Dec 12, 2024

City of Santa Rosa
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Re: Proposed Changes to the City's ADU Ordinance

Dear Santa Rosa Planning Commission,

The California Housing Defense Fund ("CalHDF") submits this letter regarding the proposed amendments to the City's accessory dwelling unit ("ADU") ordinance, which are calendared as agenda item 11.1 for the December 12, 2024 Planning Commission meeting.

CalHDF appreciates that the City is amending its ADU ordinance to keep pace with changes in state law. However, the proposed ordinance's requirements conflict with state law as discussed below.

Background

The law gives local governments authority to enact zoning ordinances that implement a variety of development standards on ADUs. (Gov. Code, § 66314.) The standards in these local ordinances are limited by state law so as not to overly restrict ADU development. (See *id.*) Separately from local ADU ordinances, Gov. Code, § 66323 prescribes a narrower set of ADU types for which it imposes a ministerial duty on cities to approve. "Notwithstanding Sections 66314 to 66322 ... a local agency shall ministerially approve" these types of ADUs. (*Id.* at subd. (a).) This means that ADUs that satisfy the minimal requirements of section 66323 must be approved regardless of any contrary provisions of the local ADU ordinance. (*Ibid.*)

SB 1211, effective 1 January 2025, makes this even more explicit: Gov. Code, § 66323, subdivision (b): "A local agency shall not impose any objective development or design

standard that is not authorized by this section upon any accessory dwelling unit that meets the requirements of any of paragraphs (1) to (4), inclusive, of subdivision (a)."

In addition, ADUs that qualify for the protections of Gov. Code, § 66323, like other ADUs, must be processed by local governments within 60 days of a complete permit application submittal. (Gov. Code, § 66317, subd. (a).)

State law also prohibits creating regulations on ADU development not explicitly allowed by state law. Government Code Section 66315 states, "No additional standards, other than those provided in Section 66314, shall be used or imposed, including an owner-occupant requirement, except that a local agency may require that the property may be used for rentals of terms 30 days or longer."

Impermissible Prohibition on Separate Sales

City code section 20-42.130(B)(5) bans all sales of ADUs separate from the primary dwelling. However, Government Code section 66341 establishes certain circumstances in which the local agency must allow separate sales of ADUs. The City should amend the proposed code to facilitate separate sales in these circumstances.

Impermissible Requirement for Land Dedication

City code section 20-42.130(B)(6) requires dedication of property as a condition of development of an ADU in certain circumstances. As discussed above, state law prohibits creating regulations on ADU development not explicitly allowed by state law. Government Code Section 66315 states, "No additional standards, other than those provided in Section 66314, shall be used or imposed, including an owner-occupant requirement, except that a local agency may require that the property may be used for rentals of terms 30 days or longer." This land dedication requirement is also a clear violation of Government Code section 66323, which prohibits any standards not explicitly authorized in that section.

Additionally, the Fifth Amendment of the Constitution prohibits governments from taking private property without just compensation. The Fifth Amendment has been interpreted by the U.S. Supreme Court to prohibit zoning and land use regulations that effectively deprive an owner of protected property rights. (See *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104.) Perhaps the most clear cut regulatory taking occurs when a land use regulation allows for a permanent physical occupation of private property. (*Loretto v. Teleprompter Manhattan Catv Corp.* (1982) 458 U.S. 419.) There is perhaps no more obvious example of a violation of the regulatory taking doctrine than the policy enacted by the City here. The City requires, through zoning regulation, that property owners deed their private property over to the City without just compensation, for public use as street right-of-way. And this is for approval of an ADU, not for a subdivision.

The fact that this dedication is only required as a condition of approval for residential development does not allow it to escape constitutional scrutiny. The Supreme Court has long held that regulatory conditions on development approvals that would otherwise constitute takings must be reasonably related to mitigating impacts of that development, and roughly proportional to those impacts. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (Nollan); *Dolan v. City of Tigard* (1994) 512 U.S. 374 (Dolan).) The City has established no such relationship because it cannot, and a desire for a wider right-of-way is wildly out of proportion to any purported impact of an ADU. The City is free to widen its street by acquiring property on the private market, or by use of eminent domain powers providing just compensation to property owners, but it cannot simply enact a regulation requiring that homeowners give land to the City without just compensation.

And the City should be aware that the state legislature has recently curtailed its ability to require housing development projects to donate land to the city. Assembly Bill No. 3177, effective January 1, 2025, states that "A local agency shall not impose a land dedication requirement on a housing development pursuant to Section 66001 to widen a roadway if the land dedication requirement is for the purpose of mitigating vehicular traffic impacts, achieving an adopted traffic level of service related to vehicular traffic, or achieving a desired roadway width." (Gov. Code, § 66005.1, subd. (c)(1).)

State Law Forbids Requiring ADU Applications in Certain Circumstances

City code section 20-42.130(D)(1) requires ADU applications for all proposed ADUs. However, Government Code section 66323, subdivision (a) requires the City to approve building permit applications for ADUs that fit certain criteria and does not allow for a separate ADU application in addition.

Impermissible Deed Restriction Requirements

City code section 15-4E-2(E) requires a restrictive covenant to be placed on the property prior to the issuance of a certificate of occupancy for an ADU. This is a clear violation of Government Code section 66323, which prohibits any standards not explicitly authorized in that section. Deed restrictions are also not permitted by Government Code section 66315, which forbids standards not listed in section 66314, and it is unclear why the City would want applicants to go through the trouble of filing such a deed restriction, other than to discourage ADU development by increasing development cost.

The California Department of Housing and Community Development ("HCD") has communicated that such deed restrictions are unlawful in its review of other cities' ADU ordinances. See, for example, the attached August 26, 2024 HCD review of San Marino's ADU ordinance, in which HCD instructs the City of San Marino to remove its deed restriction requirement.

Separately, City code section 15-4E-2(F) requires certain deed restrictions, required by the City and declaring accessory structures as non-inhabitable, to be lifted prior to issuance of a building permit for an ADU. This is also a clear violation of Government Code section 66323, which prohibits any standards not explicitly authorized in that section. Owner occupancy standards are also not permitted by Government Code section 66315, which forbids standards not listed in section 66314.

Additionally, such deed restrictions imposed on ADUs (or on other accessory structures) are unenforceable. This is due to the absence of horizontal privity between the City and the applicant. In other words, since the City does not own the applicant's property at the time of the application, and does not own a neighboring property to whose benefit the proposed restriction(s) redound, black letter property law bars the restrictions from binding future property owners. (See, e.g., *Scaringe v. J. C. C. Enters* (1988) 205 Cal.App.3d 1536 [describing the types of privity relationship between covenanting parties that allow enforcement of a deed restriction]; see also Civ. Code §§ 1460 et seq.)

Impermissible General Plan Requirements

City code section § 20-42.130(B)(2) requires ADUs to be consistent with the General Plan text and diagrams. This type of blanket imposition of General Plan standards is not allowed by state law.

As discussed above, state law gives local governments authority to enact zoning ordinances that implement a variety of development standards on ADUs. (Gov. Code, § 66314.) The standards in these local ordinances are limited by state law so as not to overly restrict ADU development. (See *id*.) And state law forbids cities from imposing other standards on ADUs beyond what are specifically listed in Government Code, section 66314. (Gov. Code, § 66315.)

Separately from local ADU ordinances, Gov. Code, § 66323 prescribes a narrower set of ADU types for which it imposes a ministerial duty on cities to approve. The City must approve building permits for ADUs that meet specific height, size, and setback criteria. The City cannot therefore impose the underlying General Plan text and diagram requirements on such ADUs.

Impermissible Historic Preservation Requirements

City code section 20-42.130(B)(3) prohibits ADU development on properties or adjacent to properties listed on the California Register of Historic Resources. Additionally, City code section 20-42.130(E)(14) imposes a variety of design requirements and a historic resources survey requirement on ADUs developed within the Historic (-H) Combining District.

However, no such standards may be imposed on ADUs that meet the requirements of Government Code Section 66323, subd. (a), as discussed above.

Impermissible Setback Requirements (General)

City code sections 20-42.130(E)(2)(a)(1) and 20-42.130(E)(2)(b)(1) mandates that new detached ADUs must provide a side-corner setback of eight feet and also conform to the setback requirements that the underlying zoning district imposes on primary dwellings. The front setback requirement is only relaxed if it is otherwise impossible to develop an 800 square foot ADU on the property, and the code only allows this for single family properties.

And City code section 20-42.130(E)(2)(d) requires ADUs to base front setbacks on the projected future street width of public streets, not the current front property line.

However, Government Code section 66323, subdivision (a) does permit any application of front setback requirements to ADUs that qualify for its protections, regardless of whether or not an ADU is developable elsewhere on the property. There are many policy reasons for this. For instance, a homeowner may prefer to preserve a private backyard space while redeveloping the less useful front yard. While children may play in the backyard, the front yard is closer to the street and less safe for a variety of activities. The City therefore must allow front yard ADUs that comply with the standards in Government Code section 66323, subdivision (a) both on single family and on multifamily properties, without having to demonstrate any hardship.

Additionally, the City must allow ADUs proposed within a primary dwelling expansions of up to 150 square feet for the purposes of facilitating ingress and egress. (Gov. Code, § 66323, subd. (a)(1)(A).) The City must allow such expansions notwithstanding underlying setback requirements.

Impermissible Setback Requirements (Hillside and Creekside)

City code section 20-42.130(E)(13) imposes 15-foot side and rear setbacks on ADUs that exceed certain heights or exceed 800 square feet in floor area and are also located in certain hillside areas. And City code section 20-42.130(E)(15) imposes specific setback requirements on ADUs that exceed 16 feet in height or exceed 800 square feet in floor area and are also located near waterways.

However, Government Code section 66323, subdivision (a) does permit any application of setback requirements on ADUs that are developed by conversion of a portion of the primary dwelling or by conversion of an existing accessory structure. Additionally, the City must allow ADUs proposed within a primary dwelling or accessory structure expansions of up to 150 square feet for the purposes of facilitating ingress and egress and cannot require such setbacks for these 150 square foot expansions. (Gov. Code, § 66323, subd. (a)(1)(A).)

And Government Code section 66323, subdivisions (a)(2) and (a)(4) allow for ADUs up to 18 feet in height in some circumstances, not 16 feet, and the City may not impose any setback requirements on such ADUs other than four foot side and rear setbacks.

Impermissible Sprinklering Requirements

City code section 20-42.130(E)(3)(a)(1) imposes a sprinkler requirement on structures that exceed 1,200 square feet of total floor area. And City code sections 20-42.130(E)(3)(b)(1) and 20-42.130(E)(3)(c)(1) both impose a sprinkler requirement on "all buildings that undergo any combination of substantial remodel, addition or both that exceed 50 percent of the existing total floor area."

All these requirements violate Government Code section 66314, subdivision (d)(12): "Accessory dwelling units shall not be required to provide fire sprinklers if they 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 primary dwelling." This also violates Government code section 66323, subdivision (c): "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."

If the existing primary dwelling is not required to provide sprinklers, then a conversion ADU or a detached new construction ADU is also not required to provide sprinklers, regardless of its size and regardless of how much remodeling is done.

Also, the aforementioned sprinklering requirements conflict with City code section 20-42.130(E)(16).

Impermissible Floor Area Limitations

City code section 20-42.130(E)(3)(c) forbids ADUs within a primary dwelling to be more than 45% of the combined floor area of the two dwellings, and it also limits both internal conversion ADUs and detached conversion ADUs to 1,200 square feet.

However, neither of these restrictions are not permitted for ADUs that qualify for the protections of Government Code section 66323, subdivision (a)(1), as the state law forbids applications of regulations other than those listed in that section.

This means that an applicant may convert more than 45% of a primary dwelling into an ADU. This also means that an applicant is free to convert an accessory building into an ADU, even if the accessory structure is greater than 1,200 square feet (and the resulting ADU is also greater than 1,200 square feet).

Impermissible Height Limitations

City code section 20-42.130(E)(4) only allows an additional two feet in roof height to accommodate a roof pitch aligned with the primary dwelling up to a maximum height of 18 feet. However, Government Code section 66321, subdivision (b)(4)(B) plainly allows up to 20 feet in height for ADUs within ½ mile of a major transit stop or a high-quality transit corridor and a roof that aligns in pitch with that of the primary dwelling.

Impermissible Design Limitations

City code section 20-42.130(E)(6) requires ADUs to match certain design elements in the primary dwelling. However, no such standards may be imposed on ADUs that meet the requirements of Government Code Section 66323, subd. (a), as discussed above.

Non-objective Privacy Requirements

City code section 20-42.130(E)(9) requires the following: "A balcony, window or door of a second story accessory dwelling unit shall be designed to lessen privacy impacts to adjacent properties. Appropriate design techniques include obscured glazing, window placement above eye level, screening treatments, or locating balconies, windows and doors toward the existing on-site residence." However, these are not objective standards, and the City may only impose objective standards pursuant to Government Code section 66314, subdivision (b)(1). It is impossible for an applicant to know *ex ante* what a reviewing official will consider adequate to mitigate "privacy impacts."

Also, as a policy matter, it is unclear why the onsite primary residence is less deserving of privacy than a neighboring property and why more privacy is needed vis a vis ADU residents than primary dwelling residents.

Impermissible Limitations on ADUs Constructed via SB 9

City code sections 20-42.130(E)(10)(e) and 20-42.130(F)(1)(d) forbid the development of ADUs and JADUs, respectively, in conjunction with SB 9 lot splits if the parcel does not meet the following requirements:

> (1) The parcel is located outside of the City's Wildland Urban Interface (WUI).
> (2) The street to access the parcel is at least 36 feet wide, with parking provided on both sides or at least 30 feet wide, with parking limited to one side of the street.

These requirements are forbidden by state law. Government Code, section 65852.21, subdivision (a) establishes eligibility for parcels that may add second units and ADUs on parcels split pursuant to SB 9, and the City may not add additional criteria via local code.

Impermissible Parking Requirements

City code section 20-42.130(E)(11) imposes parking requirements on ADUs less certain exceptions. As discussed above, Government Code section 66323 mandates that the City approve a specific class of ADUs subject only to specified height and setback requirements, notwithstanding any local code requirements to the contrary. This means that the City cannot subject such ADUs to parking requirements.

Additionally, as noted above, SB 1211, effective 1 January 2025, makes the prohibition on parking requirements (or any other development standard not authorized by section 66323) even more explicit: Gov. Code, § 66323, subdivision (b): "A local agency shall not impose any objective development or design standard that is not authorized by this section upon any accessory dwelling unit that meets the requirements of any of paragraphs (1) to (4), inclusive, of subdivision (a)."

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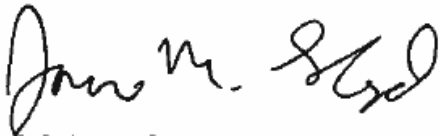
CalHDF is a 501(c)(3) non-profit corporation whose mission includes advocating for increased access to housing for Californians at all income levels, including low-income households. You may learn more about CalHDF at www.calhdf.org.

Sincerely,

Dylan Casey
CalHDF Executive Director



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