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December 19, 2025

Ginger L. Buteau, Town Clerk
Town of Auburn
104 Central Street
Auburn, MA 01501

Re: Auburn Annual Town Meeting of May 6, 2025 – Case # 11863
Warrant Articles # 18, 19, 20, 21 and 25 (Zoning)
Warrant Article # 34 (General)

Dear Ms. Buteau:

Articles 19, 20, and 21 – We approve Articles 19, 20, and 21 adopted at the Auburn May 6, 2025, Annual Town Meeting.[1]

Article 18 - Under Article 18, the Town amended Section 9.3.12, "Accessory Dwelling Units," 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]

Except for text in Section 9.3.12.3 (e) that prohibits ADUs with more than one bedroom, that we disapprove because it conflicts with G.L. c. 40A, § 3 and the Regulations, we approve the amendments adopted under Article 18 because the approved text does not 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). We also offer comments for the Town's consideration regarding certain existing provisions.

[1] In a decision issued on August 29, 2025, we approved Article 34 and placed Articles 18, 19, 20, 21, and 25 on "hold" pending receipt of information we needed to conclude our review. The Town submitted the required information on September 23, 2025 and we took Articles 18, 19, 20, 21, and 25 off "hold" and assigned them a new 90-day deadline of December 22, 2025. We will issue our decision on Article 25 under separate cover.

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

In this decision we summarize the by-law amendments adopted under Article 18; 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 18.

I. Summary of Article 18

Under Article 18, the Town made specific changes to Section 9.3.12 "Accessory Dwelling Units," by deleting existing text shown in ~~strikethrough~~ and adding new text shown in red to allow ADUs as of right in the Town. As amended, Section 9.3.12 imposes design, dimensional, use, and parking requirements on ADUs. See Section 9.3.12.3.

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

Our review of Article 18 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 18, 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.

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[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."

III. Summary of Legislative Changes Regarding ADUs

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

On January 31, 2025, the EOHLC promulgated regulations for the implementation of the legislative changes regarding ADUs. See 760 CMR 71.00, "Protected Use Accessory Dwelling Units."[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.

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

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[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).

[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-

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 parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 18.

IV. Section 9.3.12.3 (e)'s Bedroom Limitation

As amended, Section 9.3.12.3 (e)'s limits the size of ADUs and limits the number of bedrooms in an ADU to one bedroom as follows (with emphasis added):

> An Accessory Dwelling Unit is permitted provided that the unit be no greater than nine hundred (900) square feet or is not larger in Gross Floor Area than ½ the Gross Floor Area of the Principal Dwelling, whichever is smaller**, nor have more than one (1) bedroom**.

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."

We disapprove the text shown above in bold and underline that limits ADUs to no more than one bedroom 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, and the Regulations 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 9.3.12.3 (e)'s one-bedroom limitation regulates the interior space of an ADU in violation of Section 3's, prohibition against regulating interior space. For this reason, we disapprove the one bedroom limitation imposed under Section 9.3.12.3 (e) shown above in bold and underline.

Section 9.3.12.3 (e)'s one 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 9.3.12.3 (e) 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 9.3.12.3 (e)'s one bedroom limitation on this basis as well.[9]

V. Comments on the Existing Text in Section 9.3.12

We offer comments below on Section 9.3.12's existing provisions that were not amended under Article 18 and are therefore not now before the Attorney General for review and approval, to ensure that the existing provisions are applied consistent with the protections given to ADUs under G.L. c. 40A, § 3 and the Regulations, as discussed in more detail below.

A. Section 9.3.12's References to "Single-Family Dwelling"

Throughout Section 9.3.12's existing text, ADUs are allowed in the context of single-family dwellings. Allowing ADUs only with 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, 488 Mass. 319, 324 (2021) (citing with approval trial judge's ruling that "By limiting medical marijuana facilities to nonprofit entities, the bylaw[,] while not prohibit[ing] those facilities, does restrict them in a way that the [S]tate explicitly determined they should not be limited" and "[a]ccordingly, the town's bylaw is preempted by State law to the extent it requires all medical marijuana dispensaries to be nonprofit organizations.").

General Laws Chapter 40A, Section 3 and the Regulations 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

[9] 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.

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 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, allowing an ADU only in the context of single-family dwellings conflicts with G.L. c. 40A, § 3 and the Regulations. The Town should consult with Town Counsel regarding amending Section 9.3.12 at a future Town Meeting to delete the references to "single-family" dwellings.

B. Sections 9.3.12.1 and 9.3.12.3's Ingress/Egress Requirements

Although not subject to any changes under Article 18 and therefore not subject to our review, we call the Town's attention to Sections 9.3.12.1 and 9.3.12.3 that requires ADUs to be complete, separate housekeeping units that function as a separate unit from the original unit, including "ingress/egress to the unit without requiring passage through the primary dwelling unit." Prohibiting ADUs from having ingress and egress through a primary dwelling would conflict with G.L. c. 40A, § 3 and the 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 "Accessory Dwelling Unit" in relevant part (with emphasis added) 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:
>
> (a) 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 Building Code for safe egress.

Moreover, the Regulations prohibit towns from imposing regulations that require the ADU to be attached or detached from the Principal Dwelling. See Section 71.03 (2) (e). In addition, the Regulations, 760 CMR 71.03 (3)(b)(1), prohibit the Town from imposing any design standard that "[b] [i]s so restrictive, excessive, burdensome, or arbitrary that it prohibits, renders infeasible, or unreasonably increases the costs of the use or construction of a Protected Use ADU." Requiring an ADU to provide ingress and egress without passage through the primary dwelling unit conflicts with the protections given to ADUs under G.L. c. 40A, § 3 and the Regulations that would allow ADUs in attached structures to be accessed through the primary dwelling and prohibits towns from imposing unreasonable regulations on ADUs. We suggest that the Town discuss this requirement with Town Counsel.

C. Section 9.3.12.3' Minimum Lot Size

The existing text in Section 9.3.12.3, which is not subject to change under Article 18, requires the single family house lot on which the ADU will be located to comply with the minimum

lot size and other dimensional requirements for the zoning district where the single-family home is located. We caution the Town that it cannot apply this provision to impose any requirements related to minimum lot area on an ADU because such application would conflict with the Regulations. Specifically, 760 CMR 71.03 (3)(b)(2) prohibits a Town from requiring a minimum lot size for a Protected Use ADU.[10] We encourage the Town to consult with Town Counsel about an amendment at a future Town Meeting that makes it clear that the minimum lot size requirements are not applicable to an ADU.

D. Section 9.3.12.3 (f)'s Parking Requirements

Although not amended under Article 18, Section 9.3.12.3 (f) requires one off-street parking space for an ADU. General Laws Chapter 40A, § 3 and the Regulations allow towns to require one parking space for an ADU unless the ADU is located within a 0.5 mile radius of a transit station. See G.L. c. 40A, § 3 ("…not more than 1 additional parking space shall be required for an accessory dwelling unit; and provided further, that no additional parking space shall be required for an accessory dwelling located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station.); see also 760 CMR 71.03 (2) (b) (the Town cannot impose a requirement for more than one additional parking space or any additional parking space requirement for a Protected Use ADU if any portion of its Lot is located within a 0.5-mile radius of a Transit Station.)[11] The Town must ensure that it does not require a parking space for ADUs located within a 0.5-mile radius of a transit station and the Town should amend Section 9.3.12.3 (f) to provide a parking exemption for these ADUs. The Town should consult with Town Counsel with any questions on this issue.

V. Conclusion

Except for a portion of the text in Section 9.3.12.3 (e) that limits ADUs to one bedroom, that we disapprove because it conflicts with state law, we approve Article 18 because the approved provisions do not conflict with state law. However, the Town should consult closely with Town Counsel when applying these provisions to Protected Use ADUs to ensure they are applied consistent with G.L. c. 40A, § 3 and 760 CMR 71.00. If the provisions adopted under Article 18 or the existing 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,"

[10] 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."

[11] 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."

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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