

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

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May 30, 2023

Debbie Pedro, Community Development Director
Community Development
City of Saratoga
13777 Fruitvale Ave
Saratoga, CA 95070

Dear Debbie Pedro:

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

Thank you for submitting the City of Saratoga (City) accessory dwelling unit (ADU) Ordinance No. 376 (Ordinance), adopted October 21, 2020, to the California Department of Housing and Community Development (HCD). The Ordinance was received on July 26, 2021. 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 June 30, 2023.

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

- 15-06.240 (e) – *Junior Accessory Dwelling Unit* – The Ordinance defines a JADU as a unit that is “contained entirely within an existing or proposed single-family dwelling or accessory structure.” However, Government Code section 65852.22, subdivision (a)(4), states that a local JADU ordinance shall “require 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.” Therefore, JADUs may only be created in *attached* accessory structures. The City must clarify the Ordinance accordingly.
- 15-56.020 (a) – *Unit Allowance* – The Ordinance states, “One accessory dwelling unit and one junior accessory dwelling shall be allowed on any one lot which contains an existing or concurrently approved single-family dwelling unit.” However, Government Code section 65852.2, subdivision (e)(1), states,

“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.” Moreover subpart (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. Statute does not use “or” nor “one of” to indicate that 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 application, nor deny a permit for a JADU under this section. This permits a homeowner who meets specified requirements to create one converted ADU; one detached, new construction ADU; and one JADU, in any order without prejudice, totaling three units. This standard also 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. The City must note the exceptions and remove the quoted language from the Ordinance.

- 15-56.025 (a)(2), (a)(6) – *Zoning* – The Ordinance states that “the accessory dwelling unit shall comply with applicable zoning regulations (including, but not limited to, required setbacks, floor area limits, site coverage, and height limits). However, Government Code section 65852.2, subdivision (c)(2)(C), prohibits “[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.” Furthermore, height may not be restricted below the maximums outlined in subdivision (c)(2)(D), which permit heights of up to 16, 18, and 25 feet depending on the applicable provisions. The City must revise the Ordinance to note the exceptions.

- 15-56.025 (a)(3), (b)(1)(a)(4), and (b)(4) – *Separate Sale* – The Ordinance prohibits separate sale of an ADU from a primary dwelling, stating that ADUs may not “be intended for sale, or sold separately from the main dwelling.” 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 non-profit corporation, among other things. The City must revise the Ordinance to allow for such an exception.
- 15-56.025 (a)(5)(a)(i), (a)(5)(a)(ii) and (a)(5)(a)(iii) – *Maximum Size* – The Ordinance states that attached ADUs “shall not exceed 50 percent of the existing or concurrently approved living area of a single-family dwelling, with a maximum size of 1,200 square feet, whichever is less.” It further states that detached ADUs have a maximum of 1,200 square feet if “not located in the side or rear setback” or 850 square feet for one bedroom or 1,000 square feet for two bedrooms for ADUs within a side or rear setback. However, local development standards provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a) through (d), may not preclude ADUs created under subdivision (e), and therefore any unit created in converted space in accordance with subdivision (e)(1)(A) or (C) is not subject to size maximums. The City must note the exception.

Furthermore, requiring the size of an attached ADU to be less than either 50 percent of the existing dwelling or 1,200 square feet potentially conflicts with statute in the instance where the size of the primary dwelling being is less than 1,600 square feet. Government Code section 65852.2, subdivision (c)(2)(C), prohibits “[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.” (Emphasis added.) Therefore, the City must note the exception.

- 15-56-025 (a)(6) – *Height* – The Ordinance states, “No detached accessory dwelling unit located partially or entirely within a side or rear setback area shall exceed sixteen (16) feet in height.” The term “side or rear setback area” is not further explained and it is unclear if the City intends that ADUs be permitted in the four-foot setbacks that may be required per Government Code section 65852.2, subdivision (a)(1)(D)(vii). In any case, current Government Code section 65852.2, subdivision (c)(2)(D) requires that heights be no less than 16, 18, 20 or 25 feet depending on the applicable provisions. The City should clarify the setback issue and must amend the Ordinance to conform to statute.

- 15-56.25 (a)(8) – *Construction above Garage Setbacks* – The Ordinance states, “A setback no less than five feet from the side and rear lot lines shall be allowed for an accessory dwelling unit that is constructed above a garage that is non-conforming as to setbacks.” However, Government Code section 65852.2, subdivision (a)(1)(D)(vii), requires “a setback of no more than four feet... [for an ADU] in the same location and to the same dimensions as an existing structure.” Therefore, the City must change “five” to “four” to comply with statute.
- 15.56.025 (a)(5)(a)(iii) and (a)(13) – *Bedroom Limitations* – The Ordinance creates size maximums for either “one bedroom” or “two bedrooms.” It later states, “An accessory dwelling unit may not have more than two bedrooms.” However, 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). 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 subdivision (e). Therefore, the City should revise section (a)(5)(a)(iii) and must remove section (a)(13).
- 15-56.025 (a)(11) – *Entrance Restriction* – The Ordinance states, “If the accessory dwelling unit is attached to the main dwelling both the accessory dwelling unit and the main dwelling may be served by a common entrance; a separate exterior entrance to the accessory dwelling unit must be located on the side or at the rear of the main dwelling.” However, 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)), the City may not allow common entry and must remove this provision. Further imposing a constraint on the location of an entry door may make the creation of an additional housing unit infeasible. 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). Therefore, the City must remove the door location requirement for subdivision (e) ADUs and provide an exception for when the requirement is infeasible.
- 15-56.25 (2)(b) – *JADU Within Walls* – The Ordinance states that a “junior accessory dwelling unit shall be constructed within the existing walls of an existing or proposed single-family structure....” However, Government Code section 65852.22, subdivision (a)(4), expands on this definition to state, “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.” Therefore, the City should add language noting that JADUs

may be created in attached garages.

- 15-56.030 (a) – *Multifamily Conversion* – The Ordinance states that one ADU may be created out of converted non-livable space “for every four dwelling units” in a multifamily dwelling. However, Government Code section 65852.2, subdivision (e)(1)(C)(ii), provides for “**at least one** accessory dwelling unit within an existing multifamily dwelling and shall allow up to 25 percent of the existing multifamily dwelling units.” (Emphasis added.) As written, the Ordinance may prohibit converted units in multifamily structures with fewer than four dwelling units. Therefore, the City must add “and at least one” in this section to comply with statute.
- 15-56.040 – *Permitting* – The Ordinance states that “the Community Development Department shall ministerially process for approval any application... [within 60 days].” However, current Government Code section 65852.2, subdivision (a)(3)(A), states, “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.” (Emphasis added.) Therefore, the City must change the language from “process for approval” to “approve or deny.”
- 15-56.050 (e) – *Legalization* – The Ordinance states that “any accessory dwelling unit or junior accessory dwelling unit established prior to February 19, 2003, which does not qualify for legalization under this Section by reason of not having been lawfully constructed, shall be deemed a new unit subject to [increased scrutiny with the burden of proof on the applicant].” However, Government Code section 65852.23, 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 Section 65852.2 or any local ordinance regulating accessory dwelling units.” Therefore, the City must amend the Ordinance to comply with statute.

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.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Zisser', with a long horizontal stroke extending to the right.

David Zisser
Assistant Deputy Director
Local Government Relations and Accountability