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June 17, 2025

Alissa K. Horsung, Town Clerk
Town of Princeton
6 Town Hall Drive
Princeton, MA 01541

Re: Princeton Special Town Meeting of November 20, 2024 – Case # 11673
Warrant Articles # 4, 5, and 6 (Zoning) [1]

Dear Ms. Horsung:

Article 5 - Under Article 5, the Town amended its zoning by-laws related to "Accessory Dwelling Units" ("ADUs") to allow ADUs as of right in compliance with G.L. c. 40A, § 3 and the implementing Regulations promulgated by the Executive Office of Housing and Livable Communities ("EOHLC"), 760 CMR 71.00, "Protected Use Accessory Dwelling Units" ("Regulations").[2]

We partially approve Article 5 because the approved text does not conflict with state law. However, we disapprove the following provisions because they conflict with G.L. c. 40A, § 3 and the Regulations (see Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the Constitution for the Attorney General to disapprove a by-law)):

- Sections A, C (1), and C (5)'s references to "single-family" dwellings;
- Sections A and C (1)'s prohibition against ADUs constructed in a new structure;
- Section (C) (2)'s two bedroom limitation;

[1] In a decision issued March 19, 2025, we approved Articles 4 and 6, and by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended the deadline for our decision on Article 5 for 45-days until May 3, 2025. On April 30, 2025, by agreement with Town Counsel, we again extended our deadline for an additional and final 45-days until June 17, 2025.

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

- Section C (4)'s minimum lot area requirement;

- Section C (6)'s parking requirement; and

- a portion of Section X's definition of "Accessory Dwelling Unit."

In this decision we summarize the by-law amendments adopted under Article 5; discuss the Attorney General's standard of review of town by-laws and the recent statutory and regulatory changes that allow Protected Use ADUs as of right;[3] and then explain why, based on our standard of review, we partially approve the zoning by-law amendments adopted under Article 5.[4] In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 5.

I. Summary of Article 5

Under Article 5, the Town amended its zoning by-laws to make two changes. First, the Town amended Section X, "Definitions," to delete the current definition of "Accessory Apartment" and insert a new definition of "Accessory Dwelling Unit." Second, the Town amended Section XVII to delete the existing text and insert a new Section XVII, "Accessory Dwelling Units," that imposes requirements on ADUs including site plan [Section (B) (1)]; requirements for attached ADUs and for detached ADUs[5] [Section (C) (1)]; limiting ADUs to no more than two bedrooms [Section (C) (2)]; subjecting the ADU to certain dimensional requirements [Section (C) (4)]; and parking requirements [Section (C) (6)].

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

Our review of Article 5 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

[3] 760 CMR 71.02 defines the term "Protected Use ADU" as follows: "An attached or detached ADU that is located, or is proposed to be located, on a Lot in a Single-family Residential Zoning District and is protected by M.G.L. c. 40A, § 3, provided that only one ADU on a lot may qualify as a Protected Use ADU. An ADU that is nonconforming to Zoning shall still qualify as a Protected Use ADU if it otherwise meets this definition."

[4] We acknowledge that the Town adopted Article 5 at its November 2024 Special Town Meeting, which was well before EOHLC finalized its Regulations and therefore the Town did not have the benefit of the Regulations' requirements when it adopted Article 5.

[5] During the course of our review, we received a letter from the Princeton Planning Board urging us to approve Article 5's prohibition against stand-alone detached ADUs. We appreciate this correspondence as it has aided our review. However, as discussed in detail in Section IV (B), a prohibition against constructing a stand-alone detached ADU in a new structure conflicts with the Regulations.

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

III. Summary of Recent Legislative Changes Regarding ADUs

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

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

> 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

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

> 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 5.

IV. Text Disapproved from Article 5 Because It Conflicts with G.L. c. 40A, § 3 and the Regulations

A. References to "Single-Family" Dwellings

Several provisions in Section XVII reference "single-family" dwellings as opposed to principal dwellings in relevant part as follows (with emphasis added):

> Section A
> …to provide alternative housing options; and to enable owners of **detached single-family** dwellings larger than required for their present needs to share space and the burdens of homeownership.
>
> Section C (1)
> An ADU shall be located as part of the principal **single-family** dwelling or as part of an accessory structure on the same lot as the principal **single-family** dwelling, such as an attached garage or a detached garage or barn. An ADU shall clearly be subordinate to the principal **single-family** dwelling.
>
> Section C (5)
> The exterior appearance of the buildings on a lot shall remain, to the extent practicable, that of a **single-family** dwelling and subordinate accessory buildings.

We disapprove and delete the words "single-family" shown above in bold and underline that limits ADUs as accessory to a single-family dwelling because limiting ADUs to a single-family dwelling conflicts with G.L. c. 40A, § 3 and the Regulations that allow ADUs as-of-right on the same lot as any type of "Principal Dwelling," as explained below. See West Street Associates, LLC v. Planning Board of Mansfield, 448 Mass 319, 324 (2021) (citing with approval trial judge's ruling that "By limiting medical marijuana facilities to nonprofit entities, the bylaw[,] while not prohibit[ing] those facilities, does restrict them in a ways that the [S]tate explicitly determined they should not be limited" and "[a]ccordingly, the town's bylaw is preempted by State law to the extent it requires all medical marijuana dispensaries to be nonprofit organizations.")

General Laws Chapter 40A, Section 3 and the Regulations allow Protected Use ADUs as-of-right on the same lot as any type of "Principal Dwelling," not just a single-family dwelling.

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

See 760 CMR § 71.02's definitions of "Accessory Dwelling Unit (ADU)" (defining an ADU as "[a] self-contained housing unit, inclusive of sleeping, cooking, and sanitary facilities on the same Lot as a Principal Dwelling . . .") and "Protected Use ADU" (defining a "Protected Use ADU" as "[a]n attached or detached ADU that is located, or is proposed to be located, on a Lot in a Single-Family Residential Zoning District."). The Regulations define "Principal Dwelling" as a structure that contains at least one dwelling unit as follows (with emphasis added):

> A structure, regardless of whether it, or the Lot it is situated on, conforms to Zoning, including use requirements and dimensional requirements, such as setbacks, bulk, and height, *that contains at least one Dwelling Unit* and is, or will be, located on the same Lot as a Protected Use ADU.

The Regulations' definition of "Principal Dwelling" contemplates Protected Use ADUs on lots that include more than one dwelling unit. For example, Protected Use ADUs are allowed on lots containing a two-family dwelling or a multi-family dwelling. Therefore, the above quoted provisions that state that ADUs are allowed only on lots with a "single-family" dwelling conflict with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the words "single-family" as shown above in bold and underline.

B. Limiting ADUs to Attached ADUs Only

Sections A and C (1) prohibit a detached ADU from being constructed in a new structure, in relevant part as follows (with emphasis added):

> Section A
> The purposes of this Accessory Dwelling Unit…by-law are to provide small dwelling units which may be rented without **adding to the number of buildings in the town or** substantially altering the appearance of the town and its dominant rural, residential, and agricultural character…
>
> Section C (1)
> **An ADU shall not be constructed as a new separate detached dwelling on a lot with an existing detached single-family dwelling**.

During the course of our review, we received a letter from the Princeton Planning Board urging us to approve these requirements asserting that G.L. c. 40A, § 3 does not require towns to allow "free-standing ADUs" and that the Regulations' provisions to the contrary have a "complete absence of any statutory basis for such regulation." See letter dated May 22, 2025 from John Mirick, Chair of the Princeton Planning Board to AAG Caprioli. In addition, the Planning Board asserts that the "interest of…Princeton is to maintain, to the extent practicable, the environment and appearance of single-family residential neighborhoods" and that the Town's "requirement that an ADU be attached to the existing dwelling or to an existing accessory building, rather than being constructed as a free-standing second detached dwelling, serves the legitimate municipal purpose of preserving the character of Princeton's residential neighborhoods." Id. Lastly, the Planning Board urges us to approve the prohibition on stand-alone ADUs because "[i]n the absence of specific legislative direction, that issue is left to each municipality." Id.

We appreciate this correspondence as it has aided our review. However, as explained in more detail below, the Town's prohibition against stand-alone detached ADUs (ADUs constructed in new separate detached structure) conflicts with the statute and the Regulations. We therefore disapprove and delete the text shown above in bold and underline that prohibits an ADU from "adding to the number of buildings in the town" or from being constructed in a "new separate detached dwelling."

General Laws Chapter 40A, Section 3 provides in relevant part that:

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

General Laws Chapter 40A, Section 3 protects ADUs by providing that zoning by-laws shall not prohibit, unreasonably regulate or require the special permit or other discretionary zoning approval for the use of land or structures for a single ADU in a single-family residential zoning district but authorizes municipalities to impose reasonable regulations on the creation and use of ADUs, if it so chooses. The Regulations, 760 CMR 71.02 defines a "Protected Use ADU" in relevant part (with emphasis added) as: "An attached or <u>detached</u> 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…." And, more importantly, the Regulations, 760 CMR 71.03 (2), "Prohibited Regulation," Paragraph (e), "Relationship to Principal Dwelling," provides that: "A requirement that a Protected Use ADU be attached to or detached from the Principal Dwelling" constitutes a prohibited regulation." These two provisions in the Regulations establish that a Protected Use ADU can be "attached or detached" and prohibit a Town from imposing a requirement that the ADU be attached or detached. For these reasons, the by-law's prohibitions against an ADU adding to the number of buildings in the Town and prohibiting an ADU from being constructed in a new separate detached dwelling, results in a complete prohibition of one type of detached ADU (an ADU constructed in a new structure) in conflict with the statute and Regulations. We therefore disapprove the text shown above in bold and underline.

C. <u>Two Bedroom Limitation</u>

Section C (2) limits the size of an ADU and the number of bedrooms, as follows (with emphasis added):

> An ADU shall not exceed 900 square feet or one-half (1/2) of the gross floor area of the principal dwelling, whichever is smaller**, <u>and shall not contain more than two bedrooms</u>**.

We disapprove Section C (2) that imposes a two bedroom limitation on ADUs, as shown above in bold and underline, because the text conflicts with G.L. c. 40A, § 3's prohibition on regulating the interior area of a single-family residential building. General Laws Chapter 40A,

Section 3 provides in pertinent part as follows:

> No zoning . . . by-law shall regulate or restrict the interior area of a single family residential building . . . provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. . . .

General Laws Chapter 40A, Section 3, prohibits the regulation or restriction of the interior area of single family residences. 81 Spooner Road, LLC v. Town of Brookline, 452 Mass. 109, 113 (2008). In 81 Spooner Road, the court concluded that a Brookline by-law creating a maximum gross floor area to lot size ratio was not inconsistent with G.L. c. 40A, § 3. The court concluded that the language of G.L. c. 40A, § 3, prohibiting the regulation of interior space prohibits only "'direct' regulation of interior area, and not incidental effects of reasonable dimensional, bulk, and density requirements." 81 Spooner Road, 452 Mass. at 116; see also, White v. Armour, 2008 WL 4946478 (Mass. Land Ct.) (Weston's prohibition against a Residential Gross Floor Area the "greater of 3,500 s.f. or 10% of the lot area up to a maximum of 6,000 s.f." was a valid regulation of bulk and height of structures and not a violation of G.L. c. 40A, § 3).

As the court in 81 Spooner Road, explained,

> Construing the prohibition in s. 3, second par., to mean direct regulation of interior area is sensible. It is based on a sound method of analysis used to resolve similar internal conflicts in other statutes, and it would make s. 3, second par., with its proviso a coherent and internally consistent piece of legislation. It permits municipalities to effectuate the legislative purpose of zoning, as set forth in St. 1975, c. 808, s. 2A, while simultaneously preserving the legislative policy against snob zoning and another stated purpose of zoning: "to encourage housing for persons of all income levels.

81 Spooner Road, 452 Mass. at 117.

An ADU is defined under G.L. c. 40A, § 1A, the Regulations, and Section X "Definitions," as a "dwelling unit…accessory to…a principal…dwelling." An ADU is not defined under state law to be a two-family or a multi-family dwelling. Therefore, we determine an ADU is a single-family residential building for purposes of G.L. c. 40A, § 3 and therefore Section C (2)'s two-bedroom limitation regulates the interior space of an ADU in violation of Section 3's, prohibition against regulating interior space. We therefore disapprove Section C (2) shown above in bold and underline.

Section C (2)'s two bedroom limitation is also an impermissible use and occupancy restrictions under the statute. The Regulations define "Use and Occupancy Restrictions" as:

> A Zoning restriction, Municipal regulation . . . zoning approval or other requirement imposed by the Municipality that limits the current, or future, use or occupancy of the Protected Use ADU to individuals or households upon the characteristics of, or

> relations between, the occupants, 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.

By limiting the number of bedrooms for an ADU, Section C (2) limits the occupancy of the ADU, including limiting the number of occupants beyond what is required by applicable state code, including the State Sanitary Code, in violations of the Regulations. We therefore disapprove Section C (2) on this basis as well.[11]

D. Dimensional Requirements

Section C (4) imposes dimensional requirements on the ADU as follows (with emphasis added):

> An ADU is subject to the **area,** yard, and height regulations of Section VI of these Zoning By-laws.

We disapprove and delete the word "area" from Section C (4), shown above in bold and underline, that imposes a minimum lot area requirement on an ADU in conflict with the Regulations, 760 CMR 71.03 (3)(b)(2), that prohibit a Town from requiring a minimum lot size for a Protected Use ADU.[12]

Section C (4) requires an ADU to comply with the "area, yard, and height regulations of Section VI." Section VI (I), "Area and Yard Regulations," Subsection (A), imposes a minimum lot area requirement as follows: "Except as hereinafter specified, there shall be provided for each dwelling or other residential structure, each business building, and each industrial building or concern in the Town a lot with a minimum area of 87,120 square feet. Of said 87,120 square feet not less than 43,560 square feet must be exclusive of wetland and flood hazard areas." Because the Regulations prohibit the Town from imposing minimum lot size requirements on a Protected Use ADU (see 760 CMR 71.03 (3)(b)(2) ("…a Municipality may not require a minimum Lot size for a Protected Use ADU"), and Section C (4) requires an ADU to comply with the "area" requirements of Section VI, including Section VI (1) (A)'s minimum lot size requirement, we disapprove the word "area" as shown above un bold and underline because it conflicts with the Regulations .

With regards to the remaining approved portion of Section C (4) that requires an ADU to

[11] Although not a basis of our disapproval, we note that a bedroom limitation for ADUs, would likely be found, on a full factual record, to be (1) an unreasonable regulation under 760 CMR 71.03 (3)(a); (2) violate the Dover Amendment protections given to ADUs under G.L. c. 40A, 3; and (3) violate Fair Housing laws that prohibits discrimination in providing housing based on a protected class, including family status (i.e., the presence of children in the household.) See 44 U.S.C. § 3604 (the Fair Housing Act [FHA]) and G.L. c. 151B, § 4, ¶ 6.

[12] The Regulations, 760 CMR 71.02, define "Lot" as "[a]n area of land with definite boundaries that is used, or available for use, as the site of a structure, or structures, regardless of whether the site conforms to requirements of Zoning."

comply with the yard and height regulations of Section VI, we cannot conclude that these requirements are unreasonable and therefore prohibited under 760 CMR 71.00. However, if these requirements are used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the implementing Regulations.

In applying Section C (4), the Town must also ensure that the application of this Section C (4) serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification, impose an excessive cost or substantially diminish or interfere with the use or development of a Protected Use ADU. See 760 CMR 71.03 (3)(a). The Town should consult with Town Counsel to ensure the proper application of Section C (4) to a Protected Use ADU. In addition, an important additional requirement, because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose "reasonable regulations" on a Protected Use ADU. If the by-law provisions, including the Town's existing Section VI requirements, are used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul of the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3.

Further, in applying the approved dimensional requirements, the Town should be mindful that 760 CMR 71.03 (b)(2)(a) prohibits towns from imposing dimensional requirements, such as setbacks, lot coverage, open space, bulk and height, and number of stories that are more restrictive than required for the Principal Dwelling, Single-Family Dwelling (as defined in 760 CMR 71.02) or other accessory structure in the zoning district where the Protected Use ADU is located, whichever is most permissive. The Town must ensure that the application Section C (4) is no more restrictive than those yard and height requirements required for a Principal Dwelling, Single Family Dwelling or other accessory structure (as defined in 760 CMR 71.02) in the zoning district where the Protected Use ADU is located, whichever is more permissive.

Finally, the Town should discuss with Town Counsel whether Section C (4) should be amended at a future Town Meeting to include the applicable dimensional requirements for an ADU (rather than referencing the existing zoning by-law provisions in Section VI) to ensure that those utilizing the ADU by-law have clear information regarding any required yard and height regulations.

E. Parking Requirements

Section C (6) imposes parking requirements on the ADU, as follows (with emphasis added):

> **There shall be at least one additional off-street parking space to serve an ADU.**

We disapprove and delete the text in Section C (6) shown above in bold and underline that requires "at least one additional off-street parking space" for the ADU because as written, this text requires ADUs to provide "at least" one additional and requires all ADUs to provide an off-street parking space without exempting ADUs located within a 0.5-mile radius of a transit

station from the parking requirement, in conflict with the G.L. c. 40A, § 3 and the Regulations. General Laws Chapter 40A, Section 3 prohibits a municipality from: (1) requiring more than one parking space for an ADU and (2) requiring any parking space for an ADU that is located within a 0.5-mile radius of a transit station, as follows:

> The use of land or structures for an accessory dwelling unit under this paragraph shall not require owner occupancy of either the accessory dwelling unit or the principal dwelling; provided, that 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.

In addition, the Regulations, 760 CMR 71.03 (2) prohibit a Town from imposing any prohibited Regulations on a Protected Use ADU, including the following:

> (b) Minimum Parking Requirements. A requirement of, as applicable:
>
> 1. More than one additional on-street or off-street parking space for a Protected Use ADU if all portions of its Lot are located outside a 0.5 mile radius of a Transit Station; or
>
> Any additional on-street or off-street parking space for a Protected Use ADU if any portion of its Lot is located within a 0.5 mile radius of a Transit Station.

The Regulations prohibit a town from requiring more than one parking space or requiring any additional parking space for an ADU located within a 0.5-mile radius of a transit station. 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."

Because Section (C) (6) requires an ADU to provide "at least" one additional parking space and requires all ADUs to provide a parking space without exempting ADUs located within a 0.5-mile radius of a transit station, this parking requirement conflicts with G.L. c. 40A, § 3 and 760 CMR 71.03 (2) (b), and we therefore disapprove and delete the text as shown above in bold and underline.

The Town is authorized by the statute and the Regulations to require one additional parking space for a Protected Use ADU that is not located within a 0.5-mile radius of a Transit Station. However, the Town cannot, as it has done here, require ADUs to provide "at least one" parking space and require all ADUs to provide an additional parking space without exempting those lots that are within a 0.5-mile radius of a transit station from the parking requirement because as written, that requirement potentially requires more than one parking space and would allow the Town to require a parking space for a lot with an ADU that is located within a 0.5-mile radius of a transit station. See West Street Associates, LLC, 448 Mass at 319. For this reason, we disapprove and delete the text shown above in bold and underline.

F. Definition of Accessory Dwelling Unit

Under Article 5 the Town amended Section X, "Definitions," to delete the definition of the term "Accessory Apartment," and add a new definition for "Accessory Dwelling Unit," as follows (with emphasis added):

> Accessory Dwelling Unit: A dwelling unit subordinate in size, accessory to, and on the same lot as, a principal **single-family** dwelling. The Accessory Dwelling Unit may be located as part of the principal dwelling or as part of a building accessory to the principal dwelling unit, such as an attached or detached garage or barn, **but shall not be constructed as a new separate detached dwelling on a lot with an existing detached single-family dwelling**. An accessory dwelling unit may not exceed 900 square feet or one-half (1/2) of the gross floor area of the principal dwelling, whichever is smaller**, and shall not contain more than two bedrooms**.

As explained in more detail above, we disapprove: (1) the words "single-family" because the Regulations' definition of "Principal Dwelling" contemplates Protected Use ADUs on lots that include more than one dwelling unit, such as lots containing a two-family dwelling or a multi-family dwelling; (2) the requirement that the ADU not be constructed as a separate detached dwelling because the Regulations provide that a Protected Use ADU can be "attached or detached" and prohibit a Town from imposing a requirement that the ADU be attached or detached; and (3) the limitation that the ADU contain not more than two bedrooms because it regulates the interior space of an ADU in violation of G.L. c. 40A, § 3's, prohibition against regulating interior space. We incorporate by reference the detailed basis for these disapprovals as explained above in Sections IV (A), (B), and (C). The Town must ensure that the remaining approved portion of Section X's definition of an "Accessory Dwelling Unit," is applied consistent with G.L. c. 40A, § 3 and the Regulations and should consult with Town Counsel with any questions on this issue.

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

A. Site Plan Review

Section B (1), "Procedures," allows ADUs by right in all zoning districts "subject to Site Pla Review under Section XII of these Zoning By-laws." Section B (2) details the information that must be provided by the applicant and provides in relevant part that: "[f]or an ADU, a plot plan and scaled architectural drawings conforming to these requirements shall satisfy the requirements for Site Plan Review under Section XII."

It is not clear whether Section B (1)'s Site Plan Review requirement is limited to the

applicant providing only a plot plan and scaled architectural drawings or whether the other provisions of Section XII apply. We have reviewed the Town's existing zoning by-laws, Section XII, "Site Plan Review" that requires the applicant to submit detailed site plan information and requires the Planning Board to make a number of determinations as to the project. We encourage the Town to consult with Town Counsel regarding a future amendment to Section B (2) to detail which portions of Section XII's site plan requirements apply to the Protected Use ADU to ensure those requirements comply with G.L. c. 40A, § 3 and Regulations. In addition, we offer additional comments for the Town's consideration regarding the proper application of the site plan review requirement.

In applying Section B (2) regarding site plan review, the Town must ensure that its site plan review requirements are not unreasonable or inconsistent with the site plan review process for Dover Amendment protected uses. See The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 33 (1979) (town cannot require applicant to submit site plan and "informational statement" with details about its landscaping plans, projections about the increased impact on municipal services, and other details outside the scope of what the town could lawfully regulate under the Dover Amendment). While 760 CMR 71.03 (3)(5) allows site plan review for a Protected Use ADU, it requires that such site plan process be "clear and objective" and not impose terms or conditions that are "unreasonable or inconsistent" with an as-of-right process. Therefore, any site plan process that the Town imposes upon a Protected Use ADU must be limited in its scope to only those requirements that are permissible under the Regulations as applied to a Dover Protected ADU. The Town should consult with Town Counsel with any questions on this issue.

Finally, although we approve Section B (2) requiring site plan review for a Protected Use ADU, the Town cannot apply to a Protected Use ADU the existing provisions of Section XII (5), "Planning Board Decision," Subsection C, "Denial," that authorize the Planning Board to deny site plan review as follows: "The planning board may deny site plan approval only if the applicant fails to provide sufficient information for the board to make the determinations required under subsection 5(A) above." For uses allowed as-of-right, 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 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 Section B (2)'s site plan requirements to a Protected Use ADU to ensure it is not applied in a manner that conflicts with the Dover protections afforded to a Protected Use ADU.

In conclusion, the Town should consult with Town Counsel regarding an amendment to Section B (2) at a future Town Meeting to clarify the site plan process applicable to Protected Use ADUs. In the interim, the Town must ensure that Section B (2)'s requirement for site plan approval is applied consistent with G.L. c. 40A, § 3 and the Regulations, as discussed herein.

B. Pre-existing ADUs

Section C (9) provides as follows:

> Any ADUs in existence at the time of adoption of this amended by-law which are not entitled to protection pursuant to M.G.L. c. 40A, §§ 6 or 7 or Section VII.2 of the Zoning By-laws, must be brought into compliance with the requirements of this section by filing an application for Site Plan Review under Section XII of these Zoning By-laws and satisfying the procedures and requirements set forth therein.

It is not clear what the Town intends by Section (C) (9)'s provisions and whether the Town intends for a pre-existing Accessory Apartment or ADU to serve as the Protected Use ADU. Although we approve Section C (9), the Town must ensure that a previously approved Accessory Apartment or ADU that is now intended as a Protected Use ADU under G.L. c. 40A, 3, no longer remains subject to any provision previously required for an Accessory Apartment under the prior Section XVII, "Special Residential Use Regulations," Section A, "Accessory Apartment," such as Section XVII (1) (4) that imposes an owner-occupancy requirement, as some of these prior provisions are in conflict with G.L. c. 40A, § 3 and 760 CMR 71.00.

We strongly encourage the Town to consult with Town Counsel regarding an amendment to Section C (9) that makes it explicitly clear that any prohibited or unreasonable regulations that were imposed on a previously approved accessory apartment or ADU are unenforceable to a Protected Use ADU. See 760 CMR 71.03 (4) ("A Municipality shall not enforce any Prohibited Regulation or Unreasonable Regulation that was imposed as a condition for the approval of the use of land or structures for a Protected Use ADU prior to the effective date of 760 CMR 71.00, regardless of whether such Protected Use ADU complies with the Municipality's Zoning, including, but not limited to, use requirements and dimensional requirements, such as setbacks, bulk, and height."). The Town should consult with Town Counsel with any questions regarding the proper application of Section C (9).

VI. Conclusion

We partially approve Article 5 except for the following provisions that we disapprove as shown above in Section IV in bold and underline: (1) Sections A, C (1) and C (5)'s references to "single-family" dwellings; (2) Sections A and C (1)'s prohibition against ADUs constructed in a new structure; (3) Section C (2)'s two bedroom limitation; (4) Section C (4)'s minimum lot area requirement; (5) Section C (6)'s parking requirement; and (6) a portion of Section X's definition of "Accessory Dwelling Unit."

The Town should consult closely with Town Counsel when applying the remaining approved ADU provisions to ensure that they are applied consistent with G.L. c. 40A, § 3 and

760 CMR 71.00. If the approved provisions are used to deny a Protected Use ADU, or otherwise applied in ways that constitute an unreasonable regulation in conflict with 760 CMR 71.03 (3), such application would violate G.L. c. 40A, § 3 and the Regulations. The Town should consult with Town Counsel and EOHLC to ensure that the approved by-law provisions are applied consistent with G.L. c. 40A, § 3 and the Regulations, as discussed herein.

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

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

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

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

Very truly yours,

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