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AG Bylaw Response for

Nahant Annual Town Meeting of May 17, 2025—Case # 11926

Warrant Article # 24 (Zoning)

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. Once this statutory duty is fulfilled,

- (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and
- (2) zoning by-laws and amendments are deemed to have taken affect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Posted: November 4, 2025

(2) Nahant Town Hall, Nahant Police Station, Nahant Public Library, and the Nahant Fire Station.

Witness my hand and the seal of the Town of Nahant this 4th day of November 2025

Very truly yours,

Diane M. Dunfee
Town Clerk
Town of Nahant
334 Nahant Road
Nahant, Massachusetts 01908
781-581-0018 *17
ddunfee@nahant.org



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

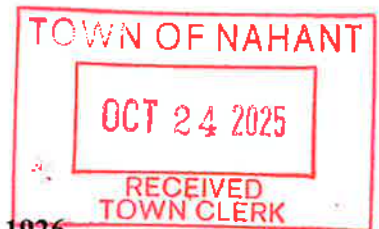
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October 24, 2025

Diane Dunfee, Town Clerk
Town of Nahant
334 Nahant Road
Nahant, MA 01908



**Re: Nahant Annual Town Meeting of May 17, 2025 – Case # 11926
Warrant Article # 24 (Zoning)¹**

Dear Ms. Dunfee:

Article 24 – Under Article 24, the Town amended its zoning by-laws regarding Accessory Dwelling Units (“ADUs”) 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 partially approve the amendments adopted under Article 24 because the approved text does not conflict with G.L. c. 40A, § 3 and the Regulations. However, we disapprove and delete³ the following provisions because this text conflicts with G.L. c. 40A, § 3 and the Regulations, as explained below (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)):

- Section 15’s references to “single-family” dwellings;
- a portion of Section 15.04 (2)’s requirement that the principal dwelling be existing;
- a portion of Section 15.04 (2)(a)’s ADU size limit calculation;

¹ On September 10, 2025, by agreement with Town Counsel as authorized by G.L. c. 40, § 32, we extended the deadline for our review of Article 24 for 45-days until October 26, 2025.

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.

- a portion of Section 15.04 (2)(d)'s ADU rental restriction;
- a portion of Section 15.04 (2)(e) imposing the single-family dwelling's setback requirements on the ADU;
- Section 15.04 (2)(f)'s height restrictions; and
- Section 15.04 (2)(h)'s parking requirements

In this decision we summarize the by-law amendments adopted under Article 24; 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 24. In addition, we offer comments for the Town's consideration regarding certain approved provisions.

I. Summary of Article 24

Under Article 24 the Town amended its zoning by-laws to add a new Section 15, "Nahant Protected Use Accessory Dwelling Units," to allow ADUs by right in compliance with "Section 8 of Chapter 150 of the Acts of 2024, also known as the Affordable Homes Act." Section 15.01, "Purpose and Intent." In addition, under Article 24 the Town amended Section 4.13, "Table of Use Regulations," to allow a Protected Use Accessory Dwelling Unit ("PADU") by right in all zoning districts in the Town except the Natural Resource ("NR") District where the use is prohibited.⁵

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

Our review of Article 24 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

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."

⁵ 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 also prohibited in the NR, and we therefore approve this portion of the Table. The Town should consult with Town Counsel with any questions and to ensure that Protected Use ADUs are allowed in any Single-family Residential Zoning District in the Town.

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 24, 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.”⁶ The Regulations define key terms and prohibit certain “Use and Occupancy Restrictions” defined in Section 71.02 as follows:

⁶ 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”⁷ 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.”⁸ 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.⁹ 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).

⁷ 760 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.

⁸ 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).

⁹ Section 71.03 (3)(a) provides that while a town may reasonably regulate and restrict Protected Use ADUs, a restriction or regulation imposed “shall be unreasonable” if the regulation or restriction, when applicable to a Protected Use ADU: (1) does not serve a legitimate Municipal interest sought to be achieved by local Zoning; (2) serves a legitimate Municipal interest sought to be achieved by local Zoning but its application to a Protected Use ADU does not rationally relate to the legitimate Municipal interest; or (3) serves a legitimate Municipal interest sought to be achieved by local Zoning and its application to a Protected Use ADU rationally relates to the interest, but compliance with the regulation or restriction will: (a) result in complete nullification of the use or development of a Protected Use ADU; (b) impose excessive costs on the use or development of a Protected Use ADU without significantly advancing the Municipality’s legitimate interest; or (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 # 11579.¹⁰ Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 24.

IV. Text Disapproved from Article 24 Because it Conflicts with G.L. c. 40A, § 3 and the Regulations

A. References to “Single-Family” Dwelling

Several provisions in Section 15 reference an ADU in the context of a “single-family” dwelling as follows (with emphasis added):

Section 15.03 (6)

A PADU [Protected Use Accessory Dwelling Unit] shall be permitted as a “By Right” use accessory to a lawful **Single-Family** dwelling use.

Section 15.04 (2)

The Building Inspect may issue a Building Permit authorizing the installation and use of a PADU within a...**Single-Family** Dwelling...

Section 15.04 (2)(a)

...Once a PADU has been added to a **Single-Family** Dwelling or lot, the PADU shall not be enlarged beyond the square footage allowed by this section.

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 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):

¹⁰ 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.”

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 15.04 (2) – Requirement that the Structure be Existing

Section 15.04 (2) references an ADU in the context of an existing structure as follows, with emphasis added:

The Building Inspect may issue a Building Permit authorizing the installation and use of a PADU within a lawful existing...Dwelling to which the PADU is accessory, or in an existing detached building accessory to and on the same lot as the principal dwelling subject to the following...

We disapprove the portion of Section 15.04 (2) that allows an ADU only in an existing dwelling or in an existing detached accessory building (shown above in bold and underline) because these provisions conflict with G.L. c. 40A, § 3 and the Regulations, as explained below.

General Laws Chapter 40A, Section 3 provides in relevant part that:

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

General Laws Chapter 40A, Section 3 protects ADUs by providing that zoning by-laws shall not prohibit, unreasonably regulate or require the special permit or other discretionary zoning approval for the use of land or structures for a single ADU in a single-family residential zoning district but authorizes municipalities to impose reasonable regulations on the creation and use of ADUs, if it so chooses. The Regulations, 760 CMR 71.02 defines a "Protected Use ADU" in relevant part (with emphasis added) as: "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...."

Neither G.L. c. 40A, § 3 nor the Regulations limit an ADU to only an existing principal dwelling, or an existing detached accessory structure, but instead allow an ADU "on the same lot as a Principal Dwelling." Therefore, an ADU could be constructed at the same time as a new principal dwelling or new accessory structure is constructed. Therefore, limiting an ADU to only

a lot with an existing principal dwelling or an existing detached accessory structure, as opposed to a lot with a principal dwelling, conflicts with the statute and Regulations. For this reason, we disapprove the text shown above in bold and underline.

C. Section 15.04 (2)(a) – Floor Area Calculations

Section 15.04 (2)(a) provides as follows regarding floor area calculations (with emphasis added):

Garages, unfinished attics and basements, unenclosed porches and decks shall not be included in the floor area calculations....

We disapprove the portion of Section 15.04 (2)(a), shown above in bold and underline, that restricts the gross floor area of an ADU in a manner that conflicts with G.L. c. 40A, § 3 and the Regulations, as explained below.

General Laws Chapter 40A, Section § 3 allows an ADU as of right, defined in G.L. c. 40A, § 1A as “is not larger in gross floor area than 1/2 the gross floor area of the principal dwelling or 900 square feet, whichever is smaller.” Under the Regulations, 760 CMR 71.02, “Definitions,” “Gross Floor Area” is defined as follows:

The sum of the areas of all stories of the building of compliant ceiling height pursuant to the Building Code, including basements, lofts, and intermediate floored tiers, measured from the interior faces of exterior walls or from the centerline of walls separating buildings or dwelling units but excluding crawl spaces, garage parking areas, attics, enclosed porches and similar spaces. Where there are multiple Principal Dwellings on the Lot, the GFA of the largest Principal Dwelling shall be used for determining the maximum size of a Protected Use ADU.

General Laws Chapter 40A, Section 3 and the Regulations require municipalities to allow ADUs as of right up to half the gross floor area of the principal dwelling or 900 square feet, whichever is smaller. See 760 CMR § 71.02’s definitions of “Accessory Dwelling Unit (ADU)” (defining the size of an ADU as no “larger in gross floor area than one-half the gross floor area of the principal dwelling or 900 square feet, whichever is smaller.”) 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.”).

In conflict with the Regulations, Section 15.04 (2)(a) limits the size of an ADU by providing that “unfinished attics and basements” are not including in the calculations despite the Regulations’ definition of “Gross Floor Area” that includes basements (whether finished or not) and excludes attics (whether finished or not) in calculating the ADUs size of 50% of the gross floor area or 900 square feet, whichever is smaller. Thus, Section 15.04 (2)(a)’s size limitation conflicts with the as-of-right protections given to all ADUs that fall within the statutory size limits under G.L. c. 40A, § 3 and the Regulations, and we therefore disapprove the portion of Section 15.04 (2)(a) shown above in bold and underline. The Town should consult with Town Counsel with any questions regarding the allowed size of a Protected Use ADU.

D. Section 15.04 (2)(d) – Rental of an ADU

Section 15.04 (2)(d) limits the rental of an ADU as follows (with emphasis added):

No PADU shall be used for **boarding and lodging, short-term rental, or other commercial use (other than long term rentals). A PADU may be rented for periods not shorter than a duration of three (3) consecutive months.**

We approve Section 15.04 (2)(d) that prohibits an ADU from being used as a short-term rental (“STR”), but disapprove the remainder of Section 15.04 (2)(d), shown above in bold and underline, that prohibits an ADU from being used for (1) boarding and lodging; (2) other commercial use besides long term rentals; and (3) a rental of a period less than 3 consecutive months, because these provisions conflict with G.L. c. 40A, § 3 and the Regulations, which limit the Town’s ability to regulate the rental of ADUs, as explained below.

General Laws Chapter 40A, Section 3 and the Regulations authorize a Town to prohibit ADUs from being rented as STRs and explicitly prohibit towns from prohibiting or unreasonably regulating the rental of ADUs. Section 3 provides in pertinent 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, including...restrictions and prohibitions on short-term rental, as defined in section 1 of chapter 64G.

In addition, as to the rental of ADUs, G.L. c. 40A, § 1A and the Regulations, 760 CMR 71.02, define “Accessory Dwelling Unit,” provide as follows:

A self-contained housing unit, inclusive of sleeping, cooking and sanitary facilities on the same Lot as a Principal Dwelling, subject to otherwise applicable dimensional and parking requirements, that...(c) is subject to such additional restrictions as may be imposed by a municipality including but not limited to...prohibitions on Short-term Rental as defined in M.G.L. c. 64G, § 1; provided, however, that no Municipality shall unreasonably restrict the creation or rental of an ADU that is not a Short-term Rental.

And further, 760 CMR 71.03, “Regulation of Protected Use ADUs in Single-family Residential Zoning Districts,” prohibits a town from requiring “a special permit, waiver, 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...”

1. *Boarding, Lodging or Other Commercial Use*

As an initial matter, the Town’s by-laws do not define the terms “boarding,” “lodging,” or “other commercial use.” However, under Section 15.04 (2)(d) the Town expressly prohibits ADUs from being STRs. Therefore, by including a prohibition on ADUs from being used for boarding, lodging, and other commercial use, the Town is seeking to prohibits the rental of ADUs other than

as STRs. By granting municipalities express permission to prohibit only the rental of ADUs as STRs, G.L. c. 40A, § 3 and the Regulations disallow prohibitions of other types of rentals, including landlord/tenant rentals. See Harborview Residents' Comm., Inc. v. Quincy House. Auth., 368 Mass. 425, 432 (1975) ("a statutory expression of one thing is an implied exclusion of other things omitted from the statute"). Any prohibition on the rental of ADUs other than as STRs would be an unreasonable regulation in violation of Section 3 and the Regulations, especially in light of the statutory purpose. See 760 CMR 71.01 (1) (goal of ADU provisions of G.L. c. 40A, § 3 is to "encourage the production of accessory dwelling units throughout the Commonwealth with the goal of increasing the production of housing to address statewide, local, and individual housing needs for households of all income levels and at all stages of life"). For this reason, we disapprove and delete the text in Section 15.04 (2)(d) that prohibits ADUs from being rented for boarding, lodging, and other similar commercial uses as shown above in bold and underline.

2. Three Month Rental Requirement

We also disapprove the portion of Section 15.04 (2)(d), shown above in bold and underline, that requires ADUs to have a three month lease, because it conflicts with G.L. c. 40A, § 3 and the Regulations which, as discussed above in more detail, limit the Town's ability to regulate the rental of ADUs. See G.L. c. 40A, § 3 (prohibiting towns from prohibiting or unreasonably regulating the rental of ADUs other than as STRs); see also 760 CMR 71.02, definition of "Accessory Dwelling Unit" (prohibiting a municipality from unreasonably restricting the creation and rental of an ADU that is not a STR).

Section 15.04 (2)(d) requires a three month lease for the rental of an ADU. By requiring a three month lease for the rental of an ADU, the Town is seeking to prohibit the rental of ADUs other than as STRs. By granting municipalities express permission to prohibit only the rental of ADUs as STRs, G.L. c. 40A, § 3 and the Regulations disallow prohibitions of other types of rentals, including landlord/tenant rentals. See Harborview Residents' Comm., Inc., 368 Mass. at 432. Because the portion of Section 15.04 (2)(d) that requires a 3 month rental of an ADU constitutes a prohibition on the rental of ADUs other than as STRs, it is an unreasonable regulation in violation of Section 3 and the Regulations, and we therefore disapprove this portion of Section 15.04 (2)(d), as shown above in bold and underline.

E. Section 15.04 (2)(e) – Setback Requirements

Section 15.04 (2)(e) imposes setback requirements on a PADU as follows (with emphasis added):

Setbacks for PADUs shall be the same as setbacks established in the Nahant Zoning Bylaws **for Single-Family Dwellings**.

We disapprove the text shown above in bold and underline that imposes the "Single-Family Dwellings" setback requirements on the PADU 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 15.04 (2)(e) imposes on an ADU the same setback requirements as the “Single-Family Dwelling” 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 text shown above in bold and underline. The Town should consult with Town Counsel with any questions regarding the proper application of Section 15.04 (2)(e).

In applying the remaining approved setback requirement of Section 15.04 (2)(e), the Town must ensure that it is applied consistent with the Regulations. Importantly, 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 setback 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 this setback requirement is 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 this setback 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, 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.

F. Section 15.04 (2)(f) – Height Requirements

Section 15.04 (2)(f) imposes height requirements on an ADU as follows (with emphasis added):

Detached PADUs shall not exceed thirty (30) feet in building height (as defined in Section 2 – Height of Building) without a special permit.

We disapprove Section 15.04 (2)(f) because it conflicts with the Regulations that require the Town to impose dimensional requirements on ADUs that are the most permissive requirement

between the principal dwelling, a single-family dwelling, or an accessory structure in the district where the lot is located. See 760 CMR 71.03 (3)(b)(2). We have reviewed the Town's Table of Dimensional Requirements (see <https://nahant.org/wp-content/uploads/2024/12/ZONING-BYLAWS-of-NAHANT-2.pdf>) and note that although in most zoning districts the maximum height is 30 feet (which can be extended with a special permit); however, in the R-1 district, one-family dwellings are allowed up to 35 feet. For this reason, Section 15.04 (2)(f) conflicts with the Regulations and we disapprove it, as shown above in bold and underline.

G. Section 15.04 (2)(h) – Parking Requirements

Section 15.04 (2)(h) imposes parking requirements on the PADU as follows (with emphasis added):

For each PADU, one additional off-street parking space shall be required in addition to any parking already required of the Principal Dwelling.

We disapprove Section 15.04 (2)(h) (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.

General Laws Chapter 40A, Section 3 prohibits a municipality from requiring 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."

During the course of our review, we received a communication from Nahant Town Counsel urging us to approve Section 15.04 (2)(h) because although the Town has one bus stop, it does not have a bus station. See June 12, 2025 letter from Attorney Daniel Skrip to the Municipal Law Unit. Moreover, Town Counsel urges our approval contending that the Regulations definition of bus station should not be interpreted to include bus stops but instead only bus terminals. In addition, Town Counsel urges our approval of Section 15.04 (2)(h)'s parking requirement because of Nahant's unique land situation,¹¹ the Town has "a parking problem." We greatly appreciate this communication as it has aided our review of the by-law. However, because the Regulations prohibit the Town from requiring any additional parking space for an ADU located within a 0.5 mile radius of a transit station, which includes a bus station defined as "[a] location serving as a point of embarkation for any bus operated by a Transit Authority," and Nahant is part of the Massachusetts Bay Transit Authority ("The Ride") that includes bus service (see <https://www.mass.gov/info-details/public-transportation-in-massachusetts>), Section 15.04 (2)(h)'s requirement that *all* ADUs provide a parking space, even those ADUs that are exempted under the Regulations from having to provide a parking space, 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 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. The Town should consult with Town Counsel with any questions regarding this issue.

V. Additional Comments Regarding Text Approved Under Article 24

A. Section 15.03 (5) – Application for a Protected Use ADU

Section 15.03 (5) requires as follows regarding a PADU application: "Application for a PADU shall be submitted by the property owner(s) of record. The application shall be signed by one hundred (100) percent of the record title ownership interest of the principal dwelling and shall include a copy of the deed."

Although we approve this provision because under our standard of review we cannot conclude it is an unreasonable regulation, the Town must ensure that it is applied consistent with the Regulations. Importantly, 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 this 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 this requirement is 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 this requirement serves, and is rationally related to, a legitimate municipal interest and will not, as applied, result in a nullification, impose an excessive

¹¹ Town Counsel states that Nahant "is a tombolo (not a peninsula) with 99% of its boarder surrounded by water."

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 15.04 (2)(c) – Separate Ownership

Section 15.04 (2)(c) provides as follows: “A PADU is not intended for sale separate from the sale of the principal dwelling. The principal dwelling and PADU and lot on which they are located shall remain in common or single ownership, and shall not be severed in ownership, including that the lot or buildings thereon shall not be placed in a condominium form of ownership.” In addition, Section 15.05 (1) provides “[n]o PADU may be sold 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 15.04 (2) (c) is in conflict with state law.

In reviewing this provision, we have considered the question whether the by-law’s requirement that the ADU not be sold separate 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 15.04 (2)(c)’s provisions are 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 15.04 (2)(c)’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.

V. Conclusion

Except for the following provisions: (1) Section 15's references to "single-family" dwellings; (2) a portion of Section 15.04 (2)'s requirement that the principal dwelling be existing; (3) a portion of Section 15.04 (2)(a)'s ADU size limit calculations; (4) a portion of Section 15.04 (2)(d)'s ADU rental restrictions; (5) a portion of Section 15.04 (2)(e) imposing the single-family dwelling's setback requirements on the ADU; (6) Section 15.04 (2)(f)'s height restrictions; and (7) Section 15.04 (2)(h)'s parking requirements, that we disapprove, we approve the remainder of the amendments adopted under Article 24. However, 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 24 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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