



Accessory Dwelling Units

Presented by:

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Role of The Municipal Law Unit

Pursuant to G.L. c. 40, s. 32, whenever a town adopts or amends its general by-laws or zoning by-laws, within 30 days of adjournment of Town Meeting, the Town Clerk is required to submit them to the Attorney General's Office for review and approval. The Attorney General then has 90 days in which to decide whether the proposed amendments are consistent with the Constitution and the laws of the Commonwealth. If the Attorney General finds an inconsistency between the proposed amendments and state law, the amendments or portions of them will be disapproved. The Municipal Law Unit is responsible for undertaking this review and for issuing a written decision approving or disapproving by-law amendments.



The Municipal Law Unit's Standard of Review

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 v. Attorney General, 398 Mass. 793, 795-96 (1986). 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).



MLU's Standard of Review

Zoning By-laws

Zoning by-law amendments 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.



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Summary of Recent Changes to the Law on 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. Section 7 of the Act, which took effect on August 6, 2024, by virtue of the Act’s emergency preamble, amends G.L. c. 40A, § 1A by striking the definition of “Accessory dwelling unit” and inserting a new definition that provides as follows:

“Accessory dwelling unit,” 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: (i) maintains a separate entrance, either directly from the outside or through an entry hall or corridor shared with the principal dwelling sufficient to meet t he requirements of the state building code for safe egress; (ii) is not larger in gross floor area than ½ the gross floor area of the principal dwelling or 900 square feet, whichever is smaller; and (iii) is subject to such additional restrictions as may be i mposed by a municipality, including, but not limited to, additional size restrictions and restrictions or prohibitions on short -term rental, as defined in section 1 of chapter 64G; provided however that no municipality shall unreasonably restrict the creation or rental of an accessory dwelling unit that is not a short-term rental.



G.L. c. 40A, s. 3's Protections for ADUs

- Section 8 of the Act, which took effect on February 2, 2025, amended 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, as follows:

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, including, but not limited to, 310 CMR 15.000 et seq., if applicable, site plan review, regulations concerning dimensional setbacks and the bulk and height of structures and may be subject to restrictions and prohibitions on short-term rental, as defined in section 1 of chapter 64G. 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. For more than 1 accessory dwelling unit, or rental thereof, in a single-family residential zoning district there shall be a special permit for the use of land or structures for an accessory dwelling unit. The executive office of housing and livable communities may issue guidelines or promulgate regulations to administer this paragraph.

The amendment to G.L. c. 40A, § 3, to include ADUs means that ADUs are now entitled to statutory protections from local zoning requirements.



EOHLC's Regulations for ADUs

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.” The purpose of the ADU statutory and regulatory changes is to encourage the production of ADUs in the state with the “goal of increasing the production of housing.” 760 CMR 71.01 (1). To that end, the Regulations “establish rules, standards and limitations that will assist” towns and landowners in the administration of the statutory changes to G.L. c. 40A, § 3. Id. The Regulations seek to “balance municipal interests in regulating the use and construction of ADUs while empowering property owners to add much needed housing stock.” 760 CMR 71.01 (2).



EOHLC's Regulations cont.

The Regulations define key terms, including “Accessory Dwelling Unit;” “Principal Dwelling;” “Prohibited Regulation;” “Protected Use ADU;” “Single-Family Residential Zoning District;” and “Unreasonable Regulation.” See 760 CMR 71.02, “Definitions.”



Unreasonable Regulation of an ADU

While a town is prohibited from “unreasonably restrict[ing]” a Protected Use ADU, the town may subject the Protected Use ADU to “reasonable regulations.” See 760 CMR 71.03 (1). The Regulations extensively address reasonable and unreasonable regulations of Protected Use ADUs. See 760 CMR 71.03 (3). The Regulations set forth the test for determining whether a municipal restriction is unreasonable and sets parameters establishing when such municipal restriction would be deemed unreasonable.

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.



Dimensional Requirements for an ADU

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).



Site Plan Review for ADUs

Towns may also impose site plan review of a Protected Use ADU but the Regulations require the site plan review to be clear and objective and prohibit 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).



Protected Use ADUs are a “Dover Protected Use”

- By including ADUs in G.L. c. 40A, § 3, ADUs are now entitled to statutory protections from local zoning requirements and are considered so-called “Dover Amendment” protected uses.
- Section 3 now expressly provides that a town’s zoning by-law cannot prohibit, unreasonably regulate or require a special permit or other discretionary zoning approval for the use of land or structures for a single ADU. In addition, the inclusion of ADUs in Section 3 as a protected use subject to only “reasonable” regulation means that a town cannot impose its zoning rules on an ADU if doing so would “nullify” the use or excessively burden the use without appreciably advancing legitimate zoning goals. This test is reflected in the Regulations and is applicable to all local regulation of Protected Use ADUs



ADU By-law Requirements that Conflict with State Law and EOHLC's Regulations

Parking Requirements

A parking requirement that mandates “a minimum of” one off-street parking space for all ADUs 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 when an ADU is not located within 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.



ADU By-law Requirements that Conflict with State Law and EOHLA's Regulations

Parking Requirements

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:

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.

Requiring "a minimum of" one parking space contemplates some circumstances when more than one parking space would be required, which conflicts with G.L. c. 40A, § 3 and 760 CMR 71.03 (2) (b)

In addition, towns cannot require an additional parking space for an ADU within .5 miles of a transit station as that term is defined in the Regulations.



ADU By-law Requirements that Conflict with State Law and EOHLIC's Regulations cont.

Bedroom Limitations

- Bedroom limitations conflict with G.L. c. 40A, § 3's prohibition on regulating the interior area of a single-family residential building. General Laws Chapter 40A, Section 3 provides in pertinent part as follows:
- No zoning...by-law shall regulate or restrict the interior area of a single family residential building...provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements....



ADU By-law Requirements that Conflict with State Law and EOHLIC's Regulations Cont.

Bedroom Limitations cont.

- Bedroom limitations are also an impermissible use and occupancy restriction under the Regulations, that define “Use and Occupancy Restrictions” as follows:
- A Zoning restriction, Municipal regulation . . . zoning approval or other requirement imposed by the Municipality that limits the current, or future, use or occupancy of the Protected Use ADU to individuals or households upon the characteristics of, or relations between, the occupants, 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
- By limiting the number of bedrooms, Section 5.19 (C) (1) (f) limits the occupancy of the ADU, including limiting the number of occupants beyond what is required by applicable state code, including the State Sanitary Code, and it limits characteristics of or the relations between the occupants, in violations of the Regulations. We therefore disapprove Section 5.19 (C) (1) (f) on this basis as well.
- Bedroom limitation for ADUs would also likely be found, on a full factual record, to be (1) an unreasonable regulation under 760 CMR 71.03 (3)(a); (2) violate the Dover Amendment protections given to ADUs under G.L. c. 40A, 3; and (3) violate Fair Housing laws that prohibits discrimination in providing housing based on a protected class, including family status (i.e., the presence of children in the household.) See 44 U.S.C. § 3604 (the Fair Housing Act [FHA]) and G.L. c. 151B, § 4, ¶ 6.



ADU By-law Requirements that Conflict with State Law and EOHLC's Regulations

Special Permit Requirement for ADUs Proposed for a Pre-existing Non-Conforming Structure or Lot

General Laws Chapter 40A, Section 3 and 760 CMR 71.00 prohibit the imposition of a special permit requirement (except in limited situations) for an ADU:

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...



ADU By-law Requirements that Conflict with State Law and EOHLC's Regulations

Special Permit Requirement for ADUs Proposed for a Pre-existing Non-Conforming Structure or Lot cont.

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

Municipalities shall not prohibit, impose a Prohibited Regulation, or Unreasonable Regulation, or except as provided under 760 CMR 71.03 (5) and 760 CMR 71.03 (c), require a special permit, 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; provided that Municipalities may reasonably regulate a Protected Use ADU, subject to the limitations under 760 CMR 71.00.

- G.L. c. 40A, § 6 does not *require* a special permit process and instead authorizes the Town to make a “finding.” In limited circumstances, it may be allowed, for the Town to require a Section 6 finding for an ADU constructed on or within a nonconforming structure or lot. See Petrucci v. Bd. of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998).



ADU Requirements that Conflict with State Law and EOHLA's Regulations

Lot Area Requirement

- The Regulations, 760 CMR 71.03 (3)(b)(2), prohibit a Town from requiring a minimum lot size for a Protected Use ADU.
- Any by-law provision imposing lot size or lot area requirements conflicts with the Regulations because the Regulations prohibit the Town from imposing minimum lot size requirements on a Protected Use ADU.



ADU Requirements that Conflict with State Law and EOHLA's Regulations cont.

References to ADUs Allowed only as part of a "single-family dwelling"

- General Laws Chapter 40A, Section 3 and the Regulations allow Protected Use ADUs as-of-right on the same lot as any type of “Principal Dwelling,” not just a single-family principal dwelling. 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 it, 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. Restricting ADUs to single-family dwellings conflicts with G.L. c. 40A, § 3 and the Regulations.



Disapproved Text cont.

Short Term Rentals

G.L. c. 40A, § 3 and the Regulations that provide only limited authorization to towns to prohibit ADUs from being used as a “Short-term Rental *as defined* in section 1 of chapter 64G” (emphasis added). Here, the Town’s STR prohibition exceeds the occupancy limits for STRs in G.L. c. 64G, § 1, that defines the “Occupancy” of a STR as follows (with emphasis added):

- the use or possession or the right to the use or possession of a room in a short-term rental normally used for sleeping and living purposes for a period of not more than 31 consecutive calendar days, regardless of whether such use and possession is as a lessee, tenant, guest or licensee.
- By referring to G.L. c. 64G, the Room Occupancy Excise statute, G.L. c. 40A, §§ 1A and 3 and the Regulations define a STR as the rental of an ADU with stays of not more than 31 consecutive calendar days. The Regulations also prohibit towns from prohibiting or unreasonably regulating the rental of ADUs. Any prohibition on the rental period of ADUs other than as allowed under G.L. c. 64G, would be an unreasonable regulation in violation of Section 3 and the Regulations, unless the Town could satisfy the requirements of Section 71.03 (3).



Comments on other ADU Provisions

Dimensional Requirements

- Towns must ensure that its existing dimensional requirements, including, frontage, front, side, and rear setbacks, and lot coverage as applied to an ADU, are no more restrictive than those required for a Principal Dwelling, Single Family Dwelling or other accessory structure (as defined in 760 CMR 71.02) in the zoning district where the Protected Use ADU is located, whichever is more permissive.
- Towns must ensure that the application of dimensional 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, the dimensional regulations may be deemed to be unreasonable as applied to a Protected Use ADU.
- Because a Protected Use ADU is a Dover Amendment protected use, the Town can only impose “reasonable regulations” on a Protected Use ADU. If the Town’s existing dimensional requirements are used in a manner to prohibit or unreasonably restrict a Protected Use ADU, such application would run afoul of the Dover amendment protections given to a Protected Use ADU under G.L. c. 40A § 3.



Comments on other ADU Provisions

Common Ownership

The Regulations prohibit a municipality from imposing “owner-occupancy” requirements on either the ADU or the principal dwelling, but they are silent on the issue of whether the ADU and the principal dwelling must remain in single ownership.

Requirements that the ADU stay in common ownership with the principal dwelling 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.



Comments on other ADU Provisions

ADU Address Requirements

760 CMR § 71.03 (8) requires ADUs to be given “an address consistent with the most current Address Standard published by MassGIS.” Further, the Regulations require that ADU addresses be reported to MassGIS and EOHLIC after assignment. MassGIS has provided guidance, recommendations, and best practices for ADU numbering, including stating that “every detached, attached, and internal ADU should receive an address that uniquely distinguishes it from any other address in the municipality” and that the address complies with MassGIS’s best practices. See <https://www.mass.gov/info-details/massgis-addressing-guidance-for-accessory-dwelling-units-adus>.



Comments on other ADU Provisions

ADUs With a Larger Gross Floor Area

General Laws Chapter 40A, § 3 allows one ADU to be built as of right up to 900 square feet or $\frac{1}{2}$ the gross floor area of the principal dwelling whichever is smaller. In circumstances where a Town chooses to allow by-right a Protected Use ADU to be built larger (for example, “up to 1200 square feet”), it would likely be interpreted that the larger ADU constitutes the G.L. c. 40A, § 3 Protected Use ADU because Towns are authorized under 760 CMR 71.03 (7) to “adopt[] more permissive Zoning...than would be allowed under 760 CMR 71.03.”

To the extent that a larger ADU constructed under the local by-law constitutes the Protected Use ADU authorized by G.L. c. 40A, § 3, the Town must ensure that it does not impose any “Prohibited Regulations” or “Unreasonable Regulations,” as part of the See 760 CMR 71.03.



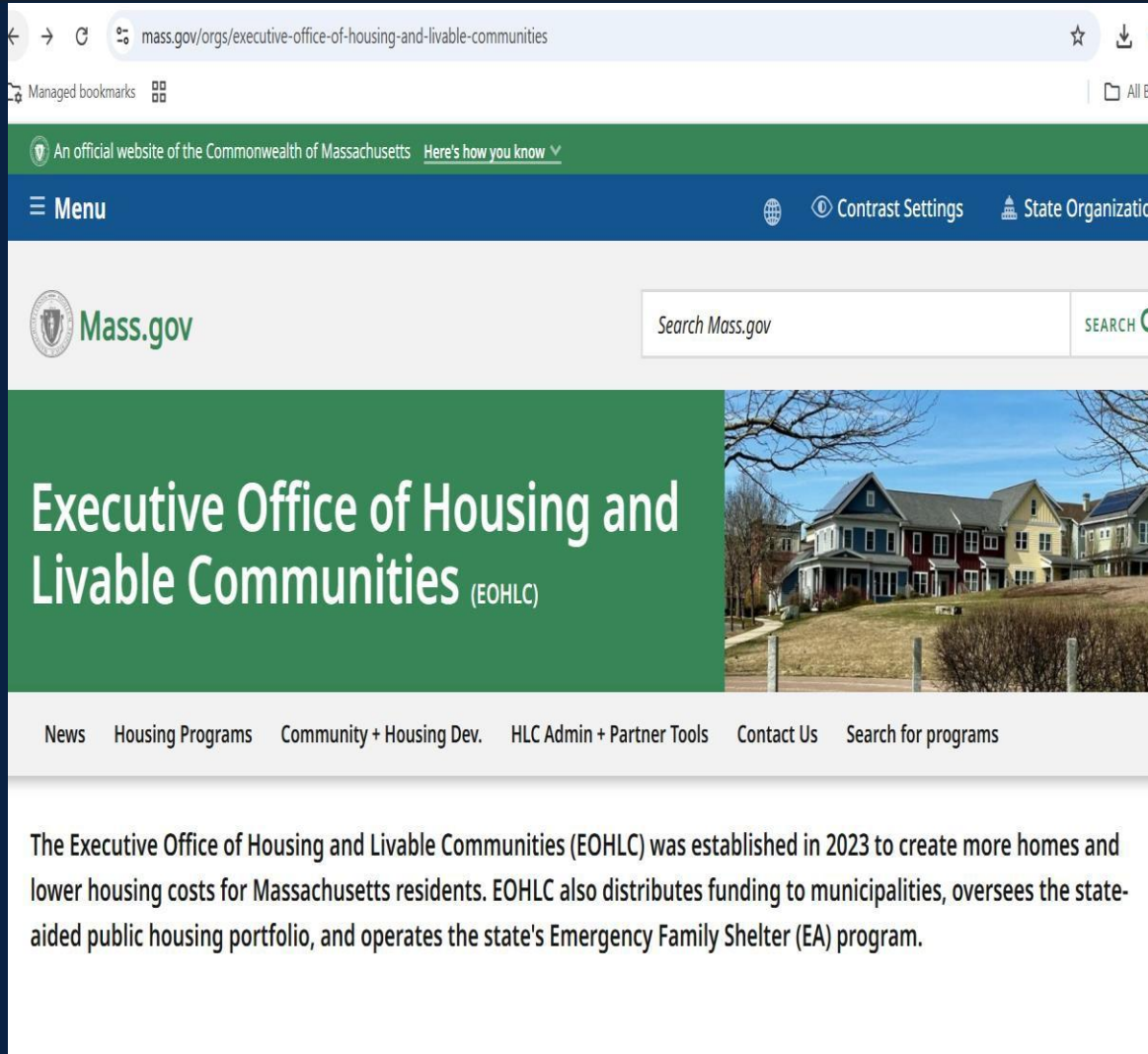
Comments on other ADU Provisions

ADUs With a Larger Gross Floor Area (continued)

If a by-law allows a larger ADU by special permit the decision to pursue the special permit must be a voluntary decision by the applicant and the applicant must be free to withdraw from the special permit process at anytime and construct a Protected Use ADU as of right as authorized by G.L. c. 40A, § 3 if they so choose.



EOHLC Resources and Guides



<https://www.mass.gov/orgs/executive-office-of-housing-and-livable-communities>

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 5 requirements for ADUs (<https://www.mass.gov/doc/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>).



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