ANDREA JOY CAMPBELL
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

(508) 792-7600
(508) 795-1991 fax
www.mass.gov/ago

November 5, 2026

Julie S. Smith, Town Clerk
Town of Chatham
549 Main Street
Chatham, MA 02633

Re: Chatham Annual Town Meeting of May 11, 2026 -- Case # 12367
Warrant Article # 51 (Zoning)[1]

Dear Ms. Smith:

Article 51 - Under Article 51, the Town voted to amend its zoning by-laws to make several changes regarding Accessory Dwelling Units ("ADUs"), including deleting Chapter VII, "Special Regulations," Section B, "Specific Standards," Subsection 19, "Accessory Dwelling Unit (ADU)" ("Section 19") and replacing it with a new Section 19, "Accessory Dwelling Unit (ADU)," 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" ("ADU Regulations").[2]

We partially approve Article 51 because the approved text does not conflict with state law. However, we disapprove and delete[3] the following: (1) a portion of Section 19 (C)(3) that requires a year-round lease of an ADU; (2) a portion of Section 19 (D)(2) that imposes the most permissive dimensional requirement as applied "to dwellings" but does not include accessory structures; and (3) a portion of Section 19 (D)(2)'s special permit requirement, because these provisions 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).

[1] On September 3, 2026, by agreement with Town Counsel as authorized under G.L. c. 40A, § 32, we extended our deadline for review of Article 51 for 60-days until November 6, 2026.

[2] The Regulations can be found here: 760 CMR 71.00. However, we note that EOHLC has announced its intention to update the Regulations. The draft Regulations are available at www.mass.gov/adu. The Town should monitor future amendments to the Regulations and consult with Town Counsel on such amendments.

[3] The use of the term "disapprove" collectively means "disapprove and delete" such that any text disapproved by the Attorney General (shown in bold and underline) by virtue of such disapproval is also deleted from the Town's zoning by-law and does not take effect under G.L. c. 40 § 32.

In this decision we summarize the by-law amendments adopted under Article 51; 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;[4] and then explain why, based on our standard of review, we partially approve the zoning by-law amendments adopted under Article 51. In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 51.

I. Summary of Article 51

Under Article 51, the Town voted to make several changes to its zoning by-laws regarding ADUs. The first change amends Section II, "Definitions," to insert a new definition for the term "Dwelling Unit, Accessory (ADU)." The next change amends Section VII.B.19 by deleting the existing text in its entirety and replacing it with a new Section VII.B.19, "Accessory Dwelling Unit (ADU)," that imposes requirements on ADUs, including allowing ADUs as of right in the R60, R40, R40A, R30, R20, R20A, Small Business ("SB"), and General Business ("GB") zoning districts, subject to the requirements of Section 19, and prohibits ADUs in all other zoning districts.[5] The by-law imposes additional restrictions on ADUs including allowing only one ADU by right and prohibiting an ADU from being used as a short-term rental. Sections 19 (C)(2) and (3). The by-law also imposes other requirements including imposing lease requirements [Section 19 (C)(3)]; requiring an ADU to remain in common ownership with the Principal Dwelling [Section 19 (C)(6)]; and imposing "Dimensional Requirements," including size limitations [Section 19 (D)(1)].

Lastly, under Article 51, the Town amended its Table of Use Regulations to add a line for Accessory Dwelling Units that allows them by right ("P") in the R60, R40, R40A, R30, R20, R20A, SB, and GB districts and prohibits them in the I, M/C, and M districts.

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

Our review of Article 51 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

[4] 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."

[5] The other zoning districts are the Industrial ("I"); Residence-Seashore Conservancy ("RC3"); Municipal ("M"); and Municipal Conservancy ("M/C") Districts. 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 permitted or an allowable use, including any Zoning District where Single-family Residential Dwellings are allowed as-of-right or by Special Permit." According to the Town's existing Table of Use, single-family dwellings are also prohibited in the I, RC3, M, and M/C Districts. For this reason, we approve Section 19 (C) (1) allowing ADUs only in the above-mentioned zoning districts and prohibiting ADUs in the other districts. 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.

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 51, 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 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 (2) Massachusetts Department of Environmental Protection's Guidance on Title 5 requirements for ADUs and FAQs and (3) MassGIS Addressing Guidance regarding address assignments for ADUs.

> 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 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).

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[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.

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 51.

IV. Text Disapproved from Article 51 Because it Conflicts with G.L. c. 40A, § 3 and the Regulations

A. Section 19 (C)(3) – Year-Round Lease Requirement

Section 19 (C)(3) requires an ADU to be rented on a year-round basis, as follows (with emphasis added):

> ADUs may not be used as Short-Term Rentals. **In order to address the Town's need for year-round housing, an ADU shall be actively rented and/or leased on a year-round basis until such time as the ADU no longer meets the definition of "Accessory Dwelling Unit" as defined by Section II of this Protective Bylaw. A one-year waiver may be granted for ADUs that are unable to be rented due to the need for repairs or unforeseen circumstances.**

We disapprove the text shown above in bold and underline, that requires an ADU to be "actively rented and/or leased on a year-round basis," because this lease requirement conflicts with G.L. c. 40A, § 3 and the implementing ADU Regulation, as explained below.

Section 19 (C)(3)'s lease requirement conflicts with G.L. c. 40A, § 3 and the ADU Regulations which limit the Town's ability to regulate the rental of ADUs. General Laws Chapter 40A, Section 3 and the ADU Regulations authorize a Town to prohibit ADUs from being rented as Short-Term Rentals ("STRs") but explicitly prohibit towns from prohibiting or unreasonably regulating the rental of ADUs, in pertinent 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 district; provided, that the use of land or structures for such accessory dwelling unit under this paragraph may be subject to reasonable regulations, including, . . . restrictions and prohibitions on short-term rental, as defined in section 1 of chapter 64G.

In addition, as to the rental of ADUs, G.L. c. 40A, § 1A and the ADU Regulations, 760 CMR 71.02's definition of "Accessory Dwelling Unit," also prohibits a Town from unreasonably restricting the rental of an ADU that is not a STR, as follows (with emphasis added):

> 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 . . . (c) is subject to such additional restrictions as may be imposed by a

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

municipality including but not limited to . . *prohibitions on Short-term Rental as defined in M.G.L. c. 64G, § 1; provided, however, that no Municipality shall unreasonably restrict the creation or rental of an ADU that is not a Short-term Rental*.

Further, the ADU Regulations, 760 CMR 71.03, "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts," prohibits a town from requiring "a special permit, waiver, 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."

Although the Town may prohibit the rental of an ADU as a STR, as the Town has done here (see Section 19 (C)(3) ("ADUs may not be used as Short-Term Rentals"), the Town also attempts to impose a year-round lease requirement on a Protected Use ADU. By requiring a year-round lease for the rental of an ADU, the Town is seeking to prohibit the rental of ADUs other than as STRs. By granting municipalities express permission to prohibit *only* the rental of ADUs as STRs, G.L. c. 40A, § 3 and the ADU Regulations disallow prohibitions of other types of rentals, including landlord/tenant rentals. See Harborview Residents' Comm., Inc. v. Quincy House. Auth., 368 Mass. 425, 432 (1975) ("a statutory expression of one thing is an implied exclusion of other things omitted from the statute"). Any prohibition on the rental of ADUs other than as STRs would be an unreasonable regulation in violation of Section 3 and the Regulations, especially in light of the statutory purpose. See 760 CMR 71.01 (1) (goal of ADU provisions of G.L. c. 40A, § 3 is to "encourage the production of accessory dwelling units throughout the Commonwealth with the goal of increasing the production of housing to address statewide, local, and individual housing needs for households of all income levels and at all stages of life").

Further, although we recognize that Chatham is a Seasonal Community,[11] we still must disapprove the text in Section 19 (C)(3) that imposes a year-round lease requirement on a Protected Use ADU, because this provision conflicts with the ADU Regulations, and is not otherwise authorized by state law, including the Seasonal Communities Regulations, 760 CMR 76.00, promulgated by EOHLC at 760 CMR 76.00 *et seq*.[12] Although Chatham is a Seasonal Community, the Seasonal Community Regulations do not allow a Seasonal Community Town to impose a minimum lease requirement on a Protected Use ADU. Lastly, we acknowledge that EOHLC has shared *draft* proposed ADU Regulations for public comment (see www.mass.gov/adu) and the *draft* proposed ADU Regulations provide in relevant part as follows (new *draft* text in underline): "Use and Occupancy Restrictions. A requirement that a Protected Use ADU shall be subject to a Use and Occupancy Restriction provided that:...A Municipality that is a seasonal community as defined in 760 CMR 76.02 may require a Protected Use ADU be subject to a year-round housing occupancy restriction if required under zoning established pursuant to 760 CMR 76.04 (1)(b)."

However, not only are these *draft* proposed ADU Regulations still in draft form, but the

[11] EOHLC designated Chatham as a Seasonal Community (see Seasonal Communities Designation) and the Seasonal Community designation was subsequently approved at the Chatham 2025 Annual Town Meeting under Article 49. See 2025 ATM Minutes

[12] These Regulations were filed with the Secretary of State's office on February 4, 2026 and became effective on February 27, 2026 (see Seasonal Communities Regulations and Resources).

draft proposed ADU Regulations would require that the zoning be established "pursuant to 760 CMR 76.04 (1)(b)" that relates to a year-round housing restriction[13] on "Attainable Housing Units on Undersized Lots."[14] However, Chatham's lease provision in Section 19 (C)(3) proposes to apply to all ADUs. For these reasons, even if these *draft* proposed Regulations were to become final in this form, they will not authorize the Town to impose a year-round lease requirement on all Protected Use ADUs. For this reason, we disapprove the text (shown above in bold and underline) from Section 19 (C)(3) that imposes a year-round lease requirement on all protected use ADUs. We encourage the Town to continue to monitor any proposed amendments to the ADU Regulations and to consult with Town Counsel with any questions.

B. Section 19 (D)(2) – Dimensional Requirement

Section 19 (D)(2) imposes dimensional requirements on ADUs as follows (with emphasis added):

> ADUs shall comply with the applicable district's most permissive applicable setback, height, building coverage and lot coverage requirements, as may be applicable **to dwellings**, as contained in the dimensional requirements of this Zoning Bylaw and the tables attached thereto.

We disapprove the text "to dwellings" (shown above in bold and underline), that limits the application of Section 19 (D) (3)'s dimensional requirements to the most permissible as applicable only "to dwellings" because this text conflicts with the Regulations that requires the Town to impose the most permissive dimensional regulations as applied not just to dwellings (the principal

[13] A "Year-Round Housing Occupancy Restriction" is defined in the Seasonal Communities Regulations as: "A limitation on the use and occupancy of a Dwelling Unit, whether or not stated in the form of a deed restriction, easement, covenant or condition in any deed, mortgage, will, agreement, lease or other legally binding instrument, executed by or on behalf of the owner of the land that limits occupancy to individuals or households who have executed an agreement with a Seasonal Community, or its designee, to occupy the Dwelling Unit as their Primary Residence for not less than 10 months in a 12-month period, subject to reasonable exceptions for temporary absences as may be included in such agreement. Such agreement shall be recorded with the registry of deeds or registered in the district of the land court in the county where the Dwelling Unit is located and shall be made part of the deed that encumbers such Dwelling Unit." See 760 CMR 76.02.

[14] "Attainable Housing Unit" is defined in the Seasonal Communities Regulations as: "A Year-round Housing Unit that is subject to an Affordable Housing Restriction or any other use restriction, whether stated in the form of a deed restriction, easement, covenant or condition in any deed, mortgage, will, agreement, lease, or other legally binding instrument, executed by or on behalf of the owner of the land that limits occupancy to an individual or household with income that does not exceed 250% AMI, or such lower limit as may be established by a Seasonal Community. Nothing in 760 CMR 76.00 changes the Subsidized Housing Inventory eligibility criteria, and no Attainable Housing Unit shall be counted on the Subsidized Housing Inventory unless it satisfies the requirements for the Subsidized Housing Inventory under 760 CMR 56.03(2) or any other regulation or guidance issued by EOHLC." See 760 CMR 76.02.

In addition, the Seasonal Communities Regulations define "Undersized Lot" as: "A Lot that at the time of Recording or Endorsement is located in a Single-family Residential Zoning District, does not meet the minimum Lot size requirements for the Zoning District and has not merged with an adjacent Lot under common ownership." Id.

dwelling or a single-family dwelling in the district) but also to an accessory structure.

Specifically, the Regulations, 760 CMR 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards," that requires the Town to apply the most permissive dimensional standard, in relevant part as follows, with emphasis added:

> (b) Municipality shall apply the analysis articulated in 760 CMR 71.03 (3)(a) to establish and apply reasonable Zoning or general…by-laws, or Municipal regulations for Protected Use ADUs, but in no case shall a restriction or regulation be found reasonable where it exceeds the limitations, or is inconsistent with provisions, described below, as applicable:…(2) Dimensional Standards. Any requirement concerning dimensional standards, such as dimensional setbacks, lot coverage, open space, bulk and height, and number of stories, that are more restrictive than is required for the Principal Dwelling, or a Single-family Residential Dwelling or accessory structure in the Zoning District in which the Protected Use ADU is located, whichever results in more permissive regulation, provided that a Municipality may not require a minimum Lot size for a Protected Use ADU.

Because Section 19 (D)(2) references the most permissive dimensional standards but only as to those imposed "to dwellings," and it therefore does not include those applied to accessory structures in the same zoning district, the text shown in bold and underline conflicts with the Regulations, as quoted above. We therefore disapprove the text "to dwellings." The Town should consult with Town Counsel with any questions regarding the proper application of Section 19 (D)(2)'s dimensional requirements.

In addition, in applying the approved portion of Section 19 (D)(2)'s dimensional requirements, because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose "reasonable regulations" on a Protected Use ADU. Therefore, if a setback, height, building or lot coverage requirement is used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. Moreover, the Town must ensure that these 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 this requirement serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification, impose an excessive cost or substantially diminish or interfere with the use or development of a Protected Use ADU. See 760 CMR 71.03 (3)(a). If the Town cannot satisfy this standard, the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of any dimensional requirements to a Protected Use ADU.

C. Section 19 (D)(2)(a) - Special Permit Requirement

Section 19 (D)(2)(a), requires a special permit to waive setback and coverage requirements for an ADU as follows with emphasis added:

> The Zoning Board of Appeals may waive setback and coverage requirements **by Special Permit**, provided however that the setback shall not be less than 10 feet unless already allowed by Zoning District.

We disapprove the portion of Section 19 (D)(2)(a) that allows the Zoning Board of Appeals ("ZBA") to waive a setback or coverage requirement only by special permit because it conflicts with G.L. c. 40A, § 3 and the Regulations 760 CMR 71.00, that prohibit the imposition of a special permit requirement (except in limited situations not relevant here)[15] for an ADU, as explained in more detail below.

General Laws Chapter 40A, Section 3 prohibits a zoning by-law from requiring a special permit or other discretionary zoning approval 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 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 a special permit requirement 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.

The provision of Section 19 (D)(2)(a) requiring a special permit to waive setback and coverage requirements for an ADU imposes a discretionary special permit review process for an ADU that is prohibited by G.L. c. 40A, § 3 and 760 CMR 71.03 (1). We therefore disapprove Section 19 (D)(2)(a), as 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 adopted under Article 51 to ensure that the Town applies these provisions consistent with G.L. c. 40A, § 3 and the Regulations.

[15] The Regulations include only two instances when the Town may require a special permit for an ADU. First, notwithstanding 760 CMR 71.03 (1)'s prohibition on special permits for ADUs, 760 CMR 71.03 (5) requires a municipality that "chooses to allow additional ADUs on the same [l]ot as a Protected use ADU in a Single-family Residential Zoning District," to allow the additional ADUs by special permit. Second, 760 CMR 71.03 (6) allows a Town to require a special permit "for development of a Protected Use ADU in a floodplain or aquifer protection overlay if required for the Principal Dwelling, provided that the Special Permit is based on clear, objective, and non-discretionary criteria." Neither of these exceptions authorize Section V-G (A)(8)'s special permit requirement.

A. Section 19 (C)(6) – Common or Single Ownership

Section 19 (C)(6) provides that the ADU shall remain in "common or single ownership with the principal Dwelling Unit." We approve this provision because, although the ADU Regulations prohibit a municipality from imposing "owner-occupancy" requirements on either the ADU or the principal dwelling, the ADU 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 the ADU Regulations' definition of ADU authorize a municipality to impose "additional restrictions" on an ADU. Therefore, based upon our standard of review, we cannot conclude that Section 19 (C)(6) is in conflict with state law.

In reviewing this provision, we have considered the question whether the by-law's requirement that the ADU "remain in common or single ownership with the principal Dwelling Unit" 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 19 (C)(6)'s provision 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 19 (C)(6)'s provision requiring the ADU to remain in "common or single ownership" with the principal dwelling is in conflict with the Regulations or is an unreasonable regulation under 760 CMR 71.03 (3). However, the Town should be prepared to satisfy the requirements of 760 CMR 71.03 (3) if this provision, as applied to a particular person, is challenged in the Court as unreasonable. The Town should consult closer with Town Counsel on this issue.

B. Sections 19 (D)(3) and (F) –Nonconformities

Section 19 (D)(3) imposes requirements for an accessory structure being converted to an ADU as follows:

> Conversions of existing non-residential accessory structures to ADUs are permitted provided that either: (1) the existing accessory structure complies with the above-described dimensional requirements; or (2) a conversion of an existing pre-existing nonconforming

> accessory structure is not externally enlarged or expanded unless enlargement or expansion receives a finding from the Zoning Board of Appeals that the converted structure shall not be substantially more detrimental than the existing nonconforming structure to the neighborhood.

In addition, Section 19 (F), "Relationship to non-conformities," imposes requirements for an attached ADU proposed for a pre-existing nonconforming single-family home as follows:

> If an attached ADU is proposed for a pre-existing, nonconforming single-family primary residence, a finding shall be required from the Zoning Board of Appeals that the structure shall not be substantially more detrimental than the existing nonconforming structure to the neighborhood ,provided that no finding may consider the ADU use or impose conditions on such use.

We approve Sections 19 (D)(3) and 19 (F) because these provisions do not conflict with state law. See Amherst, 398 Mass. at 795-96. However, we offer comments for the Town's consideration to ensure these Sections are applied consistent with the ADU Regulations, as explained below.

The ADU Regulations, 760 CMR 71.02's, definition of a "Protected Use ADU" addresses the issue of non-conformity and states as follows: "An ADU that is nonconforming to Zoning shall still qualify as a Protected Use ADU if it otherwise meets this definition." In addition, 760 CMR 71.03 (9), "Pre-existing Nonconforming structures," prohibits a Town from prohibiting an ADU in a nonconforming existing structure as follows: "A Municipality may not prohibit the development of a Protected Use ADU in an existing structure or Principal Dwelling, or Lot due to nonconformance, that could be used for, or converted into, a Protected Use ADU in conformance with the Building Code, 760 CMR 71.00, and state law." In light of these provisions in the Regulations, the Town should consult with Town Counsel regarding the proper application of Sections 19 (D)(3) and 19 (F).

In addition, both Sections 19 (D)(3) and (F) require a "finding" that the enlargement or expansion or the proposed structure is not substantially more detrimental than the existing nonconforming structure to the neighborhood. It appears that these finding requirements are intended to reflect the requirements of G.L. c. 40A, § 6 regarding pre-existing nonconforming structures that provides: "Pre-existing 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 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." Because Sections 19 (D)(3) and 19 (F) require a "finding" but not a special permit, we approve these Sections.

However, in applying Sections 19 (D)(3) and (F), because ADUs are a Dover Amendment protected use, only in limited circumstances, may it be appropriate for the Town to require even 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 Dover Amendment 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.

Lastly, in applying these provisions, the Town must ensure that they are applied consistent with the recent amendments to G.L. c. 40A, § 6, regarding non-conforming uses and structures.

On July 9, 2026, Governor Healey signed into law Chapter 137 of the Acts of 2026, "An Act Making Appropriations for the Fiscal Year 2027 for the Maintenance of the Departments, Boards, Commissions, Institutions, and Certain Activities of the Commonwealth, for Interest, Sinking Fund, and Serial Bond Requirements, and for Certain Permanent Improvements" ("the "Act").[16] Sections 42, 43, 44, 45, and 46 amend portions of G.L. c. 40A, § 6 related to non-conforming uses and structures. In particular, Section 43 of the Act provides as follows:

> SECTION 43. Said section 6 of said chapter 40A, as so appearing, is hereby further amended by inserting after the word "neighborhood", in line 21, the following words:- provided, however, that pre-existing nonconforming structures or residential uses that do not conform to zoning because of lot size or shape, frontage, lot coverage or floor area ratio requirements may be extended or altered as of right, without the need for a finding by the special permit granting authority under this paragraph, if such extension or alteration complies with the current dimensional regulations regarding height, stories and setback.

General Laws Chapter 40A, Section 6, as amended by Section 43 of the Act, now provides in relevant part as follows (with emphasis added):

> Pre-existing 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 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 or structure[17] to the neighborhood *provided,*

[16] The Act can be found here: Chapter 137 of the Acts of 2026. Section 135 of the Act provides that "Except as otherwise provided, this act shall take effect on July 1, 2026."

[17] Section 44 of the Act adds the word "or structure" after the word "use" as follows: "Said section 6 of said chapter 40A, as so appearing, is hereby further amended by inserting after the word "use", in line 21, the

however, that pre-existing nonconforming structures or residential uses that do not conform to zoning because of lot size or shape, frontage, lot coverage or floor area ratio requirements may be extended or altered as of right, without the need for a finding by the special permit granting authority under this paragraph, if such extension or alteration complies with the current dimensional regulations regarding height, stories and setback.

The Town must ensure that Sections 19 (D)(3) and 19 (F) related to structures, are not applied to pre-existing non-conforming structures or residential uses that are only non-conforming due to lot size or shape, frontage, lot coverage or floor area ratio, as extension or alternation to those types of non-conforming structures or residential uses are now allowed "as of right, without the need for a finding...if such extension or alteration complies with the current dimensional regulations regarding height, stories and setback." In light of the recent amendments to G.L. c. 40A, § 6 (that we recognize took place after the Town's May 11, 2026 Annual Town Meeting), the Town should consult closely with Town Counsel to ensure the proper application of these provisions. In addition, the Town may wish to discuss with Town Counsel whether these sections should be further amended at a future Town Meeting.

C. Section 19 (E) – Parking

1. Parking Space

Section 19 (E)(1) requires "[a]t least one (1) off-street parking space must be provided for all ADUs." Although we approve this provision requiring "at least one" off-street parking space for ADUs that are not located within a 0.5 mile radius of a transit station, the Town must ensure that this provision is not applied in a manner that would allow the Town to require more than one parking space. Instead, the parking requirements must be applied to allow the property owner to choose to have more than one parking space if they so elect. The Town should consult with Town Counsel to ensure that this provision is applied consistent with G.L. c. 40A, § 3 and the Regulations and that this provision is not used by the Town to require the property owner to provide more than one parking space for a Protected Use ADU that is not located within a 0.5 mile radius of a Transit Station. The Town should consult with Town Counsel with any questions on this issue.

2. Tandem Parking

Section 19 (E)(2), "Parking," prohibits a tandem parking space for an ADU as follows: "Parking may be in a driveway or a garage, but the parking space may not be a tandem space with a parking space for the primary dwelling." We have considered whether the prohibition on a "tandem space with a parking space for the primary" structure constitutes an unreasonable regulation.

Based on our standard of review, we cannot conclude that Section 19 (E)(2)'s prohibition against tandem parking fails to serve any legitimate municipal interest; or otherwise fails the test for determining an unreasonable regulation under 760 CMR 71.03 (a) 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 this requirement is used in a manner to prohibit

following words:- or structure."

or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. Moreover, the Town must ensure that this prohibition is analyzed on a case by case basis as it relates to a particular property because in some circumstances the provision could be unreasonable as applied to a particular property. Lastly, the Town must ensure that the application of this requirement serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification, impose an excessive cost or substantially diminish or interfere with the use or development of a Protected Use ADU. See 760 CMR 71.03 (3)(a). If the Town cannot satisfy this standard, then the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of Section 19 (E)(2) to a Protected Use ADU.

3. Garage Special Permit

Section 19 (E)(3), "Parking," imposes a special permit requirement for the construction of a garage to serve the ADU as follows: "The construction of a new garage to serve an ADU shall require a Special Permit from the Zoning Board of Appeals." We approve Section 19 (E)(3)'s special permit requirement for garages that serve an ADU because under our standard of review, we cannot conclude that a special permit for a garage that serves an ADU conflicts with the Regulations.

Under the Town's existing zoning by-laws, garages are considered an accessory use and are allowed as of right in the R60, R40, R40A, R30, R20, R20A, and SB zoning districts and by special permit in the GB District and prohibited in the I, M and M/C zoning districts. There is nothing in the Regulations that expressly requires a town to allow accessory uses, including garages, as of right to ADUs (which are themselves also considered an "accessory" use to a principal dwelling.) However, if the special permit requirement for a garage that serves an ADU is used in a manner that prohibits or unreasonably restricts an ADU, such application would run afoul of the Dover amendment protections given to an 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 as applied to a particular ADU application, the special permit requirement for a garage that serves the ADU may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of Section 19 (E)(3).

VI. Conclusion

We partially approve Article 51, except for the following provisions: (1) a portion of Section 19 (C)(3) that imposes a year-round lease requirement; (2) a portion of Section 19 (D)(2) that imposes the most permissive dimensional requirement as applied "to dwellings" but does not include accessory structures; and (3) a portion of Section 19 (D)(2)(a) that requires a Special Permit for waiver of setback and coverage requirements for an ADU, that we disapprove as explained above in Section IV.

As to the approved provisions, the Town should consult closely with Town Counsel when applying the 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 51 are used to deny a Protected Use ADU, or otherwise applied in ways that constitute an unreasonable regulation in conflict with 760 CMR 71.03 (3), such application would violate G.L. c. 40A, § 3 and the Regulations. The Town should consult with Town Counsel and EOHLC to ensure that the approved by-law provisions are applied consistent with G.L. c. 40A, § 3 and the Regulations, as discussed herein.

Finally, we remind the Town of the requirements of 760 CMR 71.04, "Data Collection," that requires municipalities to maintain certain records, as follows:

> Municipalities shall keep a record of each ADU permit applied for, approved, denied, and issued a certificate of occupancy, with information about the address, square footage, type (attached, detached, or internal), estimated value of construction, and whether the unit required any variances or a Special Permit. Municipalities shall make this record available to EOHLC upon request.

The Town should consult with Town Counsel or EOHLC with any questions about complying with Section 71.04.

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

Very truly yours,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL
Nicole B. Caprioli
By: Nicole B. Caprioli
Assistant Attorney General
Deputy Director, Municipal Law Unit
10 Mechanic Street, Suite 301
Worcester, MA 01608
(774) 214-4418

cc: Town Counsel Jason R. Talerman