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May 19, 2025

Diane Pelland, Town Clerk
Town of Swansea
81 Main Street
Swansea, MA 02740

Re: Swansea Special Town Meeting of October 28, 2024 -- Case # 11615
Warrant Article # 8 (Zoning) [1]
Warrant Articles # 9, 10, and 11 (General)

Dear Ms. Pelland:

Article 8 - Under Article 8, the Town amended multiple sections of its zoning by-laws, including deleting Section 265-4.3, "Accessory Dwelling Units," and inserting a new Section 265-4.3, "Accessory Dwelling Units, to allow Accessory Dwelling Units ("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 8 because the approved text does not conflict with state law. However, we disapprove the following provisions adopted under Article 8 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):

- The word "single-family" and "single-family home" in Section 265-4.3 (B)(1);
- Section 265-4.3 (C) (7)'s requirement that an ADU provide "at least" one additional parking space;
- Section 265-4.3 (C) (8)'s dimensional requirements for detached ADUs;

[1] In a decision dated February 14, 2025, we approved Articles 9, 10, and 11 and by agreement with Town Counsel as authorized under G.L. c. 40A, § 32, we extended our deadline for review of Article 8 for 60 days until April 19, 2025. On April 18, 2025, we extended our deadline for Article 8 for an additional and final 30 days until May 19, 2025.

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

- Section 265-4.3 (C) (9)'s requirement that ADUs shall be placed in the side yard with the same front yard setback as the primary structure;
- Section 265-4.3 (D) (3)'s requirement that the site plan show that a detached ADU will be in harmony with the surrounding area and maintain stability, property values, and residential character of the neighborhood.

In this decision we summarize the by-law amendments adopted under Article 8; 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 8.[4] In addition, we offer comments for the Town's consideration regarding certain approved provisions adopted under Article 8.

I. Summary of Article 8

Under Article 8, the Town voted to delete Section 265-4.3, "Accessory Dwelling Units," and insert a new Section 265-4.3, "Accessory Dwelling Units," to allow ADUs as-of-right in the Town's zoning districts where single family homes are allowed. Single-family homes are allowed as-of-right in the Town's Rural Residential ("RR") and Business A ("BA") Districts and prohibited in all other zoning districts. See Section 265-4.0, "Table of Principal and Accessory Uses," and Section 265-4.2, "Permitted Uses." Section 265-4.3 (B) (1) establishes the approval process for ADUs as follows:

> The Building Inspector shall issue a Building Permit authorizing the installation and use of an ADU within an existing or new single-family dwelling or for the installation and use of a single ADU in a detached structure on a single-family lot, subject to the Technical Review Requirements as provided in § 265-4.3D.

Section 265-4.3 (C) imposes dimensional requirements on ADUs, including limiting ADUs to one on a single lot; imposing the gross floor area requirement for the ADUs as required under G.L. c 40A, § 3 and the Regulations; and other dimensional and design requirements as follows:

> (3) The principal dwelling units and ADU shall remain in common ownership with each other and with the ownership of the lot on which they are located, and shall not be severed in ownership so long as they remain on the same lot. This prohibition includes, without limitation, the prohibition of the creation of

[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 80 at its October 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 8.

condominium form of ownership, or of any other common interest land jointly owned by individual unit owners.

* * *

7. Sufficient and appropriate space for at least one additional parking space shall be constructed by the owner to serve the ADU. . . No additional parking space shall be required for an ADU located not more than 0.5 miles from a commuter rail station, subway state, ferry terminal or bus station.

8. Dimensional Requirements for Detached ADU:

Setback	Dimension
Front Yard	35’
Rear Yard	30’
Side Yard	15’ 30’ if Corner Lot
Maximum Setback from Primary Residence	75’

9. Detached ADU shall be (a) placed behind primary structure in rear yard or (b) shall be placed in side yard with the same front yard setback as the primary structure.

Section 265-4.3 (D) requires an applicant for an ADU to submit a site plan for technical review before the issuance of a building permit. The site plan must include details of the ADU’s location; access and parking; utilities; fire safety; landscaping; architectural design; and must include a floor plan. See Section 265-4.3 (2). Finally, as to site plan review, Section 265-4.3 (D) (3) requires:

The plan must demonstrate” that the proposed detached ADU will be in “harmony with the surrounding area, maintaining the stability, property values, and residential character of the neighborhood.

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

Our review of Article 8 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 8, 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. 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. Section 7 of the Act, which took effect on August 6, 2024, by virtue of the Act's emergency preamble, amends G.L. c. 40A, § 1A by striking the definition of "Accessory dwelling unit" and inserting a new definition that provides as follows:

> "Accessory dwelling unit," 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: (1) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet the requirements of the state building code for safe egress; (ii) is not larger in gross floor area than ½ the gross floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as may be imposed by a municipality, including, but not limited to, additional size restrictions and restrictions or prohibitions on short-term rental, as defined in section 1 of chapter 64G; provided however that no municipality shall unreasonably restrict the creation or rental of an accessory dwelling unit that is not a short-term rental.[5]

Section 8 of the Act, which took effect on February 2, 2025,[6] amended G.L. c. 40A, § 3 (regarding subjects that enjoy protections from local zoning requirements, referred to as the

[5] Section 1A previously defined an "Accessory dwelling unit" as a self-contained housing unit, inclusive of sleeping, cooking and sanitary facilities on the same lot as a principal dwelling, subject to otherwise applicable dimensional and parking requirements, that: (i) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet the requirements of the state building code for safe egress; (ii) is not larger in floor area than 1/2 the floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as may be imposed by a municipality, including but not limited to additional size restrictions, owner-occupancy requirements and restrictions or prohibitions on short-term rental of accessory dwelling units.

[6] Section 8 was exempt from the Act's emergency preamble. See Section 143 of the Act.

"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, as follows:

> 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, including, but not limited to, 310 CMR 15.000 et seq., if applicable, site plan review, regulations concerning dimensional setbacks and the bulk and height of structures and may be subject to restrictions and prohibitions on short-term rental, as defined in section 1 of chapter 64G. 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. For more than 1 accessory dwelling unit, or rental thereof, in a single-family residential zoning district there shall be a special permit for the use of land or structures for an accessory dwelling unit. The executive office of housing and livable communities may issue guidelines or promulgate regulations to administer this paragraph.

The amendment to G.L. c. 40A, § 3 to include ADUs means that ADUs are now entitled to statutory protections from local zoning requirements, as discussed in more detail below.

IV. Protected Use ADUs are a "Dover Protected Use"

Central to the analysis of whether a Town's regulation of a Protected Use ADU is reasonable and thus allowed under the statute and Regulations, is the fact that the Legislature has added ADUs to G.L. c. 40A, § 3, thereby including this use among the subjects entitled to statutory protections from local zoning requirements, so-called "Dover Amendment" protected uses.

In adopting Section 3, the Legislature determined that certain land uses are so important to the public good that the Legislature has found it necessary "to take away" some measure of municipalities' "power to limit the use of land" within their borders. Attorney General v. Dover, 327 Mass. 601, 604 (1950) (discussing predecessor to G.L. c. 40A, § 3); see Cnty. Comm'rs of Bristol v. Conservation Comm'n of Dartmouth, 380 Mass. 706, 713 (1980) (noting that Zoning Act as a whole, and G.L. c. 40A, § 3, specifically, aim to ensure that zoning "facilitate[s] the provision of public requirements"). To that end, the provisions of Section 3 "strike a balance between preventing local discrimination against" a set of enumerated land uses while "honoring legitimate municipal concerns that typically find expression in local zoning laws." Trustees of Tufts Coll. v. City of Medford, 415 Mass. 753, 757 (1993). Over the years, the Legislature has added to the list of protected uses, employing different language—and in some cases different methods—to limit municipal discretion to restrict those uses, as evidenced by the most recent

amendments to Section 3 under Chapter 150 of the Acts of 2024. Crossing Over, Inc. v. City of Fitchburg, 98 Mass. App. Ct. 822, 829 (2020) (G.L. c. 40A, § 3, "was originally enacted to prevent municipalities from restricting educational and religious uses of land, see St. 1975, c. 808, § 3, but the Legislature has expanded G. L. c. 40A, § 3, over time to ensure that other land uses would be free from local interference.")

Section 3 now expressly provides that a Town's zoning by-law cannot prohibit, unreasonably regulate, or require a special permit or other discretionary zoning approval for the use of land or structures for a single ADU. In addition, the inclusion of ADUs in Section 3 as a protected use subject to only "reasonable" regulation means that a Town cannot impose its zoning rules on an ADU if doing so would "nullify" the use or excessively burden the use without appreciably advancing legitimate zoning goals. Tufts Coll., 415 Mass. at 757, 759. This test is reflected in the Regulations and is applicable to all local regulation of Protected Use ADUs.

V. EOHLC's Regulations of Protected Use ADUs

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." The purpose of the ADU statutory and regulatory changes is to encourage the production of ADUs in the state with the "goal of increasing the production of housing." 760 CMR 71.01 (1). To that end, the Regulations "establish rules, standards and limitations that will assist" Towns and landowners in the administration of the statutory changes to G.L. c. 40A, § 3. Id. The Regulations seek to "balance municipal interests in regulating the use and construction of ADUs while empowering property owners to add much needed housing stock." 760 CMR 71.01 (2).[7]

The Regulations define key terms, including "Accessory Dwelling Unit;" "Principal Dwelling;" "Prohibited Regulation;" "Protected Use ADU;" "Single-Family Residential Zoning District;" and "Unreasonable Regulation." See 760 CMR 71.02, "Definitions." In addition. the Regulations 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.

[7] 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).

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"[8] 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."

While a town is prohibited from "unreasonably restrict[ing]" a Protected Use ADU, the town may subject the Protected Use ADU to "reasonable regulations." See 760 CMR 71.03 (1). The Regulations extensively address reasonable and unreasonable regulations of Protected Use ADUs. See 760 CMR 71.03 (3). The Regulations set forth the test for determining whether a municipal restriction is unreasonable and sets parameters establishing when such municipal restriction would be deemed unreasonable.[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

[8] 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.

[9] 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).

c. Substantially diminish or interfere with the use or development of a Protected Use ADU without appreciably advancing the Municipality's legitimate interest.

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).

Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 8

VI. We Disapprove Certain Text Because It Conflicts with G.L. c. 40A, § 3 and the Regulations

A. Section 265-4.3's (B)'s Approval Process

Section 265-4.3 (B) (1) establishes the approval process for ADUs as follows:

> The Building Inspector shall issue a Building Permit authorizing the installation and use of an ADU within an existing or new **single-family** dwelling or for the installation and use of a single ADU in a detached structure on a **single-family home** lot, subject to the Technical Review Requirements as provided in § 265-4.3D.

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

General Laws Chapter 40A, Section 3 and the Regulations allow Protected Use ADUs as-of-right on the same lot as any type of "Principal Dwelling," not just a single-family dwelling. See 760 CMR § 71.02's definitions of "Accessory Dwelling Unit (ADU)" (defining an ADU as "[a] self-contained housing unit, inclusive of sleeping, cooking, and sanitary facilities on the same Lot as a Principal Dwelling . . .") and "Protected Use ADU" (defining a "Protected Use ADU" as "[a]n attached or detached ADU that is located, or is proposed to be located, on a Lot in a Single-Family

Residential Zoning District."). The Regulations define "Principal Dwelling" as a structure that contains at least one dwelling unit as follows (with emphasis added):

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

The Regulations' definition of "Principal Dwelling" contemplates Protected Use ADUs on lots that include more than one dwelling unit. For example, Protected Use ADUs are allowed on lots containing a two-family dwelling or a multi-family dwelling. Therefore, by stating that the ADUs are allowed only within a "single-family dwelling" or on a "single family home" lot, it conflicts with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the words "single-family" and "single-family home" as shown above in bold and underline from Section 265-4.3 (B).

B. Section 265-4.3 (C) (7)'s Requirement of "At Least" One Additional Parking Space for an ADU

Section 265-4.3 (C) (7) requires at least one additional parking space for ADUs that are not located within 0.5 miles of a transient station as follows (with emphasis added):

> Sufficient and appropriate space for **at least** one additional parking space shall be constructed by the owner to serve the ADU. . . No additional parking space shall be required for an ADU located not more than 0.5 miles from a commuter rail station, subway state, ferry terminal or bus station.

We disapprove and delete the words "at least" (as shown above in bold and underline), because as written, this text requires an ADU to provide "at least" one additional off-street parking space in conflict with the G.L. c. 40A, § 3 and the Regulations. General Laws Chapter 40A, Section 3 prohibits a municipality from requiring more than one parking space for an ADU 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 additional parking space for an ADU. Because Section 265-4.3 (C) (7) requires "at least" one parking space this provision conflicts with G.L. c. 40A, § 3 and 760 CMR 71.03 (2) (b) and we therefore disapprove it (as shown above in bold and underline).

C. Section 265-4.3 (D) (8)' s Dimensional Requirements

Sections 265-4.3 (D) (8) and (9) impose dimensional standards on ADUs, as follows (with emphasis added):

8. Dimensional Requirements for Detached ADU:

Setback	**Dimension**
Front Yard	**35'**
Rear Yard	**30'**
Side Yard	**15'** **30' if Corner Lot**
Maximum Setback from Primary Residence	**75'**

9. Detached ADU shall be (a) placed behind primary structure in rear yard **or (b) shall be placed in side yard with the same front yard setback as the primary structure.**

We disapprove and delete Section 265-4.3 (D) (8) and the side yard requirements in Section 265-4.3 (D) (9) (as shown in bold and underlined above) because they conflict with the Regulations. Section 71.03 (3)(b)(2), "Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;" "Dimensional Standards," prohibits a Town from imposing dimensional standards on Protected Use ADUs 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 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.

Section 265-5.2, "Special Provisions and Exception to Dimensional Regulations," subsection (D), "Accessory Structures" imposes dimensional requirements for accessory structures as follows:

> D. Accessory structures:
> (1) Roadside stands shall have side and rear yard setbacks of 10 feet, but need not have any front yard setback.
> (2) All other accessory buildings and structures shall have side and rear yard setbacks of 10 feet, and shall be placed in the rear and side yards only; provided, that the Zoning Board of Appeals may grant a special permit to allow placement of the same up to four feet into the front yard so long as a 10 foot front yard setback is maintained.

The dimensional requirements in Section 265-4.3 (C) (8) and (9) appear to match the dimensional requirements applicable to uses and structures in RR and BA Districts. However, Section 265-5.2 (D) imposes more generous dimensional requirements for accessory structures than those contained in Section 265-4.3 (C) (8) and (9). Therefore, Section 265-4.3 (C) (8)'s dimensional requirements and Section 265-4.3 (C) (9)'s text requiring ADUs to be located in the side yard setback with the same front yard setback as the primary structure impose dimensional requirements on an ADU that are more restrictive than those allowed for any other accessory structures. For this reason, Section 265-4.3 (C) (8) and the portions of (9) shown above in bold and underline conflict with 760 CMR 71.03 (3)(b)(2) and are disapproved.

D. Section 265-4.3 (D) (3)'s Site Plan Requirement for Detached ADUs

Section 265-4.3 (D) (3) requires that the site plan for a detached ADU "demonstrate" that the detached ADU is in "harmony with the surrounding area, maintaining the stability, property values, and residential character of the neighborhood" as follows:

> **The plan must demonstrate" that the proposed detached ADU will be in "harmony with the surrounding area, maintaining the stability, property values, and residential character of the neighborhood.**

We disapprove Section 265-4.3 (D) (3) as show above in bold and underline because it conflicts with 760 CMR 71.03 (3)(b)(5), "Site Plan Review," which requires site plan review requirements for Protected ADUs to be "clear and objective" and not impose terms and conditions that are unreasonable or inconsistent with the G.L. c. 40A, § 1A's definition of the as-of-right process.[10]

Section 265-4.3 (D) (3)'s requirement that the site plan "demonstrate" that the detached ADU is in "harmony with the surrounding area, maintaining the stability, property values, and residential character of the neighborhood" does not satisfy the standard to provide "clear and

[10] General Laws Chapter 40A, Section 1A defines "As of right" as a "development that may proceed under a zoning ordinance or by-law without the need for a special permit, variance, zoning amendment, waiver or other discretionary zoning approval."

objective" site plan review requirements, and therefore conflicts with the Regulations. Without any further details on what information an applicant for site plan approval must provide to show that the detached ADU is in harmony with the surrounding area (which is not defined), maintain the stability of property values, and the residential character of the neighborhood, Section 265-4.3 (D) (3) does not provide a site plan review process that is "clear" or "objective." Rather, the by-law allows for the Town to impose any terms and conditions it chooses, including those that may be 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). Absent "clear and objective" site plan requirements for the Planning Board's approval of site plan review, Section 265-4.3 (D) (3) results in the type of discretionary zoning approval prohibited under G.L. c. 40A, § 3, and the Regulations. For this reason, we disapprove Section 265-4.3 (D) (3) as shown in bold and underline above in Section 265-4.3 (D) (3) conflicts with G.L. c. 40A, § 3, and the Regulations, including 760 CMR 71.03 (3)(b)(5), that requires site plan review to be clear and objective and we disapprove it.

VII. 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 8 to ensure that the Town applies these provisions consistent with G.L. c. 40A, § 3 and the Regulations.

A. Section 265-4.3 (C) (3)'s Requirement that the ADU Stay in Common Ownership with the Principal Dwelling Units

Section 265-4.3 (C) requires that the principal dwelling unit and ADU "remain in common ownership" and prohibits the "creation of condominium form of ownership" as follows:

> (3) The principal dwelling units and ADU shall remain in common ownership with each other and with the ownership of the lot on which they are located, and shall not be severed in ownership so long as they remain on the same lot. This prohibition includes, without limitation, the prohibition of the creation of condominium form of ownership, or of any other common interest land jointly owned by individual unit owners.

Although the Regulations prohibit a municipality from imposing "owner-occupancy" requirements on either the ADU or the principal dwelling, the Regulations are silent on the issue of whether the ADU and the principal dwelling must remain in single ownership. In addition, both the statute and 760 CMR 71.02's definition of ADU authorize a municipality to impose "additional restrictions" on an ADU. Based upon our standard of review, we cannot conclude that Section 265-4.3 (C) is in conflict with state law.

In reviewing Section 265-4.3 (C) we have considered the question whether the by-law's requirement that the ADU "remain in common ownership with" the principal dwelling amounts to an unlawful exercise of the Town's zoning power because it is based on ownership and not use.

"A fundamental principle of zoning [is that] it deals basically with the use, without regard to the ownership, of the property involved or who may be the operator of the use." CHR Gen., Inc. v. City of Newton, 387 Mass. 351, 356, (1982) (internal quotations and citations omitted). In some instances, therefore, municipal condominium bans have been deemed unlawful. Id. at 356-58 (ordinance regulating conversion of residential units to condominiums was invalid regulation based on ownership because "a building composed [of] condominium units does not 'use' the land it sits upon any differently than an identical building containing rental units."); see also Bannerman v. City of Fall River, 391 Mass. 328 (1984) (city not authorized to adopt condominium ban pursuant to municipal powers to operate water/sewer, regulate traffic, or supervise public health).

It appears that Section 265-4.3 (C) 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. In circumstances where condominium conversions constitute use changes, municipalities may regulate them 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 Section 265-4.3 (C) 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 265-4.3 (C) (3)'s provisions are in conflict with the Regulations or are an unreasonable regulation under 760 CMR 71.03 (3). However, the Town should be prepared to satisfy the requirements of 760 CMR 71.03 (3) if this provision, as applied to a particular person, is challenged in the Court as unreasonable. The Town should consult closer with Town Counsel on this issue.

VIII. Conclusion

We partially approve Article 8, except for:

- The word "single-family" and "single-family home" in Section 265-4/3 (B)(1);
- Section 265-4.3 (C) (7)'s requirement that an ADU provide "at least" one additional parking space;
- Section 265-4.3 (C) (8)'s dimensional requirements for Detached ADUs;
- Section 265-4.3 (C) (9)'s requirement that ADUs shall be placed in the side yard with the same front yard setback as the primary structure;
- Section 265-4.3 (D) (3)'s requirement that the site plan show that a detached ADU will be in harmony with the surrounding area and maintain stability, property values, and residential character of the neighborhood.

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 in Article 8 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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