HBRA
Home Builders & Remodelers Association
MASSACHUSETTS

January 6, 2025

Edward Augustus, Secretary
Executive Office of Housing and Livable Communities
100 Cambridge Street, Suite 300
Boston, MA 02114

Re: Draft Regulations on Accessory Dwelling Units
760 CMR 71

Dear Secretary Augustus:

On behalf of the Home Builders and Remodelers Association of Massachusetts (HBRAMA), I thank you for allowing us the opportunity to comment on the proposed regulations regarding Accessory Dwelling Units (ADUs) as authorized by the Affordable Homes Act, signed into law this past summer by Governor Healey. This legislative and regulatory effort will have a significant impact on overcoming local municipal resistance to ADUs and will provide a much needed boost to housing availability throughout the Commonwealth.

Our comments are aimed to simplify the regulatory framework that has been proposed in an effort to make the provisions clear and consistent with its authorizing legislation, and to eliminate any potential ambiguities that could confuse, delay and foster regulatory overreach.

Comment 1: Section 71.01 Definitions

Gross Floor Area

The draft regulations define Gross Floor Area (GFA), stating that it includes "all floors of the building, including basements, cellars, mezzanine and intermediated floored tiers and penthouses..." The term GFA is then included in reference to a Protected Use ADU's size in relation to a Primary Dwelling.

There are two concerns here. First, the definition of GFA is no longer included in 780 CMR 51.00 (Massachusetts Residential Code).[1] While the term gross floor area is commonly used within municipal zoning by-laws and ordinances, and in other existing regulations, there is no single consistent definition of the term. Second, the draft regulations will severely limit the size of an Protected Use ADU if the current GFA definition is used to measure the maximum permissible size of "900 square feet."

We believe the intent of the regulation is to create an ADU with a maximum of 900 square feet of **actual living space**. It would better serve the intent of the law and implementing regulations to amend the definition of a Protected Use ADU's maximum size by including only the areas that are Conditioned Space as defined by 780 CMR 51.00, as shown below:

[1] A definition of GFA was last included in the 7th Edition Residential Code, and we are concurrently using the 9th and 10th Editions of the code.

> 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 the requirements of the state building code for safe egress; (ii) is not larger in Gross Floor Area Conditioned Space than 1/2 the Gross Floor Area of the Principal Dwelling or 900 square feet of **Conditioned Space**, whichever is smaller; and (iii) is subject to such additional restrictions as may be imposed by a municipality, including, but not limited to, additional size restrictions and restrictions or prohibitions on Short-term Rental; provided, however, that no Municipality shall unreasonably restrict the creation or rental of an ADU that is not a Short-term Rental.

The following is the definition of Conditioned Space as it appears in the current version of 780 CMR 51.00:

CONDITIONED SPACE. An area, room or space that is enclosed within the building thermal envelope and that is directly or indirectly heated or cooled. Spaces are indirectly heated or cooled where they communicate through openings with conditioned spaces, where they are separated from conditioned spaces by uninsulated walls, floors or ceilings, or where they contain uninsulated ducts, piping or other sources of heating or cooling.

This change to the regulations would allow a Protected Use ADU to be built on a traditional foundation which creates a basement area that is typically used to house necessary equipment (e.g., HVAC equipment, hot water tank, ventilation unit, well tank, etc.) and provide additional storage space that is often lacking in smaller dwellings such as an ADU. Using the above definition would only include basement space if "finished" as Conditioned Space.

Comment 2: Section 71.01 Definitions

Lot

The draft regulations for Lot should be revised by clarifying that it includes non-conforming Lots.

> Lot. An area of land with definite boundaries that is used, or available for use, as the site of a building, or buildings, **regardless of whether it conforms to Zoning, including use requirements and dimensional requirements**.

This change will enable Protected Use ADUs on non-conforming Lots, consistent with the current definition of Principal Dwelling.

Comment 3: Section 71.01 Definitions

Principal Dwelling

The draft regulations for Principal Dwelling should be revised to anticipate the future construction of a Principal Dwelling and a Protected Use ADU on a Lot.

> Principal Dwelling. A structure, regardless of whether it 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.

This change will enable a unified application for the new construction of both a Principal Dwelling and a Protected Use ADU.

Comment 4: Section 71.03(3)(c)

Historic Districts

The draft regulations provide an exception to Unreasonable Regulations authorizing a municipality to establish Design Standards and dimensional standards for Protected Use ADUs located in an Historic District **that are more restrictive or different from what is required for a Single-Family Residential Dwelling**.

This regulation is outside the scope of the authorizing legislation, allows for disparate treatment of ADUs relative to single-family dwellings, and will impede the development of Protected Use ADUs, despite the qualifying language regarding excessive, burdensome or arbitrary prohibitions. This exception to Unreasonable Regulations opens the door to municipal overreach and abuse and should be eliminated.

Comment 5: Section 71.03(3)(d)

Unreasonable Regulations

The draft regulations provide that EOHLC may clarify and provide examples of what constitute Unreasonable Regulations through guidelines. We believe that specific examples should be provided now, in the context of the draft regulations and pending public comment, to better define the ground rules of legitimate municipal interests, particularly as they relate to a myriad of non-zoning based land use tools such as regulations regarding curb cuts, street trees, stormwater management, impermeable surfaces, tree removal, grading, and the like. Further clarification should be provided now as to how excessive or impermissible costs should be measured in order to determine whether municipal regulation is excessive.

Thank you for your consideration of our views and we would welcome the opportunity to discuss them in greater detail with you and your staff.

Respectfully,

David O'Sullivan
President