

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

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August 30, 2023

Dina Tasini, Community Development Director  
Planning Division  
City of Tiburon  
1505 Tiburon Blvd  
Tiburon, CA 94920

Dear Dina Tasini:

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

Thank you for submitting the Town of Tiburon (Town) accessory dwelling unit (ADU) Ordinance No. 594 (Ordinance), adopted February 16, 2022, 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 September 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:

- 16.52.100. (A)(1) – *Definitions: Accessory Dwelling Unit* – The Ordinance states that an ADU "...shall mean an attached or detached residential dwelling unit that provides complete independent living facilities for one or more persons and is located on a lot with a proposed or existing dwelling. It shall include permanent provision for living sleeping, eating, cooking, and sanitation on the same parcel as the single-family dwelling is or will be situated." However, Government Code section 65852.2, subdivision (j)(1), provides that "[a]n accessory dwelling unit also includes the following:

(A) An efficiency unit.

(B) A manufactured home, as defined in Section 18007 of the Health and Safety Code."

The Town should amend this section of the Ordinance to also include efficiency units and manufactured homes.

- 16-52.100 (A)(2) – *Definitions: Junior Accessory Dwelling Unit* – The Ordinance states, "A Junior Accessory Dwelling Unit must include an efficiency kitchen with a sink, cooking

facility with appliances that do not require electrical service greater than 120 volts....” However, Government Code section 65852.22, subdivision (a)(6)(A), requires only “a cooking facility with appliances” in JADUs. Language prohibiting 220-volt connections was specifically removed from statute. The Ordinance must be amended to comply with State ADU Law.

- 16-52.100 (B1)(2) – *Lot Permissions* – The Ordinance states, “Accessory Dwelling Units and Junior Accessory Dwelling Units are permitted on lots zoned to allow single-family or multi family dwelling residential use.” However, under Government Code section 65852.22, subdivision (a)(1), JADUs are only permissible within single-family residences and in single-family residential zones. The Town must amend this section to make this clarification.
- 16-52.100 (B1)(3) – *Applications* – The Ordinance states, “The building permit application shall be acted upon within 60 days....” However, Government Code section 65852.2, subdivision (a)(3)(A), states that a local agency must either approve or deny an application for an ADU within 60 days. The Town should amend this section to read “approve or deny.”
- 16-52.100 (B2)(1) – *Sale* – The Ordinance states, “The Accessory Dwelling Unit may not be sold separately from the Primary Unit.” 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. Therefore, this section should be amended to allow for the separate sale as determined in Government Code section 65852.26.
- 16-52.100 (B2)(4) Table 1 – *Attached ADU Size* – The Ordinance states, “In no case may the total floor area of an attached ADU exceed 50% of an existing primary dwelling.” However, this contradicts the Ordinance’s guaranteed allowance in subdivision (B2)(3). Additionally, Government Code section 65852.2, subdivision (c)(2)(C), prohibits a local agency from imposing a “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.) If the primary dwelling is less than 1,600 square feet, the Ordinance as it is currently written, would require an ADU to be less than 800 square feet. The City must revise the Ordinance to eliminate this potential constraint on the size of an ADU addition and clarify that neither floor area ratio nor lot coverage would deny a minimum of 800 square-foot ADU. Therefore, the Town should clarify this restriction and its applicability.

- 16-52.100 (B2), (B2)(3), (B2)(7), and (B2)(9) – *Setbacks and Setback Exceptions* – Table 3 specifies " In the case of an ADU within a Precise Plan Area or Residential Planned Development Area where no front setback is prescribed, the front setback shall be 30 feet." The Ordinance also states, "All standards related to size, limits on lot coverage, floor area ratio, open space and/or minimum lot size that apply to an Accessory Dwelling Unit shall not prohibit an Accessory Dwelling Unit measuring 800 square feet of floor area or less, a height of 16 feet or less, and four-foot side and rear yard setbacks, provided the Accessory Dwelling Unit complies with all other applicable standards." However, under Government Code section 65852.2, subdivision (c)(2)(C), a local agency cannot impose front yard setbacks which would preclude an 800 square-foot ADU from being constructed on the lot. Imposing front yard setbacks would potentially prevent ADUs from being constructed in spaces within those front setbacks. The exceptions in subdivision (B2)(3) of the Ordinance do not mention an exception for front setbacks. The Town must remove this restriction from the Ordinance or add front setback exception requirements.

Additionally, the Ordinance states, "No Setback shall be required for a lawfully constructed garage in existence prior to January 1, 2017, that is converted in whole or part to an Accessory Dwelling Unit." However, 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." This applies to all existing converted space and is not limited to garages. Also, the existing space may be converted to an ADU regardless of whether it is lawfully constructed or not. Pursuant to Government Code section 65852.2, subdivision (d)(2), "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, even if an accessory structure was not previously permitted or lawfully constructed, it may be converted to an ADU. The Town must amend this section to expand the setback exemptions and remove the term "lawfully constructed."

- 16-52.100 (B2)(10) – *Height* – The Ordinance states, "One story Accessory Dwelling Units shall have a height limit of 16 feet or no taller than the primary residence at the area of attachment and in no case greater than 30 feet. Accessory Dwelling Units may be two stories and no greater in height than 30 feet." The Ordinance does not address the height requirement for detached ADUs. Government Code section 65852.2, subdivision (c)(2)(D), states that "a local agency shall not establish by ordinance any of the following: Any height limitation that does not allow at least the following, as applicable:
  - (i) A height of 16 feet for a detached accessory dwelling unit on a lot with an existing or proposed single family or multifamily dwelling unit.

- (ii) A height of 18 feet for a detached accessory dwelling unit on a lot with an existing or proposed single family or multifamily dwelling unit that is within one-half of one mile walking distance of a major transit stop or a high-quality transit corridor, as those terms are defined in Section 21155 of the Public Resources Code. A local agency shall also allow an additional two feet in height to accommodate a roof pitch on the accessory dwelling unit that is aligned with the roof pitch of the primary dwelling unit.
- (iii) A height of 18 feet for a detached accessory dwelling unit on a lot with an existing or proposed multifamily, multistory dwelling.
- (iv) 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.”

Restricting ADUs to the height of the primary dwelling, or to less than 18 feet for detached ADUs, is not compliant with State ADU Law. The Town must amend this section to allow for heights as described in State ADU Law.

- 16-52.100 (B2)(13) – *Parking Exceptions* – The Ordinance lists five parking exceptions (a through e). However, Government Code section 65852.2, subdivision (d)(1), includes a sixth parking exception: “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.” The Town must amend the Ordinance to include this exception.
- 16-52.100 (B2)(15) – *Architectural Compatibility, Setbacks* – The Ordinance details several design criteria, such as (B2)(15)(c) (“The Accessory Dwelling Unit shall be located at least 10 feet from the top of any creek bank that exists on the lot of the proposed Accessory Dwelling Unit.”) (B2)(15)(g) (“No entryways are allowed within 10 feet of a side or rear property line.”), and (B2)(15)(p) (“Two trees shall be planted at each proposed window of the Accessory Dwelling Unit facing a neighboring property....”). However, for the construction of ADUs, no setbacks or limits on lot coverage may preclude the construction of an ADU of 800 square feet under Government Code section 65852.2, subdivisions (c)(2)(A) and (c)(2)(C). Imposing such restrictions even on proposed ADUs which are 800 square feet or less could prevent them from being constructed on the lot. The Town must amend this section to clarify that none of these design criteria may preclude an 800 square-foot unit on the lot.

Additionally, there are subjective criteria, such as (B2)(15)(j) (“The roof color of the Accessory Dwelling Unit shall use similar roof materials and color as the primary dwelling

unit.”) within the design criteria. Government Code section 65852.2, subdivision (a)(1)(B)(i), states, “The ordinance shall ... Impose objective standards on accessory dwelling units that include, but are not limited to, parking, height, setback, landscape, architectural review, maximum size of a unit, and standards that prevent adverse impacts on any real property that is listed in the California Register of Historical Resources.” An objective standard is defined in Government Code section 65852.2, subdivision (j)(7), as “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.” Phrases such as “similar to” are subjective in nature. The Town must amend this section to contain only objective standards.

- 16-52.100 (C1)(2) – *JADUs, Applications* – The Ordinance states, “The Director shall act on the application within 60 days from receipt...” However, Government Code section 65852.22, subdivision(c)(1) states that a local agency must either approve or deny an application for an ADU within 60 days. The Town must amend this section to read “approve or deny.”

Additionally, the Ordinance references JADUs in the context where “there is an existing single-family or multifamily dwelling on the lot.” However, under Government Code section 65852.22, JADUs are only permissible in single-family residential zones. The Town must amend this section to make this clarification.

- 16-52.100 (C2)(2) – *Owner Occupancy* – The Ordinance states, “One of the dwelling units on the site (either the Primary Unit or the Junior Accessory Dwelling Unit) shall be owner-occupied.” However, there is a narrow exemption in Government Code section 65852.22, subdivision (a)(2), where owner-occupancy shall not be required if the owner is another governmental agency, land trust, or housing organization. The Town must amend this section to allow for this exception.
- 16-52.100 (C2)(1) – *JADU Development Standards* – The Ordinance states that “Junior Accessory Dwelling Units shall be no greater than 500 square feet in size and contained entirely within a single-family residence.” However, Government Code section 65852.22, subdivision (a)(4), requires that a local ordinance must “[r]equire 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, a JADU may be built within “**proposed**” primary dwellings, as well as within the confines of any “enclosed uses within the residence, such as garages.” The Town must amend this section to allow for the creation of JADUs in proposed primary dwellings as well as in attached, enclosed uses.

- 16-52.100 (D)(1),(2), and (4) – *Accessory Dwelling Units Subject to Limited Standards* – The Ordinance specifies, “One Accessory Dwelling Unit or Junior Accessory 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 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 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). The Town must revise the Ordinance to remove this restriction.

Additionally, the Ordinance states, “The detached Accessory Dwelling Unit must comply with the following:

- a. Maximum floor area: 800 square feet.
- b. Maximum height: 16 feet.
- c. Minimum rear and side setbacks: four feet.”

However, Government Code section 65852.2, subdivision (c)(2)(D), prescribes the height limitations for detached and attached ADUs, and sets the limit at 16, 18 or 25 feet, as provided in the subdivision. Limiting these ADUs to 16 feet would violate State ADU law. The Town must amend this section to allow for the heights as described in subdivision (c)(2)(D).

- 16-52.100 (D)(4) – *Detached Accessory Dwelling Units on Multifamily Lots* – The Ordinance states, “In the event an Accessory Dwelling Unit is proposed on a lot that has an existing multifamily dwelling but is detached from that multifamily dwelling, no more

than two Accessory Dwelling Units are permitted.” However, Government Code section 65852.2, subdivision (e)(1)(D), allows “[n]ot more than two accessory dwelling units that are located on a lot that has an existing or *proposed* multifamily dwelling...” (Emphasis added.) Therefore, the Town must amend the Ordinance section to allow detached ADUs in conjunction with proposed multifamily dwellings.

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 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 Tyler Galli, of our staff, at (916) 776-7163 or at [Tyler.Galli@hcd.ca.gov](mailto:Tyler.Galli@hcd.ca.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Zisser', with a stylized flourish extending to the right.

David Zisser  
Assistant Deputy Director  
Local Government Relations and Accountability