

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

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August 4, 2023

Laura Russell  
Planning and Building Director  
Town of Portola Valley  
765 Portola Road  
Portola Valley, CA 94028

Dear Laura Russell:

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

Thank you for submitting the Town of Portola Valley accessory dwelling unit (ADU) Ordinance No. 2021-438 (Ordinance), adopted July 14, 2022, to the California Department of Housing and Community Development (HCD). HCD has reviewed the Ordinance, and the accompanying documents sent with the May 25, 2023, email to HCD Analyst Mike Van Gorder. HCD 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 September 1, 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 (1)(B)(2)(f) – *Existing Interior Space* – The Ordinance defines “Existing Interior Space” by stating, “For the purposes of internal ADU creation, existing interior space shall be within a building which was permitted by the town and passed its final building inspection.” However, nonconforming zoning conditions may result in ‘existing interior space’ that was never permitted by the town or that never passed its final building inspection. Government Code section 65852.2, subdivision (d)(2), 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.” Therefore, the Town must amend this section.

- Sections (1)(B)(3)(a)(i) and (1)(B)(3)(a)(ii) – *Fire Prohibitions* – The Ordinance states that “ADUs are prohibited on parcels smaller than one acre whose direct vehicular access is from a road or cul-de-sac which (1) has a single point of ingress/egress and (2) has a width of less than eighteen feet.” The Ordinance’s findings go into detail explaining the nature of the fire risk and the Town’s approach to risk management, outlining a fuel hazard study specific for the purpose and mapping where evacuation could be constrained in an emergency. The use of these locally chartered studies and the fifty pages of documents included in the May 25, 2023 email speaks to the great care and consideration the Town has put into risk management. HCD appreciates the thoughtful analysis.

However, the Town uses local restrictions proscribed in Government Code section 65852.2, subdivision (a)(1)(A) to apply to *all* ADUs, not just those subject to subdivision (a). Government Code section 65852.2, subdivision (e) begins with “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...” before describing by right ADUs and JADUs pursuant to Government Code section 65852.2, subdivisions (e)(1)(A) through (e)(1)(D). Applying authority – including the designation of suitable areas for ADUs based on ‘traffic and public safety’ – which is intended to govern subdivision (a) units, to subdivision (e) units violates state statute, as local development standards do not apply to subdivision (e) units. The Town may not restrict new construction ADUs pursuant to subdivision (e), while simultaneously allowing, through its building and zoning codes, other new residential development. The Town must amend the Ordinance to allow for subdivision (e) ADUs within residential or mixed-use zones.

Section(1)(B)(3)(a)(ii) of the Ordinance states that “ADUs on parcels which are one acre or larger and whose direct vehicular access is from a road or cul-de-sac, which (1) has a single point of ingress/ egress and (2) has a width of less than eighteen feet, shall comply with the setback requirements of the underlying zoning district, regardless of ADU size.” 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, and minimum lot size, for either attached or detached dwellings that does not permit at least an 800 square foot accessory dwelling unit that is at least 16 feet in height with four-foot side and rear yard setbacks to be constructed in compliance with all other local development standards.” Therefore, this restriction must be removed or amended to comply with State ADU Law.

Regarding lot size and ADU restrictions, it was explained in the May 25, 2023 email that “The majority of parcels in Portola Valley are over one acre. However, the area of town which contains most of the safety concerns (Woodside Highlands), the parcels are less than an acre. The parcel size of less than an acre was added to the criteria as an alternative way to screen [out lots] for the fire safety exception.” However, as this may constrain development choices in smaller lots outside the fire hazard area, the Town should remove this parameter for fire safety designation and instead designate the specific geographic location to govern such implementation.

HCD appreciates the need for enforcement flexibility given the worsening fire hazard in California. HCD further appreciates the Town’s willingness to provide ADU allowances beyond state requirements in places of reduced fire risk; furthermore, HCD does not take issue with most of the objective standards described in Section (1)(B)(3)(a)(iii) that apply to all residential development within the locally designated fire hazard zone. However, as written, the Town’s fire restrictions in Section (1)(B)(3)(a) ultimately prohibit ADUs and must be revised.

- Section (1)(B)(4)(b) – *State Exemption ADUs* – The Ordinance states that “any parcel zoned residential or mixed use permitting residential shall be permitted to build one of the following applicable ADUs... however, the safety exceptions in Section 3a and 3b above shall apply.” It has already been established that the fire hazard restrictions may not apply to subdivision (e) units, which this section addresses directly. However, the Ordinance’s use of the word “one” when introducing the different categories of subdivision (e) units limits the number of development options available in statute.

Pursuant to Government Code section 65852.2, subdivision (e)(1), “Notwithstanding subdivisions (a) to (d), inclusive, a local agency shall ministerially approve an application...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 lots with existing or proposed single-family dwellings. Statute does not use “or” nor “one of” to indicate only one or another would be applicable to the exclusion of the other.

Thus, if the local agency approves an ADU that is created from existing (or proposed) space of a single-family dwelling, or created from an existing

accessory structure, and the owner subsequently applies for a detached ADU permit (or vice versa), which meets the size and setback requirements, pursuant to the subdivision, the local agency cannot deny the applicant, nor deny a permit for a ADU under this section. This permits a homeowner, who meets specified requirements, to create one (1) converted ADU, one (1) detached, new construction ADU, and one (1) JADU, in any order without prejudice, totaling three units. This standard simultaneously applies to ADUs created pursuant to Government Code section 65852.2, subdivision (e)(1)(C) and (D), on lots with proposed or existing multifamily dwellings according to specified requirements. Therefore, the Town should amend the Ordinance to reflect state statute.

- Section (1)(B)(4)(b)(ii) – *Conversions Interior Units* – The Ordinance states, “One ADU or one JADU is permitted per lot within the existing or proposed space of a single-family dwelling...” This reflects an older version of state statute. Current Government Code section 65852.2, subdivision (e)(1)(A), permits “One accessory dwelling unit **and** one junior accessory dwelling unit per lot with a proposed or existing single-family dwelling.” Therefore, the Town must replace the word “or” with “and” to reflect current statute.
- Section (1)(B)(4)(b)(iii) – *Multifamily Options* – The Ordinance states that an applicant may select from two options. Option 1 refers to Conversion, and Option 2 allows for 2 detached ADUs. The Ordinance implies that only one option may be selected by an applicant. However, as stated above, Government Code section 65852.2, subdivision (e)(1), states that any ADUs listed in (e)(1)(A) through (D) must be permitted. Subdivision (e)(1)(C) pertains to the conversion of non-livable space in multifamily structures and (e)(1)(D) allows for the creation of two detached ADUs. Therefore, the Ordinance must be amended to allow for both options to be available to an applicant.
- Section (1)(B)(4)(b)(iii) and (1)(B)(4)(e) – *Height* – The Ordinance sets a maximum height at sixteen feet for many ADUs. However, current ADU statute restricts local agencies from requiring the height of attached and detached ADUs, to be less than either 16, 18, 20, or 25 feet pursuant to Government Code section 65852.2, subdivisions (c)(2)(D) and (e)(1)(B)(ii). The Town should review recent changes to ADU statute and amend the Ordinance accordingly.
- Section (1)(B)(4)(c) – *Special Setbacks* – The Ordinance mentions “special setbacks applicable to the parcel” when describing maximum sizes. However, this term is not defined clearly in the Ordinance. HCD requires more information – what constitutes a “special setback” applicable to a parcel? Be advised that Government Code section 65852.2, subdivision (a)(1)(D)(vii), states “No setback shall be required for an existing living area or accessory structure or a structure constructed in the same location and to the same dimensions as an existing structure that is converted to an accessory dwelling

unit or to a portion of an accessory dwelling unit, and a setback of no more than four feet from the side and rear lot lines shall be required for an accessory dwelling unit that is not converted from an existing structure or a new structure constructed in the same location and to the same dimensions as an existing structure.” Please advise HCD if such “special setbacks” would constitute a conflict with this provision of State statute.

Section (1)(B)(4)(c)(i)(4) – *Converted Size Maximums* – The Ordinance allows a size maximum of “[s]eventeen hundred square feet for internal ADUs on all parcel sizes.” However, local development standards such as size maximums may not preclude any unit created subject to Government Code section 65852.2, subdivision (e). The Town must note the exception for subdivision (e) units in this section.

- Section (1)(B)(4)(d) and (1)(B)(4)(d)(ii) – *Size Calculations* – The Ordinance states “Basements located under an ADU that do not have internal access to the ADU are discouraged and shall be counted towards AMFA calculations.” It later states “Covered parking provided for ADUs shall be included in site AMFA calculations.” HCD requires more information – is there a scenario in which the application of these requirements could result in an ADU being required to be smaller? If so, the Ordinance may conflict with State statute.
- Section (1)(B)(4)(f) – *Parking* – The Ordinance exempts certain lots from requiring parking spaces but violates statute with omissions relevant to the following sections wherein no parking may be required:
  - Government Code section 65852.2, subdivision (d)(1): “The accessory dwelling unit is located within one-half mile walking distance of public transit.”
  - Government Code section 65852.2, subdivision (d)(2): “The accessory dwelling unit is located within an architecturally and historically significant historic district.
  - Government Code section 65852.2, subdivision (d)(4): “When on-street parking permits are required but not offered to the occupant of the accessory dwelling unit.”
  - Government Code section 65852.2, subdivision (d)(5): “When there is a car share vehicle located within one block of the accessory dwelling unit.”

The Town must change the language in this section to reflect State statute.

- Section (1)(B)(4)(j)(v) – *Safety Setbacks* – The Ordinance states “all ADUs must comply with applicable health and safety setback requirements governing specific parcels, including but not limited to setbacks required for fire safety, emergency vehicle access, geology, seismic, creek, topography, and other similar public

health and safety considerations.” HCD requires more information – would the application of the above requirements conflict with the four-foot side and rear setback requirements mandated by Government Code section 65852.2, subdivision (a)(1)(D)(vii)?

- Section (1)(B)(4)(j)(vi) – *Design Requirements* – The Ordinance requires that ADUs not within the base zoning have “1) on sides of the structure within required setback(s), there may be no exterior lighting, no egress windows or doors, and no portion of the windows and/or skylights shall be above 9’ in height; 2) windows in required setbacks must consist of obscured glass to promote privacy between neighbors...” and “6) fire safe landscape screening must be planted and maintained to minimize visual impact to the neighbors.” However, 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). The Town must either remove this section or revise it to reflect State statute.
- Section (1)(B)(4)(j)(vii) – *Easement* – The Ordinance states “For the purposes of this section, if any of the property boundaries are within or adjacent to an open space, road, trail, utility or similar easement running the length or width of the property boundary, the setback shall be measured from the edge of the easement located on the property.” However, State ADU Law refers solely and specifically to setbacks being measured from “lot lines” (Gov. Code, § 65852.2, subd. (a)(1)(D)(vii)). Therefore, measuring setbacks from an easement conflict with State law. The Town must remove this section.
- Section (1)(B)(4)(l) – *Subjective Criteria* – The Ordinance states “...utilities installed to serve an ADU shall be grouped with any existing infrastructure for the main building and screened to the extent feasible, as determined by the planning and building director.” However, “the extent feasible, as determined by the planning and building director” is a non-objective term that cannot be known to an applicant. Government Code section 65852.2, subdivision (a)(6), requires that ADU ordinances “...shall not include any discretionary processes, provisions, or requirements for those units....” Therefore, the Town must remove or amend this language.
- Section (1)(B)(6)(a) – *“Shall be Acted Upon”* – The Ordinance states “An ADU or JADU application which qualifies for ministerial review shall be acted upon within sixty days of the date the town receives a completed application.” The term “shall be acted upon” reflects outdated language that was amended as of January 1, 2023. Current Government Code section 65852.2, subdivision (a)(3), reads, “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....” Therefore, the Town must amend the language to match current statute.

Section (1)(B)(6)(b) – *Ministerial Review* – The Ordinance states that “...any State Authorized ADU defined in Section 18.36.040. B.4.b shall not be subject to discretionary review.” Section 18.36.040. B.4.b refers only to ADUs reflected in Government Code section 65852.2, subdivision I. There is no mention of units built pursuant to Government Code section 65852.2, subdivision (a), which must also be considered without discretionary review. Therefore, the Town must expand the language of this section to include all ADUs under Government Code section 65852.2.

Section (1)(B)(6)(c) – *ASCC Review* – The Ordinance states “ADUs which include any of the following shall be subject to ASCC Review....” ASCC Reviews are established in section (1)(B)(6)(b)(i)(2) as being discretionary. However, Government Code section 65852.2, subdivision (a)(6) requires that ADU Ordinances require “...only ministerial provisions for the approval of accessory dwelling units and shall not include any discretionary processes, provisions, or requirements for those units....” Therefore, the Town must remove this section

- Section (1)(B)(7)(a) – *Sold Separately* – The Ordinance states that “ADUs and JADUs shall not be sold separately from the main dwelling.” However, Government Code section 65852.26, subdivision (a), 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 Town must revise the Ordinance to allow for such an exception.
- ADU Fire Safety Checklist (Exhibit G) – *Sprinklers* – The Ordinance requires compliance with an “ADU Fire Safety Checklist”, which states that “Automatic Fire Sprinkler Systems shall be required”. However, Government Code section 65852.2, subdivision (e)(3), states “The installation of fire sprinklers shall not be required in an accessory dwelling unit if sprinklers are not required for the primary residence. The construction of an accessory dwelling unit shall not trigger a requirement for fire sprinklers to be installed in the existing multifamily dwelling.” The Town must note the exceptions.

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 contact Mike Van Gorder, of our staff, at (916) 916-776-7541 or at [mike.vangorder@hcd.ca.gov](mailto:mike.vangorder@hcd.ca.gov) if you have any questions or would like HCD's technical assistance in these matters.

Sincerely,

A handwritten signature in black ink that reads "Shannan West". The signature is written in a cursive, flowing style.

Shannan West  
Housing Accountability Unit Chief