

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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December 21, 2022

Jonathan Lait, Director
Planning and Development Services
City of Palo Alto
250 Hamilton Avenue, 5th Floor
Palo Alto, CA 94301

Dear Jonathan Lait:

RE: City of Palo Alto Accessory Dwelling Unit (ADU) Ordinance – Letter of Technical Assistance

The California Department of Housing and Community Development (HCD) thanks the City of Palo Alto (City) for submitting accessory dwelling unit (ADU) Ordinance Number 5507 (Ordinance) and for its response to HCD's December 23, 2021, written findings of non-compliance. HCD appreciates the time and effort the City took in crafting its February 3, 2022, response, and for the conversation between City staff and HCD Analyst Lauren Lajoie on February 2, 2022. Nevertheless, HCD has concerns with the City's response as it fails to address identified inconsistencies between the City's ADU ordinance and State ADU Law, as outlined in this letter.

HCD requests that the City respond to this letter no later than January 20, 2023, with a detailed plan of action and timeline, to bring its Ordinance into compliance pursuant to Government Code section 65852.2, subdivision (h)(2)(B).

Background and Summary of Issues

In its December 23, 2021, findings, HCD detailed where it found the Ordinance violates Government Code section 65852.2. In its February 3, 2022, letter, the City responded point by point to the findings as they were presented in the HCD letter. While the responses indicate a willingness to come into compliance with state law, HCD remains concerned that the proposed changes to the City's Ordinance are insufficient. This letter will address HCD's findings for which the City's response and/or commitment to correct was not satisfactory and where HCD still considers an inconsistency between the Ordinance and State ADU Law.

1) HCD's Original Finding

Daylight Plane - Section 18.09.040(b): Table 2 states that "daylight plane" acts as a limit on the height of ADUs. In many instances, this may not be a problem; however, daylight plane concerns cannot be used to unduly limit the height of an ADU. ADUs

are permitted up to 16 feet high. (Gov. Code, § 65852.2, subds. (c)(2)(C), (e)(1)(B)(ii).) Therefore, in considering restrictions that the City is imposing on ADUs for daylight planes, the ordinance should note the 16-foot height allowable for ADUs. This Table must be amended to clarify this point.

Palo Alto's Response

"Please note that the City's daylight plane regulations do not apply to subdivision (e) ADUs, which are governed by PAMC Section 18.09.030. The City will add a clarifying sentence at the top of Section 18.09.040 explaining that none of the regulations in PAMC 18.09.040 apply to subdivision (e) ADUs. In addition, the City will add a clarifying statement that the regulations in PAMC 18.09.040 are not intended to limit the conversion of existing structures to ADUs or JADUs. For all other ADUs; however, the City has requested clarity on HCD's position on daylight plane on numerous occasions, most recently by email dated August 8, 2021. Please see this email, which is attached, for an explanation of the City's position. The City looks forward to continued discussion of this topic."

HCD's Follow-up Response

On February 23, 2022, HCD received a copy of an email from Assistant City Attorney (ACA) Albert Yang dated August 30, 2021. ACA Yang sought clarification on behalf of the City on whether local government could enforce a development standard that would require that any portion of an ADU fall below 16 feet in height. The email states: "Subdivision (c)(2)(C) provides that a local agency may not establish "[1] any other minimum or maximum size for an accessory dwelling unit, [2] size based upon a percentage of the proposed or existing primary dwelling, or [3] limits on lot coverage, [4] floor area ratio, [5] open space, and [6] minimum lot size [. . .] that does not permit at least an 800 square foot accessory dwelling unit that is at least 16 feet in height with four-foot side and rear yard setbacks to be constructed in compliance with all other local development standards." ACA Yang argues that the law is very specific regarding the development standards addressed and it (*the subdivision*) specifically recognizes that the list does not encompass all development standards. ACA Yang states, "The specific development standards addressed in subdivision (c)(2)(C) do not include daylight plane standards." ACA Yang impliedly concludes that because the development standards, which ACA Yang numbered from [1] through [6], do not list daylight plane standards, the City may impose daylight plane standards over the minimum 16-foot height requirement.

However, the City incorrectly cited subdivision (c)(2)(C) above; thereby, creating a list of "development standards" from portions of (c)(2)(A) and (c)(2)(B)(i) and (ii) and conflated these with "other local development standards" found in subdivision (c)(2)(C). Accurately cited, subdivision (c)(2)(C) states:

(C) Any other minimum or maximum size for an accessory dwelling unit, size based upon a percentage of the proposed or existing primary dwelling, or limits on lot

coverage, floor area ratio, open space, and minimum lot size, for either attached or detached dwellings that does not permit at least an 800 square foot accessory dwelling unit that is at least 16 feet in height with four-foot side and rear yard setbacks to be constructed in compliance with all other local development standards.

State ADU Law authorizes a local agency to establish the minimum and maximum size requirements for ADUs in subdivision (c)(1), but any such size requirement must allow for a minimum height of 16 feet while being constructed in compliance with all other local development standards. This height requirement is meant to be in harmony with local development standards. Because the subdivision has set the minimum height, authorized by statute, local design standards set in the ordinance cannot invalidate this provision, pursuant to Government Code section 65852.2 (a)(5). Therefore, **the minimum height of all proposed ADUs is 16 feet and cannot be limited by Daylight Plane restrictions.** Table 2 must be amended to clarify this point. Please note that SB 897 (2022), effective January 1, 2023, amends this subdivision, and adds provisions regarding the minimum height for detached and attached ADUs.

2) HCD's Original Finding

Floor Area & JADUs - Section 18.09.040(b): Development standards can account for ADUs in their measurement of the floor area restrictions or ratio (FAR). But these standards may not account for or consider JADUs. A JADU may not be included in this calculation, because a JADU is a unit that is contained entirely within a single-family residence. (Gov. Code § 65852.22, subd. (h)(1).) Footnote 4 of Table 2 impermissibly includes JADUs as part of the FAR calculations. This footnote must be amended to clarify this point.

Palo Alto's Response

"Footnote 4 of Table 2 provides additional FAR on a site for ADUs and JADUs. This is an incentive to promote production of such units without limiting the development potential of a primary unit. Because a JADU is contained entirely within the space of a single-family residence, it would normally be included in the floor area of the primary unit. Footnote 4 provides an opportunity for a property owner to exempt all JADU square footage from the calculation of floor area for the primary unit. The removal of JADUs from footnote 4 would only serve to restrict the development of JADUs. The City will attempt to clarify the language of this footnote."

HCD's Follow-up Response

HCD supports the City's attempt to add clarifying language. Converting an area within an existing home should not be counted. To clarify footnote 4 in Table 2, the City could include, for example, "This provision applies to JADUs in **proposed** single-family dwellings, or remodels that increase the square footage of a single-family dwelling."

3) HCD's Original Finding

Noise-Producing Equipment - Section 18.09.040(h): Local agencies may impose development standards on ADUs; however, these standards shall not exceed state standards. Section 18.09.040(h) states that noise-producing equipment "shall be located outside of the setbacks." This section must be revised to only refer to ADUs since setbacks are not required for JADUs. In addition, this setback for noise-producing equipment for ADUs must be revised to make clear that this setback requirement will not impede the minimum state standards of four-foot setbacks. (Gov. Code, § 65852.2, subd. (c)(2)(C)).

Palo Alto's Response

"As noted above, the City will add a clarifying statement that the regulations in PAMC 18.09.040 are not intended to limit the conversion of existing structures to ADUs or JADUs. For new construction; however, the City permits JADUs to build at a lesser setback than a single-family home normally would. Therefore, the removal of JADUs from this section will only serve to restrict the development of JADUs.

"Additionally, the City's ordinance states that noise producing equipment needs to be placed outside the setback for an ADU or JADU. This means that the noise producing equipment itself cannot be placed closer than four feet to a property line for either type of structure; not that the ADU or JADU cannot be placed at those locations. This is consistent with the state setback requirements for an ADU."

HCD's Follow-up Response

JADUs are entirely within the walls of a proposed or existing single-family dwelling and as such not subject to any setback requirements. Therefore, the City should remove the reference to JADU from *Section 18.09.040(h)*. The City writes, "For new construction; however, the City permits JADUs to be built at a lesser setback than a single-family home normally would." Please clarify this statement for us. HCD applauds the City's intention to promote JADUs by relaxing setback requirements. However, since setbacks do not apply to JADUs, the City would have to relax the setback requirements for the primary single-family dwelling to achieve the desired effect.

4) HCD's Original Finding

Corner Lots - Section 18.09.040(j) Design: This section states, "Except on corner lots, the unit shall not have an entranceway facing the same lot line (property line) as the entranceway to the main dwelling unit unless the entranceway to the accessory unit is located in the rear half of the lot. Exterior staircases to second floor units shall be located towards the interior side or rear yard of the property." These standards appear to apply only to the creation of ADUs and may unduly restrict the placement of an ADU on some lots. Local development standards provided by ordinance pursuant to subdivisions (a) through (d) of Government Code section 65852.2 do not apply to ADUs created under subdivision (e). Please consider eliminating this restriction or modifying it such that it applies "when feasible."

Palo Alto's Response

"As noted above, the City will add a clarifying sentence at the top of Section 18.09.040 explaining that none of the regulations in PAMC 18.09.040 apply to subdivision (e) ADUs. The City will clarify this is not applicable for subsection (e) ADUs. We are not aware of any evidence that this simple design requirement creates an excessive constraint on ADU production and that has not been our experience."

HCD's Follow-Up Response

Requirements such as stipulating the facing of entranceways or the location of stairways may unduly restrict the creation of ADUs on some lots. Statute for both ADUs (Gov. Code, § 65852.2, subd. (e)(1)(A)(ii)) and JADUs (Gov. Code, § 65852.22, subd. (a)(5)) require independent entry into the unit, and a constraint on the location of an entry door may prohibit the creation of an additional housing unit. In addition, this requirement could add significant expense if entry doors must be installed in an exterior wall instead of utilizing an existing doorway facing the same direction as the entryway to the primary dwelling. The City must either eliminate this restriction or modify it such that it applies "when feasible."

5) HCD's Original Finding

Parking - Section 18.09.040(k)(iv) Parking: The ordinance indicates if covered parking for a unit is provided in any district, the maximum size of the covered parking area for the accessory dwelling unit is 220 square feet. Further, under this section, the space for the covered parking count towards the total floor area for the site and the ADU if attached to the unit. Covered parking should not count towards the total floor area of the site as if it would unduly limit the allowable size of an ADU established by state law, nor should it directly count toward the area available for the ADU. Although standards within an underlying zone may apply when noted in the adopted ADU ordinance, they may not be more restrictive than those contained in state statute. (See, e.g., Gov. Code, § 65852.2, subs. (a)(1)(B), (a)(1)(D)(vii), (a)(1)(D)(x), (c), and (e).) The portion of this section stating "unit unless attached to the unit" should be deleted, or the section should otherwise be modified to comply with state law.

Palo Alto's Response

"As noted above, the City will add a clarifying sentence at the top of Section 18.09.040 explaining that none of the regulations in PAMC 18.09.040 apply to subdivision (e) ADUs.

"Currently, all covered parking in the single-family zones counts towards floor area for the site and dwelling unit. The City does not understand how this creates a standard that is more restrictive than that contained in state statute; none of the subsections cited in your letter speak to whether a garage for an ADU must be

exempted from the unit size for the ADU. Moreover, this provision does not create a constraint on ADU production, as a property owner may always choose to provide a detached garage, uncovered parking, or no parking at all for the ADU.

“The City has concerns that allowing attached garages onto these structures will incentivize individuals to illegally expand the unit into the garage, which would both exceed the City's ordinance, contain unpermitted construction, and potentially place the health and safety of the occupants at risk.”

HCD's Follow-up Response

Covered parking does not count towards the total floor area of the ADU. An ADU is defined in Government Code section 65852.2, subdivision (j)(1), as “complete independent living facilities,” and subdivision (j)(4) further specifies that the living area for the ADU “does not include a garage...” Thus, a covered parking space or garage, whether or not attached to a unit, would be considered “non-livable” space. Therefore, as stated in our original finding, covered parking should not count towards the total floor area of the site as it would unduly limit the allowable size of an ADU established by state law. Similarly, it should not directly count toward the area available for the ADU, as this could also restrict the size of the ADU. The addition of garage space to the ADUs livable space would violate ADU size requirements found in Government Code section 65852.2, subdivisions (a)(1)(D)(iv) and (v), and (c).

While the City raises concerns of potential illegal expansion, the City may not adopt an ordinance that would violate State ADU Law. The City may rely on its enforcement of codes and standards to mitigate its concerns. The City should remove the portion of this section stating “unless attached to the unit” or otherwise modify the section to comply with State ADU Law.

Conclusion

Given the deficiencies described above and in HCD's December 23, 2021, letter, the City's Ordinance is inconsistent with State ADU Law. HCD requests that the City respond to this letter no later than January 20, 2023, with a detailed plan of action and timeline, to bring its Ordinance into compliance pursuant to Government Code section 65852.2, subdivision (h)(2)(B). Specifically, to bring its ADU ordinance into compliance, the City must either amend the Ordinance according to HCD's findings to comply with State ADU Law (Gov. Code, § 65852.2, subd. (h)(2)(B)(i)) or readopt the Ordinance without changes. Should the City choose to readopt the Ordinance without the changes specified by HCD, the City must include findings in its resolution that explain the reasons the City finds that the Ordinance complies with State ADU Law despite the findings made by HCD. (Gov. Code, § 65852.2, subd. (h)(2)(B)(ii), (h)(3)(A).)

HCD will review and consider any plan of action and timeline received from the City before January 20, 2023, in advance of taking further action authorized by Government Code section 65852.2.

HCD appreciates the City's efforts provided in the preparation and adoption of the Ordinance and welcomes the opportunity to assist the City in fully complying with State ADU Law. Please feel free to contact Mike Van Gorder, of our staff, at (916) 776-7541 or at mike.vangorder@hcd.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannan West". The signature is fluid and cursive, with the first name "Shannan" and the last name "West" clearly distinguishable.

Shannan West
Housing Accountability Unit Chief