

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

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January 13, 2023

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

Dear Belinda Deines:

**RE: Review of the City of Dana Point's Accessory Dwelling Unit (ADU) Ordinance under ADU Law (Gov. Code, § 65852.2)**

Thank you for submitting the City of Dana Point's (City) accessory dwelling unit (ADU) Ordinance No. 21-06 (Ordinance) adopted August 23, 2021, to the California Department of Housing and Community Development (HCD). HCD has reviewed the Ordinance and submits these written findings pursuant to Government Code section 65852.2, subdivision (h). HCD finds that the Ordinance does not comply with section 65852.2 in the manner noted below. Under that statute, the City has up to 30 days to respond to these findings. Accordingly, the City must provide a written response to these findings no later than February 13, 2023.

The Ordinance addresses many statutory requirements; however, HCD finds that the Ordinance does not comply with State ADU Law in the following respects:

- Section 9.07.210(C)(1) – *Standards for ADUs* – The Ordinance states, “Any construction, establishment, alteration, enlargement, or modification of an Accessory Dwelling Unit shall comply with the requirements of this Section, the underlying development standards in the zoning district in which the lot is located, as well as any applicable overlay district...” ADU development standards may be imposed by the local agency with an adopted ADU ordinance. These standards within an underlying zone may apply when noted in the adopted ADU ordinance, but shall not be more restrictive than those contained in state statute. (Gov. Code, § 65852.2, subs. (a)(8)) Furthermore, local development standards provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a) through (d), cannot preclude the approval of ADUs created under subdivision (e). Therefore, the City must amend this section of the Ordinance to clarify that state statute prevails in cases of a conflict between local zoning and overlay districts and State ADU Law.

- Section 9.07.210(D)(4)(a) – *Permit Revocation* – The Ordinance states that “Subject to Government Code section 65852.2 (n), an Accessory Dwelling Permit may be revoked if the Accessory Dwelling Unit violates one or more requirements of this section or any other applicable portions of the Dana Point Municipal Code.” This provision raises concerns as it is unclear to its exact meaning and under what circumstances it would apply. Assuming building permits are issued following review and approval, it remains unclear what circumstances would allow for revocation. The City should remove the phrase “or any other applicable portions of the Dana Point Municipal code”, or in the alternative, specify the “applicable portions,” and amend that the application of Municipal Code is subject to conformity with State ADU Law.
- Section 9.07.210(E)(1) – *Number of ADUs Allowed per Site* – “An applicant may construct one (1) attached ADU or one (1) attached JADU per lot...” This reference is outdated. Current Government Code section 65852.2, subdivision (e)(1)(A), provides for “One accessory dwelling unit *and* one junior accessory dwelling unit per lot” (emphasis added). Therefore, the City must change “or” to “and.” Additionally, Government Code section 65852.2, subdivision (e)(1) states that a local agency shall ministerially approve an application to create any of the following ADUs listed from subdivision (e)(1)(A) through (D). The City must amend its ordinance to also allow for a combination of subdivision (e)(1)(A) and (B) or (e)(1)(C) and (D).

The Ordinance also incorrectly references “attached” ADUs or Junior ADUs (JADUs) as subject to mandatory approval pursuant to Government Code section 65852.2, subdivision (e). However, subdivision (e) only addresses ADUs and JADUs that are created within the proposed or existing space of a primary dwelling, or ADUs created within an accessory structure (i.e., conversions), and newly created detached ADUs. Subdivision (e) does not address “attached ADUs.” Therefore, the City must remove the reference to “attached ADUs” from Section 9.07.210 (E) of the Ordinance.

- Section 9.07.210(E)(1)(a) – *Accessory Structures and JADUs* – The Ordinance states that “The ADU or JADU must be wholly contained within the proposed space of a proposed single family dwelling, or within the existing space of an existing single-family dwelling or an existing accessory structure.” However, Government Code section 65852.2 (e)(1)(A)(iv) additionally requires that JADUs comply with section 65852.22. Section 65852.22, subdivision (a)(4) requires that JADUs be constructed “within the walls of the proposed or existing single-family residence. For the purposes of this paragraph, enclosed uses within the residence, such as attached garages, are considered part of the proposed or existing single-family residence.” Therefore, JADUs may be constructed in an attached garage. Note that JADUs may not be created in any other

accessory structure or detached garage. The City must amend the Ordinance to allow JADUs to be created only within the single-family dwelling or attached garage, while ADUs may be created within a primary dwelling or within an accessory structure.

- Sections 9.07.210(E)(1)(f), 9.07.210(E)(2)(e), 9.07.210(F)(2), 9.07.210(F)(3) – *Deed Restriction* – The Ordinance currently prohibits the separate sale of an ADU. However, Government Code section 65852.26 creates a narrow exception to allow separate conveyance of an ADU to a qualified buyer if the property was built or developed by a qualified nonprofit corporation, among other things. The City must amend the Ordinance to add the exception.
- Sections 9.07.210(E)(1)(h) and (E)(3)(g) – *Maximum Size of an Attached ADU* – The Ordinance states “The total floor area of an attached ADU shall be limited to 50% of living area of the primary dwelling.” It later requires that “the total floor area of [a converted ADU in a multifamily building] be limited to 50% of the average living area of existing Multi-Family dwelling units.” As stated above “attached ADUs” are not subject to mandatory approval pursuant to Subdivision (e) and must be removed from Section 9.07.210 (E). However, Government Code section 65852.2, subdivision (c)(2)(C), which would apply to “attached ADUs”, prohibits “Any requirement for a zoning clearance or separate zoning review or 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, front setbacks, and minimum lot size, for either attached or detached dwellings that does not permit at least an 800 square foot accessory dwelling unit with four-foot side and rear yard setbacks to be constructed in compliance with all other local development standards.” Therefore, the City must add language to clearly state that an attached ADU may not be required to be smaller than 800 square feet.

Furthermore, the conversion of non-livable space within multifamily dwellings shall allow for at least one ADU and up to 25 percent of the existing multifamily dwelling units per Government Code section 65852.2, subdivision (e)(1)(C). Therefore, the 50 percent coverage area requirement of the Section 9.07.210 (E)(3)(g) must be amended to avoid conflict with the provision found in subdivision (e)(1)(C).

- Sections 9.07.210(E)(1)(i) and 9.07.210(F)(6) – *Maximum Height* – The Ordinance states “The maximum height for a JADU or ADU attached to a primary dwelling shall be the height of the underlying zoning district.” ADU statute restricts local agencies from requiring the height of attached and detached ADUs, to be less than either 16, 18, or 25 feet pursuant to Government Code section 65852.2, subdivisions (c)(2)(D) and (e)(1)(B)(ii).

Where the height limitations in an underlying zoning district would restrict the maximum height to less than state requirements, the Ordinance must be amended to allow for the minimum height requirements in State ADU Law. Additionally, please note that the creation of ADUs or JADUs from proposed or existing space within the primary residence and the creation of ADUs from accessory structures are not subject to additional height limitations.

- Section 9.07.210(E)(1)(g) and Section 9.07.215(D)(4)(j) – *Fire Walls* – The Ordinance states “ADUs... attached to the primary dwelling shall contain a fire wall sufficient for fire retention.” Fire walls are required in several sections including but not limited to sections 9.07.210(E)(3)(b), 9.07.210(E)(3)(f), 9.07.210(F)(9)(d), and 9.07.215(D)(4)(j). The additional requirement for attached ADUs may exceed those imposed by the City on other residential development, and thus, the Ordinance may be in violation of Government Code section 65852.2, subdivision (a)(8), which states that “no additional standards, other than those provided in this subdivision, shall be used or imposed.” For HCD to determine compliance with State ADU Law, please provide a) whether every wall attached to a residential building required to be a fire wall, and b) whether fire walls are required between a single-family home and an attached garage. Please include any citations or references to supporting statute, regulation or ordinance citation.
- Sections 9.07.210(E)(2)(g), 9.07.210(E)(4)(f) and 9.07.210(F)(7) – *Separation from Other Structures* – The Ordinance states that “The detached ADU shall maintain a ten (10) foot separation from the primary dwelling and any accessory structure(s) located on the property.” However, Government Code section 65852.2, subdivisions (e)(1)(B) and (D) require that a local agency shall ministerially approve an application for detached ADUs. Therefore a 10-foot separation requirement cannot preclude an ADU created under these subdivisions and the City must amend the Ordinance to either remove this requirement or impose 10-foot separation only when feasible to allow for an 800 square foot detached ADU.
- Sections 9.07.210(E)(1)(j), 9.07.210(E)(2)(h), 9.07.210(E)(3)(h), 9.07.210(E)(4)(g), 9.07.210(F)(9)(k), 9.07.215(D)(4)(g) – *Homeowner’s Association Approval* – The Ordinance states that ADUs and JADUs “...shall be approved by the applicant's homeowner's association, if applicable, prior to an application being submitted to the City.” It also requires “written evidence of the HOA’s approval.” However, Government Code section 65852.2, subdivision (a)(6) states that a “a local agency shall provide an approval process that includes only ministerial provisions

for the approval of accessory dwelling units and shall not include any discretionary processes, provisions, or requirements for those units, except as otherwise provided in this subdivision.” Therefore, the City cannot add an additional requirement for a Homeowner Association approval and must remove this section.

- Section 9.07.210(E)(3) – *Attached Multifamily ADU Allowance* – The Ordinance states that “An applicant shall be allowed to construct one (1) attached ADU within each multi-family dwelling structure.” As mentioned above “attached” ADUs are not found in Government Code section 65852.2, subdivision (e). Subdivision (e)(1)(C) allows for ADUs to be built within portions of an existing multifamily dwellings that are not used as livable space these are *conversion units*. Government Code section 65852.2, subdivision (e)(1)(C)(ii) requires that “A local agency shall allow **at least one** [conversion] accessory dwelling unit within an existing multifamily dwelling and shall allow **up to 25 percent** of the existing multifamily dwelling units.” Therefore, the allowance for only one unit violates state statute. Although Ordinance Section 9.07.210 (E)(3)(e) allows for up to 25 percent of existing multifamily dwellings, the approval is subject to additional development standards pursuant to Section 9.07.210 (H) process. This additional approval requirement violates the ministerial approval requirement pursuant to Government Code section 65852.2 (e)(1). The City must update this section with the language in subdivision (e)(1)(C)(ii) that permits “at least one” and “up to 25 percent of existing” units when ADUs are created out of converted space in a multifamily dwelling and remove section (E)(3)(e).
- Section 9.07.210(E)(3)(d) and (E)(4)(c) – *Certificate of Occupancy* – The Ordinance requires that, “A certificate of occupancy had been issued for the multi-family dwelling on or before January 1, 2020.” This section limits the construction of ADUs to multi-family dwellings that have been issued a certificate of occupancy on or before January 1, 2020. Government Code section 65852.2 (e)(1)(C) and (D) provides for the ministerial approval of ADU applications in multifamily dwelling structures that meet the requirements and conditions set forth in these subdivisions. A certificate of occupancy is not a requirement or condition for the ministerial approval for ADUs pursuant to this subdivision. Therefore, the City must remove this section.
- Section 9.07.210(F)(1)(a) and (F)(1)(c) – *Local Restrictions* – The Ordinance states “Due to the public safety concerns associated with water, erosion, and flood hazards, as well as the proliferation of existing non-conforming structures within the City’s Flood Plain Overlay Districts, no attached or detached ADU shall be located in the City’s Flood Plain

Overlay District without obtaining a Site Development Permit pursuant to Section 9.07.210(H).”

It later states “Due to public safety concerns with hillside stability, small, narrow steep lots, drainage, and related traffic flow conditions, no attached or detached ADUs shall be constructed on any lot which contains a hillside condition, which shall mean a lot with a topographic slope percentage, as defined in Section 9.75.190 of this Dana Point Zoning Code, either front to rear or side to side, of twenty (20) percent or greater, calculated in accordance with Section 9.05.110(a)(4)(A), without obtaining a Site Development Permit pursuant to Section 9.07.210(H).”

The Ordinance does not indicate how ADUs impact public safety concerns associated with water, erosion, flood hazards, slope, or traffic safety, nor the proliferation of existing nonconforming structures. State Law requires local agencies to “Designate areas within the jurisdiction of the local agency where accessory dwelling units may be permitted. The designation of areas may be based on the adequacy of water and sewer services and the impact of accessory dwelling units on traffic flow and public safety.” (Gov. Code, § 65852.2, subd. (a)(1)(A)). But the City has not established the impact of ADUs to public safety in the Flood Plain Overlay District or on lots with Hillside Conditions. Additionally, the Site Development Permit process is a discretionary process that violates Government Code section 65852.2, subdivision (a)(6) that requires “a local agency shall provide an approval process that includes only ministerial provisions for the approval of accessory dwelling units and shall not include any discretionary processes, provisions, or requirements for those units, except as otherwise provided in this subdivision.” Therefore, the City must remove this section of the Ordinance to comply with State ADU Law.

- Section 9.07.210(F)(1)(d) – *Existing Non-Conforming Structure or Use* – The Ordinance states “No attached or detached ADU shall be constructed on any lot which has an existing development constructed upon it, which is non-conforming with respect to the City's current use or development standards without obtaining a Site Development Permit pursuant to Section 9.07.210(H).” However, Government Code section 65852.2, subdivision (d)(2) states that “the local agency shall not deny an application for a permit to create an accessory dwelling unit due to the correction of nonconforming zoning conditions, building code violations, or unpermitted structures that do not present a threat to public health and safety and are not affected by the construction of the accessory dwelling unit.” Therefore, the City must remove this section to comply with State ADU Law.
- Section 9.07.210(F)(1)(e) – *Location Restriction, Fire* – “No attached or detached ADU shall be constructed on any lot located within the City's Fire

Ember Zone without obtaining a Site Development Permit pursuant to Section 9.07.210(H)...” The Site Development Permit process is discretionary in violation of Government Code section 65852.2, subdivision (a)(6) that requires “a local agency shall provide an approval process that includes only ministerial provisions for the approval of accessory dwelling units and shall not include any discretionary processes, provisions, or requirements for those units, except as otherwise provided in this subdivision.” The City of Dana Point, in conjunction with the Orange County Fire Authority, and the State of California Office of the State Fire Marshal has adopted the current version of the Very High Fire Hazard Severity Zone (VHFHSZ), Ember Zone 1 and Ember Zone 2 Fire Areas.

However, while CalFire maps establish the Very High Fire Hazard Severity Zones that impact building design standards (such as required building materials), these zones do not limit the locations where ADUs may be permitted. The Very High Fire Hazard Severity Zone map of Dana Point provided on the Cal Fire website states, “The California Building Commission adopted California Building Code Chapter 7A requiring new buildings in VHFHSZs to use ignition resistance of buildings, especially from firebrands. The updated very high fire hazard severity zones will be used by building officials for *new building materials* in the Local Responsibility Area. The updated zones will also be used to identify property whose owner must comply with *natural hazards disclosure requirements* at time of property sale and 100- foot defensible space clearance.” (Emphasis added.) These building standards and requirements do not prohibit the siting of ADUs. Therefore, the City must remove this discretionary permit process for ADU applications within the Fire Ember Zone.

- Section 9.07.210(F)(5) – *Required Setbacks*: The Ordinance states that all ADUs “must also strictly comply with the front yard setback requirement of the underlying zoning district....” However, Government Code section 65852.2, subdivision (c)(1)(C) states that a local agency may not impose “Any requirement for...front setbacks that would not permit at least an 800 square foot accessory dwelling unit with four-foot side and rear yard setbacks to be constructed in compliance with all other local development standards.”. Therefore, ADUs may be located partially or entirely in the front setback. The City must amend the Ordinance to comply with State ADU Law.
- Section 9.07.210(F)(8)(d) – *Limitation on the Number of Bedrooms* – The Ordinance states, “An ADU shall contain no more than two bedrooms.” Limiting the number of bedrooms within an ADU 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). Therefore, the City should remove this section.

- Section 9.07.210(F)(9)(f) – *Additional Conditions* – The Ordinance states that “Any attached or detached ADU shall be architecturally consistent with the primary residential or multi-family dwelling. In addition, all ADUs shall be designed and sited to: (i) be similar to the primary dwelling with respect to architectural style, roof pitch, color, and materials” However, “architecturally consistent” and “similar” may be subjective in application, and therefore may violate Government Code section 65852.2, subdivision (a)(6), that requires ministerial approval and prohibits discretionary processes. Subdivision (a)(1)(B)(i) allows the City to impose objective standards on dwelling units and pursuant to subdivision (j)(7), objective standards mean “standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal.” Therefore, the City must amend or clarify the Ordinance to comply with State ADU Law.

Section 9.07.210(F)(9)(g) – *Solar Panels* – The Ordinance states that “Solar panels shall be required for any attached or detached ADU.” Be advised that newly constructed, non-manufactured, detached ADUs may be subject to the California Energy Code requirement (excluding manufactured homes) to provide solar systems. Per the California Energy Commission (CEC), the solar systems can be installed on the ADU or on the primary dwelling unit. ADUs that are constructed within existing space, or as an addition to existing homes, including detached additions where an existing detached building is converted from non-residential to residential space, are not subject to the Energy Code requirement to provide solar systems. (ADU July 2022 Handbook, page 23.) The City should ensure that its solar requirements comply with the California Energy Code.

- Section 9.07.210(F)(9)(h) – *Historic Register* – The Ordinance states that an ADU shall not cause a “substantial adverse change on any real property that is listed in the National Register of Historic Places, and/or California Register of Historic Places, and/or the City of Dana Point Historic Architectural Resources Inventory.” This is not consistent with State ADU Law. Under Government Code section 65852.2 subdivision (a)(1)(B)(i), an ordinance may “impose standards on accessory dwelling units ... that prevent adverse impacts on any real property that is listed in the California Register of Historic Resources.” Locally registered resources that are not also state listed would not fall within this provision. The Ordinance should be revised to limit sites to those allowed by State ADU Law.



- Section 9.07.210(F)(9)(j) – *Placement Limitations* – The Ordinance requires “detached ADUs to be located only in the rear ½ of the parcel and attached ADUs to be located only in the rear ½ of the primary dwelling.” However, Government Code section 65852.2, subdivision (c)(2)(C), prohibits “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, front setbacks, and minimum lot size, for either attached or detached dwellings that does not permit at least an 800 square foot accessory dwelling unit with four-foot side and rear yard setbacks to be constructed in compliance with all other local development standards.” Because the subdivision prohibits restrictions on front setback requirements, detached and attached ADUs may also be placed in the front of the parcel and front half of the primary dwelling. Therefore, the City must remove this limitation.
- Section 9.07.210 (H) – *Nonministerial Process* – The Ordinance has numerous references to Section 9.07.210(H) as a discretionary process to be used in the event of an ADU application exceeds standards in the Ordinance: Section 9.07.210 subdivision (H) describes a “discretionary Site Development Permit in accordance with Dana Point Zoning Code Chapter 9.71.” Unless these Site Development Permits are required by the City’s Local Coastal Plan (LCP), this violates Government Code section 65852.2, subdivision (a)(6) which requires that “a local agency shall provide an approval process that includes only ministerial provisions for the approval of accessory dwelling units and shall not include any discretionary processes, provisions, or requirements for those units, except as otherwise provided in this subdivision. Therefore, the City should either clarify any applicable LCP requirements or remove all references to Section 9.07.210(H) for any ADU built in accordance with Government Code section 65852.2, subdivision (a) or (e).
- Section 9.07.215(C)(2) – *Application Processing* – “An application for a JADU Permit will be deemed complete once all information required by the application form has been submitted to the Community Development Department, including all required fees, and all changes required to building permit plans submitted to the Community Development Department have been made to the satisfaction of the Director.” However, the “satisfaction of the Director” is discretionary and subjective. Government Code section 65852.22, subdivision (c)(1) states “an application for a permit pursuant to this section shall, notwithstanding Section 65901 or 65906 or any local ordinance regulating the issuance of variances or special use permits, be considered ministerially, without discretionary review or a hearing.” Therefore, the City must remove the referenced phrase.

- Section 9.07.215(C)(3)(b) – *Application Approval* – The Ordinance states the application shall be approved “if the proposed Junior Accessory Dwelling Unit complies with the requirements of this section and the underlying development standards in the zoning district as well as any applicable overlay district in which the lot is located. It is difficult to determine what underlying development standards in the zoning district or other applicable overlay district requirements would apply to improvements located entirely within an existing or proposed structure. Standards within an underlying zone may apply when noted in the adopted ADU ordinance but cannot be more restrictive than those contained in state statute. The City should clarify underlying development standards in the zoning district, as well as any applicable overlay district in which the lot is located, will apply if they are not more restrictive than those contained in state statute.
- Section 9.07.215(D)(4)(c) – *Nonconforming Dwelling* – “No JADU shall be constructed in any dwelling that is non-conforming with respect to structure or use.” However, Government Code section 65852.22 (d) states that “a local agency shall not deny an application for a permit to create a junior accessory dwelling unit pursuant to this section due to the correction of nonconforming zoning conditions, building code violations, or unpermitted structures that do not present a threat to public health and safety and that are not affected by the construction of the junior accessory dwelling unit.” Therefore, the City must remove this section of the Ordinance.
- Section 9.07.215(D)(6) – *Associated Permits* – “If an application for a JADU triggers the requirement for a discretionary or ministerial permit other than a JADU Permit and/or a building permit (including but not limited to a Site Development Permit, Coastal Development Permit and/or Conditional Use Permit), those associated permits must be applied for and approved prior to application for a JADU Permit. The process for obtaining the associated permit(s) shall be as set forth in Title 9 of the Dana Point Zoning Code.” However, JADUs must be approved ministerially, without discretionary review or a hearing, per Government Code section 65852.2, subdivision (a)(3). An application for a permit pursuant to this section shall, notwithstanding Section 65901 or 65906 or any local ordinance regulating the issuance of variances or special use permits, be considered ministerially, without discretionary review or a hearing.” (Gov. Code, § 65852.2, subd. (a)(3) and Gov. Code, § 65852.22, subd. (c)). Therefore, the City cannot require the pre-application and approval of these associated permits, as a condition for accepting an application for a JADU permit. It is also unclear how a JADU located entirely within a single-family dwelling would trigger a discretionary permit. The City must remove this section of the Ordinance.

In response to the findings in this letter, and pursuant to Government Code section 65852.2, subdivision (h)(2)(B), the City must either amend the Ordinance to comply with State ADU Law or adopt the Ordinance without changes. Should the City choose to adopt 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. Accordingly, the City's response should provide a plan and timeline to bring the Ordinance into compliance.

Please note that, pursuant to Government Code section 65852.2, subdivision (h)(3)(A), if the City fails to take either course of action and bring the Ordinance into compliance with State ADU Law, HCD may notify the City and the California Office of the Attorney General that the City is in violation of State ADU Law.

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](mailto: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