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Make Room for Daddy:

The New Law on Accessory Dwelling Units

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In March of this year, Governor Hassan signed into law Senate Bill 146, relative to accessory dwelling units. The new law will soon be codified at RSA 674:71 to :73. Until it appears there, it can be found on the legislature's website, www.gencourt.state.nh.us. It is chapter 6 of the 2016 laws, which can be found by clicking on "2016 Chaptered Final Version" under "General Court News and Hot Links."

The New Law

The fundamental requirement of the new law is that every municipality with a zoning ordinance "shall allow accessory dwelling units as a matter of right or by either conditional use permit pursuant to RSA 674:21 or by special exception, in all zoning districts that permit single-family dwellings."

Definition. The new law defines an "accessory dwelling unit" (or "ADU") as "a residential living unit that is within or attached to a single-family dwelling, and that provides independent living facilities for one or more persons, including provisions for sleeping, eating, cooking, and sanitation on the same parcel of land as the principal dwelling unit it accompanies." They often go by other names, such as accessory apartments or in-law apartments. Whatever a municipality calls them, they must be permitted under the new law.

This is an example of "statewide zoning" that municipal officials frequently, and understandably, resist. The legislature set forth its justification for the new law in the text of SB 146:

> There are many important societal benefits associated with the creation of accessory dwelling units, including:
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> (a) Increasing the supply of affordable housing without the need for more infrastructure or further land development.
> (b) Benefits for aging homeowners, single parents, recent college graduates who are saddled with significant student loan debt, caregivers, and disabled persons.
> (c) Integrating affordable housing into the community with minimal negative impact.
> (d) Providing elderly citizens with the opportunity to live in a supportive family environment with both independence and dignity.

Local officials may or may not find this explanation compelling; regardless, they must comply with the law. A prohibition on ADUs in a zoning ordinance will be invalid; and *if an ordinance does not mention ADUs, they will automatically be deemed permitted.*

However, there are several factors that may soften the blow. First, the new law does not take effect until June 1, 2017. This will give every municipality time to review and amend its zoning ordinance, if necessary.

Second, as stated above, ADUs must be allowed either as a matter of right *or by conditional use permit or special exception*. This enables municipalities to exercise significant discretion in allowing ADUs.

Third, the law allows a number of limits and restrictions that may be placed on ADUs. These should alleviate concerns that every single-family dwelling may be quickly converted into a duplex.

ROOM FOR DADDY *from page 19*

Where to Begin?

To deal with the new law, a municipality should begin by asking a few questions. Most of this will be the planning board's job, although of course it may obtain input from others:

Does your ordinance already address ADUs? Many zoning ordinances permit ADUs subject to certain conditions. Other may permit them without limitation. Still others may prohibit them, or may not mention them at all. Again, the ordinance may use a different name, such as in-law apartment. Depending on what your ordinance says about ADUs, it may or may not need to be amended—but it probably does.

- If your ordinance expressly allows ADUs without limitation, then you may not need to do anything, because the ordinance already complies with the new law. However, please keep reading, because your ordinance may contain a limitation that doesn't *seem* like a limitation.

- If your ordinance prohibits ADUs, that prohibition will be invalid once the new law takes effect. The ordinance must allow ADUs, although it may impose certain conditions, so you should plan to amend the ordinance.

- If your ordinance allows ADUs subject to conditions, you will need to determine whether those conditions comply with the new law, and plan to amend the ordinance if they do not.

- If your ordinance is silent on ADUs, they will automatically be deemed permitted without limitation under the new law, so you must amend the ordinance to maintain any control whatsoever.

- The new law allows limitations to be placed on ADUs, but *those limitations must be included in the ordinance*; otherwise "one accessory dwelling unit shall be deemed a permitted accessory use, as a matter of right, to any single-family dwelling in the municipality, and *no municipal permits or conditions shall be required* other than a building permit, if necessary."

How does your ordinance define ADU? Some zoning ordinances define an ADU, or an in-law apartment, as one that is for the use of a family member of the occupant(s) of the principal dwelling unit. *This is a limitation, and it is one that is not permitted under the new law.* If your zoning ordinance defines ADU in that manner, or otherwise limits occupancy only to family members, that limitation will be invalid.

It is strongly recommended that the zoning ordinance be amended to define "accessory dwelling unit" in a manner consistent with the new law's definition (see above). If the ordinance currently uses the term "in-law apartment" or something similar, it should be amended to use the statutory term "accessory dwelling unit," so there is no suggestion that the occupants must be related to occupants of the principal dwelling unit.

Special Exception or Conditional Use Permit. Under the new law, ADUs must be allowed either as a matter of right or by conditional use permit or special exception. One of the best ways to exercise control over ADUs is to allow them only by special exception or conditional use permit. If you want to limit ADUs in this manner, it will be necessary to state that in the ordinance.

Most zoning ordinances already allow certain uses only by special exception and list specific criteria that must be established--typically including things like compatibility with neighboring land uses, consistency with the public interest, and demonstration that the use will not cause undue noise, smoke, traffic congestion, or other undesirable impacts. It is a fairly simple matter to add ADUs to the list of uses that are permitted by special exception. This will ensure that they are reviewed on a case-by-case basis and permitted only where there will be no serious adverse consequences.

What Else Can You Do?

In addition to special exception/conditional use permit requirements, the new law allows certain specific conditions to be applied to ADUs, while prohibiting other conditions.

Here are some of the conditions a zoning ordinance may impose:

One ADU per dwelling. A municipality is not required to allow more than one ADU for any single-family dwelling. A one-ADU limit should be stated in the ordinance. Of course, the municipality may allow more than one ADU per dwelling, if it chooses.

Owner occupancy. The ordinance may require owner occupancy of either the principal or the accessory dwelling unit, "but it shall not specify which unit the owner must occupy." An owner occupancy requirement is definitely recommended if you want to avoid turning a property into a duplex with an absentee landlord.

Minimum and maximum sizes. The ordinance may establish size limits for ADUs, but it may not limit the ADU to less than 750 square feet. A minimum size is probably unnecessary, but including a maximum is a good idea, so that someone with a 1,500-square-foot residence cannot add a 5,000-square-foot ADU. Just make sure your maximum size is at least 750 square feet.

Adequate parking. The ordinance (or the ZBA, as a condition of a special exception) may require adequate parking to accommodate the ADU.

Aesthetic continuity. A municipality "may establish standards for accessory dwelling units for the purpose of maintaining the aesthetic continuity with the principal dwelling unit as a single-family dwelling." This is an appealing option, but implementing it may be tricky. Including standards in the zoning ordinance will require careful drafting. Alternatively, the ordinance could authorize the planning board to adopt standards as part of a conditional use permit process.

Detached ADUs. A municipality is not required to allow detached ADUs—for example, a unit that is above a detached garage or is a stand-alone building. If it does allow them, they are subject to all of the other provisions of the law, except that an increased lot size may be required. If a municipality adopts the statutory definition of an ADU, this will serve to disallow detached ADUs, as the statutory definition refers to a unit that is "within or attached to a single-family dwelling."

What *Can't* You Do?

Here are some conditions that the ordinance may not impose:

Family relationship. A municipality "may not require a familial relationship between the occupants of an accessory dwelling unit and the occupants of a principal dwelling unit." As noted above, some municipalities have this restriction built into their definition; that will need to change.

Bedroom limit. A municipality "may not limit an accessory dwelling unit to only one bedroom." This means, of course, that it may impose a *two*-bedroom limit. It may also impose a maximum occupancy per bedroom "consistent with policy adopted by the United States Department of Housing and Urban Development."

Increased lot size. The municipality may not impose "additional requirements for lot size, frontage, space limitations, or other controls beyond what would be required for a single-family dwelling without an accessory dwelling unit." For example, if the ordinance requires one acre and 100 feet of frontage for a single-family dwelling, it cannot require two acres and 200 feet for a single-family dwelling with an ADU. (As noted above, however, increased requirements can be imposed for *detached* ADUs.)

However, "[a]ny municipal regulation applicable to single-family dwellings shall also apply to the combination of a principal dwelling unit and an accessory dwelling unit including, but not limited to lot coverage standards . . . ." Thus, for example, if a house is already built to the ordinance's setback limit, the owner may not add an ADU that goes beyond that limit.

Separate water and sewer systems. The municipality may not require a separate water or septic system for the ADU, although it may (in fact, must) require adequate provisions for water supply and sewage disposal in accordance with state law. Of course, if DES requires a separate septic system, or if a separate system is the only practical way to meet the state standards, then a separate system will be necessary.

Unlocked connecting door. "An interior door shall be provided between the principal dwelling unit and the accessory dwelling unit, but a municipality shall not require that it remain unlocked." Some municipalities do require a door between the two units, and some require that it remain unlocked, as an indirect way to ensure a familial relationship between the occupants.

It is unclear why the new law *requires* a connecting door, rather than allowing the *municipality* to require the door. In any event, to comply with the law, the zoning ordinance should require a connecting door but not require that it remain unlocked.

Time to Get Started

As stated above, the new law does not take effect until June 1, 2017. This delayed effective date was included specifically to give municipalities time to amend their zoning ordinances. If your planning board has not already begun to review its ordinance and consider changes, it should do so in the very near future. Towns with March town meetings will need to have hearings on any zoning changes not later than January, and it will take some time to get your amendments ready for a hearing.

Please understand that this article is only an overview of the law. Many of these issues will require careful drafting and a thorough review of the statute, and municipalities are strongly encouraged to consult with their legal counsel or professional planning staff as they consider how to comply with the new law. NHMA's legal staff also is available to answer questions about the law, although we do not have the resources to assist with reviewing and drafting ordinances.

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