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May 27, 2025

Pamela LaFleur, Town Clerk
Town of Leicester
3 Washburn Street
Leicester, MA 001524

Re: Leicester Special Town Meeting of November 9, 2024 -- Case # 11623
Warrant Article # 9 (Zoning)[1]

Dear Ms. LaFleur:

Article 9 - Under Article 9, the Town amended sections of its zoning by-laws, including adding a new Section 5.19, "Accessory Dwelling Units," that allows 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 9 because the approved text does not conflict with state law. However, we disapprove the following provisions adopted under Article 9 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 1.3's definitions for "Accessory Dwelling, Attached;" "Accessory Dwelling Unit, Contained;" and Accessory Dwelling Unit, Detached;"
- The words "single-family house or house" in Section 5.19 (C) (1) (e);
- Section 5.19 (C) (1) (f)'s Two Bedroom Limitation for ADUs;
- Section 5.19 (C) (1) (h)'s requirements that the lot on which the ADU is located meets "all" dimensional regulations; and

[1] On February 13, 2025, by agreement with Town Counsel as authorized under G.L. c. 40A, § 32, we extended our deadline for review of Article 9 for 60 days until April 24, 2025. On April 22, 2025, we extended our deadline for Article 9 for an additional and final 30 days until May 24, 2025.

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

- Section 5.19 (C) (1) (i)'s requirement that an ADU shall provide "1 [parking] space per Accessory Dwelling Unit."

In this decision we summarize the by-law amendments adopted under Article 9; 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 9.[4] In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 9.

I. Summary of Article 9

Under Article 9, the Town voted to add to Section 1.3, "Definitions," new definitions for: (1) "Accessory Dwelling Unit;" (2) "Accessory Dwelling Unit, Attached;" (3) Accessory Dwelling Unit, Contained;" and (4) "Accessory Unit, Detached;" (collectively referred to in this decision as "ADUs") as follows:

> Accessory Dwelling Unit, Attached – An accessory dwelling unit which is attached to and involves significant changes to the single-family detached dwelling, including but not limited to, external fire escape structures, exterior additions, and other similar changes which result in a significant alteration to the appearance and function of the building or site.
>
> Accessory Dwelling Unit, Contained – An accessory dwelling unit which is contained entirely within an existing or new single-family detached dwelling and requires no significant external changes to the dwelling or site beyond entrances and windows as required by the building code.
>
> Accessory Dwelling Unit, Detached – A detached accessory dwelling unit shall be a freestanding, accessory, single[-]family detached dwelling permitted to occur on a residential property as an accessory, incidental and subordinate to the primary structure. A detached accessory dwelling unit may be the result of new construction or rehabilitation of an existing structure.

Under Article 9 the Town also added a definition for "Accessory Housing Unit" and requires AHUs to comply with Section 5.19 and other additional requirements as set forth in the definition of AHU. The definition of AHU provides in pertinent part as follows:

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[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 9 at its November 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 9.

Accessory Housing 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:

* * *

ii. is larger than 900 square feet but is 1300 square feet or less . . .

The Town also amended Section 3.2, "Schedule of Uses," to allow ADUs and Accessory Housing Units ("AHUs") as-of-right in the Town's Suburban-Agricultural ("SA"), Residential 1 ("R1"), Residential 2 ("R2"); Business ("B"); Central Business ("CB"); Industrial ("I"); and Business-Industrial-A ("BI-A") districts and prohibit them in the Highway Business Industrial District 1 ("HB-1") and Highway Business Industrial District 2 ("HB-2") zoning districts.[5] [6] Section 3.30, "Business Residential-1 ("BR-1"), Section 3.32.B.1, "Residential Industrial Business ("RIB"), and Section 5.6.02.2.L, "Greenville Village Neighborhood Business District ("NB") are also amended to allow ADUs and Accessory Housing Units as-of-right.[7]

Finally, under Article 9, the Town added a new Section 5.19, "Accessory Dwelling Units," that imposes use and dimensional requirements on ADUs and AHUs. Section 5.19 (C) imposes use and dimensional requirements as follows"

1. The Building Commissioner may issue a Building Permit authorizing the installations and use of an Accessory Dwelling Unit only when the following conditions are met:

* * *

c. Only one Accessory Dwelling Unit may be created within a single-family house or house lot.

* * *

f. An Accessory Dwelling Unit shall not have more than two bedrooms.

* * *

h. Lot must meet all dimensional regulations and there must be space to provide for adequate and safe water supply and sewage disposal.

i. Off-street parking spaces shall be available for use by the owner-occupant(s) and tenants with adequate access and egress for the site. Parking shall be provided at 1 space

[5] As voted under Article 9, ADUs are Protected Use ADUs that are allowed as-of-right under G.L. c. 40A, § 3and the Regulations. As voted under Article 9, AHUs are not Protected Use ADUs, but rather are the type of more "permissive" zoning allowed under Section 760 CMR 71.03 (7).

[6] Single family dwellings are allowed as-of-right in the SA, R1, R2; B; CB; I; and BI-A Districts and prohibited in the HB-1 and HB-1 Districts.

[7] Single family dwellings are allowed as-of-right in the BR-1, RIB, and NB Districts.

per Accessory Dwelling Unit.

j. Accessory Dwelling Units must have address numbers visible for emergency services personnel.

* * *

k. Under no circumstances shall the Accessory Dwelling Unit be sold separately from the primary residences.

l. Accessory Dwelling Unit shall not be used as a Bed and Breakfast or short-term rental.

* * *

o. Mobile homes are prohibited.

Section 5.19 (D) pertains to enforcement of the by-law and authorizes the Zoning Enforcement Officer/Building Commissioner to administer and enforce the by-law. Section 5.19 (D) (d) requires proposed buildings and the building location to "conform with the town's laws and by-laws" and requires any new building or structure to "conform to all adopted state and town laws, bylaws, codes and regulations."

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

Our review of Article 9 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 9, 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. 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.[8]

Section 8 of the Act, which took effect on February 2, 2025,[9] 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, 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

[8] 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.

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

> 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. 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. Crossing Over, Inc. v. City of Fitchburg, 98 Mass. App. Ct. 822, 829 (2020) (G.L. 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.

V. 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).[10]

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"[11] or an "Unreasonable

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

[11] 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.

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.[12]

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.

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

[12] 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).

(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).

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

VI. We Disapprove Certain Text Because It Conflicts with G.L. c. 40A, § 3 and the Regulations

A. The Words "single family" in the ADU Definitions and "single-family house or house" in Section 5.19 (C) (1) (e)

Section 1.3 defines ADUs as being part of a "single family" dwelling in pertinent part as follows:

> Accessory Dwelling Unit, Attached – An accessory dwelling unit which is attached to and involves significant changes to the **single-family** detached dwelling . . .
>
> Accessory Dwelling Unit, Contained – An accessory dwelling unit which is contained entirely within an existing or new **single-family** detached dwelling . . .
>
> Accessory Dwelling Unit, Detached – A detached accessory dwelling unit shall be a freestanding, accessory, **single[-]family** detached dwelling permitted to occur on a residential property as an accessory, incidental and subordinate to the primary structure. . .

Section 5.19 (C) (c) allows one ADUs created within a single family house or house lot as follows:

> c. Only one Accessory Dwelling Unit may be created within a **single-family house or house** lot.

We disapprove and delete the words "single-family" and "single-family house or house" in Section 1.3 and Section 5.19 (C) (c) as shown above bold and underline that limits ADUs as accessory to a single-family dwelling or on a single family house or house lot because limiting ADUs to a single-family dwelling or single-family lot 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, 448 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 ways that the [S]tate explicitly determined they should not be limited" and "[a]ccordingly, the town's bylaw is preempted by State law to the extent it requires all medical marijuana dispensaries to be nonprofit organizations.")

General Laws Chapter 40A, Section 3 and the Regulations allow Protected Use ADUs as-of-right on the same lot as any type of "Principal Dwelling," not just a 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):

> 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, by stating that the ADUs are allowed only within a "single-family dwelling" or on a single-family home lot, conflicts with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the words "single-family" and "single-family house or house" as shown above in bold and underline from Section 1.3 and Section 5.19 (C) (c).

B. Section 5.19 (C) (f)'s Two Bedroom Limit for ADUs

We disapprove and delete Section 5.19 (C) (f)'s two-bedroom limitation ("An Accessory Dwelling Unit shall not have more than two bedrooms.") because it conflicts with G.L. c. 40A, § 3's prohibition on regulating the interior area of a single-family residential building. General Laws Chapter 40A, Section 3 provides in pertinent part as follows:

> No zoning . . . by-law shall regulate or restrict the interior area of a single family residential building . . . provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. . . .

General Laws Chapter 40A, Section 3, prohibits the regulation or restriction of the interior area of single family residences. 81 Spooner Road, LLC v. Town of Brookline, 452 Mass. 109, 113 (2008). In 81 Spooner Road, the court concluded that a Brookline by-law creating a maximum gross floor area to lot size ratio was not inconsistent with G.L. c. 40A, § 3. The court concluded that the language of G.L. c. 40A, § 3, prohibiting the regulation of interior space prohibits only "'direct' regulation of interior area, and not incidental effects of reasonable dimensional, bulk, and density requirements." 81 Spooner Road, 452 Mass. at 116; see also, White v. Armour, 2008 WL 4946478 (Mass.Land Ct.) (Weston's prohibition against a Residential Gross Floor Area the "greater of 3,500 s.f. or 10% of the lot area up to a maximum of 6,000 s.f." was a valid regulation of bulk and height of structures and not a violation of G.L. c. 40A, § 3).

As the court in 81 Spooner Road, explained,

> Construing the prohibition in s. 3, second par., to mean direct regulation of interior area is sensible. It is based on a sound method of analysis used to resolve similar

> internal conflicts in other statutes, and it would make s. 3, second par., with its proviso a coherent and internally consistent piece of legislation. It permits municipalities to effectuate the legislative purpose of zoning, as set forth in St. 1975, c. 808, s. 2A, while simultaneously preserving the legislative policy against snob zoning and another stated purpose of zoning: "to encourage housing for persons of all income levels.

81 Spooner Road, 452 Mass. at 117.

An ADU is defined under G.L. c. 40A, § 1A, the Regulations, and Section 1.3 of the Town's zoning by-laws as a "self-contained housing unit." An ADU is not defined under state law to be a two-family or a multi-family dwelling. Therefore, we determine an ADU is a single-family residential building for purposes of G.L. c. 40A, § 3 and therefore Section 5.19 (C) (1) (f)'s two-bedroom limitation regulates the interior space of an ADU in violation of Section 3's prohibition against regulating interior space. We therefore disapprove Section 5.19 (C) (1) (f).

Section 5.19 (C) (1) (f)'s two bedroom limitation is also an impermissible use and occupancy restriction under the Regulations, that define "Use and Occupancy Restrictions" as follows:

> A Zoning restriction, Municipal regulation . . . zoning approval or other requirement imposed by the Municipality that limits the current, or future, use or occupancy of the Protected Use ADU to individuals or households upon the characteristics of, or relations between, the occupants, 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

By limiting the number of bedrooms, Section 5.19 (C) (1) (f) limits the occupancy of the ADU, including limiting the number of occupants beyond what is required by applicable state code, including the State Sanitary Code, and it limits characteristics of or the relations between the occupants, in violations of the Regulations. We therefore disapprove Section 5.19 (C) (1) (f) on this basis as well.[13]

C. Section 5.19 (C) (1) (h)'s Dimensional Requirements for ADU

Section 5.19 (C) (1) (h) requires the lot on which the ADU is located to meet "**all** dimensional regulations." We disapprove and delete the word "all" from Section 5.19 (C) (1) (h) because the Regulations: (1) prohibit the Town from imposing minimum lot size requirements for ADUs and (2) prohibit the Town from imposing dimensional standards that are more restrictive than those required for the Principal Dwelling or a Single-family Residential Dwelling or

[13] Although not a basis of our disapproval, we note that a bedroom limitation for ADUs, would also likely be found, on a full factual record, to be (1) an unreasonable regulation under 760 CMR 71.03 (3)(a); (2) violate the Dover Amendment protections given to ADUs under G.L. c. 40A, 3; and (3) violate Fair Housing laws that prohibits discrimination in providing housing based on a protected class, including family status (i.e., the presence of children in the household.) See 44 U.S.C. § 3604 (the Fair Housing Act [FHA]) and G.L. c. 151B, § 4, ¶ 6.

accessory structure in the Zoning District in which the Protected Use ADU is located, as explained below.

The Regulations, 760 CMR 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards," 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, 760 CMR 71.03 (3)(b)(2), prohibit a Town from requiring a minimum lot size for a Protected Use ADU.[14] Section 4.2, "Schedule of Dimensional Requirements – Table 1" ("Table 1") includes a minimum lot size requirement based on the specific zoning district where the lot is located. Table 1 also includes specific minimum lot size requirements for single-family dwellings in BI-A, BR-1, I, and RIB Districts. The Town cannot require an ADU to comply with Table 1's minimum lot size requirement.

In addition, the Regulations prohibit the Town from imposing dimensional standards that are more restrictive than those required for the Principal Dwelling or a Single-family Residential Dwelling or accessory structure in the zoning district in which the ADU is located, whichever results in more permissive regulations no more restrictive than those required. Therefore, the Town can only require an ADU to comply with Table 1's other dimensional requirements, including frontage, setbacks, height, number of stories, and maximum building coverage, that are no more restrictive than those 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 regulations Section 5.19 (C). Because the Town cannot require an ADU to comply with "all" dimensional requirements, we disapprove the word "all" from Section 5.19 (C) (1) (h).

D. Section 5.19 (C) (1) (i)'s One Parking Space Requirement for an ADU

Section 5.19 (C) (1) (i) requires one parking space per each ADU as follows:

[14] The Regulations, 760 CMR 71.02, define "Lot" as "[a]n area of land with definite boundaries that is used, or available for use, as the site of a structure, or structures, regardless of whether the site conforms to requirements of Zoning." However, the Town's zoning by-laws do not appear to define "lot area."

> Off-street parking spaces shall be available for use by the owner-occupant(s) and tenants with adequate access and egress for the site. **Parking shall be provided at 1 space per Accessory Dwelling Unit.**

We disapprove and delete the one space per ADU a (as shown above in bold and underline), because as written, this text requires all ADUs to provide 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 a parking space for any 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 5.19 (C) (i) requires all ADUs to provide 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 an additional parking space because as written, that requirement encompasses a Protected Use ADU that is located within a 0.5-mile radius of a Transit Station, in conflict with the statute and the Regulations. See West Street Associates, LLC, 488 Mass. at324 (citing with approval trial judge's ruling that ""By limiting medical marijuana facilities to nonprofit entities, the bylaw[,] while not prohibit[ing] those facilities, does restrict them in a way that the [S]tate explicitly determined they should not be limited" and "[a]ccordingly, the town's bylaw is preempted by State law to the extent it requires all medical marijuana dispensaries to be nonprofit organizations.").

Should the Town wish to amend Section 5.19 (C) (1) (i) 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 any such 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.

VII. 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 9 to ensure that the Town applies these provisions consistent with G.L. c. 40A, § 3 and the Regulations.

A. Section 5.19 (C) (h)'s Dimensional Requirements

As to Section 5.19 2's (C) (h)'s approved dimensional requirements imposed on ADUs, the Town must ensure that its existing dimensional requirements, including, frontage, front, side, and rear setbacks, and lot coverage as applied to an 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, 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 5.19 2's (C) (h)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 5.19 2's (C) (h) should be amended to specifically include text that an ADU is not subject to minimum lot size requirements (as required by the Regulations) and that an ADU may only be subject to "reasonable regulations" (under the test set forth in Section 760 CMR 71.03 (3) of the Regulations) because it is a Dover Amendment protected use under G.L. c. 40A and because the Regulations prohibit towns from unreasonably regulating an ADU. Lastly, 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 5.19 (C) (j)'s ADU Numbering Requirement

Section 5.19 (C) (j) requires ADUs to have numbering visible for emergency responders. Section 71.03 (8) of the Regulations requires ADUs to be given "an address consistent with the most current Address Standard published by MassGIS" MassGIS requires ADU addresses to be reported to MassGIS and EOHLC after assignment. MassGIS has provided guidance, recommendations, and best practices for ADU numbering, including stating that "every detached, attached, and internal ADU should receive an address that uniquely distinguishes it from any other address in the municipality" and that the address complies with MassGIS's best practices. See https://www.mass.gov/info-details/massgis-addressing-guidance-for-accessory-dwelling-units-adus. We suggest that the Town discuss Section 5.19 (C) (j)'s ADU address requirements and MassGIS's guidance with Town Counsel.

C. Section 5.19 (C) (k)'s Common Ownership Requirement

Section 5.19 (C) (k) prohibits the ADU from being sold separately from the primary residences, which means that the ADU and the primary residence must remain in common ownership."

Although the Regulations prohibit a municipality from imposing "owner-occupancy" requirements on either the ADU or the principal dwelling, the Regulations are silent on the issue of whether the ADU and the principal dwelling must remain in single ownership. In addition, both the statute and 760 CMR 71.02's definition of ADU authorize a municipality to impose "additional restrictions" on an ADU. Based upon our standard of review, we cannot conclude that Section 5.19 (C) (k) is in conflict with state law.

In reviewing Section 5.19 (C) (k) we have considered the question whether the by-law's requirement that the ADU cannot be sold separately from the primary residence 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 5.19 (C) (k) is 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

Section 5.19 (C) (k)) 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 5.19 (C) (k)'s 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.

D. Section 1.3's Definition of ADU and Section 5.19 (C) (o)'s Prohibition on Mobile Homes as ADUs

Section 1.3's new definition of "Accessory Dwelling Unit," expressly states that mobile homes cannot be ADUs and Section 5.19 (C) (o) states that mobile home are prohibited from being used as ADUs. The Town's existing by-laws, Section 1.3 defines "Trailer, Mobile Home" as follows:

> Trailer or Mobile Home - A trailer or mobile home shall mean any vehicle or object on wheels so designed and constructed or reconstructed or added to by means of such accessories as to permit the use and occupancy thereof for human habitation, whether resting on wheels, jacks or other foundations, and shall include the type of vehicle commonly known as a Mobile Home, which shall be defined to mean a dwelling unit built on a chassis and containing complete electrical, plumbing sanitary facilities and designed to be installed on a temporary or permanent living quarters; and being less than 20 feet in width in its completed habitable form, but specifically excluding camping trailers

"Mobile homes" are now generally referred to as "manufactured home." See The Attorney General's Guide to Manufactured Housing Community Law, pg. 6 at https://www.mass.gov/doc/attorney-generals-guide-to-manufactured-housing-may-2024/download (stating "Many manufactured housing residents have found that manufactured homes (sometimes called "mobile homes") offer the benefits of traditional site-built housing at a much lower cost.") The term "manufactured home" is defined in G.L. c. 140, § 32Q as follows:

> As used in sections thirty-two A to thirty-two P, inclusive, the words "manufactured home" shall mean a structure, built in conformance to the National Manufactured Home Construction and Safety Standards which is transportable in one or more sections, which in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling unit with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein.

The Regulations neither define or refer to a "mobile home" or "manufactured home." Instead, the Regulations refer only to a "Modular Dwelling Unit," defined as follows:

> A pre-designed Dwelling Unit assembled and equipped with internal plumbing, electrical or similar systems prior to movement to the site where such Dwelling Unit is affixed to a foundation and connected to internal utilities; or any portable structure with walls, a floor, and a room, designed or used as a Dwelling Unit,

transportable in one or more sections and affixed to a foundation an connected to external utilities.

With regards to a "Modular Dwelling Unit," the Regulations 760 CMR 71.03 (3)(b)(7) provide that "[a]ny requirement that prohibits, regulates or restricts a Modular Dwelling Unit from being used as a Protected Use ADU that is more restrictive than the Building Code" is an unreasonable regulation. We have considered whether the by-law's restriction on a mobile home being used as ADU conflicts with the Regulations. Under our standard of review and based on the above definitions, we cannot conclude that a "mobile home" is the same as a "Modular Dwelling Unit." Therefore, we cannot conclude that the by-law's prohibition on a mobile home being used as an ADU conflicts with the Regulations.[15] However, we also cannot predict with any certainly whether, if this provision is challenged, a Court on a full factual record, may conclude otherwise. We therefore encourage the Town to consult with Town Counsel to ensure that the application of this provision 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.

E. Section 5.19 (C) (1) (l)'s Prohibition on ADUs Being Used as Bed and Breakfast

Section 5.19 (C) (1) (l)'s prohibits ADUs from being used as a Short-Term Rental ("STR") and as a Bed and Breakfast establishment. We approve Section 5.19 (C) (1) (l) because the Regulations expressly allow towns to prohibit ADUs as short term rentals. See G.L. c. 40A, § 1A's definition of ADU and the Regulations. The Town's existing by-laws, Section 1.3's defines a "Bed and Breakfast" as a "short term" rental – "house. . .where up to six (6) short-term lodging rooms and breakfast are provided." Therefore, based upon our standard of review, we cannot conclude that such prohibition violates G.L. c. 40A, § 3 and the Regulations. However, we suggest that the Town discuss Section 5.19 (C) (1) (l) with Town Counsel because Section 3 and the Regulations provide a limited authorization on the Town's ability to regulate the rental of ADUs. If Section 5.19 (C) (1) (l) 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, the Town cannot apply Section 5.19 (C) (1) (1) to prohibit the rental of ADUs other than as allowed under G.L. c. 64G, because such application would violate Section 3 and the Regulations. We suggest that the Town discuss this issue in more detail with Town Counsel.

VIII. Conclusion

We partially approve Article 9, except for:

[15] For example, G.L. c. 140, § 32Q definition of "manufactured home" provides that it does not need to be affixed to a permanent foundation; but the Regulations' definition of "Modular Dwelling Unit" requires it to be affixed to a foundation.

- The words "single-family" in Section 1.3's definitions for "Accessory Dwelling, Attached;" "Accessory Dwelling Unit, Contained;" and Accessory Dwelling Unit, Detached;"
- The words "single-family house or house" in Section 5.19 (C) (1) (e);
- Section 5.19 (C) (1) (f)'s Two Bedroom Limitation for ADUs;
- Section 5.19 (C) (1) (h)'s requirements that lot on which the ADU is located to meet "all" dimensional regulations; and
- Section 5.19 (C) (1) (i)'s requirement that an ADU shall provide "1 [parking] space per Accessory Dwelling Unit."

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 10 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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