

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

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June 28, 2024

Brenda Wisneski, Community Development Director  
Community Development Department  
City of Dana Point  
33282 Golden Lantern  
Dana Point, CA 92629

**RE: Review of City of Dana Point's Accessory Dwelling Unit and Junior  
Accessory Dwelling Unit (ADU) Ordinances, and Resolution**

**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 Junior Accessory Dwelling Unit (JADU) Law have been re-numbered.<sup>1</sup>

Dear Brenda Wisneski:

The California Department of Housing and Community Development (HCD) has reviewed the City of Dana Point's (City) ADU Ordinance No. 23-06 (Ordinance), adopted July 18, 2023, and Resolution 23-06-20-01 (Resolution), adopted June 20, 2023, by the City Council. Pursuant to Government Code section 66326, subdivision (a), HCD finds that the City's ADU and JADU ordinances are not compliant with State ADU Law, as described below.<sup>2</sup> Accordingly, the City has up to 30 days to respond to these findings and must provide a written response to this notice no later than July 28, 2024.

**Background**

On January 13, 2023, HCD sent an ADU Findings Letter regarding the City's previous ADU Ordinance.<sup>3</sup> The City replied on February 13, 2023, indicating that the City was drafting an updated ordinance. On June 20, 2023, the City adopted a new ADU Ordinance and on July 18, 2023, a Resolution. In the Resolution, in compliance with Government Code section 66326, subdivision (b)(2)(B), the City provides findings that the Ordinance complies with State ADU Law, and therefore did not amend certain sections of the Ordinance despite HCD's ADU Findings Letter and April 5, 2023, Letter of Technical Assistance outlining the City's non-compliance and directing the City to process ADUs pursuant to State ADU Law.

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<sup>1</sup> Enclosure 1 – ADU and JADU Government Code section Conversion Chart.

<sup>2</sup> State ADU Law refers to ADU and JADU Laws, as enacted in Chapter 13 of Division 1 of Title 7 of the Government Code.

<sup>3</sup> Enclosure 2 – Dana Point Findings Letter – January 13, 2023.

While the new Ordinance contains substantial changes following HCD's findings, the Ordinance does not comply with State ADU Law in the following ways:

## Findings

1. Section 9.07.210 B.2. & B.4. – *“Attached” and “Detached” Definitions and Development Standards* – The Ordinance states, “An ‘attached Accessory Dwelling Unit’ shall mean and refer to an accessory dwelling unit, as that term is defined in Government Code section 65852.2 subdivision (j)(1) that is connected via a permanent wall, ceiling, or floor to either a primary dwelling or an accessory structure located on the same lot, including but not limited to an Accessory Dwelling Unit that is located within a proposed or existing primary dwelling or accessory structure....” The Ordinance also states, “A ‘detached Accessory Dwelling Unit’ shall mean and refer to an accessory dwelling unit, as that term is defined in Government Code section 65852.2, subdivision (j)(1) that is not connected via a wall, ceiling, or floor to either a primary dwelling or an accessory structure located on the same lot.”<sup>4</sup>

Government Code section 66314, subdivision (d)(3) states, “The accessory dwelling unit 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.” The City allows for ADUs to be created within accessory structures that are physically detached from the primary dwelling. Under the City’s definition, these ADUs would be considered “attached” and may thus lead to confusion because the structure is detached from any structures. HCD recommends that the City add a separate definition for ADUs located within the primary dwelling or existing accessory structure (whether the accessory structures are attached or detached).

2. Section 9.04.210 B.5, 6. – *Existing accessory structure and Dwelling Unit* – The Ordinance states, “The term existing accessory structure shall mean an accessory structure for which construction was completed on or before January 1, 2020.” (internal quotations omitted). The Ordinance also states, “The term existing dwelling units shall mean a dwelling unit for which the construction was completed, and could be legally occupied, before January 1, 2020.” However, State ADU Law provides for ADUs to be created in lots “zoned to allow single-family or multifamily dwelling residential use and includes a proposed or existing dwelling.”<sup>5</sup> Statute does not require an accessory structure or primary dwelling be constructed before or after a specific date for it to be eligible for an ADU. The City must remove definitions that require the existence of a structure or dwelling unit to be permitted or occupiable prior to specific dates.

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<sup>4</sup> Gov. Code, § 65852.2, subd. (j)(1), is renumbered as § 66313, subdivision (a).

<sup>5</sup> Gov. Code, § 66314.

3. Section 9.07.210 B.7. – *Existing Multifamily Definition* – The Ordinance states, “The term ‘existing multi-family dwelling’ shall mean a multi-family dwelling for which construction was completed in such a manner that all of the dwelling units could be legally occupied on or before January 1, 2020.” State ADU Law only requires lots be “zoned to allow single-family or multifamily dwelling residential use and includes a proposed or existing dwelling.”<sup>6</sup> The statute does not require an existing multifamily dwelling be constructed prior to a specific date to be eligible for an ADU. Therefore, the City must remove references to constructed or occupied dates for existing multifamily dwellings from its definitions.
4. Section 9.07.210 C.3. – *Existing Illegal ADUs* – The Ordinance states, “Subject to Government Code Section 65852.2, subdivision (e)(2) and (n), the provisions of this section shall in no way validate any existing illegal Accessory Dwelling Unit. An application may be made pursuant to this Section to convert an illegal Accessory Dwelling Unit to a legal conforming Accessory Dwelling Unit and shall be subject to the same standards and requirements as for a newly proposed Accessory Dwelling Unit.” However, Government Code section 66332, subdivision (a) states, “Notwithstanding any other law, and except as otherwise provided in subdivision (b), a local agency shall not deny a permit for an unpermitted accessory dwelling unit that was constructed before January 1, 2018, due to either of the following: [1] The accessory dwelling unit is in violation of building standards pursuant to Article 1 (commencing with Section 17960) of Chapter 5 of Part 1.5 of Division 13 of the Health and Safety Code. [2] The accessory dwelling unit does not comply with this Article or any local ordinance regulating accessory dwelling units.” Therefore, the City cannot deny a permit for an unpermitted ADU created before January 1, 2018, even if the unpermitted ADU does not meet the same standards and requirements for a newly proposed ADU. The City must amend the Ordinance to comply with State ADU Law.
5. Section 9.07.210 D.1., D.4.b., E.1.f., E.3.e., and E.4.f. – *Deed Restriction* – The Ordinance States, “With the exception of legal non-conforming Accessory Dwelling Units described in Section 9.07.210 (C)(2) above, all Accessory Dwelling Units require an Accessory Dwelling Unit Permit. The applicant shall also obtain a building permit as required by the City’s Building and Construction Codes set forth in Title 8 and record a deed restriction as provided in Section 9.07.210 (F)(3).” However, Government Code section 66315 states, “Section 66314 establishes the maximum standards that a local agency shall use to evaluate a proposed accessory dwelling unit on a lot that includes a proposed or existing single-family dwelling. No additional standards, other than those provided in Section 66314, shall be used or imposed, including an owner occupant requirement, except that a local agency may require that the property may be used for rentals of terms 30 days or longer.” Therefore, a deed restriction may not be the basis of delay or denial of a permit for an ADU. In addition, the City should review the standards in the City’s Building and Construction Codes within Title 8 to ensure compliance with State ADU Law and clarify that any conflicting requirements do not apply.

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<sup>6</sup> Gov. Code, § 66314, subd. (d)(2).

6. Section 9.07.210 D.4.b., C.1. and 9.07.215 C.4.b, and D. – *Underlying Development Standards* – The Ordinance states that the Community Development Director shall approve an application “...if the proposed Accessory Dwelling Unit complies with the requirements of this Section, the underlying development standards in the zoning district in which it is located, as well as any applicable overlay district.” However, Government Code section 66315 states, “Section 66314 establishes the maximum standards that a local agency shall use to evaluate a proposed accessory dwelling unit on a lot that includes a proposed or existing single-family dwelling. No additional standards, other than those provided in Section 66314, shall be used or imposed....” The underlying development standards in the zoning district or overlay district may not apply if they conflict with or are more stringent than the Ordinance or State ADU Law. Therefore, the City must amend the Ordinance to indicate these exceptions and should evaluate standards within the zoning district and overlay districts to ensure compliance with State ADU Law.
7. Section 9.07.210 E. – *ADU and JADU Unit Allowance* – The Ordinance states, “Pursuant to Government Code section 65852.2, subdivision (e),<sup>7</sup> ADUs that meet the following development standards shall qualify for mandatory approval of an ADU Permit Application. Only one of the following shall be permitted per lot....” However, Government Code section 66323, subdivision (a) states, “Notwithstanding Sections 66314 to 66322, inclusive, a local agency shall ministerially approve an application for a building permit within a residential or mixed-use zone 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.” Paragraph (2) permits “[o]ne detached, new construction, accessory dwelling unit that does not exceed four-foot side and rear yard setbacks.” The statute does not use “or” or “one of” to indicate only one or another would be applicable to the exclusion of the other. Rather, the use of the term “any” followed by an enumeration of state mandated ADU types permitted indicate that any of these ADU types can be combined on a lot zoned for single-family dwellings. This allows a homeowner who meets specified requirements to create one converted ADU; one detached, new construction ADU; and one JADU. Thus, if the local agency approves an ADU that is created from existing (or proposed) space, and the owner subsequently applies for a detached ADU (or vice versa) that meets the size and setbacks pursuant to the subdivision, the local agency cannot deny the application, nor deny a permit for a JADU under this section. This subdivision also applies to ADUs created pursuant to paragraphs (3) and (4), on lots with proposed or existing multifamily dwellings. Limiting single-family lots to one ADU prevents property owners from creating ADUs mandated under section 66323. The City must revise the Ordinance to remove these restrictions.

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<sup>7</sup> Gov. Code § 65852.2, subd. (e), is renumbered as § 66323.

8. Section 9.07.210 E.1.h., E.3.f. – *Total Floor Area/Maximum Size* – The Ordinance states, “The total floor area of an attached ADU shall be limited to not more than 800 square feet” and “[t]he total floor area of an ADU shall be limited to 50% of the average living area of existing Multi-Family dwelling units. Notwithstanding the foregoing, an applicant shall be allowed to construct an attached ADU that is at least 800 square feet.” However, Government Code section 66314, subdivision (d)(4) states, “If there is an existing primary dwelling, the total floor area of an attached accessory dwelling unit shall not exceed 50 percent of the existing primary dwelling.” These standards apply to both single-family and multifamily units. Thus, the City must amend their ordinance to allow for the 50-percent calculation for both.

In addition, Government Code section 66321, subdivision (b)(2) states that “a local agency shall not establish by ordinance... [a] maximum square footage requirement for either an attached or detached accessory dwelling unit that is less than either” 850 square feet or 1,000 square feet for an ADU that has at least two bedrooms. Additionally, Government Code section 66321, subdivision (b)(3) states that “a local agency shall not establish by ordinance... [a]ny 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.” In other words, the total floor area of an attached ADU may be either up to 50 percent of an existing primary dwelling’s total floor area, or 850 square feet, with an increase 1,000 square feet for an ADU with more than one bedroom, whichever is smaller, and under no circumstances may the minimum size be less than 800 square feet due to the size of the primary dwelling. Therefore, the City must amend the Ordinance to allow for attached ADUs to expand beyond 800 square feet as applicable.

9. Section 9.07.210 E.1.a. and Section 9.07.215 D.4.b. – *JADUs and Attached Garages* – The Ordinance states, “The ADU or JADU must be wholly contained within the existing or proposed space of an existing or proposed single family dwelling. In addition, an ADU (but not a JADU) may be contained wholly within an existing accessory structure.” However, Government Code section 66333, subdivision (d) allows “...a permitted junior accessory dwelling unit to be constructed within the walls of the proposed or existing single-family residence. For purposes of this paragraph, enclosed uses within the residence, such as attached garages, are considered a part of the proposed or existing single-family residence.” The City should amend the Ordinance to clarify that JADUs may be created within enclosed uses within the residence such as an attached garage.
10. Section 9.07.210 F.1.a. – *Flood Plain Overlay District Standards* – The Ordinance states, “Any attached or detached ADU located in the City’s Flood Plain Overlay District shall comply with all of the development standards applicable to residential

development in the City's Flood Plain Overlay District." However, Government Code section 66315 states, "Section 66314 establishes the maximum standards that a local agency shall use to evaluate a proposed accessory dwelling unit on a lot that includes a proposed or existing single-family dwelling. No additional standards, other than those provided in Section 66314, shall be used or imposed...." The City should review the standards in the Flood Plain Overlay District to ensure compliance with State ADU Law and clarify that any conflicting requirements do not apply.

11. Section 9.07.210 F.1.b. – *Coastal Overlay District* – The Ordinance states that "in accordance with the City's Certified Local Coastal Program, no attached or detached ADU shall be developed within the City's Coastal Overlay District without obtaining a Coastal Development Permit and Conditional Use Permit and otherwise complying with all provisions of the City's Local Coastal Program related to ADUs." However, Government Code section 66317, subdivision (a) states, "A permit application for an accessory dwelling unit or a junior accessory dwelling unit shall be considered and approved ministerially without discretionary review or a hearing, notwithstanding Section 65901 or 65906 or any local ordinance regulating the issuance of variances or special use permits." Government Code section 66329 states, "Nothing in this article shall be construed to supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code)...." Unless the California Coastal Act requires a Coastal Development Permit or Conditional Use Permit, the City may not require a discretionary review or hearing for the approval of an ADU permit application. The City must clarify that such a process is only required when the California Coastal Act is impacted by or conflicts with State ADU Law.
12. Section 9.07.210 F.1.c. – *Existing Non-conforming Structure or Use* – The Ordinance states in Subsection F.1.c., "Due to public safety, public nuisance, and traffic flow concerns, no attached or detached ADU or JADU shall be constructed on any lot which has an existing development constructed upon it that is non-conforming with respect to the City's current use or development standards related to parking or driveway length, without obtaining a Site Development Permit (SDP) pursuant to Section 9.07.210(H)." The Ordinance presumptively prohibits all ADUs and JADUs when a non-conforming use or development standard exists on a lot. However, Government Code section 66322 states, "Notwithstanding any other law... (b) 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." Before the City denies an ADU or JADU<sup>8</sup> application, it must show that the nonconformity presents a threat to public health and is affected by the construction of the ADU. The City must clarify that the construction of an ADU on a lot which has an existing development constructed upon it that is non-conforming

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<sup>8</sup> Gov. Code, § 66336.

with respect to the City's current use or development standards related to parking or driveway length may be prohibited only if such non-conformance presents a threat to public health and safety and is affected by the construction of the ADU.

13. Section 9.07.210 F.1.d. – *Application Review* – The Ordinance states, “The City shall review each [ADU] Application for any other issues related to adequacy of water or sewer services, and /or impact of the proposed ADU on traffic flow, or public safety....” However, Government Code section 66317, subdivision (a) states, “A permit application for an accessory dwelling unit or a junior accessory dwelling unit shall be considered and approved ministerially without discretionary review or a hearing....” The Ordinance provides for a per-unit discretionary review in violation of State ADU Law. Government Code section 66314, subdivision (a) provides that a local agency may, through an ordinance, “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.” The City must designate the specific areas that are impacted by traffic flow and public safety. The City is not authorized by statute to create a discretionary review on a per-unit basis. Therefore, the City must remove this section of the Ordinance to comply with State ADU Law.
14. Section 9.07.210 F.2. – *Owner Occupancy* – The ADU Ordinance requires, by January 1, 2025, that “a natural person with legal or equitable title to the lot must reside in either the primary dwelling unit or the ADU as the person’s legal domicile and permanent residence.” However, Government Code section 66315 states, “No additional standards, other than those provided in Section 66314, shall be used or imposed, including an owner-occupant requirement, except that a local agency may require that the property may be used for rentals of terms 30 days or longer.” The City must remove the owner occupancy requirement from the Ordinance.
15. Section 9.07.210 F.6.a., b. and c. – *Maximum Height/Stories* – The Ordinance states, “All detached ADUs and all ADUs attached to accessory structures shall be subject to a height limitation of sixteen (16) feet and shall be limited to one story.” However, Government Code section 66321, subdivision (b)(4) provides for a height limit of 16, 18, 20, or 25 feet depending on the circumstances of the ADU. In addition, Government Code section 66321, subdivision (b)(4)(D) states, “A height of 25 feet or the height limitation in the local zoning ordinance that applies to the primary dwelling, whichever is lower, for an accessory dwelling unit that is attached to a primary dwelling. This clause shall not require a local agency to allow an accessory dwelling unit to exceed two stories.” The City must allow at least two stories for an ADU attached to a primary dwelling. The City must also amend the maximum height limit for detached and attached ADUs to comply with State ADU Law.
16. Section 9.07.210. F.8.b., F.8. f. – *Additional Requirements* – The Ordinance lists several additional standards for ADUs, some of which are in excess of the requirements listed in Government Code section 66314. For example, the

Ordinance provides that “ADUs shall include sufficient permanent provisions for living, sleeping, eating, cooking, and sanitation, including but not limited to washer dryer hookups and kitchen facilities...” and that “[a]ll ADUs are required to have separate exterior access from the proposed or existing primary residence.” However, pursuant to Government Code section 66315, “Section 66314 establishes the maximum standards that a local agency shall use to evaluate a proposed accessory dwelling unit on a lot that includes a proposed or existing single-family dwelling. No additional standards, other than those provided in Section 66314, shall be used or imposed....” The requirement for washer and dryer hookups and separate exterior access are in excess of the standards found within Government Code section 66314. Therefore, these additional standards may not apply to ADUs with an existing or proposed single-family dwelling on the lot.

Additionally, the Ordinance states, “In the event the exterior features of the primary dwelling are altered or remodeled, the exterior features of the ADU shall be updated in order to maintain consistency between the buildings...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; (ii) protect public access to and along the shoreline areas; (iii) protect public views to and along the ocean and scenic coastal areas; (iv) protect sensitive coastal resources; (v) minimize and, where feasible, avoid shoreline hazards; (vi) contain the size, scale, access and amenities that are accessory in nature to the primary dwelling.” These terms and conditions are subjective and require discretion and independent judgement. Government Code section 66314, subdivision (b) requires that local development standards be objective. “Objective standards” means 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.<sup>9</sup> Therefore, the City must amend the Ordinance to apply only objective standards to ADUs and JADUs.

17. Section 9.07.210 F.8.j. and 9.07.215 D.4.g. – *HOA Approval* – The Ordinance states, “In the event that the property upon which the ADU is proposed is located within a Homeowner’s Association (HOA), the applicant shall submit to the City written evidence of the HOA’s approval of the ADU concurrent with their ADU application.” Government Code section 66317, subdivision (a) requires that “[a] permit application for an accessory dwelling unit or junior accessory dwelling unit shall be considered and approved ministerially without discretionary review or a hearing, notwithstanding Section 65901 or 65906 or any local ordinance regulating the issuance of variances or special use permits. The permitting agency shall either approve or deny the application to create or serve an accessory dwelling unit or a junior accessory dwelling unit within 60 days from the date the permitting agency receives a completed application if there is an existing single-family or multifamily dwelling on the lot.” Subdivision (c) of this section states, “No local ordinance, policy, or regulation, other than an accessory dwelling unit ordinance consistent

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<sup>9</sup> Gov. Code, § 66313, subd. (h).



with this article shall be the basis for the delay or denial of a building permit or a use permit under this section.” Additionally, “Section 66314 establishes the maximum standards that a local agency shall use to evaluate a proposed accessory dwelling unit on a lot that includes a proposed or existing single-family dwelling. No additional standards, other than those provided in Section 66314, shall be used or imposed, including an owner-occupant requirement, except that a local agency may require that the property may be used for rentals of terms 30 days or longer.”<sup>10</sup> Therefore, the City may not require an applicant to provide HOA approval with their ADU and JADU application. The City must remove this Ordinance provision to comply with State ADU Law.

18. Section 9.07.210. F.9.e. – *Parking Requirement Exemptions* – The Ordinance states, “The foregoing parking standards shall not be imposed on an ADU in any of the following circumstances,” and lists several exemptions required by Government Code section 66321, subdivision (a). However, the Ordinance is missing the exemption in paragraph 6, which requires no parking requirements be imposed on an ADU “[w]hen 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 amend the Ordinance to include this exception.
19. Section 9.07.210 G. – *Associated Permits* – The Ordinance states, “If an application for an ADU triggers the requirement for a discretionary or ministerial permit other than an ADU permit and/or a building permit... those associated permits must be applied for and obtained prior to applying for an ADU permit.” However, Government Code section 66316 states, “An existing accessory dwelling unit ordinance governing the creation of an accessory dwelling unit by a local agency or an accessory dwelling ordinance adopted by 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 article.” An ADU should not trigger a requirement for a discretionary permit. In addition, “The permitting agency shall either approve or deny the application to create or serve an accessory dwelling unit or a junior accessory dwelling unit within 60 days from the date the permitting agency receives a completed application....”<sup>11</sup> Government Code section 66317, subdivision (c) further states, “No other local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section.” HCD reminds the City that State ADU Law requires that an application is approved or denied within 60 days of being deemed complete and does not require, and may not be delayed by, any other associated permits prior to submittal of the ADU application.

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<sup>10</sup> Gov. Code, § 66315.

<sup>11</sup> Gov. Code, § 66317, subd. (a).

20. Section 9.07.210 H. – *Nonministerial Process* – The Ordinance states where “an Applicant desires to develop an ADU that would otherwise be prohibited as a result of not complying with the development standards set forth in this Section, he/she may apply for a Site Development Permit....,” which is subject to Planning Commission approval, creating a discretionary process. Government Code section 66317 requires a local agency to consider and approve ADUs “ministerially without discretionary review or a hearing” and to “either approve or deny the application ... within 60 days from the date the permitting agency receives a completed application....” HCD understands that the Ordinance is intended to be less restrictive than State ADU Law by creating an alternative path to denial. However, where this process leads to undue delay or ambiguity, it is inconsistent with State ADU Law. Moreover, Government Code section 66317 states that “[i]f the local agency has not approved or denied the completed application within 60 days, the application shall be deemed approved.” The City should provide appropriate clarification.
21. Section 9.07.215 D.1. and D.2. – *30-Day Rental* – The Ordinance states, “The JADU shall not be sold separately from the primary dwelling unit and shall be rented for less than thirty (30) days.” Section D.2. requires a deed restriction that includes a 30-day minimum rental restriction. Government Code section 66333 states, “Notwithstanding Article 2 (commencing with Section 66314), a local agency may, by ordinance, provide for the creation of junior accessory dwelling units in single-family residential zones. The ordinance may require a permit to be obtained for the creation of a junior accessory dwelling unit, and shall do all of the following....” State JADU Law does not provide a 30-day minimum rental term and explicitly lists the deed restrictions to be recorded. Therefore, the City may not require a 30-day minimum rental for JADUs and must remove this requirement and deed restriction.
22. Section 9.07.215 D.4. – *Separate Bathroom* – The Ordinance lists the allowable unit size and construction of JADUs. However, Government Code section 66333 states, “If a permitted junior accessory dwelling unit does not include a separate bathroom, the permitted junior accessory dwelling unit 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 provide for a JADU that shares a bathroom with the primary dwelling and has a separate interior entrance for consistency with State ADU Law and to avoid confusion.
23. Section 9.07.215 D.4.c. – *Nonconforming Condition* – The Ordinance states, “No JADU shall be constructed in any dwelling that is non-conforming with respect to parking, or driveway length. However, Government Code section 66336 states, “A local agency shall not deny an application for a permit to create a junior accessory dwelling unit pursuant to this article 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 may not preclude (and deny) a JADU application because of an existing nonconforming condition. To deny a JADU

application, the City must find that the nonconforming condition is a threat to public health and safety and affected by the construction of the JADU. The City must clarify that the construction of an ADU on a lot which has an existing development constructed upon it that is non-conforming with respect to the City's current use or development standards related to parking or driveway length may be prohibited only if such non-conformance presents a threat to public health and safety and is affected by the construction of the ADU.

24. *Resolution No. 23-06-20-01* – On June 20, 2023, the City adopted Resolution No. 23-06-20-01 with findings in response to HCD's first Findings Letter, as required by State ADU Law.<sup>12</sup> However, HCD finds that the Resolution does not adequately address HCD's original findings from January 13, 2023. The City's findings provided in the resolution are still in conflict with State ADU Law and the City failed to address the indicated changes with the adoption of their new ADU Ordinance.

## **Complaints**

Please note that HCD has received several complaints in reference to the City's application of State ADU Laws when processing ADU applications. On April 5, 2023,<sup>13</sup> HCD addressed this issue with the City via a Letter of Technical Assistance in which HCD reminded the City of its obligation to process ADU permits by applying State ADU Laws until such time that the City's ordinance is compliant. Based on the received complaints, including the one previously mentioned in the April 5, 2023, letter, it appears the City is not adhering to State ADU Law regardless of HCD's Letter of Technical Assistance or HCD's ADU Findings Letters.

## **Conclusion and Next Steps**

Though the City has adopted a new Ordinance with findings in response to HCD's first Findings Letter, as required by State ADU Law,<sup>14</sup> HCD finds the new Ordinance non-compliant with State ADU Law.

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<sup>12</sup> Gov. Code, § 66326, subd. (b)(2)(B).

<sup>13</sup> Enclosure 4, HCD Letter of Technical Assistance, April 5, 2023.

<sup>14</sup> Gov. Code, § 66326, subd. (b)(2)(B).

Accordingly, the City has two options in response to this letter.<sup>15</sup> The City can either amend the Ordinance to comply with State ADU Law,<sup>16</sup> or adopt the Ordinance without changes and include findings in its adoptive resolution explaining why the City believes that the Ordinance complies with State ADU Law despite HCD's findings.<sup>17</sup> If the City fails to take either course of action and bring the Ordinance into compliance with State ADU Law, HCD must notify the City and may notify the California Office of the Attorney General that the City is in violation of State ADU Law.<sup>18</sup>

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 me at [Jamie.Candelaria@hcd.ca.gov](mailto:Jamie.Candelaria@hcd.ca.gov) if you have any questions.

Sincerely,



Jamie Candelaria  
Senior Housing Accountability Manager  
Housing Policy Development Division

Enclosures

Enclosure 1, State ADU Law SB 477 Conversion Table.  
Enclosure 2, HCD Review of the City of Dana Point's Accessory Dwelling Unit (ADU) Ordinance, January 13, 2023.  
Enclosure 3, HCD Letter of Technical Assistance, April 5, 2023.

cc: Mike Killebrew, City Manager, City of Dana Point

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<sup>15</sup> Gov. Code, § 66326, subd. (c)(1).

<sup>16</sup> Gov. Code, § 66326, subd. (b)(2)(A).

<sup>17</sup> Gov. Code, § 66326, subd. (b)(2)(B).

<sup>18</sup> Gov. Code, § 66326, subd. (c)(1).

## State ADU/JADU Law Statutory Conversion Table

New Government Code Sections	Previous Government Code Sections
<b>Article 1. General Provisions</b>	
66310	65852.150 (a)
66311	65852.150 (b)
66312	65852.150 (c)
66313	General Definition Section 65852.2 (j) 65852.22 (j)
<b>Article 2. Accessory Dwelling Unit Approvals</b>	
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.
<b>Article 3. Junior Accessory Dwelling Units</b>	
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)
<b>Article 4. Accessory Dwelling Unit Sales</b>	
66340	65852.26 (b)
66341	65852.26 (a)
66342	65852.2 (a)(10)

**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



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

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April 5, 2023

Brenda Wisneski, Community Development Director  
Community Development Department  
City of Dana Point  
33282 Golden Lantern  
Dana Point, CA 92629

Dear Belinda Deines:

**RE: City of Dana Point's Accessory Dwelling Unit Ordinance – Letter of Technical Assistance**

The California Department of Housing and Community Development (HCD) thanks the City of Dana Point (City) for its response to HCD's January 13, 2023 written findings ("findings letter") of non-compliance. On February 13, 2023, the City sent a written response, signed by Principal Planner Belinda Deines, to HCD's written findings. HCD appreciates the letter's stated commitment to amend the City's accessory dwelling unit (ADU) ordinance and looks forward to reviewing the amended ordinance for compliance with State ADU Law upon its adoption.

However, on February 8 and February 16, 2023, HCD contacted the City regarding an ADU applicant's complaint against the City. The complaint in question arose over the City's denial of an ADU application due to the primary dwelling unit possessing a nonconforming zoning condition. HCD acknowledged that such a denial would be in violation of Government Code section 65852.2, subdivision (d)(2), which states, "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."

This issue would be resolved with the City approving ADU applications in compliance with state law. Community Development Director Brenda Wisneski replied<sup>1</sup> in an email on February 16, 2023 to say that staff anticipates having a new ordinance adopted in May of 2023. It appears that the City intends to wait for the City Council amendments to pass before processing the ADU application. The purpose of this letter is to provide the

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<sup>1</sup> It should here be noted that, prior to mailing the January 13 findings letter, HCD received numerous complaints about the City's noncompliance with State ADU Law. While it is beyond the scope of this letter to enumerate the complaints, HCD is concerned that the City's first response to a complaint after sending the February 13 letter, does not indicate of an intent to comply with State ADU Law.

City technical assistance regarding its obligation to continue permitting ADUs according to State ADU Law even in the absence of a compliant ADU ordinance.

Refusing to process ADU permits would be unlawful and in violation of state law, including but not limited to State ADU Law (Gov. Code, §§ 65852.150, 65852.2, 65852.22) and the Housing Crisis Act (HCA) of 2019 (Gov. Code, § 66300).

### **State ADU Law**

HCD's findings letter informed the City that its ordinance is noncompliant. While the City works on adopting a new ordinance, it remains obligated to process ADU applications per Government Code section 65852.2, subdivisions (a)(3)(A) and (b)(1), which require a permitting agency to "either approve or deny [an] application to create or serve an accessory dwelling unit or a junior accessory dwelling unit within 60 days from the date the permitting agency receives a completed application." Moreover, subdivision (a)(3)(A) states that "[i]f the local agency has not approved or denied the completed application within 60 days, the application shall be deemed approved."

In addition, the City, upon denying an ADU or JADU application, must provide "in writing a full set of comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant" (Gov. Code, § 65852.2, subd. (b)(2)).

Notably, Government Code section 65852.2, subdivision (a)(7), states, "No other local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this subdivision." The absence of a compliant ordinance; therefore, cannot preclude the City from acting to approve or deny a permit to create an ADU.

### **Housing Crisis Act of 2019**

This kind of delay may also constitute a violation of provisions of the HCA. The HCA prohibits a local government from "enact[ing] a development policy, standard, or condition" that would have the effect of "[c]hanging 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 ... in effect on January 1, 2018." (Gov. Code, § 66300, subd. (b)(1)(A).) The statute defines "reducing the intensity of land use" to include "any other action that would individually or cumulatively reduce the site's residential development capacity." (*Ibid.*)

Clearly, refusing to process ADU permits would have the effect of reducing the residential development capacity of sites across the City, in violation of the HCA. The HCA also prohibits a local government from “[i]mposing a moratorium or similar restriction or limitation on housing development ... within all or a portion of the jurisdiction ... other than to specifically protect against an imminent threat to the health and safety of persons residing in, or within the immediate vicinity of, the area subject to the moratorium ....” (Gov. Code, § 66300, subd. (b)(1)(B)(i).) Moreover, the local government shall not enforce restrictions or limitations on a housing development until it has submitted their ADU ordinance to and have received approval from HCD. (Gov. Code, § 66300, subd. (b)(1)(B)(ii).) If HCD denies approval, “that ordinance shall be deemed void.” (*Ibid.*)

## Conclusion

HCD would like to remind the City that HCD has enforcement authority of State ADU Law, the Housing Crisis Act, and other state housing laws. If HCD finds that a city’s actions do not comply with state law, HCD may notify the California Office of the Attorney General that the local government is in violation of state law (Gov. Code, § 65585, subd. (j)).

In summary, the City must continue processing ADU applications in compliance with state law. HCD will continue to monitor the City’s actions and inactions and will respond in order to remedy any violations.

HCD appreciates the City’s efforts in revising its ordinance and welcomes the opportunity to assist the City in fully complying with State ADU Law. Please contact Mike Van Gorder of our staff, at (916) 776-7541 or at [mike.vangorder@hcd.ca.gov](mailto:mike.vangorder@hcd.ca.gov) for more information.

Sincerely,

*Jamie Candelaria*

Jamie Candelaria  
Senior Housing Accountability Manager

cc: Belinda Deines, Principal Planner