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

December 1, 2025

Melissa A. Hibbard, Town Clerk
Town of Pelham
351 Amherst Road
Pelham, MA 01002

Re: Pelham Annual Town Meeting of May 10, 2025 – Case # 11861
Warrant Articles # 22, 23, 24, and 25 (Zoning)
Warrant Article # 26 (General) [1]

Dear Ms. Hibbard:

Articles 23, 24, and 25 - We approve Articles 23, 24, and 25, and the map amendment adopted under Article 25, from the May 10, 2025 Pelham Annual Town Meeting. We will return the approved map to you by mail.

Article 22 - Under Article 22, the Town amended two sections of its zoning by-laws regarding Accessory Dwelling Units ("ADUs") to allow Protected Use 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").

We partially approve the amendments adopted under Article 22 because the approved text does not conflict with state law. However, we disapprove and delete[2] 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)):

[1] On August 28, 2025, we placed Articles 22, 23, 24, and 25 on 299 hold due to a procedural defect in their adoption. In response, the Town informed us that the information originally submitted was incorrect and resubmitted to us revised Form 7 documents. In light of this, we assigned the submission a new 90-day deadline of December 1, 2025. We will issue our decision regarding Article 26 by separate cover.

[2] 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.

● portions of the Town's dimensional requirements in Sections C (1)(b) and C (2)(a)(ii) and (iii); and

● a portion of Section C (1)(c) that prohibits a mobile home from being used as an ADU.

In this decision we summarize the by-law amendments adopted under Article 22; 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 amendments adopted under Article 22. In addition, we offer comments for the Town's consideration regarding certain approved provisions to ensure that they are applied consistent with state law.

I. Summary of Article 22

Under Article 22, the Town amended two sections of its zoning by-laws regarding ADUs. The first change amends Section 5.A, "Table of Use Regulations," ("Table") to delete the existing use of "Accessory Apartment" and add three new ADU uses as follows: (1) ADUs within 50 feet of the principal dwelling are allowed as of right in all zoning districts; (2) ADUs beyond 50 feet from the principal dwelling are allowed as of right in all districts but require site plan review in the Residential and Village Center Rural Edge districts; and (3) a second ADU is allowed by special permit with site plan approval in the Village Center Mixed-Use district and Village Center Neighborhood district and prohibited in the remaining districts. The second change deletes the existing Section 9.1, "Accessory Apartments," and inserts a new Section 9.1, "Accessory Dwelling Units," that imposes requirement on ADUs including dimensional requirements.

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

Our review of Article 22 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 22, 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

[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."

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."[4] 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.

[4] 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).

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"[5] 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."[6] 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.[7] 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.[8] Against the backdrop of these statutory and regulatory

[5] 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.

[6] 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).

[7] 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.

[8] 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."

parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 22.

IV. Text Disapproved from Article 22 Because it Conflicts with G.L. c. 40A, § 3 and the Regulations

A. Dimensional Requirements

1. Special Permit

Section C, "Regulations," Subsection (1)(b), imposes the following dimensional requirements on ADUs (with emphasis added):

> An ADU must meet all regulations (including front, side, and rear yard setbacks and maximum height restrictions) for the zoning district in which it is located, according to Section 125-6, "Dimensional and Density Regulations," **unless a Special Permit is issued by the Planning Board in accordance with Section 125-26**.

We disapprove the text shown above that requires a special permit for a deviation from Section 125-6's dimensional and density requirements because the imposition of a special permit requirement on a Protected Use ADU conflicts with the Regulations, as explained below.

General Laws Chapter 40A, Section 3 and the Regulations, 760 CMR 71.00 prohibit the imposition of a special permit requirement (except in limited situations not relevant here)[9] for an ADU. Specifically, G.L. c. 40A, § 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

[9] 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.

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.

Because the imposition of a special permit requirement for a deviation from any dimensional or density requirements conflicts with the Regulations, we disapprove the text shown above in bold and underline.

2. *Least Restrictive Dimensional Requirements*

Section C (2), "Protected Use ADUs," Subsection (a)(ii) and (iii) impose dimensional requirements on ADUs as follows (with emphasis added):

(ii) A Protected Use ADU on a Lot with a Single-Family Residential Dwelling Unit shall not otherwise have more restrictive dimensional standards than those required **for the Single-Family Residential Dwelling,** according to Section 125-6, "Dimensional and density regulations," within the same district.

(iii) A Protected Use ADU on a Lot with a Principal Dwelling that is not a Single-Family Residential Dwelling Unit shall not otherwise have more restrictive dimensional standards than those required **for its Principal Dwelling** according to Section 125-6, "Dimensional and density regulations."

We disapprove the portion of Section C (2)(ii) that imposes dimensional requirements on an ADU on a lot with a single-family dwelling unit as the same requirement imposed on a single-family residential dwelling unit in the same district and the portion of Section C (2)(iii) that imposes dimensional requirements on a principal dwelling that is not a single-family residential dwelling as the same dimensional requirements imposed on the principal dwelling, because these provisions impose dimensional requirements based on whether the ADU is on a lot with a single-family residential dwelling or a principal dwelling, rather than the most permissive dimensional requirement between the single-family dwelling, principal dwelling, or an accessory structure, within the same zoning district, as further explained below.

The Regulations require that any dimensional requirements imposed upon an ADU be the most permissive requirements between the principal dwelling, a single-family dwelling or an accessory structure. Specifically, 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 C (2) (ii) and (iii) impose different dimensional requirements than those required in the Regulations, we disapprove the text shown above in bold and underline. The Town should consult with Town Counsel with any questions regarding the application of these provisions.

3. *Additional Comments*

As to the approved dimensional requirements, we offer additional comments for the Town's consideration to ensure the approved portions of the by-law are applied consistent with the Regulations.

In imposing a dimensional standard on an ADU, 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 dimensional 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 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 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.

B. Mobile Home Prohibition

Section C, "Regulations," Subsection (1)(c) prohibits a mobile home from being used as an ADU as follows (with emphasis added):

> Allowed Building Types. A modular dwelling unit may be used as a Detached ADU. A recreational vehicle **or mobile home** may not be used as a detached ADU.

We disapprove the provision in Section C (1)(c) that prohibits a mobile home from being used as an ADU because this provision conflicts with the Regulations, as explained below.

The Town's existing by-laws, Section 125-36, defines a "Mobile Home" as follows:

> A structure designed as a dwelling unit for location on a permanent foundation, and containing sleeping accommodations and sanitary and kitchen facilities. with plumbing and electrical connections, which is designed to be transported after fabrication to a site for use, and which is certified by the State Building Inspector as being a mobile home.

Because, as defined, the term "mobile home" (that is now referred to as a manufactured home[10]), may also include a modular dwelling unit under the Regulations, we conclude that the text shown above in bold and underline conflicts with the Regulations that allows modular dwelling units to be used as ADUs. Specifically, although the Regulations neither define or refer to a "mobile homes," "manufactured homes," or trailers, the Regulations do define and refer to a "Modular Dwelling Unit," defined in 760 CMR 71.02 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 external 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.

Further, 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. As defined under the Regulations, Modular Dwelling Units may be transported in one or more sections, must be affixed to a foundation that meets the building code and connected to external utilities at the site. A Modular Dwelling Unit could therefore include a manufactured home, and thus could include a "mobile home" particularly given the Town's definition of "mobile home.

Based on the Regulations' definition of "Modular Dwelling Unit," many structures, including modular homes, manufactured homes, mobile homes, and other prefabricated homes meet the Regulations' definition of "Modular Dwelling Unit."[11] Given the Town's definition of the term "mobile home" we conclude that Section C (1)(c)'s prohibition on a mobile home being used as a detached ADU, conflicts with the Regulations' prohibition against any requirement that

---

[10] "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."

[11] As to manufactured homes, the EOHLC's draft regulations defined Modular Dwelling Unit to specifically exclude manufactured homes defined under G.L. c. 140, § 32Q; however, that exemption was not included in EOHLC's Final Regulations. The redline version of the draft regulations compared to the final regulations is available on the EOHLC website here: https://www.mass.gov/doc/adu-final-regulations-redlines/download.

prohibits, regulates or restricts a Modular Dwelling Unit from being used as an ADU, and we therefore disapprove the portion of Section C (1)(c) shown above in bold and underline.[12]

V. The Remaining Approved Provisions Adopted Under Article 22 Must be Applied Consistent with G.L. c. 40A, § 3 and 760 CMR 71.00

A. Definition of Principal Dwelling

Section B, "Definitions," defines terms used in the by-law, including the term "Principal Dwelling," that is defined as follows:

> A structure, regardless of whether it conforms to zoning, including use requirements and dimensional requirements, such as setbacks, bulk, and height, that contains at least one Dwelling Unit and is located on the same Lot as an ADU.

The by-law definition differs slightly from the definition of "Principal Dwelling" contained in the Regulations, 760 CMR 71.02, in that the by-law definition does not include reference to a lot that does not conform to zoning, 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 Town must ensure that its definition of "Principal Dwelling" is applied consistent with the Regulations. The Town should consult with Town Counsel with any questions as well as to determine if the by-law should be amended at a future Town Meeting to address this definition.

B. Site Plan Requirement

Section C, "Regulations," Subsection (3), "Site Plan Approval," imposes a site plan requirement for a detached ADU in the Residential and Village Center Rural Edge districts when the ADU will be located more than 50 feet from the principal dwelling. We approve the site plan requirement, but the Town must ensure that it is applied consistent with state law.

Specifically, for uses allowed as of right, such as a Protected Use ADU, 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

[12] See also EOHLC's Frequently Asked Questions discussing whether an ADU be a modular home, manufactured housing, or other prefabricated home. https://www.mass.gov/info-details/accessory-dwelling-unit-adu-faqs

power to deny the use)." Osberg 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.

C. Nonconformance

Section C, "Regulations," Subsection 5, "Nonconformance," Paragraph (b), "Pre-existing Non-conforming Structures," requires a pre-existing non-conforming structure to comply with Section 125-7 of the Town's zoning by-laws and G.L. c. 40A, § 6. We have reviewed Section 125-7, "Pre-existing non-confirming uses, structures and lots," that requires a finding (but not a special permit) in certain situations related to pre-existing non-conforming structures.

Section C (5)(b) appears 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 the Town's existing by-law, Section 125-7, requires a "finding" and does not require a special permit, we approve this provision. However, 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. We strongly suggest that the Town discuss the application of G.L. c. 40A, § 6 and Section C (5)(b) with Town Counsel.

VI. Conclusion

We partially approve Article 22, except for the following provisions: (1) portions of the Town's dimensional requirements in Section C (1)(b) and C (2)(a)(ii) and (iii); and (2) a portion of Section C (1)(c) that prohibits a mobile home from being used as an ADU, that we disapprove and delete as shown in Section IV above in bold and underline. As to the remaining approved provisions, 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 22 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 Katherine L. Klein