

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

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October 27, 2023

Joel Paulson, Community Development Director
Department of Community Development
Town of Los Gatos
110 E. Main St.
Los Gatos, CA 95030

Dear Joel Paulson:

RE: Review of Los Gatos's Accessory Dwelling Unit (ADU) Ordinance under State ADU Law (Gov. Code, § 65852.2)

Thank you for submitting the Town of Los Gatos (Town) accessory dwelling unit (ADU) Ordinance No. 2307 (Ordinance), adopted April 21, 2020, 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 Town has up to 30 days to respond to these findings. Accordingly, the Town must provide a written response to these findings no later than November 26, 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 29.10.310 – *Definitions* – The Ordinance defines “junior accessory dwelling unit” as a dwelling unit that (emphasis ours) “... is contained within the space of a proposed or existing primary dwelling or **detached accessory dwelling unit**.” However, Government Code section 65852.22, subdivision (a)(4) requires that all JADUs: “...be constructed within the walls of the proposed or existing single-family residence,” which may also be within enclosed uses, such as attached garages. JADUs are not permitted in detached accessory structures or units. Therefore, the Town must amend its definition of “junior accessory dwelling unit” (JADU) to align with the requirements of State ADU Law.
- Section 29.10.310 (a) – *Definitions (Deed Restrictions)* – The Ordinance states: “A deed restriction shall be recorded specifying that the accessory dwelling unit shall be offered at a reduced rent that is affordable to a lower income renter (less than 80 percent AMI) provided that the unit is occupied by someone other than a member of the household occupying the primary dwelling unit.” The

requirement for a deed restriction may be considered an “objective standard” pursuant to Government Code section 65852.2, subdivision (a)(1)(B)(i). However, the Ordinance is unclear whether it would require a deed restriction prior to approval of an ADU permit application. Regardless, the recording of a deed restriction may not delay or deny a building permit or a use permit under Government Code 65852.2, subdivision (a)(7). Further, notwithstanding subdivisions (a)-(d), a local agency shall ministerially approve an ADU permit application pursuant to Government Code 65852.2, subdivision (e).

While HCD supports efforts to ensure affordable, high-quality housing, ADUs built pursuant to Government Code 65852.2, subdivision (e), may not be denied should they meet other all state-mandated requirements. The Ordinance does not specify whether the “Incentive Program” in the previous section establishes an incentive for ADU development or references a pre-existing program. The conditions of this program, as they pertain to ADU development, are unclear. Therefore, the Town must amend its ordinance to clarify that the deed restriction requirement does not preclude the development of ADUs pursuant to Government Code 65852.2, subdivision (e). Additionally, please also provide details regarding the Town’s ADU incentive program.

- Section 29.10.320 (b)(1) – *New Accessory Dwelling Units* – The Ordinance allows for: “Not more than one (1) junior accessory dwelling unit contained within the space of a proposed or existing primary dwelling or detached accessory dwelling unit, and one (1) accessory dwelling unit, may be permitted on a lot with a proposed or existing primary dwelling. However, Government Code section 65852.2, subdivision (e)(1), states, “Notwithstanding subdivisions (a) to (d), 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: (A) One accessory dwelling unit and one junior accessory dwelling unit per lot with a proposed or existing single-family dwelling...(i) 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.” Subparagraph (B) permits “[o]ne 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 a lot zoned for single family dwellings. This was changed in 2019 with the passing of clean-up legislation (AB 3182). The Legislature changed “or” to “and” in subsection (A), but they left the “or” in (A)(i). HCD has determined that this change is intentional in that it validates HCD’s understanding of a second unit being allowable via Subparagraph (A) while setting the criteria for creating those two units in the subsequent clauses.

This permits 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. HCD notes that the Legislature, in creating the list, did not use “or” or “one of” to indicate only one or another would be applicable to the exclusion of the other. This subdivision applies equally to ADUs created pursuant to Government Code section 65852.2, subdivisions (e)(1)(C) and (D), on lots with proposed or existing multifamily dwellings. Limiting single-family lots to one ADU would prevent property owners from creating ADUs by right under subdivision (e)(1). Therefore, the Town must amend its ordinance to clarify the correct ADU allowance as afforded by state law.

- Section 29.10.320 (b)(1) – *ADU and JADU Permitted Areas* - The Ordinance allows for: “Not more than one (1) junior accessory dwelling unit contained within the space of a proposed or existing primary dwelling **or detached accessory dwelling unit**, and one (1) accessory dwelling unit may be **permitted...**” However, Government Code section 65852.2, subdivision (e)(1)(A)(iv), requires that a JADU complies with the requirements of Government Code section 65852.22. Government Code section 65852.22, subdivision (a)(4), specifies that JADUs may only be constructed within the walls of the proposed or existing single-family residence, including enclosed uses within the residence, such as attached garages. Further, pursuant to Government Code section 65852.2, subdivision (e)(1)(A), an ADU may be created within the space of an existing accessory structure. Therefore, the Town must amend its ordinance to clarify that JADUs may not be constructed within detached ADUs and only within the proposed or existing primary residence and allow for ADUs to be constructed within the space of an existing accessory structure.
- Section 29.10.320 (b)(3) & (b)(3)(a) – *Setbacks* – The Ordinance requires that no detached ADU be placed in front of the primary dwelling in the R-1, R-D, R-M, RMH, and R-1D zones. The ordinance also states that accessory dwelling units shall comply with: “Front setbacks of the zone for a primary dwelling unit.” However, Government Code section 65852.2, subdivision (c)(2)(C) states that no local agency shall establish “Any requirement for front setbacks... that does not permit at least an 800 square foot accessory dwelling unit with four-foot side rear yard setbacks to be constructed with all other local development standards.” Additionally, standards imposed pursuant to subdivisions (a) through (d), may not preclude the development of ADUs pursuant to Government Code section 65852.2, subdivisions (e)(1)(B) and (D). Therefore, the Town must amend the Ordinance by either removing this language or clarifying its exceptions.

- Section 29.10.320 (b)(3)(d) – *Setbacks* – The Ordinance requires ADUs to comply with: “Setbacks for a primary dwelling and located within the Least Restrictive Development Area...” However, these requirements are unclear and may violate various setback requirements provided by State ADU Law. For example, these zones may only impose front setback requirements that do not permit at least an 800 square foot ADU with four-foot side rear yard setbacks to be constructed with all other local development standards (Gov. Code § 65852.22, subd. (c)(2)(C)). Additionally, the “and” in this sentence creates a confusing syntax. Therefore, the Town must amend its ordinance to clarify the specific setback requirements imposed by this section and, if they violate State ADU Law, remove the setback requirements or allow for the 800 square foot exception.
- Section 29.10.320 (b)(4) – *Height* – The Ordinance states that ADUs “shall not exceed sixteen (16) feet in height...” barring certain exceptions. However, the height requirement is more restrictive than the provisions found in Government Code section 65852.2, subdivision (c)(2)(D). For example, Government Code section 65852.2, subdivision (c)(2)(D)(iii), prevents local jurisdictions from imposing any height limitations that do not allow a height of 18 feet for a detached ADU on a lot with an existing or proposed multifamily, multi-story dwelling. Therefore, the Town must amend its ordinance to comply with State ADU Statute.
- 29.10.320 (b)(5) - *Maximum Size and Number of Bedroom* – The Ordinance states “the maximum number of bedrooms is two (2).” Limiting the number of bedrooms within ADUs and JADUs could be construed as a discriminatory practice towards protected classes and could be considered a constraint on the development of ADUs for 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).

Additionally, 2019 California Residential Code sections R304.1 and R304.2 provide the minimum floor area and dimensions for habitable rooms (i.e., bedrooms) which would apply to ADUs. The 2019 CRC limitations exist to protect health and safety, and further limitations on bedroom size and bedroom count in an ADU ordinance would be in excess of these existing standards. Furthermore, local development standards provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a) through (d), may not preclude ADUs created under Government Code section 65852.2, subdivision (e).

- 29.10.320 (b)(5) – *Development Review Committee* – The Ordinance states “Detached accessory dwelling units exceeding a combined square footage of

600 or 1,000 square feet in the HR and RC zones shall not be subject to Development Review Committee or Planning Commission approval.” The Ordinance sets the maximum size of a two-bedroom ADU at 1,200 square feet. This implies that any ADU greater than 1,000 square feet would be subject to an additional Development Review Committee or Planning Commission approval. However, Government Code 65852.2, subdivision (a)(3)(A), requires the ministerial approval of a permit application for an ADU or a JADU. Therefore, the Town must amend the Ordinance to comply with State ADU Law.

- Section 29.10.320 (b)(8)(A) – *Exceptions* – The Ordinance provides a list of criteria for ADUs where parking spaces are not required. However, the Ordinance fails to provide a parking exception provided for by Government Code section 65852.2, subdivision (d)(1)(F), which states that local agencies shall not impose any parking standards 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 paragraph.” Therefore, the Town must also note this parking exception.
- Section 29.10.320 (b)(8)(A)(6) – *Parking* – The Ordinance states that ADU parking is not required: “When the Director finds that the lot does not have adequate area to provide parking.” However, Government Code section 65852.2, subdivision (a)(1)(B)(i), only affords jurisdictions the authority to impose objective standards on ADU developments, which must involve no personal or subjective judgement 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. The provision of Director’s discretion regarding “adequate” parking does not qualify as an objective standard. Therefore, the Town must amend its ordinance to include parking standards that involve no personal or subjective judgement by a public official.
- Section 29.10.320 (b)(9) – *Design, form, materials, and color* – The Ordinance requires that: “Entrances serving the accessory dwelling unit shall not be constructed on any elevation facing a public street.” Since state law requires that ADUs and JADUs have an independent entry into the unit (Gov. Code § 65852.2, subd. (e)(1)(a)(ii) and Gov. Code § 65852.22, subd. (a)(5)), a constraint on the location of an entry door may make the creation of an additional housing unit infeasible. Furthermore, local development standards provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a) through (d), do not apply to ADUs created under Government Code section 65852.2, subdivision (e), and the restrictions as implied would not

be permissible. Therefore, the Town must revise or remove the ordinance section to comply with state law.

- Section 29.10.320 (b)(9) – *Design, form, materials, and color* – The Ordinance states: “Detached junior accessory dwelling units shall be...” Please correct what appears to be an incomplete sentence. Further, JADUs may only be constructed within the walls of a single-family residence (Gov. Code § 65852.22, subd. (a)(4)). Therefore, the Town must either amend its ordinance by removing this section or clarifying the accepted types of JADU developments.
- Section 29.10.320.(b)(10) – *Town Codes and Ordinances* – The Ordinance states that: “All accessory dwelling units shall comply with all the provisions of this chapter and other applicable Town codes.” However, Government Code section 65852.2, subdivision (a)(7) states that: “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.” Therefore, any applicable provision of the Town code cannot be the basis of a delay or denial for an ADU building or use permit. The Town must amend its ordinance to clarify that where other codes conflict with the ADU Ordinance, the Ordinance prevails.
- Section 29.10.320 (b)(12) – *Health and Safety Impacts* - The Ordinance states that an application may be denied if findings are made that the application has “adverse impacts on health, safety, and/or welfare of the public.” However, Government Code 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.” Government Code section 65852.2, subdivision (a)(1)(B)(i), authorizes the local agency to impose “objective standards” to the creation of an ADU. Government Code 65852.2, subdivision (j)(7), states that objective standards are: “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 local agency must amend the Ordinance to comply State ADU Law.

In response to the findings in this letter, and pursuant to Government Code section 65852.2, subdivision (h)(2)(B), the Town must either amend the Ordinance to comply with State ADU Law or adopt the Ordinance without changes. Should the Town choose to adopt the Ordinance without the changes specified by HCD, the Town must include findings in its resolution that explain the reasons the Town finds that the Ordinance complies with State ADU Law despite the findings made by HCD. Accordingly, the

Town'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 Town fails to take either course of action and bring the Ordinance into compliance with State ADU Law, HCD may notify the Town and the California Office of the Attorney General that the Town is in violation of State ADU Law.

HCD appreciates the Town's efforts provided in the preparation and adoption of the Ordinance and welcomes the opportunity to assist the Town 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,

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