

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

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April 11, 2024

Kevin Gardiner, Community Development Director
Burlingame Community Development Department
City of Burlingame
501 Primrose Road
Burlingame, CA 94010

Dear Kevin Gardiner:

**RE: Review of Burlingame's Accessory Dwelling Unit (ADU) Ordinance under
State ADU Law (Gov. Code, §§ 66313 - 66342)**

Please Note: As of March 25, 2024, with the Chaptering of Senate Bill (SB) 477 (Chapter 7, Statutes of 2024), the sections of Government Code relevant to State ADU and JADU Law have been re-numbered (Enclosure 1).

Thank you for submitting the City of Burlingame's (City) accessory dwelling unit (ADU) Ordinance No. 2000 (Ordinance), adopted October 28, 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 66326, subdivision (b)(1). HCD finds that the Ordinance does not comply with section State ADU and junior accessory dwelling unit (JADU) Law in the manner noted below. Pursuant to Government Code section 66326, subdivision (b)(1), 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 May 11, 2024.

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

1. Section 25.48.030 B.1. – *ADU Size* – The Ordinance states: "An accessory dwelling unit may be between 150 and 1,000 square feet..." However, ADUs converted from existing accessory structures are not subject to size requirements.¹ Therefore, the City should amend the Ordinance to note correct size requirements for converted ADUs.

¹ Gov. Code § 66323, subd. (a)(1)(A)

2. Section 25.48.030 B.1.a; B.1.b; B.1.c - *ADU Definitions* – The Ordinance provides definitions for several different ADU types that allow ADUs to be developed within, or as an expansion of, existing primary dwelling units. However, ADUs may also be constructed as a physical expansion of a proposed primary dwelling unit.² Therefore, the City must amend the Ordinance to define attached, detached, and interior ADUs to allow for these ADU types within proposed primary dwelling units.
3. Section 25.48.030 B.4.b – *JADU Definition* – The Ordinance defines “JADU” as a residential dwelling unit that “...Is contained entirely within an existing or proposed single-unit dwelling.” However, JADUs may also be constructed in enclosed uses within the residence, such as attached garages.³ Therefore, the City should amend the Ordinance to clarify the full scope of JADU development potential.
4. Section 25.48.030 B.4.c – *JADU Definition* – The Ordinance defines “JADU” as a residential dwelling unit that: “Includes its own separate sanitation facilities... or may share sanitation facilities with the existing or proposed single-unit structure. However, JADUs without a separate bathroom shall include a separate entrance from the main entrance to the structure, with an interior entry to the main living area. Therefore, the City should amend the Ordinance to clarify this requirement.
5. Section 25.48.030 C.3. – *Applications and Processing* – The Ordinance specifies that: “Within 60 days of receipt of a complete application, the Community Development Department staff shall ministerially process for approval any application for an ADU or JADU permit pursuant to this chapter.” However, Government Code section 66317, subdivision (a) states that “If the local agency has not approved or denied the completed application within 60 days, the application shall be deemed approved.” The City fails to state that ADU denials must occur on a 60-day time frame like ADU approvals, and the City fails to acknowledge that ADU applications are deemed approved after 60 days if the City has not approved or denied the application within that timeframe. Therefore, the City should amend the Ordinance to clarify the full nature of the ministerial approval process.
6. Section 25.48.030 E.1; E.2. – *Revocation of Permit* – The Ordinance specifies the grounds on which an ADU or JADU permit can be revoked and how notice of such revocation will occur. HCD requests further information regarding the permit revocation process. Please clarify, at minimum, how the City would ascertain whether an ADU is used for residential purposes and the specific permits that are revoked under this section of the Ordinance.

² Gov. Code § 66314 subds. (d)(2), (d)(3); § 66315; § 66323 subd. (a)(1)(A)

³ Gov. Code § 66333 (d)

7. Section 25.48.030 D. and E.3.– *Appeal* – The Ordinance states that ADU applicants “... may appeal the Director’s denial of request... The appeal shall be heard by the Planning Commission in a public hearing pursuant to the procedures established for discretionary actions in Chapter 25.100.” Local Agencies may adopt discretionary processes to allow for less restrictive ADU requirements.⁴ However, the Ordinance does not clarify that discretionary approval processes may not be applied until the denial steps outlined in Government Code section 66317, subdivision (b) are followed. Jurisdictions with compliant ADU ordinances may apply additional processes to further the creation of ADUs that do not otherwise comply with the minimum standards necessary for ministerial review. Therefore, the City must amend the Ordinance to more closely illustrate when discretionary approval processes may occur.
8. Section 25.48.030 G.4.b; G.4.c.iii – *30 Day Rental Terms* – The Ordinance prohibits rental terms for JADUs of “fewer than 30 consecutive calendar days.” However, JADUs on lots with single-family dwellings are approved by right so long as they comply with the requirements Article 3.⁵ Article 3 contains no restrictions on rental terms for JADUs.⁶ As a result, JADUs need not be rented for more than 30 days to gain ministerial approval. Therefore, the City must amend the Ordinance to remove this condition for JADU approval.
9. Section 25.48.030 G.5. – *Kitchen Removal* – The Ordinance states: “If an ADU or JADU which was created within a single-unit dwelling, accessory structure or multi-unit dwelling structure is required to be removed or is voluntarily removed, the kitchen facility shall be removed, and the space shall be converted back to its original use.” However, if an ADU kitchen facility must be removed due to enforcement of building standards, the owners of that ADU may request up to a five-year delay in enforcement of building standards for ADUs that meet certain criteria”.⁷ Therefore, the City should amend the Ordinance to clarify applicants’ ability to request this enforcement delay.
10. Section 25.48.030 G.3.a; G.7.a. – *Separate Conveyance* – The Ordinance states: “The ADU or JADU shall not be sold separately from the primary dwelling.” However, Government Code section 66341 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. Additionally, local agencies may adopt a local ordinance to allow the separate conveyance of the primary dwelling unit and accessory dwelling unit or units as condominiums.⁸ Therefore, the City must amend the Ordinance to note this exception and allow separate conveyance of ADUs.

⁴ Gov. Code § 66325, subd. (b)

⁵ Gov. Code § 66323, subd. (a)(1)(D)

⁶ Gov. Code §§ 66333 - 66339

⁷ Gov. Code § 66331

⁸ Gov. Code § 66342

11. Section 25.48.030 H.1. – *ADU Allowance* – The Ordinance states: “Only one ADU shall be permitted per lot which contains an existing or proposed single-unit dwelling.” However, pursuant to Government Code section 66323, subdivision (a), “Notwithstanding Sections 66314 to 66322, inclusive, a local agency shall ministerially approve an application...to create any of the following: (1) One accessory dwelling unit and one junior accessory dwelling unit per lot with a proposed or existing single-family dwelling...(A) The accessory dwelling unit or junior accessory dwelling unit is within the proposed space of a single-family dwelling or existing space of a single-family dwelling or accessory structure.” Additionally, subdivision (a)(2) permits “One detached, new construction, accessory dwelling unit that does not exceed four-foot side and rear yard setbacks.” The use of the term “any” followed by an enumeration of by-right ADU types permitted indicate that any of these ADU types can be combined on lots with existing or proposed single-family dwellings. ADU Law does not use “or” or “one of” to indicate only one or another would be applicable to the exclusion of the other.

Thus, if the local agency approves an ADU that is created from existing (or proposed) space of a single-family dwelling, or created from an existing accessory structure, and the owner subsequently applies for a detached ADU permit (or vice versa), which meets the size and setback requirements, pursuant to the Government Code section 66323 subdivision (a), the local agency cannot deny a permit for an ADU under this section. This allows a homeowner who meets specified requirements to create one (1) converted ADU, one (1) detached, new construction ADU, and one (1) JADU, in any order, **totaling three units**. This standard also applies to ADUs created pursuant to Government Code section 66323, subdivisions (a)(3) and (4) on lots with proposed or existing multifamily dwellings. Therefore, the City must amend the Ordinance to comply with State ADU Law.

12. Section 25.48.030 H.4. – *Floor Area Ratio and Lot Coverage* – The Ordinance states that: “An ADU greater than 850 square feet shall comply with the floor area ratio and lot coverage regulations as specified by the applicable zoning district.” While local agencies may impose regulations based on zoning district requirements, these may only be objective regulations that do not conflict with existing, superseding State ADU Law.⁹ Therefore, the City must either remove this language or amend the Ordinance to clarify that State ADU Law supersedes more restrictive floor area ratio and lot coverage imposed by local zoning districts.

13. Section 25.48.030 H.5.a.iii., H.6.A.ii., and J.3. – *Detached ADU Height* – The Ordinance states: “... for detached ADUs that are not greater than 850 square feet and no taller than 16 feet, no more than four-foot side or rear setbacks shall be required.” The Ordinance also requires that detached ADUs have a maximum height of 16 feet. These appear to reference height requirements for ADUs built

⁹ Gov. Code § 66313 subd. (h), § 66314 subd. (b)(1), § 66317 subd. (c)

pursuant to Government Code 66323, subdivisions (a)(2)(A) and (a)(4)(A). However, such ADUs are only subject to height limitations as provided in subparagraph (A), (B), or (C) of paragraph (4) of subdivision (b) of Section 66321.¹⁰ For example, detached ADUs on a lot with an existing or proposed multifamily, multistory dwelling must be allowed 18 feet in height. Therefore, the City must amend the Ordinance to note these and other less restrictive height requirements in accordance with State ADU Law.

14. Section 25.48.030 H.5.a.iii – *Detached ADU Setbacks* – The Ordinance states that “If any portion of the detached ADU is located forward of the rear 40 percent of the lot, it shall comply with the setback requirements of the applicable zoning district in which it is located.” However, regardless of ADU size or position, no setback shall be required for an existing living area or accessory structure or a structure constructed in the same location and to the same dimensions as an existing structure that is converted to an accessory dwelling unit or to a portion of an ADU.¹¹ Additionally, a setback of no more than four feet from the side and rear lot lines shall be required for an ADU that is not converted from an existing structure or a new structure constructed in the same location and to the same dimensions as an existing structure.¹² Therefore, the City must amend the Ordinance to clarify these conditions, regardless of the setback requirements imposed in the “applicable zoning district”.
15. Section 25.48.030 H.5.b. and J.4. – *Separation* – The Ordinance states: “There shall be a minimum four-foot separation between a detached ADU and any other structure on the lot, as measured between the exterior walls of the structures.” However, this requirement cannot preclude the development of ADUs pursuant to Government Code section 66323, subdivisions (a)(2) and (a)(4). Therefore, the City must amend the Ordinance to note these exceptions.
16. Section 25.48.030 H.6.a.i. – *Detached ADU Stories* – The Ordinance states: “All detached ADUs shall be limited to one story in height and shall not be constructed above detached garages or detached accessory structures except for accessory dwelling units created entirely within an existing legal two-story detached accessory structure.” First, Government Code section 66321, subdivision (b)(4)(D) states that: “This clause shall not require a local agency to allow an accessory dwelling unit to exceed two stories,” indicating that local agencies must permit ADUs with two stories and no other deficiencies. Additionally, local agencies may not prevent ADUs from being constructed above detached garages or accessory structures if they meet height requirements stipulated by Government Code section 66321, subdivision (b)(4). Therefore, the City must remove this language from the Ordinance.

¹⁰ Gov. Code § 66323, subds. (a)(2)(A) & (a)(4)(A)

¹¹ Gov. Code § 66314, subd. (d)(7)

¹² Ibid.

17. Section 25.48.030 H.6.a.iii. and iv. – *Plate Height* – The Ordinance makes several references to “plate height” requirements for detached ADUs. However, section 202 of the California Building Code (CBC) defines “Height, Building” as “the vertical distance from grade plane to the **average height** of the highest roof surface”. Therefore, the City amend the Ordinance to measure building height consistent with the CBC’s definition.
18. Section 25.48.030 H.9. and H.10.– *Windows, Skylights, Balconies, and Decks* – The Ordinance requires that windows and glazed openings shall be located at least three feet from any property line and that skylights shall be allowed on sloping roofs facing interior yards, on sloping roofs facing side yards if the skylight is located at least ten feet from the property line, and on flat roofs. The Ordinance further stipulates that balconies, second story decks and rooftop terraces are prohibited for all ADUs. However, these requirements cannot preclude the development of ADUs pursuant to Government Code section 66323, subdivision (a). Therefore, the City must amend the Ordinance to note these exceptions.
19. Section 25.48.030 I.1. – *JADU Location* – The Ordinance states: “The JADU may only be located within the walls of an existing or proposed single-unit dwelling.” However, attached garages are also considered a part of the existing or proposed single-family residence.¹³ As such, the Ordinance should clarify that attached garages are also eligible for conversion to JADUs.
20. Section 25.48.030 I.2 – *JADU Development Standards* – The Ordinance states: “A JADU may be allowed in conjunction with one detached ADU on the same lot as long as the ADU does not exceed 850 square feet.” However, JADUs need only comply with the requirements of Article 3 on lots containing an existing or proposed single-family dwelling.¹⁴ As this section contains no maximum size for ADUs on the same lot, the City may not impose such a requirement on JADU creation. Therefore, the City must amend the Ordinance to remove this standard.
21. Section 25.48.030 I.7. – *JADU Entrance* – The Ordinance states: “The entrance to the JADU shall not face the same public street as the entrance to the primary dwelling, unless it is the only location determined to comply with applicable building and fire codes.” However, as State JADU Law requires independent entry into the unit, a constraint on the location of an entry door may prohibit the creation of an additional housing unit.¹⁵ Additionally, local development standards provided by the Ordinance pursuant to Government Code sections, 66314 to 66322 may not preclude ADUs created under Government Code section 66323, subdivision (a)(1), and these restrictions would not be permissible for such units. Therefore, the City must amend the Ordinance to remove these restrictions on JADU entrances.

¹³ Gov. Code § 66633, subd. (d)

¹⁴ Gov. Code § 66323, subd. (a)(1)(D)

¹⁵ Gov Code § 66333, subd. (e)(1)

22. Section 25.48.030 J.2. – *ADU Conversion* – The Ordinance states: “An ADU shall not be created within any portion of the habitable area of an existing dwelling unit in a multi-unit structure.” This ordinance section aligns with Government Code section 66323, subdivision (a)(3)(A). However, State ADU Law requires that ADUs be permitted in instances where the ADU “...is either attached to, or located within, the proposed or existing primary dwelling, including attached garages, storage areas or similar uses, or an accessory structure or detached from the proposed or existing primary dwelling and located on the same lot as the proposed or existing primary dwelling, including detached garages”.¹⁶ In addition to conversion of non-habitable space, the “located within” language allows for ADUs to be developed within habitable areas of multi-family structures. Therefore, the City must remove these references from the Ordinance.
23. Section 25.48.030 K.1.a. and b. – *ADU Garage Conversions* – The Ordinance states: “Accessory dwelling units contained within the existing space of an attached garage shall include removal of vehicle garage doors which shall be replaced with architectural features the same as those of the primary dwelling unit.” The Ordinance also requires that: “An existing detached garage that is converted to an accessory dwelling unit shall include removal of the vehicle garage door(s).” However, local development standards provided by the Ordinance pursuant to Government Code sections 66314 to 66322 may not preclude ADUs created under Government Code section 66323, subdivisions (a)(2) and (a)(4), and these restrictions would not be permissible on such units. Therefore, the City must amend the Ordinance to remove these restrictions or clarify their exceptions.
24. Section 25.48.030 L.3.e. – *Parking* – The Ordinance contains numerous instances where no parking shall be required for ADUs. However, the Ordinance fails to include a parking exemption found in Government Code section 66322, subdivision (a)(6), which states that no parking shall be required for ADUs: “When a permit application for an accessory dwelling unit is submitted with a permit application to create a new single-family dwelling or a new multifamily dwelling on the same lot, provided that the accessory dwelling unit or the parcel satisfies any other criteria listed in this subdivision.” Therefore, the City must update the Ordinance to include this parking exception.
25. Section 25.48.030 M.3.b – *Utilities and Impact Fees* – The Ordinance states that: “Standard ADUs converted from interior space, unless the unit is constructed within a new single home...” shall be exempt from utility connection requirements and any associated capacity fees. However, Government Code section 66324, subdivision (d) states that ADUs described in Government Code section 66323, subdivision (a)(1) shall not require a new or separate utility connection directly between the ADU and the utility. While the language “constructed within a new

¹⁶ Gov. Code § 66314, subd. (d)(3)

single-unit home” appears to reference ADUs built pursuant to Government Code 66323, subdivision (A)(1), these ADUs may not be limited to those built within a **new** single-family home. For example, an ADU of this type may be an addition to an existing property. Therefore, the City must amend the Ordinance to clarify that **all** ADUs built pursuant to Government Code section 66323, subdivision (A)(1) shall not require a new or separate utility connection directly between the ADU and the utility.

In response to the findings in this letter, and pursuant to Government Code section 66326, subdivision (b)(2)(A) and (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 66326, subdivision (c)(1), 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 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 Nicholas Green, of our staff, at (916) 841-6665 or at Nicholas.Green@hcd.ca.gov.

Sincerely,



Jamie Candelaria
Senior Housing Accountability Manager
Housing Policy Development Division

Enclosure

New Government Code Sections	Previous Government Code Sections
Article 1. General Provisions	
66310	65852.150 (a)
66311	65852.150 (b)
66312	65852.150 (c)
66313	General Definition Section 65852.2 (j) 65852.22 (j)
Article 2. Accessory Dwelling Unit Approvals	
66314	65852.2(a)(1)(A), (D)(i)-(xii), (a)(4)-(5)
66315	65852.2 (a)(8)
66316	65852.2 (a)(6)
66317	65852.2 (a)(3), (a)(7)
66318	65852.2 (a)(9), 65852.2 (a)(2)
66319	65852.2 (a)(10)
66320	65852.2 (b)
66321	65852.2 (c)
66322	65852.2 (d)
66323	65852.2 (e)
66324	65852.2 (f)
66325	65852.2 (g)
66326	65852.2 (h)
66327	65852.2 (i)
66328	65852.2 (k)
66329	65852.2 (l)
66330	65852.2 (m)
66331	65852.2 (n)
66332	65852.23.
Article 3. Junior Accessory Dwelling Units	
66333	65852.22 (a)
66334	65852.22 (b)
66335	65852.22 (c)
66336	65852.22 (d)
66337	65852.22 (e)
66338	65852.22 (f)-(g)
66339	65852.22 (h)
Article 4. Accessory Dwelling Unit Sales	
66340	65852.26 (b)
66341	65852.26 (a)
66342	65852.2 (a)(10)