

ANDERSON KREIGER

MEMORANDUM

To: Concord Zoning Board of Appeals
From: Mina Makarios and Dana Wooten, Town Counsel
Re: Zoning Requirements for Additional Dwelling Units
Date: May 2, 2024; Revised: 5.28.24

This memorandum addresses the following two issues regarding additional dwelling units (“ADU”) under the Town of Concord Zoning Bylaw (the “Zoning Bylaw”):

- (1) whether basement floor area should be included in the calculation for the gross floor area of an ADU pursuant to Section 4.2.2.2 of the Zoning Bylaw; and
- (2) acceptable locations for a proposed ADU on a lot with reduced frontage as permitted under Section 6.2.4 of the Zoning Bylaw.

With respect to the first issue, there is a strong argument that basement floor area is included in the calculation of the gross floor area of an ADU, although certain arguments can be made to the contrary.

The second issue is more straightforward. An ADU must be situated in a location such that the lot width at the nearest point on the front wall of the ADU meets the minimum lot frontage for a given zoning district, just as with a principal or primary dwelling.

On May 9, 2024, after we provided the initial version of this memorandum, the Zoning Board of Appeals (the “Board”) received a letter from applicant’s counsel regarding the second issue. At the Board’s, we revised this memorandum to address the points raised in that letter. As explained in further detail below, the letter did not change our ultimate opinion on this issue.

I. Gross Floor Area of an ADU

A. Gross Floor Area Provisions in Zoning Bylaw Section 4.2.2.2

The Town may grant a building permit for one ADU in a single-family dwelling or detached accessory structure, provided that the ADU “shall occupy no more than 750 square feet of **gross floor area** of the single-family dwelling or detached **accessory** structure.” Section 4.2.2.2(b), Zoning Bylaw (emphasis added). The Zoning Board of Appeals (the “Board”) may grant a Special Permit to allow a slightly larger ADU of up to 1,000 gross square feet. Zoning Bylaw, § 4.2.2.2.

When an ADU is proposed to be constructed on a lot, the total gross floor area of all proposed and existing buildings on the lot is also limited under Section 4.2.2.2(l) as follows (emphasis added):

The total gross floor area of all buildings on the lot shall conform to the **maximum floor area ratio** as required in Section 6.2.13.

B. Use of the Term “Gross Floor Area” in the Zoning Bylaw

Section 1.3.12 of the Zoning Bylaw defines “gross floor area” as:

The sum of the horizontal areas of the floors of a building measured from the exterior face of exterior walls, or from the centerline of a wall separating two (2) buildings, not including any space where the floor to ceiling height is less than six feet, eight inches (6’8”).”.

Although the Zoning Bylaw is clear that any space with a ceiling height under six feet, eight inches is excluded from the gross floor area calculation, the definition does not specifically exclude “basements” from the definition of gross floor area generally.

The term “gross floor area” is referenced dozens of times throughout the text of the Zoning Bylaw. Although the majority of time the term is used without any modifying clauses or phrases, there are some, exceptions. Including four where the undefined term “basement” is also used:

- **Section 6.2.13**, which is referenced with respect to Maximum floor area ratio of all buildings on a lot containing an ADU at Section 4.2.2.2(1) provides: “The total gross floor area of all buildings on a lot shall not exceed the maximum square footage per acre of lot area as noted in Section 6, Table III, except as provided in G.L. c.40A, sec. 9C for a child care facility as an accessory use. **Excluded from the gross floor area in the Residence Districts are basements, open or screened porches**, decks and accessory structures with no permanent foundation or less than 100 square feet in area. The Board may grant relief from the Maximum Floor Area Ratio in the Residence Districts provided the Board finds that a literal application of this requirement would be unreasonable because there are no reasonable alternatives available and that the desired relief may be granted without substantial detriment to the neighborhood and without derogating from the intent and purpose of this Bylaw. Non-residential principal uses in the Residence AA, A, B & C Zone Districts shall be exempt from the Maximum Floor Area Ratio in Table III.
- **Section 4.2.2.1**, the section immediately preceding the ADU provision, contemplates the granting of a special permit for the alteration and use of an existing building (if existing at the time the lot was placed in a single residence district) for a maximum of two dwelling units, “provided the gross floor area, **excluding basements**, open or screened porches, and decks, of any additions shall not exceed in all one-fifth of the gross floor area, **excluding basements**, open or screened porches, and decks, of the existing building.” Section 4.2.2.1, Zoning Bylaw (emphasis added).

- **Section 7.1.5**, when contemplating the gross floor area for nonconforming residential structures, provides that a proposed extension, reconstruction, alteration or structural change cannot increase “the gross floor area, **excluding basements, open or screened porches, and decks**, contained within the existing structure by more than fifty percent (50%)...” (emphasis added).
- The provision of the Zoning Bylaw detailing the requirements for Alternative Planned Residential Development also provides that “**any basement area** and unfinished attic area **shall not be included in determining the maximum gross floor area** as defined and permitted in accordance with this Bylaw.” Zoning Bylaw Section 10.3.4.4(d)(iv (emphasis added).

The express reference to an exclusion for basements in these sections, but not in the definition of Gross Floor Area generally or accompanying the use of the term in Section 4.2.2.2 in particular, suggests that basements count towards Gross Floor Area in ADUs.

In contrast, Sections 4.2.2.1, 7.1.5, and 10.3.4.4 all explicitly exclude basements from the gross floor area calculation, notwithstanding the definition of gross floor area in Section 1.3.11. When constructing the meaning of a zoning bylaw, the provision of the bylaw in question is not viewed in isolation from the other provisions therein.¹ Accordingly, had Town Meeting intended to exclude the basement floor area from the calculation of gross floor area for ADUs, the exclusion would have been noted in Section 4.2.2.2.

The contrary argument is that while Gross Floor Area generally includes basements, it does not in residential districts because of the sentence in Section 6.2.13 which provides: “Excluded from the gross floor area in the Residence Districts are basements, open or screened porches, decks and accessory structures with no permanent foundation or less than 100 square feet in area.” Given the context of that sentence within the provision regarding Maximum Floor Area Ratio, we do not read this sentence, alone as generally excluding basements from the calculation of *total* Gross Floor Area in residential districts. This reading is further supported by the fact that all of the places where basements *are* specifically excluded from the calculation of Gross Floor Area also refer to residential structures. Those specific references would have been superfluous if Gross Floor Area never included basements in residential districts. Note too that the specific items excluded in each of the four examples above are not consistent: for example, one provision includes unfinished attics, three do not.

The inclusion of basements in the calculation of Gross Floor Areas for ADUs is also consistent with the purposes of Section 4.2.2.2. Section 4.2.2.2 states that “a building permit may be

¹ *Bldg. Comm'r of Franklin v. Dispatch Commc'ns of New England, Inc.*, 48 Mass App. Ct. 709, 717-718 (Mass. App. Ct. 2000) (we “relate the words in question to the associated words and phrases in the statutory context”); *Livoli v. Zoning Bd. of Appeals of Southborough*, 676N.E.2d 68, 69-70 (Mass. App. Ct., 1977) (“[w]e are not to look at provisions of a by-law in isolation”, finding that the drafters of the town zoning bylaw could have included a height limitation for accessory structures, as they did for principal structures, and they elected not to, and holding that even though the plaintiffs, as neighbors of the applicant, appealed the town’s initial decision, the town correctly issued a permit for an accessory building).

granted for one additional dwelling unit in a single-family dwelling or detached **accessory structure**” “[f]or the purpose of providing **small** additional dwelling units to rent in the Town that will not substantially alter the appearance of the Town or for the purpose of enabling owners of single-family dwellings larger than required for their present needs to share space and the burdens of homeownership...” *Id.* (emphasis added). The Zoning Bylaw defines “accessory use” as “[a]ny use which (1) is subordinate to a principal use, (2) is secondary in physical area, intensity of use, and purpose to the principal use served, and (3) is customarily incidental to the principal use.”

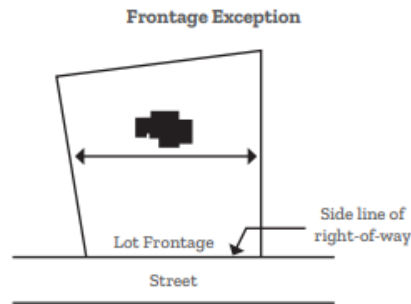
It is well established that a zoning bylaw should be construed sensibly, with regard to its underlying purpose and as a “harmonious whole”. *Valcourt v. Zoning Bd. of Appeals of Swansea*, 718 N.E.2d 389, 393 (1999) (citation omitted). The purpose of allowing an **additional** dwelling unit, as is stated in the text of the Zoning Bylaw, is that the ADU is small and accessory in nature. An ADU should not overwhelm the principal use of a dwelling, in size or in intensity of use. Excluding the basement floor area from the maximum gross floor area calculation for an ADU, which could allow property owners to build ADUs with functional gross floor areas similar to the principal structure on a lot, is arguably inconsistent with this purpose.

Thus, while it is plausible that a court could determine that basements should be omitted from the definition of Gross Floor Area for ADUs pursuant to the language in Section 6.2.13, we believe the better reading of the Zoning Bylaw is that basements are included in the definition of Gross Floor Area.

II. Frontage Requirement

The Minimum Lot Frontage required for each zoning district is described in Section 6.2.3 and Table III of the Zoning Bylaw. Section 6.2.4 of the Zoning Bylaw provides an exception to the frontage requirements in the Residence AA, A and B districts, where the lot has at least “eighty (80) percent of the minimum lot frontage.”

This exception is subject to an important limitation: the lot width at the nearest point on the **front wall of the dwelling** to the sideline of the right-of-way **shall not be less than the minimum lot frontage**” (emphasis added). In addition, “the angle formed by the intersection of the side lot line and the sideline of the right-of-way shall not be less than 45 degrees.”. A visual representation of the frontage exception and the application of the accompanying requirements is included in the Zoning Bylaw:



Lot Width: (not less than Required frontage)

Res. AA	200'
Res. A	150'
Res. B	125'

Frontage Exception: (not less than 80% of required frontage)

Res. AA	160'
Res. A	120'
Res. B	100''

The visual representation only includes a lot with one dwelling. However, the text of the Zoning Bylaw does not distinguish between primary or principal dwellings and additional dwellings such as ADUs. Thus, if an ADU is built on a lot with reduced frontage, the ADU must also comply with the requirements of Section 6.2.4. Any ADU on a reduced frontage lot must be situated in a location such that the lot width at the nearest point on the front wall of the ADU meets the minimum lot frontage for a given zoning district, just as with a primary dwelling.

II.R Response to May 9 Letter

As noted above, on May 9, 2024, Attorney Lawrence Wind sent a letter memorandum to the Board regarding the frontage requirement in response to a prior version of this memorandum. We disagree with Attorney Wind's analysis and it does not change our opinion as provided in the May 2, 2024 version of this memorandum.

Attorney Wind's argument, as we understand it, is that because § 4.2.2.2 of the Zoning Bylaw does not explicitly refer to frontage but does refer to other dimensional requirements such as setback, the frontage requirements applicable to dwellings on lots with reduced frontage in § 6.2.4 are inapplicable. However, there is no requirement that all applicable provisions of the Zoning Bylaw applicable to lots or structures be repeated in all sections. As Attorney Wind acknowledges, "a zoning by-law should be construed sensibly, with regard to its underlying purposes ... and, if possible, as a harmonious whole." *Valcourt v. Zoning Board of Appeals of Swansea*, 48 Mass. App. Ct. 124, 129 (1999)(internal citations omitted).

The particular provision at issue, § 6.2.4 would have been odd to call out separately in § 4.2.2 as § 6.2.4 is intended to provide relief from the standard frontage requirements in a limited set of cases. For most lots, the Zoning Bylaw presumes that adequate frontage exists for the first dwelling, rendering the analysis in § 6.2.4 irrelevant with respect to ADUs. However, where a lot, in certain districts, has 80% of the required frontage in that district, § 6.2.4 allows a dwelling

to be built on an area of the lot that is as wide as the required frontage. This requirement ensures that dwellings are not included in narrow areas of a lot while allowing a property owner to use larger areas of the lot for a dwelling.

Attorney Wind further argues that our initial reading that would allow structures *other* than ADUs in the same location also demonstrates that the provision is inapplicable to ADUs. However, Town Meeting was clear when it applied the limitation in § 6.2.4 to “dwellings”, rather than structures. This is certainly a rational distinction Town Meeting could make. A garage or barn, unlike a dwelling (including an ADU), is rarely inhabited on a continuous basis by people. In fact, while there may be multiple accessory structures on a lot (e.g., a garage and shed), a maximum of two dwellings (including an ADU) is permitted on a lot. Absent the ADU provision, only **one** dwelling would be permitted.

Finally, the cases Attorney Wind cites do not compel a different result. In *Valcourt*, for instance, the Appeals Court agreed with a definition of frontage that was not in the Bylaw even though it did not favor the party seeking to build. *Id.* at 129-130.

McLaughlin v. Brockton, 32 Mass. App. Ct. 930 (1992) stands for the proposition that a Court would try to harmonize different section of a Bylaw as Attorney Wind suggests, but nothing in the decision requires a Court to conclude that a provision of a Bylaw is inapplicable because it is not referenced in another. In fact, in *McLaughlin*, the Brockton zoning ordinance had two sections relating to nonconforming uses. One section (§ 27–39) required the ZBA to find that the proposed alteration “shall not be substantially more detrimental than the existing nonconforming use to the neighborhood” and the other (§ 27–43) simply stated that a “nonconforming use may be changed to a use of the same or more restrictive classification”. The Land Court determined that the landowner’s proposed nonconforming use at a property was allowed under the latter section of the ordinance and ignored the former section. The Appeals Court *overruled* that decision and interpreted § 27–43 as imposing specific restrictions on the types of alterations authorized generally by § 27–39. Applying that case to this context suggests that § 4.2.2.2 supplements, rather than supplants, § 6.2.4.

Finally, *Jenkins v. Town of Pepperell*, 18 Mass. App. Ct. 265, 270 (1984), addressed an ambiguity as to the *boundary line* between two zoning districts. In that case, where an ambiguity insolvable by the text of the Bylaw existed, and the town provided no evidence to resolve it the Appeals Court remanded to the Land Court to address the ambiguity and suggested the ambiguity be suggested in the landowner’s favor. There is no similar ambiguity here.