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July 29, 2025

Cathryn J. Kato, Town Clerk
Town of Wellesley
525 Washington Street
Wellesley, MA 02482

Re: Wellesley Annual Town Meeting of April 1, 2025 – Case # 11749
Warrant Articles # 34.2, 38.1, 39.1, and 40.1 (Zoning)
Warrant Articles # 9.1, 34.1, 35.1, 36.1, and 37.1 (General) ¹

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Dear Ms. Kato:

Article 40.1 - Under Article 40.1, the Town voted to amend its zoning by-laws regarding Accessory Dwelling Units (“ADUs”) to make specific identified changes to its existing by-law, Section 5.13, “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

We approve the specific changes adopted under Article 40.1 because the approved text does not conflict with state law. 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). However, we offer comments for the Town’s consideration both regarding the amendments adopted under Article 40.1 as well as the Town’s existing by-law text in Section 5.13 to ensure that the by-law is applied consistent with G.L. c. 40A, § 3 and the Regulations.

In this decision we summarize the by-law amendments adopted under Article 40.1; 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

¹ In a decision issued July 23, 2025 we approved Articles 9.1, 34.1, 34.2, 35.1, 36.1, 37.1, 38.1, and 39.1.

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

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.

of review, we approve the identified zoning by-law amendments adopted under Article 40.1. In addition, we offer comments for the Town's consideration regarding certain existing provisions in Section 5.13 that were not amended under Article 40.1.

I. Summary of Article 40.1

Under Article 40.1 the Town voted to amend its zoning by-laws, Section 5.13, "Accessory Dwelling Units," to make specific identified changes "to comply with recent amendments to Mass. General Laws Chapter 40A relating to accessory dwelling units, inserted by Sections 7 and 8 of Chapter 150 of the Acts of 2024, also known as the Affordable Homes Act, removing language related to owner occupancy requirements and the special permit requirement for detached accessory dwelling units." The amendments adopted under Article 40.1 amended only Sections 5.13 (D), "Operational Requirements" and 5.13 (E), "Permitting Requirements," but left unchanged the remainder of the existing text in Section 5.13, "Accessory Dwelling Units."

As amended, Section 5.13 (D) now provides as follows with new text shown in bold and deleted text shown in strikethrough:

D. Operational Requirements

i. The ~~ADU Property Owner~~ **record owner** shall record in the Registry of Deeds a notice, in a form approved by the Planning Board, stating that the property includes an Accessory Dwelling Unit subject to the provisions of the Zoning Bylaw.

ii. ~~The ADU Property Owner must reside in either the Principal Dwelling or the Accessory Dwelling Unit on the lot for at least 184 days of each calendar year. The ADU Property Owner may not lease the Owner Unit for any duration during periods when the ADU Property Owner is not residing in the Owner Unit.~~

iii. ii. The minimum leasing term for the ~~unit that is not occupied by the ADU Property Owner~~ shall be the greater of 30 days or such other period governing short term rentals which may be set forth from time to time in the Town Bylaws. The Accessory Dwelling Unit may not be leased more than once in any 30-day period.

iv. iii. There shall be no pickup or delivery of products and/or articles at the premises that is not customary in a residential area.

v. iv. The Accessory Dwelling Unit may not be used for a Home Occupation.

As amended, Section 5.13 (E) now provides as follows with new text shown in bold and deleted text shown in strikethrough:

An ADU that is nonconforming to Zoning shall still qualify as a Protected Use ADU if it otherwise meets this definition."

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E. Permitting Requirements

i. Any person or entity applying for building and occupancy permits under the State Building Code for a building which will include an Accessory Dwelling Unit shall state in the application that the project proposes to include an Accessory Dwelling Unit. The Inspector of Buildings shall not issue a building permit for construction of such building or issue a certificate of occupancy for such building until the Planning Department, in accordance with the Rules and Regulations adopted by the Planning Department, certifies that the building is in compliance with the provisions of Section 5.13.D.

~~ii. All detached Accessory Dwelling Units and all Accessory Dwelling Units which are constructed as part of other accessory structures on a property, including carriage houses, barns, or detached garages, will require a Special Permit to be issued by the Zoning Board of Appeals as Special Permit Granting Authority in accordance with Section 6.3.~~

~~iii.~~ ii. The ~~ADU Property Owner~~ **record owner** must submit an annual certification to the Planning Department, in a form determined by the Planning Board, that the Accessory Dwelling Unit has been constructed and is owned and operated in compliance with all provisions of the Zoning Bylaw.

~~iv.~~ ~~iii.~~ Notice of Sale of the property containing the Accessory Dwelling Unit must be provided to the Planning Department.

~~v.~~ iv. If the Accessory Dwelling Unit has been built or is being operated in violation of the provisions of this Section the Inspector of Buildings may, in addition to other remedies, order the removal of any one or more of the provisions that create a separate dwelling unit, such as living, sleeping, cooking, and eating.

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

Our review of Article 40.1 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 40.1, 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.”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.

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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

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>).

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 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 40.1.

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-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.”

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IV. Comments Regarding Article 40.1's Amendments and Existing Text

A. Amendments Under Article 40.1

Under Article 40.1, the Town made only specific identified changes to Sections 5.13 (D) and (E) to delete certain owner occupancy and special permit requirements. We approve these specific changes. The Town should consult with Town Counsel to ensure that Sections 5.13 (D) and (E) are applied consistent with G.L. c. 40A, § 3 and the Regulations.

B. Existing Text Not Amended Under Article 40.1

As to the remaining text in Sections 5.13 (D) and (E) that was not amended under Article 40.1 and is therefore not before the Attorney General for review and approval under G.L. c. 40A, § 32, we offer comments for the Town's consideration.

1. Section 5.13 (D) - Operational Requirements

The existing text in Section 5.13 (D) (i) requires the record owner of an ADU to record a notice in the Registry of Deeds stating that the property includes an ADU. In addition, the existing text in Sections 5.13 (D) (iii) and (iv) prohibits "pickup or delivery of products and/or articles at the premises that is not customary in a residential area" and prohibits the ADU from being used for a home occupation. We encourage the Town to consult with Town Counsel to ensure that these existing provisions are applied consistent with the Regulations.⁹

Specifically, 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" or an "Unreasonable Regulation" on, a Protected Use ADU. See 760 CMR 71.03, "Regulation of

⁹ In particular, we encourage the Town to consult with Town Counsel to ensure that the requirement to file a notice in the Registry of Deeds can satisfy the standard in Section 71.03 (3)(a) regarding reasonable regulations. In addition, as to the prohibition against a "home occupation" the Town may wish to clarify if this refers only to a home based business that requires a "Home Occupation Permit" as discussed on the Town's website at: <https://wellesleyma.gov/Faq.aspx?QID=86>.

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.

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Protected Use ADUs in Single-Family Residential Zoning Districts.”¹⁰ Moreover, Section 71.03 (3)(a) provides that while a town may reasonably regulate Protected Use ADUs, certain regulations “shall be unreasonable” in certain circumstances.¹¹ The Town must ensure that these existing provisions are not unreasonable as applied to an ADU. The Town should consult with Town Counsel to ensure both the proper application of these existing provisions as well as to determine whether any existing provisions in Section 5.13 (D) should be amended at a future Town Meeting.

2. Section 5.13 (E) – Permitting Requirements

Section 5.13 (E)(ii) was amended under Article 40.1 to delete the text “ADU Property Owner” and insert the text “record owner” however no other changes were made to the existing text. The existing text of Section 5.13 (E)(ii) requires the record owner of the ADU to submit an annual certification to the Planning Department that the ADU is “constructed and is owned and operated” in compliance with the Zoning Bylaw. It is not clear what the Town means by the existing text that the ADU is “owned and operated” in compliance with the by-law, particularly given that under Article 40.1 the town deleted text related to its prior owner occupancy requirement. In applying the existing Section 5.13 (E)(ii) the Town should be mindful that G.L. c. 40A, § 3 and the Regulations prohibit restrictions on an ADU related to an owner-occupancy requirement. See 760 CMR 71.03 (2) (a). The Town should consult with Town Counsel to determine if an amendment to Section 5.13 (E)(ii) is needed at a future Town Meeting to address this issue. In the interim, the Town cannot impose an owner occupancy requirement on a Protected Use ADU.

Lastly, the existing text in Section 5.13 (E)(iii) requires that notice of sale of property containing an ADU be provided to the Planning Department. As discussed in more detail above, while a town may reasonably regulate and Protected Use ADUs, certain regulations may be unreasonable in certain circumstances. The Town must ensure that this existing provisions is not unreasonable as applied to an ADU. The Town should consult with Town Counsel on this issue.

¹⁰ 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).

¹¹ 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.

V. Conclusion

We approve the specific identified changes to Section 5.13 (D) and (E) adopted under Article 40.1. However we encourage the Town to consult with Town Counsel regarding the existing text in Section 5.13 that was not amended under Article 40.1 to ensure that it complies with G.L. c. 40A, § 3 and the Regulations, as well as to determine if any further amendments to Section 5.13 are needed at a future Town Meeting.

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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