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December 23, 2025

Laurie L. Lucier, Town Clerk
Town of Conway
Town Offices, P.O. Box 240
32 Main Street
Conway, MA 01341

Re: Conway Annual Town Meeting of June 7, 2025 – Case # 11970
Warrant Articles # 33, 34, and 35 (Zoning)

Dear Ms. Lucier:

Articles 34 and 35 - We approve Articles 34 and 35 from the June 7, 2025 Conway Annual Town Meeting. Our comments on Article 34 are provided below.

Article 33 - Under Article 33, the Town amended Article 5 to add definitions for Accessory Dwelling Unit ("ADU") related terms, including definitions for "Accessory Dwelling Unit (ADU);" "Dwelling Unit;" "Gross Floor Area (GFA);" and "Protected Use ADU (PUADU)." Except for the word "permanent" in the definition of ADU, that we disapprove because it conflicts with G.L. c. 40A, §§ 1A and 3 and the Regulations promulgated by the Executive Office of Housing and Livable Communities ("EOHLC"), 760 CMR 71.00, "Protected Use Accessory Dwelling Units" ("Regulations"), [1] we approve the new ADU related definitions added to Article 5.

Under Article 33, the Town added a new definition of ADU as follows (with emphasis added):

> ACCESSORY DWELLING UNIT (ADU) - a self-contained housing unit upon a **permanent** foundation, 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 Gross Floor Area than 1/2 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

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

> municipality, including, but not limited to, additional size restrictions and restrictions or prohibitions on Short Term Rental, as defined in section 1 of chapter 640; provided, however, that no municipality shall unreasonably restrict the creation or rental of an ADU that is not a short-term rental.

We disapprove and delete the word "permanent" shown above in bold and underline that requires an ADU to be on a permanent foundation because it conflicts with G.L. c. 40A, § 3 and the Regulations that do not require ADUs to be on a "permanent" foundation as explained below. See West Street Associates, LLC v. Planning Board of Mansfield, 488 Mass. 319, 324 (2021) (citing with approval trial judge's ruling that "By limiting medical marijuana facilities to nonprofit entities, the bylaw[,] while not prohibit[ing] those facilities, does restrict them in a way that the [S]tate explicitly determined they should not be limited" and "[a]ccordingly, the 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 define ADU as follows:

> 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.

As an initial matter, it is unclear what the Town means by "permanent" foundation, as this term is not defined. However, regardless of the Town's intended meaning, nothing in the Regulations require ADUs to be constructed on a "permanent" foundation. And specifically, as to modular dwelling units, which are allowed as an ADU, the Regulations allow modular homes to only be "affixed" to a foundation without requiring that the foundation be permanent. See 760 CMR 71.02 (defining a Modular Dwelling Unit in relevant part as: "where such Dwelling Unit is affixed to a foundation."). For this reason, defining an ADU to be on a "permanent" foundation conflicts with G.L. c. 40A, § 3 and the Regulations.

Article 34 - Under Article 34, the Town deleted its existing Section 22.3, "Accessory Apartments, and inserted a new Section 22.3, "Protected Use Accessory Dwelling Units (PUADU)" to allow PUADUs as of right in compliance with G.L. c. 40A, § 3 and the Regulations. We approve Article 34 because it does not conflict with state law. 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 34; 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;[2] and then explain why, based on our standard

[2] 760 CMR 71.02 defines the term "Protected Use ADU" as follows: "An attached or detached ADU that

of review, we approve the zoning by-law amendments adopted under Article 34. In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 34.

I. Summary of Article 34

Under Article 34, the Town deleted its existing Section 22.3, "Accessory Apartments," and inserted a new Section 22.3, "Protected Use Accessory Dwelling Unit (PUADU)." The new Section 22.3 allows PUADUs subject to site plan review. The new Section 22.3 also imposes design, dimensional and parking requirements on PUADUs.

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

Our review of Article 34 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 34, 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

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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."

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

On January 31, 2025, the EOHLC promulgated regulations for the implementation of the legislative changes regarding ADUs. See 760 CMR 71.00, "Protected Use Accessory Dwelling Units."[3] The Regulations define key terms and prohibit certain "Use and Occupancy Restrictions" defined in Section 71.02 as follows:

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

While a municipality may reasonably regulate a Protected Use ADU in the manner authorized by 760 CMR 71.00, such regulation cannot prohibit, require a special permit or other discretionary zoning approval for, or impose a "Prohibited Regulation"[4] or an "Unreasonable Regulation" on, a Protected Use ADU. See 760 CMR 71.03, "Regulation of Protected Use ADUs in Single-Family Residential Zoning Districts."[5] Moreover, Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, certain restrictions or

[3] See the following resources for additional guidance on regulating ADUs: (1) EOHLC's ADU FAQ section (https://www.mass.gov/info-details/accessory-dwelling-unit-adu-faqs\) (2) Massachusetts Department of Environmental Protection's Guidance on Title 5 requirements for ADUs (https://www.mass.gov/doc/guidance-on-title-5-310-cmr-15000-compliance-for-accessory-dwelling-units/download); and https://www.mass.gov/doc/frequently-asked-questions-faq-related-to-guidance-on-title-5-310-cmr-15000-compliance-for-accessory-dwelling-units/download; and (3) MassGIS Addressing Guidance regarding address assignments for ADUs (https://www.mass.gov/info-details/massgis-addressing-guidance-for-accessory-dwelling-units-adus).

[4] 760 CMR 71.03 prohibits a municipality from subjecting the use of land or structures on a lot for a Protected Use ADU to any of the following: (1) owner-occupancy requirements; (2) minimum parking requirements as provided in Section 71.03; (3) use and occupancy restrictions; (4) unit caps and density limitations; or (5) a requirement that the Protected Use ADU be attached or detached to the Principal Dwelling.

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

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

We incorporate by reference our more extensive comments regarding these recent statutory and regulatory changes related to ADUs in our decision to the Town of East Bridgewater, issued on April 14, 2025 in Case # 11579.[7] Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 34.

IV. Comment on the Approved Text in Article 34

A. Section 22.3 (b) (1)'s Site Plan Requirement

Section 22.3 (b) (1) imposes a site plan requirement for a PUADU. We approve the site plan requirement, but the Town must ensure that it is applied consistent with state law.

For uses allowed as of right, such as a PUADU, site plan review is limited to the regulation of the use rather than its prohibition. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). The scope of site plan approval for as of right uses is therefore limited to imposing reasonable terms and conditions on the use. Id. citing SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 107-110 (1984). "[W]here the proposed use is one permitted by right the planning board may only apply substantive criteria consistent with Prudential Ins. Co. v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278 (1986) (i.e., it may impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use)." Osberg

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

[7] This decision, as well as other recent ADU decisions, can be found on the Municipal Law Unit's website at www.mass.gov/ago/munilaw (decision look up link) and then search by the topic pull down menu for the topic "ADUS."

v. Planning Bd. of Sturbridge, 44 Mass. App. Ct. 56, 59 (1997). "[I]f the specific area and use criteria stated in the by-law [are] satisfied, the board [does] not have discretionary power to deny…[approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use." Prudential, 23 Mass. App. Ct. at 281-282 (internal quotations and citations omitted). The Town should consult closely with Town Counsel when applying a site plan requirement to a Protected Use ADU to ensure it is not applied in a manner that conflicts with the Dover protections afforded to an ADU.

B. Section 22.3 (3) (c) (3)'s Setback Requirement for PUADUs in Accessory Structures

Section 22.3 (c) (3)'s allows PUADUs in new garages, barns, or other accessory structures (collectively referred to as "accessory structures") located within 100 feet of the principal dwelling. We approve Section 22.3 (c) (3)'s setback requirement because based on our standard of review, we cannot conclude that it conflicts with state law. However, while a municipality may regulate a PUADU in the manner authorized by 760 CMR 71.00, the Town cannot impose an "Unreasonable Regulation" on a Protected Use ADU. See 760 CMR 71.03, "Regulation of Protected Use ADUs in Single-Family Residential Zoning Districts." As discussed in more detail above, G.L. c. 40A, § 3 and the Regulations prohibit a Town from "unreasonably restrict[ing]" a Protected Use ADU, though the Town may subject the Protected Use ADU to "reasonable regulations." See 760 CMR 71.03 (1).

In imposing a dimensional standard on a PUADU, because a PUADU is a Dover Amendment protected use, the Town can only impose "reasonable regulations" on a Protected Use ADU. Therefore, if a dimensional requirement is used in a manner to prohibit or unreasonably restrict a PUADU, such application would run afoul to the Dover amendment protections given to a PUADU under G.L. c. 40A § 3 and the Regulations. Moreover, the Town must ensure that any dimensional requirements are analyzed on a case by case basis as it relates to a particular property because in some circumstances the provision could be unreasonable as applied to a particular property. In addition, the Town must ensure that the application of any dimensional 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 PUADU. See 760 CMR 71.03 (3)(a). If the Town cannot satisfy this standard, the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of any dimensional requirements to a PUADU.

B. Section 22.3 (c) (6)'s Parking Requirements

Section 22.3 (c) (6) prohibits requiring more than one parking space for PUADU as follows:

> Refer to Section 34: Off Street Parking for parking requirements, except that no more than one off-street parking space may be required for a single PUADU.

We approve this provision because it is consistent with G.L. c. 40A, § 3 and the Regulations that allows the Town to require one parking space for an ADU unless the ADU is located within a 0.5 mile radius of a transit station. See G.L. c. 40A, § 3 ("…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.); see also 760 CMR 71.03 (2) (b) (the Town cannot impose a requirement for more than one additional parking space or any additional parking space requirement for a Protected Use ADU if any portion of its Lot is located within a 0.5-mile radius of a Transit Station.)[8] While the Town is part of Franklin Regional Transit Authority, it appears that there are no transit stations (bus stops) located in the Town. For this reason, we approve Section 22.3 (c) (6)'s parking requirements. However, the Town must ensure that Section 22.3 (c) (6) is applied consistent with G.L. c. 40A, § 3 and the Regulations regarding parking spaces, as discussed in detail above. In addition, we encourage the Town to consult with Town Counsel to determine if Section 22.3 (c) (6)'s parking requirements should be amended at a future Town Meeting to specifically include a parking exemption for ADUs located within a 0.5-mile radius of a transit station. The Town should consult with Town Counsel with any questions on this issue.

V. Conclusion

We approve Article 34 because it does not conflict with state law. However, the Town should consult closely with Town Counsel when applying these provisions to ensure they are applied consistent with G.L. c. 40A, § 3 and 760 CMR 71.00. If the provisions adopted under Article 34 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.

[8] 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."

Very truly yours,

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