

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

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



January 24, 2024

Tony Stewart, Director of Community Development
City of Port Hueneme
Community Development Department
250 N. Ventura Road
Port Hueneme, CA 93041

Dear Tony Stewart:

RE: Letter of Technical Assistance: City of Port Hueneme ADU Ordinance

On March 13, 2023, the California Department of Housing and Community Development (HCD) provided written findings of non-compliance to the City of Port Hueneme (City) accessory dwelling unit (ADU) Ordinance Number 791 (Ordinance). On June 13, 2023, the City submitted its written response to HCD's findings. HCD appreciates the City's time and effort in crafting its response.

However, the City's response fails to address substantial inconsistencies between the City's zoning code and State ADU Law.

HCD requests that the City respond to this letter no later than February 24, 2024, with a detailed plan of action and timeline to bring the Ordinance into compliance pursuant to Government Code section 65852.2, subdivision (h)(2)(B). Specifically, the City must either amend the Ordinance according to HCD's findings or readopt the Ordinance and make express findings via resolution addressing HCD's findings and explaining the reasons the City believes it has complied with State ADU Law despite HCD's findings. (Gov. Code, § 65852.2, subd. (h)(2)(B)).

Pursuant to Government Code section 65852.2, subdivision (h)(3)(A), HCD may notify the Attorney General when a local ordinance is in violation of State ADU Law.

Background and Summary of Issues

In its March 13, 2023, findings, HCD detailed the areas of the Ordinance which violate Government Code section 65852.2. Government Code section 65852.2, subdivision (h)(2)(A), requires that HCD provide jurisdictions "a reasonable time, no longer than 30 days, to respond...." HCD staff reached out on April 24, 2023 to inquire as to the City's response, and was told the City Attorney was drafting it. On May 26, 2023, HCD staff reached out again offering to meet with Port Hueneme staff to discuss the letter. No

official response was provided until June 13, 2023. In its June 13, 2023, letter, the City responded point by point to the findings as they were presented in the HCD letter. This letter will provide responses to the City's specific findings that HCD still considers outstanding and inconsistent with State ADU Law. Note that HCD is only responding the findings that are inconsistent with State ADU Law and will omit from this letter mention of findings that have been properly addressed.

For reference and convenience, HCD's original finding is included in italicized font, followed by the City's response in italicized font, followed by HCD's current response in regular font.

1) HCD's Original Finding

"10802 (D) and (D)(5) – ADU Limitation – The Ordinance states that "Only one (1) accessory dwelling unit shall be allowed on a single lot of record...." And that "A lot may contain up to one ADU and one JADU..." However, Government Code section 65852.2, subdivision (e)(1), states that "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." Additionally, subparagraph (B) permits "One detached, new construction, accessory dwelling unit that does not exceed four-foot side and rear yard setbacks." The use of the term any followed by an enumeration of by-right ADU types permitted indicate that any of these ADU types can be combined on a lot zoned for single-family dwellings. This permits the creation of one converted ADU, one detached, new construction ADU, and one junior accessory dwelling unit (JADU). The City must amend it to reflect statute."

Port Hueneme's Response

"The Department of Housing and Community Development's (HCD) interpretation of Government Code section 65852.2, subdivision (e)(1) is flawed and not supported by the plain language of the statute. The relevant section provides:

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 if [a number of provisions apply]; (B) one detached, new construction, accessory dwelling unit that does not exceed four-foot side and rear setbacks for a lot with a proposed or existing single-family dwelling. The accessory dwelling unit may be combined with a junior accessory dwelling unit described in subparagraph (A). . . . (C)(i) Multiple accessory dwelling units within the portions of existing multifamily dwelling structures that are not used as livable

space . . . (D)(1) Not more than two accessory dwelling units that are located on a lot that has an existing or proposed multifamily dwelling . . . (Emphasis added)."

HCD contends that "[t]he 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." (Emphasis in original). HCD posits the statute requires one converted ADU, one detached, new construction ADU, and one JADU. This interpretation however, completely ignores the fact that subdivisions (C) and (D) are not applicable to single-family lots. The plain language of this statute indicates that certain of the enumerated subdivisions may only be utilized for proposed or existing multifamily dwellings.

Furthermore, HCD's interpretation renders the penultimate sentence of subdivision (B) superfluous, which is disfavored in statutory interpretation. This sentence, emphasized above, makes clear that one detached, new construction ADU may be combined with a JADU, as described in subparagraph (A). It is important to note that subdivision (A) allows for one ADU and one JADU. When subdivision (B) states that a new construction, detached ADU may be combined with the JADU, the legislature specifically excluded the additional ADU contemplated by subdivision (A).

HCD's interpretation of the provisions of this statute is unreasonable given the plain language and unsupported by any statutory analysis."

HCD's Follow-up Response

Subdivision (e) allows for the combination of units as dictated by the type of primary dwelling unit. HCD's initial response highlighted only those relevant to single-family homes, which would be the allowed combination of a converted unit and JADU per subdivision (e)(1)(A), and a detached new-construction unit up to 800 square feet per subdivision (e)(1)(B). To clarify, the application of subdivision (e) would require the combination of converted units per subdivision (e)(1)(C), and two detached units pursuant to (e)(1)(D). Port Hueneme must approve the combination, with respect to the type of the primary dwelling, whether single-family or multifamily. There is no ambiguity because subdivisions (e)(1)(A) and (e)(1)(B) explicitly refer to ADU types to be created with a single-family dwelling and subdivisions (e)(1)(C) and (e)(1)(D) refer to ADU types to be created with a multifamily dwelling.

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 subparagraph (A) of subdivision (e)(1), but they left the "or" in (A)(i). This change validates HCD's understanding that two units are allowed under subparagraph (A), with the criteria for creating these two units specified in the subsequent clauses.

This permits a homeowner to create one converted 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” nor “one of” to indicate only one or another would be applicable to the exclusion of the other. Limiting single-family lots to one ADU would prevent property owners from creating ADUs by right under subdivision (e)(1). The additional positive mention of combining a converted (e)(1)(B) ADU and an (e)(1)(A) JADU does not invalidate the prescribed combinations stated at the opening of subdivision (e), as the change from “or” to “and” earlier in the subdivision indicates the legislature’s intention to promote this combination.

The City states that the second sentence of subdivision (e)(1)(B) is rendered superfluous under HCD’s expressed interpretation, and that such superfluity invalidates the interpretation. However, it is not superfluous. Statute’s pluralistic allowance of ADU and JADU combinations is reinforced with the second sentence of subdivision (e)(1)(B), just as statute prohibits the use of minimum lot sizes in multiple places throughout statute – subdivisions (a)(1), (c)(2)(C), and (e)(6). HCD’s interpretation would allow for a combination of a converted ADU under (e)(1)(A) with the detached ADU in (e)(1)(B). The second sentence of subdivision (e)(1)(B) reinforces the combination of a detached ADU and a JADU; A JADU does not have to be combined with a converted ADU only. HCD’s statutory analysis is sound, has been legally vetted, and has precedent in other recent ordinance review letters such as our December 9, 2022, letter to Sunnyvale¹ or our August 30, 2023, letter to Tiburon.² Port Hueneme must approve such combinations.

2) **HCD’s Original Finding**

“10802 (D)(5)(a)(3) – Setbacks – “The Ordinance states that “A lot may contain up to one ADU and one JADU is all of the following apply: ...the side and rear setbacks are sufficient for fire and safety.” However, Government Code section 65852.2, subdivision (a)(1)(B)(i), allows the City to impose objective standards on dwelling units, and pursuant to subdivision (j)(7), “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.” Additionally, Government Code section 65852.2, subdivision (a)(1)(D)(vii), states that a setback of no more than four feet from side and rear lot lines shall be required for an ADU. Therefore, the City must amend the Ordinance to

¹ Review of Sunnyvale’s Accessory Dwelling Unit (ADU) Ordinance under State ADU Law (Gov. Code, § 65852.2)

² Review of Tiburon’s Accessory Dwelling Unit (ADU) Ordinance under State ADU Law (Gov. Code, § 65852.2)

comply with State ADU Law and should clearly indicate what “sufficient for fire and safety” means so that subjective standards are not being applied.”

Port Hueneme’s Response

“HCD takes issue with language that is included in the statute notwithstanding the fact that the City is under no mandatory duty to adopt an ordinance. Government Code section 65852.2, subdivision (e)(1)(A)(iii) states, “[t]he side and rear setbacks are sufficient for fire and safety” in one of the criteria for by-right approval of one ADU and one JADU pursuant to subdivision (A) above. It is important to note that while HCD argues that this imposes subjective criteria into the ADU approval process, this language was specifically selected by the State legislature. The City was under no affirmative duty to enact an ordinance but was authorized to do so by SB 897. If the City had not enacted its ADU ordinance the offending language would still be required pursuant to the default State provisions. Accordingly, the State set the criteria for when an ADU and JADU may be permitted on a lot with a proposed or existing single-family dwelling and determined that “side and rear setbacks are sufficient for fire and safety” was sufficiently objective criteria for ministerial approval for such housing. HCD cannot now take issue with the specific, objective language chosen by the State legislature in enacting SB 897.”

HCD’s Follow-up Response

While the City is under no obligation to adopt an ordinance, Government Code section 65852.2, subdivision (a)(1), the authorizing statute, prescribes that an adopted “ordinance shall do all of the following:” and the subdivision lists the provisions that the ordinance must adhere to.

HCD’s finding addresses units that are subject to Government Code section 65852.2, subdivision (a), not those under subdivision (e). The City responded with a citation to subdivision (e)(1)(A)(iii). Please note that this citation would only apply to a unit created subject to subdivision (e) and *not* to subdivision (a). Subdivision (a) units are subject to local development standards, which are specified in subdivisions (a) through (d). Subdivision (e) begins with the phrase, “Notwithstanding sections (a) through (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....” Units created pursuant to subdivision (e) are subject only to the standards in that section. Subdivision (a)(1)(D)(vii) is explicit in requiring no more than 4-foot side and rear setbacks.

3) HCD’s Original Finding

10802 (G)(2) – Deed Restriction – The Ordinance requires a deed restriction with an automatically renewing 55-year term to restrict ADU rents to low- or very low-income levels. However, Government Code section 65852.2, subdivision (a)(8), states “[t]his subdivision establishes the maximum standards that local agencies 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 this subdivision, shall be used or imposed except that, subject to subparagraph (B),

a local agency may require an applicant for a permit issued pursuant to this subdivision to be an owner-occupant or that the property be used for rentals of terms longer than 30 days." Therefore, any manner of affordability covenant exceeds statute.

Furthermore, this restriction appears to have the practical effect of requiring rental and disallowing occupation by a relative or any other tenant without payment. This 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).

Requiring such a deed restriction as a condition of approval constitutes a local regulation on a proposed ADU that violates statute; Government Code section 65852.2, subdivision (a)(7) states "[n]o 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." In summary, the City must remove this section.

Port Hueneme's Response

"Once again, HCD takes issue with the affordability covenant. On August 18, 2022, myself, Tony Stewart, Shawn Danino, Mike Van Gorder, Jay Cross, and Cerlinda (surname unknown) met via zoom to discuss the ADU ordinance and the affordability covenant. During that meeting, I presented the City's position that the affordability covenant is not a design standard and is not affected by Government Code sections 65852.2 or 65852.22, which is plainly stated as the import of Section 65852.2, subdivision (a)(8). I was informed that HCD would look into the issues I raised and provide analysis on its authority to regulate this matter in the absence of apparent authority to do so. In fact, Mr. Cross represented the City could expect HCD's response within two to three weeks. To date, no analysis responding to my concerns has been provided.

The presence of an affordability covenant does not add any design standard. Furthermore, there is no reasonable argument that executing a form affordability covenant is the basis for delay or denial in contravention of subdivision (a)(7). This form is executed at the time of submission of a ministerial application and has no ability to delay the issuance of a building permit. In addition, this covenant does not impose any subjective criteria; it is submitted, or it is not. The stated purpose of Government Code sections 65852.150 et seq. to provide ADUs as a valuable form of housing to "family members, students, the elderly, in-home health care providers, the disabled, and others, at below market prices within existing neighborhoods." Moreover, the State indicates that available housing is falling short of meeting existing and future housing demands.

During our August 18, 2022, meeting, I explained that the City of Port Hueneme is a built-out beach community. There is a very real threat that these ADUs are not going to contribute to the State's housing needs as contemplated by the ADU statutes.

Without an affordability covenant, these properties will be rented out for summer getaways at significantly above market prices doing nothing to alleviate the State's housing concerns. It is for this reason that HCD was contacted in the first instance regarding this covenant.

Given that this covenant imposes no design criteria, I inquired as to HCD's authority to regulate in this area pursuant to Sections 65852.2 and 65852.22. I explained that this issue is one of municipal concern and the City's Charter would provide authority for this imposition. I specifically requested that HCD identify a single statute that the City is violating. Instead, HCD reiterates that the affordability covenant is a design standard and delays the process, which is objectively incorrect.

In the March 13, 2023, letter, the statement is made that the affordability covenant may discriminate against certain groups in violation of state and federal housing laws with a reference to Government Code section 65008. It is unclear how HCD alleges this Section is implicated, as there is no reference to lawful occupation, age, familial status, or any characteristic that would appear to offend these protected classes. The City requests an explanation of this reference. In the event such discrimination is implicated the City is committed to remedying the situation."

HCD's Follow-Up Response

HCD did not find that the requirement of an affordability covenant a "design standard". The initial letter referred to Government Code section 65852.2, subdivision (a)(8) to note that "no additional standards" may apply other than those that appear within the section. This was to illustrate that deed restrictions and affordability covenants are not found in State ADU Law, and their inclusion would violate subdivision (a)(8). The City took the use of this reference as grounds for its claim that HCD considers an affordability covenant a design standard, and, to paraphrase, "therefore as it is not a design standard, HCD has no enforcement authority." This statement is baseless, as only part of state ADU statute is relevant to design standards, and HCD enforces the whole of ADU statute.

The City states "there is no reasonable argument that executing a form affordability covenant is the basis for delay or denial in contravention of subdivision (a)(7). This form is executed at the time of submission of a ministerial application and has no ability to delay the issuance of a building permit." This form, while required by the Ordinance, does not appear in the Ordinance itself and is therefore explicitly subject to Government Code section 65852.2, subdivision (a)(7), which 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 Ordinance states, "the property owner shall file with the County Recorder upon approval by the City Attorney as to form and content, a deed restriction covenant..." and "the property owner shall file with the County Recorder upon approval by the City Attorney as to form and content an affordable housing agreement." The timing of the execution of the forms in question is immaterial, as their requirement as part of the application process is the core issue.

ADU applications without a deed restriction or compliant affordability covenant may be considered “incomplete”. Therefore, the absence of such a deed restriction and/or covenant would be the grounds for the City’s refusal to process the application or delaying the application until it expires, or otherwise delaying or denying a building permit. HCD has received complaints from homeowners in the City that refused to sign the affordability covenant and whose ADU applications were considered incomplete, not accepted, or otherwise not allowed to proceed. By deeming an application incomplete or otherwise not processing the application, the City effectively denies the ADU application.

The City states that HCD has not provided an analysis of its position. The analysis was incorporated in the March 13, 2023, findings letter. The City made no substantial response to HCD’s concern that an affordability requirement as written would require rentability and prohibit occupation without payment of rent, but instead asked for substantiation as to how that presents a fair housing challenge. To this question: requiring that ADUs be available only for rent to lower-income households or seniors would disallow occupation without payment of rent, which would prevent use by family members (for example, the adult child of the homeowner and that adult child’s family) or disabled relatives. Therefore, both familial status and disability could constitute grounds for a fair housing conflict. Alternatively, permanently suppressing potential income from the ADU actively discourages development of a unit that *could* be used as a low-income unit at some point or points in its life cycle. A homeowner is less likely to create a low-income unit if they are obligated to permanently restrict its potential income, leading to a potential “no-win” situation for affordability.

In response to the City’s concern that ADUs would be rented out as “summer getaways” rather than as permanent residences, Government Code section 65852.2, subdivision (a)(8)(C) states “A local agency shall require that a rental of the accessory dwelling unit created pursuant to this subdivision be for a term longer than 30 days.”

Review of the City’s most recent adopted housing element reveals an inconsistency. On page 1-32, under Quantified Objectives, the City projects the development of eight ADUs (roughly 6.5 percent of its total Regional Housing Needs Assessment (RHNA) obligation) over the planning period. These ADUs are projected as being specifically and exclusively for the moderate-income category. Requiring that all ADUs be income-restricted to low- or very low-income residents in perpetuity, would prohibit the development of the eight moderate-income ADUs that the City has claimed in its RHNA obligations.

Conclusion

Given the deficiencies described above and in HCD's March 13, 2023 letter, the City's Ordinance is inconsistent with State ADU Law. Government Code section 65852.2, subdivision (a)(4), states that if "a local agency has an existing accessory dwelling unit ordinance that fails to meet the requirements of this subdivision.... that agency shall thereafter apply the standards established in this subdivision for the approval of accessory dwelling units, unless and until the agency adopts an ordinance that complies with this section." HCD has the authority to make findings as to whether an ADU ordinance complies with the requirements of this subdivision. (Gov. Code, § 65852.2, subd. (h)(1).) Government Code section 65852.2, subdivision (h)(3)(A), authorizes HCD to notify the California Office of the Attorney General that the City is in violation of this state law.

HCD appreciates the City's efforts in the preparation and adoption of the Ordinance and welcomes the opportunity to assist the City in fully complying with State ADU Law. Please feel free to contact Mike Van Gorder, of our staff, at (916) 776-7541 or at mike.vangorder@hcd.ca.gov.

Sincerely,



Jamie Candelaria
Senior Housing Accountability Unit Manager
Housing Policy Development Division