (B) (6)'s Dimensional Requirements

Section 310-6.15 (B) (6) requires ADUs to comply with Section 310-5.1 (B)'s dimensional requirements. Section 310-5.1 (B) imposes dimensional requirements including, minimum lot size, setbacks, and lot coverage based on the zoning district where the structure or lot is located and includes dimensional requirements for accessory buildings. We approve Section 310-6.15 (B) (6), but the Town must ensure it applies the dimensional requirements consistent with the statutory

protections for ADUs and the Regulations.

As an initial matter, the Town cannot impose a minimum lot size requirement on a Protected Use ADU. See 760 CMR 71.03 (3)(b)(2) ("…a Municipality may not require a minimum Lot size for a Protected Use ADU"). Therefore, it cannot impose Section 310-5.1 (B)'s minimum lot size requirement on ADUs. With regards to the other dimensional requirements (other than minimum lot size, which the Town cannot impose on ADUs) 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.

In addition, in applying Section 310-6.15 (B) (6)'s dimensional requirements to an ADU, because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose "reasonable regulations" on a Protected Use ADU. Therefore, if a density or dimensional requirement is used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. Moreover, the Town must ensure that this prohibition is analyzed on a case by case basis as it relates to a particular property because in some circumstances the provision could be unreasonable as applied to a particular property. In addition, the Town must ensure that the application of this requirement serves, and is 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 regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of any dimensional requirements 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, 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 stating that ADUs shall comply with Section 310-5.1 (B) dimensional requirements but not specifying what those requirements are to make it clear what dimensional requirements apply to the ADU and to ensure that those utilizing the ADU by-law have clear information regarding any required dimensional standards.

C. Section 310-6.15 (C) (1)'s Front Yard Requirements

Section 310-6.15 (C) (1) provides that an ADU shall not be located closer to the front lot line than the principal dwelling and shall not be permitted in the front yard setback. It appears that Section 310-6.15 (C) (1) is intended to prohibit an ADU from being located in front of the principal dwelling, including in a front yard. We interpret this provision to relate to the location of the ADU as opposed to a setback requirement, because if intended as a setback requirement, 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.

However, in applying Section 310-6.15 (C) (1), we reiterate to the Town that because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose "reasonable regulations" on a Protected Use ADU. Therefore, if this requirement is used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. Moreover, the Town must ensure that this prohibition is analyzed on a case by case basis as it relates to a particular property because in some circumstances the provision could be unreasonable as applied to a particular property. In addition, the Town must ensure that the application of this requirement serves, and is 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 regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of Section 310-6.15 (C) (1) to a Protected Use ADU. We encourage the Town to consult with Town Counsel to determine if an amendment to Section 310-6.15 (C) (1) is needed at a future Town Meeting to clarify that this provision does not impose an additional setback requirement on a Protected Use ADU.

D. Section 310-6.15 (D)'s Site Plan Review Requirement

Section 310-6.15 (D) requires site plan for an ADU that expands the footprint for the principal dwelling and designates the Planning Board as the site plan review authority. The site plan shall consider "screening, parking, and bulk and height" of the ADU. In applying Section 310-6.15 (D)'s site plan review requirements, the Town must ensure that its site plan approval requirements are not unreasonable or inconsistent with the site plan review process for Dover Amendment protected uses. See The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 33 (1979) (town cannot require applicant to submit site plan and "informational statement" with details about its landscaping plans, projections about the increased impact on municipal services, and other details outside the scope of what the town could lawfully regulate under the Dover Amendment). Although 760 CMR 71.03 (3)(5) allows site plan review for a Protected Use ADU, it requires that such site plan process be "clear and objective" and not impose terms or conditions that are "unreasonable or inconsistent" with an as-of-right process. Therefore, any site plan process that the Town imposes upon an ADU must be limited in its scope to only those requirements that are permissible under the Regulations as applied to a Dover Protected ADU.

Therefore, in applying these site plan review provisions, we reiterate to the Town that because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose "reasonable regulations" on a Protected Use ADU. We encourage the Town to consult with Town Counsel to ensure the proper application of these provisions. In addition, the Town must ensure that Section 310-6.15 (D) is not used in a manner to prohibit or unreasonably restrict a Protected Use ADU, because such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. Lastly, the Town must ensure that the application of this requirement serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification, impose an excessive cost or substantially

diminish or interfere with the use or development of a Protected Use ADU. See 760 CMR 71.03 (3)(a). If the Town cannot satisfy this standard, then the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel with any questions and to ensure the proper application of Section 310-6.15 (D) to a Protected Use ADU.

VI. Conclusion

We approve Article 21 because it does not conflict with G.L. c. 40A, § 3 and the Regulations.

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 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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