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October 14, 2025

Beth R. Klein, Town Clerk
Town of Sudbury
322 Concord Road
Sudbury, MA 01776

Re: Sudbury Annual Town Meeting of May 5, 2025 – Case # 11774
Warrant Article # 28 (Zoning)
Warrant Articles # 17, 18, 19, 23, 25, 26, and 27 (General) ¹

Dear Ms. Klein:

Article 27 - We approve Article 27 from the May 5, 2025 Sudbury Annual Town Meeting.

Article 28 - Under Article 28 the Town amended its zoning by-laws 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 28 because the approved text does not conflict with state law. However, we disapprove and delete³ the following provisions adopted under Article 28 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 single-family dwellings;

¹ In a decision issued August 11, 2025, we approved Articles 17, 18, 19, 23, 25, and 26, and by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended the deadline for our review of Articles 27 and 28 for 60-days.

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

³ The use of the term “disapprove” collectively means “disapprove and delete” such that any text disapproved by the Attorney General (shown in bold and underline) by virtue of such disapproval is also deleted from the Town’s zoning by-law and does not take effect under G.L. c. 40 § 32.

- portions of Section 5522 imposing minimum lots size requirements and setback requirements that apply to the principal dwelling; and
- a portion of Section 5526's parking provisions

In this decision we summarize the by-law amendments adopted under Article 28; 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;⁴ and then explain why, based on our standard of review, we partially approve the zoning by-law amendments adopted under Article 28. In addition, we offer comments for the Town's consideration regarding certain approved provisions amended under Article 28.

I. Summary of Article 28

Under Article 28 the Town voted to amend two sections of its zoning by-laws regarding ADUs. The first change amends Section 7110, "Definitions," to add a new definition for the term "Accessory Dwelling Unit." The second changes deletes Section 5500 in its entirety and inserts a new Section 5500, "Accessory Dwelling Units (ADU) In Residence Districts," that imposes requirements on ADUs including dimensional and parking requirements.

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

Our review of Article 28 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 28, 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

⁴ 760 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."

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:

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

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-faq>); (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>).

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.

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).

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 28.

IV. Text Disapproved from Article 28 Because it Conflicts with G.L. c. 40A, § 3 and the Regulations

A. References to Single-Family Dwellings

Throughout Section 5500 the Town refers to “single family” dwellings instead of principal dwellings, as follows (with emphasis added):

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.

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.”

Section 5510, “Purpose”

...The type of housing allowed under this bylaw may benefit several sectors of the population – current residents whose lifestyles no longer fit into the usefulness of a larger **single-family** dwelling...

Section 5525A

An attached Accessory Dwelling Unit will be designed so that the appearance of the structure remains that of a **single-family** dwelling and its associated accessory structures.

Section 5525B

All stairways...constructed on an exterior wall, to retain the character and appearance of a **single-family** home.

Section 5525D

Where two entrances exist on the front façade of the **single-family** dwelling, one entrance will appear to be the principal entrance...to retain the character and appearance of a **single-family** home.

We disapprove the text “single-family,” shown above in bold and underline, that refers to ADUs in the context of a single-family dwelling because these provisions 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 one-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, referring to an ADU only in the context of a “single-family” dwelling 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. Minimum Lot Size and Dimensional Requirements

Section 5522 imposes dimensional requirements on the ADU as follows (with emphasis added):

An Accessory Dwelling Unit may be built in a detached accessory structure separate from the main dwelling provided: **(1) the lot meets the current minimum zoning requirement for lot area in the district in which the lot is located, (2)** the detached structure meets the same minimum setback requirements that apply **to the principal residence** in the district in which the structure is located, and the size of the ADU shall comply with Section 5521.

We disapprove the text shown above in bold and underline that imposes a minimum lot size requirement on an ADU and requires the ADU to meet the dimensional standards of the principal residence, as explained below.

1. *Minimum Lot Size*

Section 5522 permits an ADU to be built in a detached accessory structure only if “the lot meets the current minimum zoning requirement for lot area.” Therefore, Section 5522 imposes a minimum lot area requirement on an ADU. Because the Regulations prohibit the Town from imposing minimum lot size requirements on a Protected Use ADU (see 760 CMR 71.03 (3)(b)(2) (“...a Municipality may not require a minimum Lot size for a Protected Use ADU”), and Section 5522 allows an ADU only if “the lot meets the current minimum zoning requirement for lot area,” area” we disapprove the text shown above in bold and underline because it conflicts with the Regulations.

2. *Setbacks As Applied to the Principal Residence*

Section 5522 also requires the detached structure with the ADU to meet the same setback requirements “that apply to the principal residence in the district in which the structure is located.” We disapprove the text shown above in bold and underline because the Regulations require that any dimensional requirements imposed upon an ADU be the most permissive requirements between the principal dwelling, a single-family dwelling or an accessory structure, as explained below.

The Regulations, 760 CMR 71.03 (3)(b)(2), “Regulation of Protected Use ADUs in Single-family Residential Zoning Districts;” “Dimensional Standards,” that requires the Town to apply the most permissive dimensional standard, in relevant part as follows, with emphasis added:

(b) Municipality shall apply the analysis articulated in 760 CMR 71.03 (3)(a) to establish and apply reasonable Zoning or general...by-laws, or Municipal regulations for Protected Use ADUs, but in no case shall a restriction or regulation be found reasonable where it exceeds the limitations, or is inconsistent with provisions, described below, as applicable:...(2) Dimensional Standards. Any requirement concerning dimensional standards, such as dimensional setbacks, lot coverage, open space, bulk and height, and number of stories, that are more restrictive than is required for the Principal Dwelling, or a Single-family Residential Dwelling or accessory structure in the Zoning District in which

the Protected Use ADU is located, whichever results in more permissive regulation, provided that a Municipality may not require a minimum Lot size for a Protected Use ADU.

Because Section 5522 imposes on an ADU the same setback requirements as the “principal residence” instead of imposing the most permissive dimensional standards as those imposed on the principal dwelling, single-family residential dwelling, or accessory structure in the same zoning district, we disapprove the words “to the principal residence” shown above in bold and underline. The Town should consult with Town Counsel with any questions regarding the proper application of Section 5522.

C. Section 5526 – Parking Provisions

Section 5526, “Off-street Parking,” imposes parking requirements as follows (with emphasis added):

There shall be **at least** one dedicated off-street parking for the Accessory Dwelling Unit or none if you are within 0.5 miles from a commuter rail station, subway station, ferry terminal, or bus station.

We disapprove the parking provision shown above in bold and underline, that requires “at least” one off-street parking space, because it conflicts with G.L. c. 40A, § 3 and the Regulations. General Laws Chapter 40A, Section 3 prohibits a municipality from requiring more than one parking space or requiring any additional parking space when an ADU is located outside the 0.5-mile radius of a transit station, as follows:

The use of land or structures for an accessory dwelling unit under this paragraph shall not require owner occupancy of either the accessory dwelling unit or the principal dwelling; provided, that not more than 1 additional parking space shall be required for an accessory dwelling unit; and provided further, that no additional parking space shall be required for an accessory dwelling located not more than 0.5 miles from a commuter rail station, subway station, ferry terminal or bus station.

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

(b) Minimum Parking Requirements. A requirement of, as applicable:

1. More than one additional on-street or off-street parking space for a Protected Use ADU if all portions of its Lot are located outside a 0.5 mile radius of a Transit Station; or
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 statute and the Regulations authorize towns 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 an ADU to provide “at least” one additional parking space because as written, that requirement would allow the Town to require more than one parking

space for an ADU. See West Street Associates, LLC, 488 Mass. at 324. Because Section 5526 requires ADUs to provide “at least” one additional off-street parking space it conflicts with G.L. c. 40A, § 3 and 760 CMR 71.03 (2) (b). For this reason, we disapprove the text shown above in bold and underline.

V. The Remaining Approved ADU Requirements Under Article 28 Must be Applied Consistent with G.L. c. 40A, § 3 and 760 CMR 71.00

A. Section 5525E – Appearance of the ADU

Section 5525E provides as follows regarding the appearance of an ADU:

For detached Accessory Dwelling Units the building must appear to be an accessory structure and be architecturally harmonious with that of the primary^[10] dwelling, including a similar scale, quality of design, materiality, and proportions of the architectural elements and features.

Although we approve Section 5525E, the Town must ensure it is applied consistent with G.L. c. 40A, § 3 and the Regulations. The Regulations, 760 CMR 71.03 (3), “Unreasonable Regulations,” Section (b)(1), “Design Standards,” prohibits a Town from imposing any design standard on an ADU that “(a) Would not be applied to a Single-family Residential Dwelling in the Single-family Residential Zoning District in which the Protected Use ADU is located or (b) Is 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.” The Regulations, 760 CMR 71.02 define the term “Design Standard” as: “Clear, measurable and objective provisions of Zoning, or general ordinances or by-laws, which are made applicable to the exterior design of, and use of materials, for an ADU.”

Based on our standard of review, we cannot conclude that these requirements are unreasonable and therefore prohibited under 760 CMR 71.03, and for that reason we approve them. However, in applying these provisions, we reiterate to the Town that because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose “reasonable regulations” on a Protected Use ADU. Therefore, these requirements should be analyzed on a case by case basis as it relates to a particular property because in some circumstances the provisions could be unreasonable as applied to a particular property. If these requirements are used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. In addition, the Town must ensure that the application of these requirements serve, and are 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, then the regulation may be deemed to be unreasonable. The Town should consult with Town Counsel to ensure the proper application of these provisions to a Protected Use ADU.

¹⁰ Section 5500 interchanges references between a “principal dwelling” and a “primary dwelling.” We construe references to a “primary dwelling” to refer to a “principal dwelling.” However, because the Regulations refer to a “principal dwelling” not a “primary dwelling,” the Town may wish to amend these references at a future Town Meeting. The Town should consult with Town Counsel on this issue.

B. Section 5526 – Additional Parking Space Requirements

Sections 5526A through 5526G impose requirements on parking spaces for an ADU, including as follows in relevant part:

5526B In no case shall parking spaces which are more than two spaces deep be considered in computing the required parking

5526D New curb cuts or driveway connections to the road are not permitted in conjunction with the creation of an ADU

5526E Garage spaces may not be used to comply with the provisions of this Section.

As discussed above in more detail, based on our standard of review, we cannot conclude that these requirements are unreasonable and therefore prohibited under 760 CMR 71.03, and for that reason we approve them. However, because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose “reasonable regulations” on a Protected Use ADU. Therefore, these requirements should be analyzed on a case by case basis as it relates to a particular property because in some circumstances the provisions could be unreasonable as applied to a particular property. If these requirements are used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul to the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3 and the Regulations. The Town should consult with Town Counsel to ensure the proper application of these provisions to a Protected Use ADU.

C. Section 5542 – No Separate Conveyance

Section 5542 provides that the ADU cannot be conveyed separately as follows: “The Accessory Dwelling Unit shall remain accessory to a principal dwelling and the ownership of the Accessory Dwelling Unit shall not be conveyed or otherwise transferred separately from the principal dwelling.”

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 5542 is in conflict with state law.

In reviewing this provision we have considered the question whether the by-law’s requirement that the ADU’s ownership “shall not be conveyed or otherwise transferred separately from 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 5542’s ownership requirement 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. Use, but not ownership, may be regulated 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 this provision 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 5542’s ownership 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.

D. Section 5543 – Existing Non-Conforming Lots and Structures

Section 5543 requires a finding, but not a special permit, for an existing non-conforming lot or structure that will include an ADU as follows:

To the extent that a finding is required as to any ADU, Section 2400 shall apply provided, that the determination shall not be made by special permit, rather by finding of the Zoning Board of Appeals acting pursuant to G.L. c. 40A, § 6.

Section 5543 regarding non-conforming principal dwellings, requires a finding (but not a special permit) under G.L. c. 40A, § 6. It appears that this text (and reference to Section 2400) may intend to reflect the requirements of G.L. c. 40A, § 6 regarding pre-existing nonconforming structures that provides: “Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority...or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.”

Because Section 5543 require a “finding” and does not require a special permit, we approve this provision. However, because ADUs are a Dover Amendment protected use, only in limited circumstances, may it be appropriate for the Town to require even a Section 6 *finding* for an ADU associated with a nonconforming structure or lot. See Petrucci v. Bd. of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998) (no Section 6 “finding” required where applicant successfully demonstrated the unreasonableness of the application of the dimensional requirements to the structure...). In circumstances where the regulations creating the increased nonconformity can lawfully be applied to the ADU, the Town may require that the applicant demonstrate that the altered structure use will not be substantially more detrimental to the neighborhood than the existing structure so long as the town applies objective, nondiscretionary criteria and no special permit is required. However, changing the use of a nonconforming structure to an ADU use, a

statutorily protected use, cannot trigger scrutiny of the impact on a neighborhood because the ADU is a Dover Amendment protected use and cannot be denied.

Moreover, a Protected Use ADU is not “nonconforming” to any zoning rule that cannot lawfully be applied to it under the ADU statute and regulations. See Watros v. Greater Lynn Mental Health and Retardation Ass’n, Inc., 421 Mass. 106, 115 (1995); see also Ellsworth vs. Mansfield, Case No. 08 MISC 382311, 2011 WL 3198174, at *4 (Mass. Land Ct. July 25, 2011) (no Section 6 finding required for Dover protected educational use because “effectively, G.L. c. 40A, § 3 removes the non-conformity (the lack of frontage) because it would not be a ‘reasonable regulation’ of the proposed school in these circumstances”). As a result, construction or alteration of a structure for an ADU will not increase a nonconformity unless the nonconformity is created by regulations that can reasonably be applied to the ADU. We strongly suggest that the Town discuss the application of G.L. c. 40A, § 6 and Sections 5543 and 2400 with Town Counsel.

E. Section 5500 - Existing Special Permits

Section 5500, “Existing Special Permits,” provides as follows:

With respect to structures constituting or containing an Accessory Dwelling Unit for which a Special Permit was obtained at any time prior to 2 February 2025, any unit that meets the criteria of Section 5500, as amended, will be considered going forward to be a Protected Use ADU as defined by the Massachusetts Executive Office of Housing and Livable Communities, those units that do not meet the requirements of Section 5500 will be subject to all Conditions of the Special Permit issued for the creation of the ADU, including but not limited to any requirements for renewal or expiration of the Special Permit.

The Town must ensure that a previously approved ADU that is now intended as a Protected Use ADU under G.L. c. 40A, 3, no longer remains subject to any unlawful provision previously required for an ADU. We strongly encourage the Town to consult with Town Counsel regarding an amendment to Section 5550 that makes it explicitly clear that any prohibited or unreasonable regulations that were imposed on a previously approved ADU as part of the prior special permit process are unenforceable to a Protected Use ADU. See 760 CMR 71.03 (4) (“A Municipality shall not enforce any Prohibited Regulation or Unreasonable Regulation that was imposed as a condition for the approval of the use of land or structures for a Protected Use ADU prior to the effective date of 760 CMR 71.00, regardless of whether such Protected Use ADU complies with the Municipality’s Zoning, including, but not limited to, use requirements and dimensional requirements, such as setbacks, bulk, and height.”). The Town should consult with Town Counsel with any questions regarding the proper application of Section 5550.

VI. Conclusion

We partially approve Article 28, except for the following provisions: (1) references to single-family dwellings; (2) portions of Section 5522 imposing minimum lots size requirements and setback requirements that apply to the principal dwelling; and (3) a portion of Section 5526’s parking provisions, that we disapprove and delete as shown in Section IV above in bold and underline.

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

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

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

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

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

Very truly yours,

ANDREA JOY CAMPBELL
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