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June 18, 2025

Elisabeth E. Horan, Town Clerk
Town of Fairhaven
40 Center Street
Fairhaven, MA 02719

**Re: Fairhaven Special Town Meeting of November 19, 2024 --- Case # 11677**
**Warrant Articles # 1 and 13 (Zoning)**
**Warrant Article # 14 (General)[1]**

Dear Ms. Horan:

**Article 13** - Under Article 13, the Town voted to amend several sections of its zoning by-laws to allow Accessory Dwelling Units ("ADUs") as of right in compliance with G.L. c. 40A, § 3 and the implementing Regulations promulgated by the Executive Office of Housing and Livable Communities ("EOHLC"), 760 CMR 71.00, "Protected Use Accessory Dwelling Units" ("Regulations").[2]

We partially approve Article 13 because the approved text does not conflict with state law. However, we disapprove Section 198-32.1.C (1)'s height limitation for detached ADUs because it conflicts 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)).

In this decision we summarize the by-law amendments adopted under Article 13; 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

[1] On March 20, 2025, we approved Articles 1 and 14 and by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended our deadline for review of Article 13 for 60-days until May 19, 2025. On May 15, 2025, by agreement with Town Counsel, we further extended our deadline for Article 13 for an additional and final 30-days until June 18, 2025.

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

[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

of review, we partially approve the zoning by-law amendments adopted under Article 13.[4] In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 13.

## I. Summary of Article 13

Under Article 13, the Town amended several sections of its zoning by-laws to allow ADUs as of right in the Town. The Town amended Section 198-16, "Use Regulation Schedule," to allow ADUs as of right in the Town's Rural Residence ("RR") and Single Residence ("RA") districts. The Town also amended Section 198-32.1, "Accessory Dwelling Units," to impose requirements and limitations on ADUs, including dimensional requirements and prohibiting an ADU from being used as a short-term rental. Lastly, the Town added a new definition of ADU to Section 198-33.

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

Our review of Article 13 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 13, 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

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 13 at its November 19, 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 13.

constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

## III. Summary of Recent Legislative Changes Regarding ADUs

On August 6, 2024, Governor Healey signed into law the "Affordable Homes Act," Chapter 150 of the Acts of 2024 (the "Act"). The Act includes amendments to the State's Zoning Act, G.L. c. 40A, to establish ADUs as a protected use subject to limited local regulation including amending G.L. c. 40A, § 1A to add a new definition for the term "Accessory dwelling unit" and amending G.L. c. 40A, § 3 (regarding subjects that enjoy protections from local zoning requirements, referred to as the "Dover Amendment"), to add a new paragraph that restricts a zoning by-law from prohibiting, unreasonably regulating or requiring a special permit or other discretionary zoning approval for the use of land or structures for a single ADU. The amendment to G.L. c. 40A, § 3, to include ADUs means that ADUs are now entitled to statutory protections from local zoning requirements.

On January 31, 2025, the EOHLC promulgated regulations for the implementation of the legislative changes regarding ADUs. See 760 CMR 71.00, "Protected Use Accessory Dwelling Units."[5] The Regulations define key terms and prohibit certain "Use and Occupancy Restrictions" defined in Section 71.02 as follows:

> Use and Occupancy Restrictions. A Zoning restriction, Municipal regulation, covenant, agreement, or a condition in a deed, zoning approval or other requirement imposed by the 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

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[5] See the following resources for additional guidance on regulating ADUs: (1) EOHLC's ADU FAQ section (https://www.mass.gov/info-details/accessory-dwelling-unit-adu-faqs\); (2) Massachusetts Department of Environmental Protection's Guidance on Title 5 requirements for ADUs (https://www.mass.gov/doc/guidance-on-title-5-310-cmr-15000-compliance-for-accessory-dwelling-units/download); and (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-

while a town may reasonably regulate and restrict Protected Use ADUs, certain restrictions or regulations "shall be unreasonable" in certain circumstances.[8] In addition, while municipalities may impose dimensional requirements related to setbacks, lot coverage, open space, bulk and height and number of stories (but not minimum lot size), such requirements may not be "more restrictive than is required for the Principal Dwelling, or a Single-Family Residential Dwelling or accessory structure in the Zoning District in which the Protected Use ADU is located, whichever results in more permissive regulation…" 760 CMR 71.03 (3)(b)(2). Towns may also impose site plan review of a Protected Use ADU, but the Regulations requires the site plan review to be clear and objective and prohibits the site plan review authority from imposing terms or conditions that "are unreasonable or inconsistent with an as-of-right process as defined in M.G.L. c. 40A, § 1A." 760 CMR 71.03 (3)(b)(5).

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 13.

## IV. Certain Text is Disapproved from Article 13 Because It Conflicts with G.L. c. 40A, § 3 and the Regulations

Section 198-32.1.C (1) imposes a height requirement on detached ADUs as follows (with emphasis added):

> The use of land or structure for accessory dwelling units and dwelling unit conversions shall be subject to the following dimensional requirements:

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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.

[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."

(1) No detached accessory dwelling unit shall **exceed 20 feet in height, or** be higher than the principle building**, whichever is lower**;

We disapprove and delete the text shown above in bold and underline that prohibits detached ADUs from exceeding 20 feet in height because this text conflicts with the Regulations. Specifically, 760 CMR 71.03 (b)(2)(a), prohibits towns from imposing dimensional requirements on an ADU that are more restrictive than required for the Principal Dwelling, or a Single-Family Dwelling (as defined in 760 CMR 71.02) or an accessory structure in the zoning district where the Protected Use ADU is located, and requires the more permissive dimensional requirement to be applied.

Section 198-17, "Intensity of Use Regulations," subsection (A) requires all buildings to comply with the dimensional requirements for the district in which they are located as shown on the Intensity of Use Schedule ("Use Schedule") in Section 198-18. The Use Schedule imposes building height requirements ranging from thirty-five feet in the RR District to forty feet in the Mixed Use ("MU") District.

Section 198-32.1.C (1)'s height requirements shown in bold and underline above would limit detached ADUs to twenty feet or the no higher than the principal dwelling, whichever is lower. The Use Schedule allows building height greater than twenty feet in all districts. Because Section 198-32.1.C (1) imposes a height requirement that is more restrictive than required for the Principal Dwelling, or a Single-Family Dwelling or an accessory structure in the zoning district where the Protected Use ADU is located Section 198-32.1.C (1) as shown above in bold and underline conflicts with the Regulations and we disapprove it. The Town should consult with Town Counsel with any questions regarding the height requirement that may be applied to an ADU.

As to the remainder of the dimensional requirements imposed on ADUs in the Use Schedule, the Town cannot apply its provisions to impose any requirements related to minimum lot area on a Protected Use ADU (see lot area requirements in the Use Schedule) because this application would conflict with the Regulations. Specifically, 760 CMR 71.03 (3)(b)(2), prohibits a Town from requiring a minimum lot size for a Protected Use ADU.[10] We encourage the Town to consult with Town Counsel about an amendment at a future Town Meeting that clearly states that the Use Schedule's minimum lot area requirements are not applicable to an ADU.

With the exception the text shown above in bold and underline and application of the Use Schedule's lot area requirements, based on our standard of review, we cannot conclude that Use Schedule's dimensional requirements are unreasonable and therefore prohibited under 760 CMR 71.00. However, if these dimensional requirements are 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 implementing Regulations.

[10] 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."

The Town must also ensure that the application of the Use Schedule's requirements 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). The Town should consult with Town Counsel to ensure the proper application of Use Schedule to a Protected Use ADU. In addition, 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.

Finally, the Town should discuss with Town Counsel whether Section 198-32.1.C should be amended at a future Town Meeting to specifically include text that a Protected Use ADU is not subject to any minimum lot size requirements shown in the Use Schedule well as whether Section Sections 198-32.1.C should be amended to include the applicable dimensional requirements for an ADU (rather than referencing the existing zoning by-law provisions in the Table) to ensure that those utilizing the ADU by-law have clear information regarding any required dimensional standards.

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

### A. Section 198-16's Use Regulation Schedule

Under Article 13, the Town amended Section 198-16, the Town's Use Regulation Schedule, to allow ADUs as of right in the Town's Rural Residence ("RR") Single Residence ("RA") Districts as follows (new text in bold and deleted text in underlined):

| Activity or Use | RR& RA | RB | RC | P | B | I | AG | MU[14] | WRP[16] |
|---|---|---|---|---|---|---|---|---|---|
| Dwelling conversion (subject to the provisions of § 198-32.1) | ~~A~~**Y** | A | A | N | A | A | A | A | A |
| **Accessory apartment/inlaw apartment** | ~~A~~**Y** | A | A | N | N | N | A | Y | Y |
| ~~Short term rental~~ **Short term rental of principal residence** | Y | Y | Y | N | N | N | Y | Y | N |
| **Short term rental of accessory dwelling unit** | **N** | **N** | **N** | **N** | **N** | **N** | **N** | **N** | **N** |

The only text amended in the Use Schedule is the text shown in bold and underlined above and therefore it is the only text for us for review. We approve the changes to the Use Schedule because they do not conflict with state law, including the change allowing ADUs as of right in the RR and RA Districts, which are districts where single family residences are allowed as of right. However, because the General Residence ("RB"), Apartment /Multi-family ("RC"), and

Agricultural ("AG") Districts also allow single-family dwellings as of right, Protected Use ADUs must also be allowed *by right* in the RB, RC, and AG Districts, as explained below.

General Laws Chapter 40A, Section 3 allows a Protected Use ADU as of right on any lot in a single-family residential zoning district, in relevant part as follows:

> No zoning ordinance or by-law shall prohibit, unreasonably restrict or require a special permit or other discretionary zoning approval for the use of land or structures for a single accessory dwelling unit, or the rental thereof, in a single-family residential zoning district; provided, that the use of land or structures for such accessory dwelling unit under this paragraph may be subject to reasonable regulations…

The Regulations define the term "Single-family Residential Zoning District" as follows:

> Any Zoning District where Single-family Residential Dwellings are permitted or an allowable use, including any Zoning District where Single-family Residential Dwellings are allowed as-of-right or by Special Permit.

Under the existing Use Regulations, ADUs are allowed by special permit ("A") in the Town's RB, RC, and AG Districts. However, single-family dwellings are allowed in these districts by right. Therefore, ADUs must be allowed as of right in the RB, RC and AG Districts.[11] We suggest that the Town discuss this issue with Town Counsel and discuss amending the Use Schedule at a future Town Meeting to reflect that Protected Use ADUs are allowed as of right in the RB, RC, and AG Districts in accordance with G.L. c .40A, § 3. In the meantime, the Town cannot prohibit a Protected Use ADU in the Business Districts, as to do so would conflict with G.L. c. 40A, § 3 and the Regulations.

## VI. Conclusion

We partially approve Article 13 except Section 198-32.1.C (1)'s height limitation for detached ADUs that conflicts 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 in Article 13 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,

[11] It appears that single family dwellings are a prohibited use in the Town's Park ("P"), Business ("B"), and Industrial (I) Districts. See, the Use Schedule.

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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