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June 16, 2025

Kerri A. McManus, Town Clerk
Town of Georgetown
1 Liberty Street
Georgetown, MA 01833

Re: Georgetown Special Town Meeting of December 9, 2024 -- Case # 11665
Warrant Article # 3 (Zoning) [1]

Dear Ms. McManus:

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

We partially approve Article 3 because the approved text does not conflict with state law. However, we disapprove the following provisions 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)):

- a portion of Section 165-69 (A)(1) requiring the ADU to meet "all other applicable zoning requirements for the district in which it is located;"

- Sections 165-69 (A)(3) and 165-69 (A)(8)'s references to "single-family;" and

[1] In a communication dated March 14, 2025, we placed Article 3 on "299 hold" under G.L. c. 40, § 32 due to a procedural defect in its adoption. On April 23, 2025, the Town Clerk certified that the Town had followed all notice and publishing requirements of G.L. c. 40, § 32 and no claims were received for Article 3. The Attorney General is therefore authorized to, and does, waive the procedural defect for Article 3. On April 24, 2025, by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended the deadline for our review of Article 3 for 45-days until June 12, 2025.

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

- a portion of Section 165-69 (A)(8) that requires the ADU to maintain the "village-like character of the Town" and requires that the "proposed buildings shall relate harmoniously with the surrounding area."

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

I. Summary of Article 3

Under Article 3, the Town amended its zoning by-laws to delete the existing Section 165-69 and insert a new Section 165-69, "Accessory Dwelling Units," for the purpose of "allow[ing] accessory dwelling units within single-family residential zoning districts…" Section 165-69 imposes requirements and limitations on ADUs including dimensional and parking requirements; prohibiting an ADU from being used as a STR; prohibiting trailers from being used as ADUs; and prohibiting additional curb cuts for ADUs. Section 165-69 (B) allows an ADU as of right in the RA, RB, and RC zoning districts.[5] We offer comments on certain specific provisions in the new Section 165-69 below.

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

[5] General Laws Chapter 40A, Section 3 allows a Protected Use ADU "in a single-family residential zoning district," defined in the Regulations as "[a]ny Zoning District where Single-family Residential Dwellings are a permitted or an allowable use, including any Zoning District where Single-family Residential Dwellings are allowed as-of-right or by Special Permit." Section 165-69 (B), allows ADUs in the RA (Central Residential), RB (Outside Residential), and RC (Outside Residential C) districts and appears to prohibit ADUs in all other zoning districts (however the Schedule was not amended under Article 3; the Town should consult with Town Counsel to determine if it should be amended at a future Town Meeting). According to the Town's existing Use Regulations Schedule (see https://ecode360.com/attachment/GE1475/GE1475-165b%20Use%20Regulations%20Schedule.pdf), single-family dwellings are also allowed in the RA, RB, and RC districts and prohibited in all other zoning districts. For this reason, we approve Section 165-69 (B). However, the Town must ensure that Protected Use ADUs are allowed in any Single-family Residential Zoning District in the Town, and we encourage the Town to consult with Town Counsel with any questions on this issue.

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

Our review of Article 3 is governed by G.L. c. 40, § 32. Under G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") "As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid." Bloom v. Worcester, 363 Mass. 136, 154 (1973)."

Article 3, as an amendment to the Town's zoning by-laws, must be given deference. W.R. Grace & Co. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002) ("With respect to the exercise of their powers under the Zoning Act, we accord municipalities deference as to their legislative choices and their exercise of discretion regarding zoning orders."). When reviewing zoning by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court. "[T]he proper focus of review of a zoning enactment is whether it violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety or general welfare." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 57 (2003). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.'" Id. at 51 (quoting Crall v. City of Leominster, 362 Mass. 95, 101 (1972)). However, a municipality has no power to adopt a zoning by-law that is "inconsistent with the constitution or laws enacted by the [Legislature]." Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. Summary of Recent Legislative Changes Regarding ADUs

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

On January 31, 2025, the EOHLC promulgated regulations for the implementation of the legislative changes regarding ADUs. See 760 CMR 71.00, "Protected Use Accessory Dwelling Units."[6] The Regulations define key terms and prohibit certain "Use and Occupancy Restrictions" defined in Section 71.02 as follows:

[6] 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

> 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"[7] 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."[8] Moreover, Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, certain restrictions or regulations "shall be unreasonable" in certain circumstances.[9] In addition, while municipalities may impose dimensional requirements related to setbacks, lot coverage, open space, bulk and height and number of stories (but not minimum lot size), such requirements may not be "more

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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).

[7] 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.

[8] 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).

[9] Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, a restriction or regulation imposed "shall be unreasonable" if the regulation or restriction, when applicable to a Protected Use ADU: (1) does not serve a legitimate Municipal interest sought to be achieved by local Zoning; (2) serves a legitimate Municipal interest sought to be achieved by local Zoning but its application to a Protected Use ADU does not rationally relate to the legitimate Municipal interest; or (3) serves a legitimate Municipal interest sought to be achieved by local Zoning and its application to a Protected Use ADU rationally relates to the interest, but compliance with the regulation or restriction will: (a) result in complete nullification of the use or development of a Protected Use ADU; (b) impose excessive costs on the use or development of a Protected Use ADU without significantly advancing the Municipality's legitimate interest; or (c) substantially diminish or interfere with the use or development of a Protected Use ADU without appreciably advancing the Municipality's legitimate interest.

restrictive than is required for the Principal Dwelling, or a Single-Family Residential Dwelling or accessory structure in the Zoning District in which the Protected Use ADU is located, whichever results in more permissive regulation…" 760 CMR 71.03 (3)(b)(2). Towns may also impose site plan review of a Protected Use ADU, but the Regulations requires the site plan review to be clear and objective and prohibits the site plan review authority from imposing terms or conditions that "are unreasonable or inconsistent with an as-of-right process as defined in M.G.L. c. 40A, § 1A." 760 CMR 71.03 (3)(b)(5).

We incorporate by reference our more extensive comments regarding these recent statutory and regulatory changes related to ADUs in our decision to the Town of East Bridgewater, issued on April 14, 2025 in Case # 11579.[10] Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 3.

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

A. Section 165-69 (A)(1) – Requirement that an ADU Meet All Other Applicable Zoning Requirements for the District in Which it is Located

Section 165-69 (A) requires an ADU to meet certain requirements, including Subsection 1 that provides as follows (with emphasis added):

> …(1) all dimensional requirements for lots and structures set forth in 165 Attachment 3, "Town of Georgetown Intensity of Use Schedule," **along with all other applicable zoning requirements for the district in which it is located**;

We disapprove and delete the text shown above in bold and underline that requires the ADU to meet "all other applicable zoning requirements for the district in which it is located" because this text conflicts with the Regulations, as explained below.

First, it is unclear what the Town means by "all other applicable zoning requirements." The Town does not reference any specific zoning requirements or sections of its existing zoning by-laws. By not identifying the specific zoning requirements that the ADU must comply with, Section 165-69 (A)(1) allows wide discretion to determine on a case by case basis which other provisions of the zoning by-laws apply to a particular ADU and that type of discretion conflicts with the statute and Regulations. Specifically, G.L. c. 40A, § 3 prohibits a zoning by-law from requiring discretionary zoning approvals for a single ADU, in relevant part as follows:

> No zoning…by-law shall prohibit, unreasonably restrict or require a special permit or other discretionary zoning approval for the use of land or structures for a single accessory dwelling unit, or the rental thereof, in a single-family residential zoning

[10] 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."

district; provided, that the use of land or structures for such accessory dwelling unit under this paragraph may be subject to reasonable regulations…

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

> Municipalities shall not prohibit, impose a Prohibited Regulation, or Unreasonable Regulation, or except as provided under 760 CMR 71.03 (5) and 760 CMR 71.03 (c), require a special permit, wavier, variance or other zoning relief or discretionary zoning approval for the use of land or structures for a Protected use ADU, including the rental thereof, in a Single-family Residential Zoning District; provided that Municipalities may reasonably regulate a Protected Use ADU, subject to the limitations under 760 CMR 71.00.

By imposing "**all other applicable zoning requirements for the district in which it is located**" on the ADU without specifying any of the requirements, this portion of Section 165-69 (A)(1) imposes unknown requirements on ADUs that result in unlawful discretionary review and approval of ADUs in conflict with the Regulations. See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 363-64 (1973) (vague laws that do not limit the exercise of discretion by officials engender the possibility of arbitrary and discriminatory enforcement.). Further, by imposing unspecified requirements on the ADU, this provision constitutes an unreasonable regulation in conflict with the Regulations. See 760 CMR 71.03 (3) (a restriction or regulation "shall be unreasonable" if, when applied to a Protected Use ADU it "[s]ubstantially diminish[es] or interfere[s] with the use or development of a Protected Use ADU without appreciably advancing the Municipality's legitimate interest."). For these reasons, we disapprove the portion of Section 165-69 (A)(1) shown above in bold and underline. 7.02. The Town should consult with Town Counsel with any questions on this issue.

B. References to Single-Family

Two provisions reference a "single-family" dwelling instead of a principal dwelling as follows:

> Section 165-69 (A)(3)
> [ADUs are] allowed only as accessory to a **single-family** dwelling…

> Section 165-69 (A)(8)
> the Accessory Dwelling Unit shall not change the **single-family** characteristics of the principal dwelling and will maintain the village-like character of the Town by considering the architectural style and its relation to the prevailing character and scale of buildings in the neighborhood, proposed buildings shall relate harmoniously with the surrounding area.

We disapprove and delete the words "single-family" shown above in bold and underline that limits ADUs as accessory to a single-family dwelling because limiting ADUs to a single-family dwelling conflicts with G.L. c. 40A, § 3 and the Regulations that allow ADUs as-of-right on the same lot as any type of "Principal Dwelling," as explained below. See West Street

Associates, LLC v. Planning Board of Mansfield, 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, the above quoted provisions that state that ADUs are allowed only on lots with a "single-family" dwelling conflict with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the words "single-family" as shown above in bold and underline.

C. Section 165-69 (A)(8) – Design Requirements

Section 165-69 (A)(8) imposes requirements on the ADU's design as follows:

> the Accessory Dwelling Unit shall not change the **single-family** characteristics of the principal dwelling and will maintain the **village-like character of the Town by considering the** architectural style and its relation to the prevailing character and scale of buildings in the neighborhood**, proposed buildings shall relate harmoniously with the surrounding area**.

In addition to the reference to "single-family" that we disapprove (see Section IV (B) above), we disapprove and delete the text requiring the ADU to maintain the "village-like character of the Town" and the text requiring the ADU to "relate harmoniously with the surrounding area" because these requirements conflict with the Regulations as explained below.

The Regulations, 760 CMR 71.03 (3)(b)(1) prohibit the Town from imposing any design standard that "[a] [w]ould not be applied to a Single-Family Residential Dwelling in the Single-family Residential Zoning District in which the Protected Use ADU is located or [b] [i]s so restrictive, excessive, burdensome, or arbitrary that it prohibits, renders infeasible, or

unreasonably increases the costs of the use or construction of a Protected Use ADU." The Regulations, 760 CMR 71.02 define the term "Design Standards" as "[c]lear, measurable and objective provisions of Zoning, or general ordinances or by-laws, which are made applicable to the exterior design of, and use of materials for an ADU." In addition, as discussed in more detail above, 760 CMR 71.03 (1) prohibits a Town from imposing or requiring any "discretionary zoning approval" for the use of land or structures for a Protected Use ADU.

Section 165-69 (A)(8)'s requirement that the ADU's design maintain "the village-like character of the Town" and that the ADU building "relate harmoniously with the surrounding area" imposes design standards on the ADU that are not imposed on single-family dwelling and further are arbitrary in nature because they do not impose "clear, measurable and objective provisions." In addition, this provision creates a "discretionary zoning approval" to determine whether the ADU meets the "village-like character of the Town" and "relate[s] harmoniously with the surrounding area" because Section 165-69 does not define the meaning of "village-like character" or "harmoniously" nor does it state who will make this determination or what standards or criteria would guide that determination. Absent any standards or criteria, this text subjects the Protected Use ADU to a discretionary zoning approval that is prohibited under G.L. c. 40A, § 3 and the Regulations. In addition, this portion of Section 165-69 (A)(8) (shown above in bold and underline) does not define the design requirements in a "clear, measurable and objective" way such that this text also conflicts with Section 71.02's definition of "Design Standards." For these reasons, we disapprove the text in Section 165-69 (A)(8), shown above in bold and underline.

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 in Section 165-69 to ensure that the Town applies these provisions consistent with G.L. c. 40A, § 3 and the Regulations.

A. Dimensional Requirements

The approved portion of Section 165-69 (A) (see Section IV (A) above regarding text disapproved from Section 165-69 (A)(1)) requires an ADU to meet certain requirements, including Subsection 1's dimensional requirements that provides in relevant part as follows: "An Accessory Dwelling Unit shall meet the following requirements: (1) all dimensional requirements for lots and structures set forth in 165 Attachment 3, 'Town of Georgetown Intensity of Use Schedule'…" We approve this portion of Section 165-69 (A)(1) but offer comments to the Town to ensure the application of this provision is consistent with G.L. c. 40A, § 3 and the Regulations.

We have reviewed the Town's existing Attachment 3, "Intensity of Use Schedule," ("Schedule") that imposes dimensional requirements by district. The Schedule imposes requirements related to minimum lot area; minimum front, side and rear yard requirements; maximum lot coverage; and height. Although we approve Section 165-69 (A)(1), the Town cannot apply this provision to impose any requirements related to minimum lot area on a

Protected Use ADU (as contained in the 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.[11] We encourage the Town to consult with Town Counsel about an amendment at a future Town Meeting that clearly states that the Schedule's minimum lot area requirements are not applicable to an ADU.

With the exception of apply the Schedule's minimum lot size requirements, based on our standard of review, we cannot conclude that Section 165-69 (A)(1)'s requirement that an ADU comply with the Town's Intensity Schedule (Attachment 3) of the Town's existing zoning by-laws, is 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.

The Town must also ensure that the application of these 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 these provisions 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.

Further, in applying the approved dimensional requirements, the Town should be mindful that 760 CMR 71.03 (b)(2)(a) prohibits towns from imposing dimensional requirements, such as setbacks, lot coverage, open space, bulk and height, and number of stories that are more restrictive than required for the Principal Dwelling, Single-Family Dwelling (as defined in 760 CMR 71.02) or other accessory structure in the zoning district where the Protected Use ADU is located, whichever is most permissive. The Town must ensure that the application Section 165-69 (A)(1)'s dimensional requirements 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.

Finally, the Town should discuss with Town Counsel whether Section 165-69 (A)(1) should be amended at a future Town Meeting to specifically include text that a Protected Use ADUs is not subject to any minimum lot size requirements shown in the Schedule as well as whether Section 165-69 (A)(1) should be amended to include the applicable dimensional requirements for an ADU (rather than referencing the existing zoning by-law provisions in the Schedule/Attachment 3) to ensure that those utilizing the ADU by-law have clear information regarding any required dimensional standards.

[11] 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."

B. Separate Ownership

Section 165-69 (A) (4)'s ownership requirement[12] provides than an ADU "may not be maintained 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 165-69 (A)(4) is in conflict with state law.

In reviewing this provision we have considered the question whether the by-law's requirement that the ADU "may not be maintained in separate ownership" from the principal dwelling 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 165-69 (A) (4)'s ownership requirement 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 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 165-69 (A)(4)'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.

[12] Section 165-69 (A) includes two subsections both labeled (4). The first (4) relates to short term rentals and the second (4) relates to separate ownership of the ADU and principal dwelling. The Town should consult with Town Counsel to determine whether the by-law should be amended at a future Town Meeting to address this numbering issue.

C. House Numbering

Section 165-69 (A)(6) requires a detached ADU to have its "own house number visible from the exterior of the unit." In applying this provision, we highlight that the Regulations, 760 CMR § 71.03 (8) requires ADUs to be given "an address consistent with the most current Address Standard published by MassGIS." Further, the Regulations require that 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 165-69 (A)(6)'s ADU address requirements and MassGIS's guidance with Town Counsel.

D. Trailers Prohibited

Section 165-69 (A)(7) provides that an ADU "must have a permanent foundation; no trailers will be permitted as an Accessory Dwelling Unit." Neither Section 165-69, "Accessory Dwelling Units," or Section 165-7, "Definitions and Word Usage" defines the term "trailer" though it appears the Town may be referring to a mobile home. "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 "trailers" (which may include 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 trailer (or "mobile home") is the same as a "Modular Dwelling Unit." Therefore, we cannot conclude that the by-law's prohibition on a "trailer" being used as an ADU conflicts with the Regulations.[13] 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. ADUs Existing Prior to February 2, 2025

Section 165-69 (A)(10) requires that "notice of any change in use of an [ADU] lawfully in existence prior to February 2, 2025, shall be given to the Building Inspector to allow such office to assess compliance with applicable requirements within its jurisdiction." We approve Section 165-69 (A)(10). However, the Town must ensure that a previously approved ADU that is now intended as a Protected Use ADU under G.L. c. 40A, 3, no longer remains subject to any provision previously required for "an [ADU] lawfully in existence prior to February 2, 2025" such as owner-occupancy requirements previously found in Section 165-69, "Accessory Apartments," as some of these prior provisions are in conflict with G.L. c. 40A, § 3 and 760 CMR 71.00.

We strongly encourage the Town to consult with Town Counsel regarding an amendment to Section 165-69 (A)(10) that makes it explicitly clear that any prohibited or unreasonable regulations that were imposed on a previously approved accessory apartment or ADU "lawfully in existence prior to February 2, 2025" are unenforceable to a Protected Use ADU. See 760 CMR 71.03 (4) ("A Municipality shall not enforce any Prohibited Regulation or Unreasonable Regulation that was imposed as a condition for the approval of the use of land or structures for a Protected Use ADU prior to the effective date of 760 CMR 71.00, regardless of whether such Protected Use ADU complies with the Municipality's Zoning, including, but not limited to, use requirements and dimensional requirements, such as setbacks, bulk, and height."). The Town should consult with Town Counsel with any questions regarding the proper application of Section 165-69 (A)(10).

[13] 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.

F. Curb-Cuts

Section 165-69 (A)(11) prohibit additional curb cuts as follows: "[n]o additional curb cut will be authorized for access to an [ADU]." Based on our standard of review, we cannot conclude that this requirement is unreasonable and therefore prohibited under 760 CMR 71.03, and for that reason we approve it. However, in applying this provision, 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 these 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 Regulations. 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, then the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of these provisions to a Protected Use ADU.

G. Section 165-69 (B) – Findings

Section 165-69 (B) provides in relevant part that: "[t]o the extent a finding under Section 165-94 is required, such finding shall not require issuance of a special permit."[14] Section 165-94, "Preexisting nonconforming structures or uses," provides as follows:

> Preexisting nonconforming structures or uses may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the Board of Appeals in granting a special permit that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. A special permit shall not be required when alteration, reconstruction, extension or structural change to a single or two family residential structure does not increase the non-conforming nature of said structure.

Section 165-94 requires a finding in certain circumstances and Section 165-69 (B) expressly exempts a requirement for a special permit in connection with a finding. It appears that Section 165-94 reflects the requirements of G.L. c. 40A, § 6 ("Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall

[14] In addition, Section 165-69 (B) authorizes more than on ADU by special permit as follows: "[m]ore than one (1) Accessory Dwelling Unit meeting the above requirements may be allowed by special permit issued by the Zoning Board of Appeals as accessory to principal dwelling within said zoning districts, subject to the special permitting requirements of Section 165-69." We approve this provision. See 760 CMR 71.03 (5) ("if a Municipality chooses to allow additional ADUs on the same Lot as a Protected Use ADU in a Single-family Residential Zoning District, Zoning shall require a Special Permit for the use of land or structures for the additional ADUs.") In addition, it is not clear whether reference to Section 165-69 is a typographical error as the Town's special permit provisions appear to be in Article XIII. The Town should consult with Town Counsel to determine if an amendment is needed at a future Town Meeting to address this issue.

be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.") However, Section 165-69 (B) states that no special permit is required.[15]

We therefore approve Section 165-69 (B) because it may still be appropriate, in limited circumstances, for the Town to require a Section 6 finding for an ADU associated with a nonconforming structure or lot. See Petrucci v. Bd. of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998) (no Section 6 "finding" required where applicant successfully demonstrated the unreasonableness of the application of the dimensional requirements to the structure…"). In circumstances where the regulations creating the increased nonconformity can lawfully be applied to the ADU, the Town may require that the applicant demonstrate that the altered structure use will not be substantially more detrimental to the neighborhood than the existing structure so long as the town applies objective, nondiscretionary criteria and no special permit is required. However, changing the use of a nonconforming structure to an ADU use, a statutorily protected use, cannot trigger scrutiny of the impact on a neighborhood because the ADU is a protected use and cannot be denied. Moreover, a Protected Use ADU is not "nonconforming" to any zoning rule that cannot lawfully be applied to it under the ADU statute and regulations. See Watros v. Greater Lynn Mental Health and Retardation Ass'n, Inc., 421 Mass. 106, 115 (1995); see also Ellsworth vs. Mansfield, Case No. 08 MISC 382311, 2011 WL 3198174, at *4 (Mass. Land Ct. July 25, 2011) (no Section 6 finding required for Dover-protected educational use because "effectively, G.L. c. 40A, § 3 removes the non-conformity (the lack of frontage) because it would not be a 'reasonable regulation' of the proposed school in these circumstances"). As a result, construction or alteration of a structure for an ADU will not increase a nonconformity unless the nonconformity is created by regulations that can reasonably be applied to the ADU. We strongly suggest that the Town discuss the application of G.L. c. 40A, § 6 and the Section 165-69 (B) with Town Counsel.

H. ADUs With a Larger Gross Floor Area

Section 165-69 (C) allows by special permit an ADU that exceeds the gross floor area allowed by right, as follows:

> An Accessory Dwelling Unit having a gross floor area greater than what is allowed by right, but not exceeding one-half of the gross floor area of the principal dwelling to which it is accessory and otherwise meeting the requirements of this bylaw, may be allowed by special permit issued by the Zoning Board of Appeals as accessory to a principal dwelling within the RA, RB, and RC zoning districts, subject to the special permitting requirements of Section 165-69.

General Laws Chapter 40A, § 3 allows one ADU to be built as-of-right up to 900 square feet or ½ the gross floor area of the principal dwelling whichever is smaller. In circumstances

[15] The Town must ensure that neither Section 165-69 (B) or Section 165-94 are used to impose any special permit requirements on an ADU because discretionary special permit review is prohibited by G.L. c. 40A, § 3 and 760 CMR 71.03 (1) (prohibiting towns from imposing special permit requirements on ADUs.) The Town should consult with Town Counsel with any questions on this issue.

(not present here) where a Town chooses to allow by-right a Protected Use ADU to be built larger (for example, "up to 1200 square feet"), it would likely be interpreted that the larger ADU constitutes the G.L. c. 40A, § 3 Protected Use ADU because Towns are authorized under 760 CMR 71.03 (7) to "adopt[ ] more permissive Zoning…than would be allowed under 760 CMR 71.03." However, in the circumstances present here, it is not clear whether the larger ADU allowed under Section 165-69 (C) by special permit is a substitute for the as-of-right ADU allowed under G.L. c. 40A, § 3 and the Regulations or constitutes a second ADU in addition to the Protected Use ADU.

For this reason, we encourage the Town to consult with Town Counsel to ensure the proper application of Section 165-69 (C). In addition, to the extent that a larger ADU constructed by special permit under Section 165-69 (C) constitutes the Protected Use ADU authorized by G.L. c. 40A, § 3, the Town must ensure that it does not impose any "Prohibited Regulations" or "Unreasonable Regulations," as part of the special permit process. See 760 CMR 71.03. Finally, the decision to seek a larger ADU by special permit must be a voluntary decision by the applicant and the applicant must be free to withdraw from the special permit process at anytime and construct a Protected Use ADU as of right as authorized by G.L. c. 40A, § 3 if they so choose. The Town should consult with Town Counsel and EOHLC with any questions on these issues.

VI. Conclusion

We partially approve Article 3 except for the following provisions that we disapprove and delete, as shown above in Section IV in bold and underline: (1) a portion of Section 165-69 (A)(1) requiring the ADU to meet "all other applicable zoning requirements for the district in which it is located; (2) Sections 165-69 (A)(3) and 165-69 (A)(8)'s references to "single-family;" and (3) a portion of Section 165-69 (A)(8) that requires the ADU to maintain the "village-like character of the Town" and requires that the "proposed buildings shall relate harmoniously with the surrounding area.

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.

<u>Note</u>: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute.

Very truly yours,

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cc: Town Counsels Jonathan Eichman and Thomas McEnaney