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September 2, 2025

Lucille A. Dalton, Town Clerk
Town of Southampton
210 College Highway, Suite 2
Southampton, MA 01073

Re: Southampton Annual Town Meeting of May 6, 2025 – Case # 11888
Warrant Articles # 24, 25, 26, and 27 (Zoning)
Warrant Articles # 20 and 21 (General)

Dear Ms. Dalton:

Articles 21, 24, 25, and 26 - We approve Articles 21, 24, 25, and 26 from the May 6, 2025 Southampton Annual Town Meeting. Our comments regarding Articles 24 and 25 are provided below.

Article 27 - By agreement with Town Counsel pursuant to G.L. c. 40, § 32, we have extended our deadline for a decision on Article 27 for 60 days. Our decision on Article 27 will now be due on **October 31, 2025**. The signed extension agreement is attached.

Article 20 – Under Article 20 the Town amended its general by-laws, Chapter 234, “Swimming Pools,” to add new text regulating swimming pools. Except for a portion of the text in the “Exemptions,” section regarding the by-law’s effective date, that we disapprove, we approve the amendments adopted under Article 20 because they do 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). Below we explain our partial disapproval and offer additional comments for the Town’s consideration to ensure the proper application of Chapter 234.

I. Summary of Article 20

Under Article 20 the Town amended Chapter 234, “Swimming Pools,” to add new definitions and restrictions related to swimming pools. The restrictions impose setbacks from rear, side and front lot lines and barrier and fencing requirements. In addition, the by-law requires a permit from the Building Department for a swimming pool. The by-law also imposes an effective date and exempts swimming pools constructed prior to the date of the by-law from its provisions. Lastly, the by-law designates the Building Commissioner/Inspector as the enforcing authority and

authorizes the use of non-criminal disposition for a violation of the by-law.

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

Our review of Article 20 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 (establishing the scope of the Attorney General’s by-law review as determining conflicts with state law). 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.”) To disapprove a by-law (or any portion thereof), the Attorney General must cite to an inconsistency between the by-law and the state Constitution or laws. Id. at 796. “This is because a municipality has no power to adopt a by-law that is “inconsistent with the constitution or laws enacted by the [Legislature].” Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. Text Disapproved

Under Article 20 the Town amended Chapter 234, “Swimming Pools,” to add a section entitled “Exemptions” that provides in relevant part as follows (with emphasis added).

These bylaws shall take effect on July 1, 2025.

We disapprove and delete the text shown above in bold and underline because it conflicts with G.L. c. 40, § 32, that establishes the effective date of a general by-law amendment. Specifically, under G.L. c. 40, § 32, a by-law approved by the Attorney General must be posted or published before it goes into effect, as follows:

Before a by-law or an amendment thereto takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; and if the town is divided into precincts, copies shall be posted in one or more public places in each precinct of the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town.

The effective date of a by-law is governed by G.L. c. 40, § 32, which provides that a bylaw takes effect, following approval of the Attorney General, once the Town has satisfied the requirements of G.L. c. 40, § 32. For this reason, it is inconsistent with state law for the proposed by-law to provide that its provisions take effect “on July 1, 2025” (as that date passed over two months ago) and we therefore disapprove the text in bold and underline above. The Town should consult with Town Counsel with any questions on this matter.

IV. Additional Comments

As to the approved portions of Article 20, the Town must ensure that any swimming pool barrier or fencing requirements are consistent with the State Building Code that governs swimming pool access, enclosure, cover and barrier requirements. See 780 CMR 51.00 (R326.1) (“The design and construction of pools and spas shall comply with the International Swimming Pool and Spa

Code [IPSC] and the following notes...”); see also Section 305 of IPSC. The Town should consult with Town Counsel with any questions on this issue.

V. Conclusion

Except for the effective date in the Exemptions section that we disapprove (as shown above in bold and underline), we approve the amendments adopted under Article 20. The Town should consult with Town Counsel to ensure the amendments are applied consistent with the State Building Code.

Article 24 - Under Article 24, the Town voted to amend its zoning by-laws regarding Accessory Dwelling Units (“ADUs”). These changes 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”).¹ We approve Article 24 because it 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).

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;² and then explain why, based on our standard of review, we approve the zoning by-law amendments adopted under Article 24.

I. Summary of Article 24

Under Article 24 the Town amended three sections of its zoning by-laws regarding ADUs. The first change amends Section 275-2.3, “Definitions,” to delete certain definitions and add new definitions for the term “Accessory Dwelling Unit” and “Bus Station.” The second change amends Section 275-7.5 to delete the existing section and insert a new Section 275-7.5, “Accessory Dwelling Unit” that imposes requirements on ADUs, including parking requirements. The last change amends Attachment 1, “Table of Use Regulations,” to delete the line for “accessory apartment” and insert in its place a new use for ADUs and allow ADUs as a permitted use subject to site plan approval in all the districts where an accessory apartment were previously allowed.

¹ The Regulations can be found here: <https://www.mass.gov/doc/760-cmr-7100-protected-use-adus-final-version/download>

² 760 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.”

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 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.”³ The Regulations define key terms and prohibit certain “Use and Occupancy Restrictions” defined in Section 71.02 as follows:

³ 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

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”⁴ 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.”⁵ 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.⁶ 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

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>).

⁴ 760 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.

⁵ 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).

⁶ 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.

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 # 11579.⁷ Against the backdrop of these statutory and regulatory parameters regarding Protected Use ADUs, we review the zoning amendments adopted under Article 24.

IV. The Approved ADU Requirements Must be Applied Consistent with G.L. c. 40A, § 3 and 760 CMR 71.00

We approve the amendments adopted under Article 24 allowing Protected Use ADUs in the Town by right and allowing Non-Protected Use ADUs by special permit. The Town should consult closely with Town Counsel when applying the 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 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 EOHLIC to ensure that the approved by-law provisions are applied consistent with G.L. c. 40A, § 3 and the Regulations, as discussed herein.

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

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

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

Article 25 – Under Article 25, the Town amended its zoning by-laws to delete Article IX, “Site Plan Review and Approval,” in its entirety and insert a new Article IX, “Site Plan Review.” Section 275-9.9, “Decisions,” Subsection G, “Written Decision Options,” provides in relevant part

⁷ 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.”

as follows:

The Planning Board Decision on an application shall consist of either of the following:

- (1) A written approval of the proposed project;
- (2) A written denial of the application, stating reasons for such denial; or
- (3) A written approval subject to any reasonable conditions, modifications, and restrictions as the Planning Board may deem necessary to satisfy this bylaw. Such conditions may include provision for a Performance Guarantee to ensure satisfactory completion of specified elements of the approved plan...

We approve Section 275-9.9 (G) (2), but offer comments for the Town's consideration, particularly as it applies to as of right uses, including uses allowed under G.L. c. 40A, § 3 such as a Protected Use ADU.

Site plan review for uses allowed as of right is limited to the regulation of the use rather than its prohibition. Y.D. Dugout, Inc. v. Bd. of Appeals of Canton, 357 Mass. 25, 31 (1970). The scope of site plan approval for as-of-right uses is therefore limited to imposing reasonable terms and conditions on the use. Id. citing SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 107-110 (1984). "[W]here the proposed use is one permitted by right the planning board may only apply substantive criteria consistent with Prudential Ins. Co. v. Board of Appeals of Westwood, 23 Mass. App. Ct. 278 (1986) (i.e., it may impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use)." Osberg v. Planning Bd. of Sturbridge, 44 Mass. App. Ct. 56, 59 (1997). "[I]f the specific area and use criteria stated in the by-law [are] satisfied, the board [does] not have discretionary power to deny...[approval], but instead [is] limited to imposing reasonable terms and conditions on the proposed use." Prudential, 23 Mass. App. Ct. at 281-282 (internal quotations and citations omitted). The Town should consult closely with Town Counsel when applying Section 275-7.5 (G) to an as of right use to ensure it is not applied in a manner that conflicts with state law.

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

Very truly yours,

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