

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

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Belinda Deines, Principal Planner
Community Development Department
City of Dana Point
33282 Golden Lantern
Dana Point, CA 92629

Dear Belinda Deines:

RE: City of Dana Point's SB 9 Ordinance under Housing Crisis Act (Gov. Code, § 66300), ADU Law (Gov. Code, § 65852.2), etc. – Letter of Technical Assistance

The purpose of this letter is to provide technical assistance to the City of Dana Point (City) regarding the relationship between its adopted Senate Bill (SB) 9 implementation ordinance (Ordinance 22-01) ("Ordinance") and the Housing Crisis Act of 2019 (HCA) (Gov. Code, § 66300), among other relevant state housing laws. The California Department of Housing and Community Development (HCD) received several complaints raising concerns that certain provisions of the Ordinance may violate state law. HCD subsequently reviewed the adopted ordinance and other publicly available materials. This letter identifies several concerning provisions of the Ordinance and describes the ways in which these provisions likely violate the HCA.

This letter also identifies provisions of the Ordinance that raise concerns under other housing laws that HCD enforces, such as Accessory Dwelling Unit (ADU) Law (Gov. Code, § 65852.2), Land Use Discrimination Law (Gov. Code, § 65008), and the Rental Inclusionary Housing Law (Gov. Code, § 65850.01).

Housing Crisis Act of 2019 (Gov. Code, § 66300)

The HCA limits the ability of a local agency to reduce the intensity of land use wherever housing is an allowable use without concurrently increasing the intensity of land use elsewhere to compensate for the loss of residential development capacity. The HCA defines reductions in the intensity of land use to include the addition or modification of development standards. Specifically, the law provides the following:

Changing the general plan land use designation, specific plan land use designation, or zoning of a parcel or parcels of property to a less intensive use or reducing the intensity of land use within an existing general plan land use designation, specific plan land use designation, or zoning district in effect at the

time of the proposed change, below what was allowed under the land use designation or zoning ordinances of the affected county or affected city, as applicable, as in effect on January 1, 2018, except as otherwise provided in clause (ii) of subparagraph (B) or subdivision (i). For purposes of this subparagraph, “reducing the intensity of land use” includes, but is not limited to, reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or any other action that would individually or cumulatively reduce the site’s residential development capacity.

(Gov. Code, § 66300, subd. (b)(1)(A).) In addition, per Government Code section 65589.5, subdivision (a)(2)(L), the HCA is to be broadly construed to maximize the development of housing.

ADU Law (Gov. Code, §§ 65852.2 and 65858.22)

SB 9 and ADU Law are complementary. Both laws can be implemented in ways that result in developments with both “SB 9 Units” and ADUs. For example, when a lot split has not occurred, the lot is eligible to receive a duplex on the lot under SB 9 and to receive ADUs and/or junior ADUs (JADUs) as it ordinarily would under ADU Law. Or, when a lot split occurs under SB 9, each lot is eligible for up to two units, including, for example, a primary unit and an ADU or JADU. Only in the case that a lot owner both splits a lot and builds a duplex on a resulting lot under SB 9 is ADU Law superseded (i.e., the lot is not entitled to an ADU or JADU); in all other cases, State ADU Law applies.¹

Specific Findings

The following aspects of the Ordinance raise concerns:

- Sec 9.72.004 (C) and (E) – *Two Unit Maximum on Duplex Lots* – The Ordinance states, “No more than two residential units (whether primary, accessory, or single family residential duplex) shall be allowed per parcel.” This is later reinforced with the requirement of the same language in a deed restriction. However, this imposes a two-unit cap on all single-family residential duplexes, even in instances when a lot split has not occurred. Imposing a two-unit cap on unsplit lots with a duplex would violate State ADU Law. (Gov. Code, § 65852.2, subs. (a) and (e).) The City should amend the language to clarify that a two-unit cap applies only in the case of a duplex on a split lot.

¹ For more information on the interaction between SB 9 and ADU Law, please refer to HCD’s SB9 Fact Sheet, available at <https://www.hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf>.

- Sec 9.72.004 (C) – *Attachment Requirement* – The Ordinance states, “The Residential Units located on the property must be attached or connected via a permanent wall, ceiling or floor.” This appears to prohibit detached “Residential Units,” which include ADUs. However, Government Code section 65852.2, subdivision (a)(1)(D)(iii), permits ADUs that are “detached from the proposed or existing primary dwelling,” and subdivision (e)(1)(B) requires ministerial approval of “[o]ne detached, new construction, accessory dwelling unit....” Therefore, the City should revise the language to clarify that detached ADUs are permitted in association with SB 9 developments.
- Sec 9.72.004 (E); Sec. 9.72.004 (J)(10); Sec 7.37.004 (D) – *Affordability Deed Restriction* – The Ordinance requires a deed restriction wherein “the Single Family Residential Duplex shall be occupied by very-low to low-income households in perpetuity....” It is unclear if this is a reference to the first primary unit or both units. A similar requirement is later required for all split lots. In practice, these provisions make the SB 9 ordinance an inclusionary zoning ordinance as well.

However, while inclusionary zoning requirements are a well-used and important tool for the creation of affordable housing, this requirement is equivalent to either a 50-, 75- or 100-percent inclusionary requirement that is not imposed on any other type of residential development in Dana Point. While Government Code section 65850, subdivision (g), authorizes local agencies to adopt an inclusionary housing ordinance that includes residential rental units affordable to lower- and moderate-income households, under section 65850.01, HCD has the authority to review an inclusionary requirement that exceeds 15 percent and to request that a local jurisdiction submit an economic feasibility study providing “evidence that the ordinance does not unduly constrain the production of housing....” Absent an economic feasibility study showing otherwise, the Ordinance’s inclusionary requirement raises concerns that it may render implementation of SB 9 economically infeasible. Therefore, the City should remove the requirement.

- Sec. 9.72.004 (G); Sec 7.37.004 (I) – *Maximum Height* – The Ordinance states, “The Single Family Residential Duplex shall be subject to a height limitation of twelve feet for a roof pitch of less and 3/12, or fourteen (14) feet for a roof pitch between 3/12 and 6/12 or sixteen (16) feet for a roof pitch of 6/12 and greater, and shall be limited to one story.” This exact text is later repeated for units on lot splits. However, this is a height restriction far below standard single-family development standards in Dana Point, which is noted in Section 9.09.030 Table Item F as being 28 feet and two stories. This limitation, to the extent it prevents development of equivalent floor area compared to that allowed under the existing Development Standards as described above, reduces the intensity of land use and represents a reduction in residential development capacity. (Gov. Code, §

66300, subd. (b)(1)(A).) Therefore, the City must remove this reference or amend it to state that Single Family Residential Duplex and Split Lot primary dwelling structures may be the same height as the underlying zoning permits for single-family development. Be advised that in practice, preventing two-story structures means the lot coverage will necessarily increase to accommodate the units.

- Sec. 9.72.004 (I); Sec 7.37.004 (K) – *800 Square Foot Maximum* – The Ordinance states, “For all Single Family Residential Duplexes, the Total Floor Area shall not exceed 800 square feet.... In no event shall the two Residential Units located upon the parcel exceed 1600 square feet.” The Ordinance later states, “For all residential units constructed upon parcel(s) subject to or created by an Urban Lot Split, the Total Floor Area shall not exceed 800 square feet....”

However, this represents a reduction in the intensity of land use in violation of Government Code section 66300, subdivision (b)(1)(A), as any large lot would see an extreme reduction in the developable floor area compared to existing zone development standards. Furthermore, this requirement extends the size limitations imposed on primary units constructed under SB 9 to any existing primary unit on the lot (i.e., a single-family residence). In doing so, both the 1,600 square-foot parcel maximum and the 800 square-foot unit maximum represent a dramatic reduction in development potential and, therefore, violate the HCA. The City must remove these requirements.

- Sec. 9.72.004 (I); Sec 7.37.004 (K) – *Bedroom Limitation* – The Ordinance states, “For all Single Family Residential Duplexes... [each unit] shall not exceed... 1 bedroom.” The Ordinance later states, “For all residential units constructed upon parcel(s) subject to or created by an Urban Lot Split, the Total Floor Area shall not exceed... one bedroom.” However, limiting the number of bedrooms may constrain housing choice and result in discriminatory effects on families with children, people with disabilities, and other protected groups in violation of state and federal fair housing laws, including but not limited to Government Code section 65008, subdivisions (a)(1)(A) and (b)(1)(B)(i). Furthermore, reducing the number of people that may reside in a dwelling unit also constitutes a reduction in the intensity of land use and thus a violation of the HCA per Government Code section 66300, subdivision (b)(1)(A). Therefore, the City must revise this section to avoid limiting the occupancy of housing units based on familial status or other protected characteristics.

The inconsistencies described above are additionally problematic because section 9.72.006 of the Ordinance makes “[a]ny person responsible for violating” the Ordinance “guilty or an infraction or a misdemeanor.” Section 7.37.005 provides for additional civil penalties. In other words, the Ordinance criminalizes conduct that may be consistent with state law.

Conclusion

Separately and collectively, these development standards and other requirements reduce the intensity of land use, raising concerns under the HCA. They also raise concerns under Housing Element Law, State ADU Law, Land Use Discrimination Law, and SB 9 itself.

HCD would like to remind the City that under Government Code section 65585, subdivision (j), HCD has enforcement authority over the HCA, Housing Element Law, State ADU Law, Land Use Discrimination Law, Rental Inclusionary Housing Law, and other housing laws. Accordingly, HCD may review local government actions to determine consistency with these and other laws. (Gov. Code, § 65585, subd. (i).) If HCD finds that a city's actions do not comply with state law, HCD may notify the California Office of the Attorney General. (Gov. Code, § 65585, subd. (j).)

Thank you for your prompt attention to this matter. HCD recommends that the City conduct a comprehensive review of the HCA and other applicable state housing laws² and update its SB 9 implementing ordinance accordingly. Additionally, HCD requests that the City respond in writing within 30 days of receipt of this letter. The City's response should include a proposed timeline for corrective actions. If you have questions or need additional information, please contact Mike Van Gorder, of our staff, at mike.vangorder@hcd.ca.gov.

Sincerely,



David Zisser
Assistant Deputy Director
Local Government Relations and Accountability

² While it is beyond the scope of this letter to outline conflicts between the Ordinance and SB 9 (Gov. Code, §§ 65852.21, 66411.7) that do not implicate other housing laws, HCD notes that the following sections of the Ordinance are in plain conflict with SB 9: 9.72.003 (C)(2); 9.72.004 (C), (E), (J)(10), (I); 7.37.004 (A)(11), (D), (I), (K). Please refer to HCD's SB9 Fact Sheet, available at <https://www.hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf>, to bring the Ordinance into compliance with state law.