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December 19, 2025

Deborah M. Brennan, Town Clerk
Town of Wilbraham
240 Springfield Street
Wilbraham, MA 01095

**Re: Wilbraham Annual Town Meeting of May 17, 2025 – Case # 11778
Warrant Articles # 34, 35, and 36 (Zoning)
Warrant Articles # 15 and 16 (General)¹**

Dear Ms. Brennan:

Article 34 - Under Article 34, the Town amended several sections of its zoning by-laws regarding Accessory Dwelling Units (“ADUs”) to allow Protected Use ADUs as of right in compliance with G.L. c. 40A, § 3 and the implementing Regulations promulgated by the Executive Office of Housing and Livable Communities (“EOHLC”), 760 CMR 71.00, “Protected Use Accessory Dwelling Units” (“Regulations”).

We partially approve the amendments adopted under Article 34 because the approved text does not conflict with state law. However, we disapprove and delete² 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)):

- references to ADUs in the context of “single-family” dwellings;
- a portion of Section 4.10.2 (B)’s dimensional requirements imposing a minimum lot size;

¹ In a decision issued September 4, 2025 we approved Articles 15, 16, 35, and 36. On November 5, 2025 by agreement with Town Counsel we extended the deadline for our review of Article 34 for 45-days until December 25, 2025.

² The use of the term “disapprove” collectively means “disapprove and delete” such that any text disapproved by the Attorney General (shown in bold and underline) by virtue of such disapproval is also deleted from the Town’s zoning by-law and does not take effect under G.L. c. 40 § 32.

- Section 4.10.2 (C)'s parking provisions; and
- Section 4.10.4's special permit requirement for an ADU in a non-conforming principal dwelling.

In this decision we summarize the by-law amendments adopted under Article 34; discuss the Attorney General's standard of review of town by-laws and the recent statutory and regulatory changes that allow Protected Use ADUs as of right;³ and then explain why, based on our standard of review, we partially approve the amendments adopted under Article 34. In addition, we offer comments for the Town's consideration regarding certain approved provisions to ensure that they are applied consistent with state law.

I. Summary of Article 34

Under Article 34, the Town amended four sections of its zoning by-laws related to ADUs. The first change amends Section 1.3, "Definitions," to delete the existing definition of "Accessory Apartment," and insert a new definition of "Accessory Dwelling Unit." The second change amends Section 3.4, "Table One: Schedule of Use Regulations," to insert a new Subsection 3.4.2.8, Accessory Dwelling Unit, subject to the restrictions in Section 4.10," and to allow an ADU by right with site plan approval ("SPA") in the R15, R26, R34, R40, and R60 zoning districts and to prohibit ("N") an ADU in the remaining districts (RMD, NO, NS, ACF, GB, and IPG).⁴ The next change amends Section 3.9.2, "Accessory Uses: Residential," Subsection 3.9.2.15 to delete text requiring a special permit for an ADU. The last change deletes Section 4.10, "Accessory Apartment Regulations," in its entirety and inserts a new Section 4.10, "Accessory Dwelling Unit Regulations," that imposes requirements on ADUs including parking and dimensional requirements.

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

Our review of Article 34 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.

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 General Laws Chapter 40A, Section 3 allows a Protected Use ADU "in a single-family residential zoning district," defined in the Regulations as "[a]ny Zoning District where Single-family Residential Dwellings are permitted or an allowable use, including any Zoning District where Single-family Residential Dwellings are allowed as-of-right or by Special Permit." According to the Town's existing Use Table, single-family dwellings are allowed only in the R15, R26, R34, R40, and R60 districts. For this reason, we approve the amendments to Section 3.4. The Town must ensure that Protected Use ADUs are allowed in any Single-family Residential Zoning District in the Town and should consult with Town Counsel with any questions.

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 34, 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.”⁵ The Regulations define key terms and prohibit certain “Use and Occupancy Restrictions” defined in Section 71.02 as follows:

⁵ 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>).

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”⁶ 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.”⁷ 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.⁸ 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).

⁶ 760 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.

⁷ 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).

⁸ 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 # 11579.⁹ Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 34.

IV. Text Disapproved from Article 34 Because it Conflicts with G.L. c. 40A, § 3 and the Regulations

A. References to Single-Family Dwellings

Throughout the new Section 4.10, the Town refers to ADUs in the context of single-family dwellings, as follows (with emphasis added):

Section 4.10.2 (A)

The ADU shall be clearly subordinate in size to the principal **single-family** dwelling...

Section 4.10.2 (B)

The ADU shall comply with...frontage, yard (setback), height and building coverage requirements as may be applicable to **single-family** dwellings, as contained in Section 4.4.10.

Section 4.10.2 (C)

The ADU shall be a complete, separate housekeeping unit that functions as a separate unit from the principal **single-family** dwelling.

We disapprove the text “ “single-family” as shown above in bold and underline, that references ADUs in the context of single-family dwellings because these provisions conflict 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

⁹ 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.”

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, allowing an ADU only in the context of single-family dwellings conflicts with G.L. c. 40A, § 3 and the Regulations. For this reason, we disapprove the text shown above in bold and underline. The Town should consult with Town Counsel with any questions.

B. Section 4.10.2 (B) – Dimensional Requirements

Section 4.10.2 (B) imposes dimensional requirements on an ADU as follows (with emphasis added):

The ADU shall comply with **all lot area**, frontage, yard (setback), height and building coverage requirements as may be applicable to...dwellings, as contained in Section 4.4.10.

We disapprove and delete the text above in bold and underline that requires ADUs to comply with “all lot area” requirements in Section 4.4.10, “Schedule of Dimensional Requirements,” because this text conflicts with the Regulations, 760 CMR 71.03 (3)(b)(2), that prohibits a Town from requiring a minimum lot size for a Protected Use ADU.¹⁰ See 760 CMR 71.03 (3)(b)(2) (“...a Municipality may not require a minimum Lot size for a Protected Use ADU”). Because Section 4.10.2 (B) requires an ADU to comply with “all lot area” in Section 4.4.10, and Section 4.4.10 requires minimum lot area sizes in the Residential districts where ADUs are allowed by right ranging from 15,000 to 60,000 square feet, this requirement conflicts with the Regulations. For this reason, we disapprove and delete the text shown in bold and underline above.

C. Section 4.10.2 (E) – Parking Requirements

Section 4.10.2 (E) imposes parking requirements on the ADU in relevant part as follows (with emphasis added):

One (1) off-street parking space must be provided for all ADUs.

We disapprove the portion of Section 4.10.2 (E) (shown above in bold and underline) because as written, this text requires *all* ADUs to provide a parking space, including ADUs located within a ½ mile radius of a transit station. Therefore, this provision conflicts with the G.L. c. 40A, § 3 and the Regulations as explained below.

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.”

General Laws Chapter 40A, Section 3 prohibits a municipality from requiring more than one parking space or a parking space for *any* ADU located within 0.5-miles 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

2. 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, 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.”¹¹ The Town is authorized by 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 all Protected Use ADUs to provide one parking space because as written, these requirements conflict with the statute and Regulations. See West Street Associates, LLC, 488 Mass. 319 at 324.

Because Section 4.10.2 (E) requires all Protected Use ADUs to provide a parking space, including Protected Use ADUs located within a 0.5-mile radius of a transit station, this requirement 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). The Town should consult with Town Counsel with any questions regarding this issue.

D. Section 4.10.4 – Relationship to Non-conformities

Section 4.10.4 imposes a special permit requirement for an ADU in a pre-existing, non-conforming principal dwelling as follows (with emphasis added):

¹¹ The Town is part of the Pioneer Valley Transit Authority (PVTa). See <https://www.mass.gov/info-details/public-transportation-in-massachusetts>.

If an ADU is proposed for a pre-existing, non-conforming principal dwelling, the requirements of Section 3.3 of this Zoning Bylaw shall apply, provided that no special permit may consider the ADU use or impose conditions on such use.

We disapprove Section 4.10.4 (shown above in bold and underline) because it conflicts with G.L. c. 40A, § 3 and 760 CMR 71.00 that prohibits the imposition of a special permit requirement (except in limited situations not relevant here)¹² for an ADU, as explained in more detail below.

General Laws Chapter 40A, Section 3 prohibits a zoning by-law from requiring a special permit or other discretionary zoning approval for a single ADU, in relevant part as follows:

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

In addition, 760 CMR 71.03 (1) prohibits a special permit requirement for the use of land or structures for a Protected Use ADU as follows:

Municipalities shall not prohibit, impose a Prohibited Regulation, or Unreasonable Regulation, or except as provided under 760 CMR 71.03 (5) and 760 CMR 71.03 (c), require a special permit, wavier, variance or other zoning relief or discretionary zoning approval for the use of land or structures for a Protected use ADU, including the rental thereof, in a Single-family Residential Zoning District; provided that Municipalities may reasonably regulate a Protected Use ADU, subject to the limitations under 760 CMR 71.00.

The Town's existing zoning by-laws, Section 3.3, "Nonconforming Uses and Structures," Subsection 3.3.2, "Nonconforming Structures," authorizes the Board of Appeals to grant a special permit to change, extend or alter a nonconforming use or structure in certain circumstances. These existing zoning provisions appear to reflect the requirements of G.L. c. 40A, § 6 ("Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.")

¹² The Regulations include only two instances when the Town may require a special permit for an ADU. First, notwithstanding 760 CMR 71.03 (1)'s prohibition on special permits for ADUs, 760 CMR 71.03 (5) requires a municipality that "chooses to allow additional ADUs on the same [l]ot as a Protected use ADU in a Single-family Residential Zoning District," to allow the additional ADUs by special permit. Second, 760 CMR 71.03 (6) allows a Town to require a special permit "for development of a Protected Use ADU in a floodplain or aquifer protection overlay if required for the Principal Dwelling, provided that the Special Permit is based on clear, objective, and non-discretionary criteria." Neither of these exceptions authorize Section V-G (A)(8)'s special permit requirement.

Although the proposed new text in Section 4.10.4 states that “no special permit may consider the ADU use or impose conditions on such use,” this text still requires a special permit and therefore imposes a discretionary special permit review process that is prohibited by G.L. c. 40A, § 3 and 760 CMR 71.03 (1). For this reason, we disapprove and delete Section 4.10.4 as shown above in bold and underline.¹³

V. The Remaining Approved Provisions Adopted Under Article 34 Must be Applied Consistent with G.L. c. 40A, § 3 and 760 CMR 71.00

A. Section 4.10.2 (B) – Dimensional Requirements

The approved portions of Section 4.10.2 (B) impose dimensional requirements on ADUs as follows: “The ADU shall comply with...frontage, yard (setback), height and building coverage requirements as may be applicable to...dwellings, as contained in Section 4.4.10.” In addition, Section 4.10.2 (K) provides: “ADUs exceeding the dimensional requirements specified herein or otherwise not in conformance with Section 4.10 or the definition of Accessory Dwelling [U]nit in Section 1.3 are prohibited.”

The Town must ensure that the approved portions of Sections 4.10.2 (B) and (K) imposing dimensional requirements upon a Protected Use ADU are applied consistent with the Regulations. Specifically, 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

¹³ We note that G.L. c. 40A, § 6 does not require a special permit process and instead authorizes the Town to make a “finding.” In limited circumstances, it may be appropriate for the Town to require a Section 6 finding for an ADU associated with a nonconforming structure or lot. See Petrucci v. Bd. of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998) (no Section 6 “finding” required where applicant successfully demonstrated the unreasonableness of the application of the dimensional requirements to the structure...). In circumstances where the regulations creating the increased nonconformity can lawfully be applied to the ADU, the Town may require that the applicant demonstrate that the altered structure use will not be substantially more detrimental to the neighborhood than the existing structure so long as the town applies objective, nondiscretionary criteria and no special permit is required. However, changing the use of a nonconforming structure or use to an ADU use, a statutorily protected use, cannot trigger scrutiny of the impact on a neighborhood because the ADU is a protected use and cannot be denied. Moreover, a Protected Use ADU is not “nonconforming” to any zoning rule that cannot lawfully be applied to it under the ADU statute and regulations. See Watros v. Greater Lynn Mental Health and Retardation Ass’n, Inc., 421 Mass. 106, 115 (1995); see also Ellsworth vs. Mansfield, Case No. 08 MISC 382311, 2011 WL 3198174, at *4 (Mass. Land Ct. July 25, 2011) (no Section 6 finding required for Dover-protected educational use because “effectively, G.L. c. 40A, § 3 removes the non-conformity (the lack of frontage) because it would not be a ‘reasonable regulation’ of the proposed school in these circumstances”). As a result, construction or alteration of a structure for an ADU will not increase a nonconformity unless the nonconformity is created by regulations that can reasonably be applied to the ADU. We strongly suggest that the Town discuss this issue with Town Counsel.

located, whichever is most permissive. The Town must ensure that Section 4.10.2 (B)'s reference to existing dimensional requirements in Section 4.4.10 are not more restrictive than those 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.

In addition, in applying these dimensional provisions, because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose "reasonable regulations" on a Protected Use ADU. Therefore, if a dimensional requirement is used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. Moreover, the Town must ensure that these dimensional requirements are analyzed on a case by case basis as it relates to a particular property because in some circumstances the provision could be unreasonable as applied to a particular property. In addition, the Town must ensure that the application of these requirements serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification, impose an excessive cost or substantially diminish or interfere with the use or development of a Protected Use ADU. See 760 CMR 71.03 (3)(a). If the Town cannot satisfy this standard, the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of any dimensional requirements to a Protected Use ADU. The Town should consult with Town Counsel to ensure the proper application of these provisions to a Protected Use ADU.

B. Section 4.10.2 (E) – Garage to Serve the ADU

Section 4.10.2 (E) requires a special permit for construction of a garage to serve the ADU as follows: "[t]he construction of a new garage to serve an ADU shall require a special permit from the Planning Board under Section 4.4.8 and/or Section 3.9.2.2 as applicable."

We approve Section 4.10.2 (E)'s special permit requirement for garages that serve an ADU because under our standard of review, we cannot conclude that a special permit for a garage that serves an ADU conflicts with the Regulations. There is nothing in the Regulations that expressly requires a town to allow accessory uses, including garages, as-of-right to ADUs (which are themselves also considered an "accessory" use to a principal dwelling.) However, if the special permit requirement for a garage that serves an ADU is used in a manner that prohibits or unreasonably restricts an ADU, such application would run afoul of the Dover amendment protections given to an ADU under G.L. c. 40A § 3 and the Regulations.

In addition, the Town must ensure that the application of this requirement serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification, impose an excessive cost or substantially diminish or interfere with the use or development of a Protected Use ADU. See 760 CMR 71.03 (3)(a). If the Town cannot satisfy this standard as applied to a particular ADU application, the special permit requirement for a garage that serves the ADU may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of Section 4.10.2 (E).

C. Section 4.10.2 (H) – Short Term Rental Prohibition

Section 4.10.2 (H) prohibits a Short Term Rental (“STR”) in an ADU as follows (with emphasis added): “ADUs may not be used as Short-Term Rentals, as such term is defined in M.G.L. c. 64G, § 1 *or otherwise rented for a period shorter than thirty-one (31) days.*”

While we approve Section 4.10.2 (H)’s prohibition on ADUs as STRs, it is unclear what the Town means when it prohibits ADUs from “otherwise [being] rented for a period shorter than thirty-one (31) days.” General Laws Chapter 40A, Section 3 and the Regulations provide a limited authorization on the Town’s ability to regulate the rental of ADUs. If Section 4.10.2 (H) is applied to prohibit the rental of ADUs other than as STR, then it would conflict with G.L. 40A, §3 and the Regulations. See Section 71.03 (2) (c)’s prohibition on use and occupancy regulations and Section 71.03 (3)’s prohibition on unreasonable regulations. Therefore, any prohibition on the rental period of ADUs other than as allowed under G.L. c. 64G, would violate of Section 3 and the Regulations. We suggest that the Town discuss this issue in more detail with Town Counsel.

D. Section 4.10.2 (J) – Mobile Home or Temporary Structure Prohibition

Section 4.10.2 (J) prohibits a mobile home or other temporary structure from being used as an ADU as follows: “[a] mobile home or any other temporary structure shall not be used or classified as an ADU.” In analyzing this provision for consistency with state law, we have reviewed the Town’s existing by-laws, Section 1.3 that defines a “mobile home” as follows:

Mobile Home. Any vehicle or object whether resting on wheels, jacks or other foundation and having no motive power of its own, but which is drawn by, or used in connection with, a motor vehicle, and which is so designed and constructed as a dwelling unit which permits its transportation and relocation as a complete unit on its own wheels. This shall not include the type of vehicle known as a "travel trailer", "tent-type camp trailer" or "motor home".

Based on Section 1.3’s definition of the term “mobile home,” that defines mobile homes as something “used in connection with a motor vehicle” and which is intended as a dwelling unit that permits “transportation and relocation as s complete unit on its own wheels,” we approve Section 4.10.2 (J). However, the Town must ensure that Section 4.10.2 (J) is applied consistent with the Regulations that allows modular dwelling units to be used as ADUs and define a Modular Dwelling Unit as follows:

A pre-designed Dwelling Unit assembled and equipped with internal plumbing, electrical or similar systems prior to movement to the site where such Dwelling Unit is affixed to a foundation and connected to external utilities; or any portable structure with walls, a floor, and a room, designed or used as a Dwelling Unit, transportable in one or more sections and affixed to a foundation an connected to external utilities.

Further, with regards to a “Modular Dwelling Unit,” the Regulations 760 CMR 71.03 (3)(b)(7) provide that “[a]ny requirement that prohibits, regulates or restricts a Modular Dwelling Unit from being used as a Protected Use ADU that is more restrictive than the Building Code” is an unreasonable regulation. As defined under the Regulations, Modular Dwelling Units may be transported in one or more sections, must be affixed to a foundation that meets the building code and connected to external utilities at the site. Therefore, to the extent a “Mobile Home” constitutes

a Modular Dwelling Unit, the Town cannot apply Section 4.10.2 (J) to prohibit a Modular Dwelling Unit from being used as an ADU. The Town should consult with Town Counsel to ensure the proper application of this provision.¹⁴

E. Section 4.10.3 – Site Plan Approval

Section 4.10.3 requires site plan approval of all ADUs as follows: “[a]ll ADUs are required to obtain Site Plan Approval from the Planning Board pursuant to the Site Plan requirements and procedures in Section 13.3 (Site Plan Requirements) and 13.5 (Site Plan Approval) of this Zoning Bylaw. Site Plan Approval criteria shall be limited to review of consistency with the standards and requirements of this Section 4.10. Sections 13.5.4.3 and 13.5.5 shall not apply.” The Town must ensure that these provisions are applied consistent with the Regulations, as explained below.¹⁵

Although Section 4.10.3 provides that “Sections 13.5.4.3 [related to site plan conditions] and 13.5.5 [related to performance surety] shall not apply,” Section 4.10.3 does not exclude Section 13.5.4.2 that authorizes the denial of the site plan as follows: “Denial of the site plan based on a determination that either: A. Insufficient information was submitted with the application in order for the Board to adequately review the proposal; or B. [a] determination that the project does not meet the requirements of this section.”

Although we approve Section 4.10.3’s site plan requirements, the Town must ensure that it is applied consistent with state law. Specifically, for uses allowed as of right, such as a Protected Use ADU, site plan review is limited to the regulation of the use rather than its prohibition. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). The scope of site plan approval for as of right uses is therefore limited to imposing reasonable terms and conditions on the use. Id. citing SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 107-110 (1984). “[W]here the proposed use is one permitted by right the planning board may only apply substantive criteria consistent with Prudential Ins. Co. v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278 (1986) (i.e., it may impose reasonable terms and conditions on the proposed use, but it does not have discretionary 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).

¹⁴ See also EOHLC’s Frequently Asked Questions discussing whether an ADU be a modular home, manufactured housing, or other prefabricated home. <https://www.mass.gov/info-details/accessory-dwelling-unit-adu-faqs>

¹⁵ During the course of our review of Article 34, we were made aware of an unsigned letter sent to EOHLC raising concerns regarding Wilbraham’s site plan approval requirement for Protected Use ADUs asserting that because single-family homes are not required to undergo site plan approval, this ADU requirement “creates an unfair burden [on ADUs] and seems inconsistent with the state’s ADU housing goals.” The letter’s author requested that “guidance” be provided to Wilbraham on the site plan approval requirement to “ensure local compliance with Massachusetts law.” We encourage the Town to consult with Town Counsel to discuss our comments regarding site plan approval to ensure the Town applies this requirement consistent with state law, as explained in Section V (E).

The Town should consult closely with Town Counsel when applying a site plan requirement to a Protected Use ADU to ensure it is not applied in a manner that conflicts with the Dover protections afforded to an ADU.

VI. Conclusion

We partially approve Article 34, except for the following provisions: (1) references to ADUs in the context of “single-family” dwellings; (2) a portion of Section 4.10.2 (B)’s dimensional requirements imposing a minimum lot size; and (3) Section 4.10.2 (C)’s parking provisions; and (4) Section 4.10.4’s special permit requirement for an ADU in a non-conforming principal dwelling, that we disapprove and delete as shown in Section IV above in bold and underline. As to the remaining approved provisions, the Town should consult closely with Town Counsel when applying these provisions to ensure they are applied consistent with G.L. c. 40A, § 3 and 760 CMR 71.00. If the provisions adopted under Article 34 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 EOHLIC 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 EOHLIC upon request.

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

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

Very truly yours,

ANDREA JOY CAMPBELL
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