

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

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May 3, 2024

Jordan Klein, Director,
Department of Planning and Development
City of Berkeley
1947 Center St, 2nd Floor
Berkeley, CA 94704

Dear Jordan Klein:

RE: Review of Berkeley's Accessory Dwelling Unit (ADU) Ordinance under State ADU Law (Gov. Code, §§ 66313 - 66342)

Please Note: As of March 25, 2024, with the Chaptering of Senate Bill (SB) 477 (Chapter 7, Statutes of 2024), the sections of Government Code relevant to State ADU and Junior Accessory Dwelling Unit (JADU) Law have been re-numbered (Enclosure 1).

Thank you for submitting the City of Berkeley (City) accessory dwelling unit (ADU) Ordinance No. 7,888-N.S. (Ordinance), adopted October 10, 2023, 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 66326, subdivision (a). HCD finds that the Ordinance does not comply with State ADU and JADU Laws in the manner noted below. Under Government Code section 66326, subdivision (b)(1), 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 3, 2024.

HCD notes that HCD's previous ADU Ordinance review letter, dated October 17, 2022, raised the issue of the Ordinance's restrictions on ADUs in the Very High Fire Hazard Severity Zone. Upon review of the City's Ordinance 7,888-N.S. and supporting evidence, HCD has determined that the City addressed HCD's findings.

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

1. Table 23.306-1 – *Unit Allowance* – The Ordinance states a single-family dwelling is permitted, at maximum, "1 ADU and 1 Junior ADU." However, Government Code section 66323, subdivision (a) states, "Notwithstanding Sections 66314 to 66322, 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: (1) One accessory dwelling unit and one junior accessory dwelling unit per lot with a proposed or existing single-family dwelling... (A) 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.” Subdivision (a)(2) 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. Therefore, the City must amend the Ordinance to permit all by-right combinations required by State ADU Law.

2. 23.306.030 A.1 – *150 Sq. ft. Expansion* – The Ordinance states “ADU Development Standards is allowed a physical addition of no more than 150 square feet.” However, Government Code section 66323, subdivision (a)(1)(A) allows, an “expansion of not more than 150 square feet beyond the same physical dimensions as the **existing accessory structure**. An expansion beyond the physical dimensions of the existing accessory structure shall be limited to accommodating ingress and egress.” The statute intends for this expansion only with the conversion of an existing accessory structure. Therefore, the Ordinance allowing expansion for all building conversions is inconsistent with State ADU Law. The City must amend the Ordinance to limit the expansion only in conjunction with the conversion of existing accessory structures.
3. 23.306.030 A.2 – *“Main Building” and Conversion* – The Ordinance states that for a duplex or multifamily building, “Interior ADU(s) must be created entirely through non-habitable residential portions of the existing main building that are not within the living space of a dwelling unit (e.g. basement, attic, garages, storage room).” The term “main building” is problematic as Government Code section 66323, subdivision (a)(3)(1), allows “Multiple accessory dwelling units within the portions of **existing multifamily dwelling structures** that are not used as livable space....” The term “the existing main building” refers to a single building, whereas State ADU Law refers to “existing multifamily dwelling structures.” As worded, the Ordinance could lead to confusion as many multifamily projects could have multiple building with units within them.

Additionally, the adjective “main” is not objective, especially in situations wherein multiple dwelling structures occupy a single lot. Government Code

section 66314, subdivision (b)(1) requires the use of “objective standards” for ADUs, which are defined in Government Code section 66313, subdivision (h) 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.” The use of such a subjective term is inconsistent with State ADU Law.

In summary, the City must amend the Ordinance to comply with State ADU Law.

4. 23.306.030 A.3. – *Accessory Conversion* – The Ordinance states “An ADU converted from a legally established accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure....” However, Government Code section 66323, subdivision (a)(1)(A) allows, an “expansion of not more than 150 square feet beyond the same physical dimensions as the existing accessory structure. An expansion beyond the physical dimensions of the existing accessory structure shall be limited to accommodating ingress and egress.” Therefore, the City must amend the Ordinance to allow for the expansion of an accessory structure for ingress and egress.
5. 23.306.030 A.8, 23.306.040 A, 23.324.060 (C) – *Zoning Certificate* – The Ordinance states that, generally, “An application for an ADU or Junior ADU shall be allowed with a Zoning Certificate. Review must be completed within 60 days of submission of a completed application.” It also provides more specific conditions that engage with a zoning certificate, stating “Attached ADUs with height up to 25 ft. allowed with a Zoning Certificate,” allowing specific “...alterations of a lawful nonconforming existing structure or building that is an existing ADU or proposed to be converted to an ADU are permitted with a Zoning Certificate,” and allowing new windows or doors with “...a lawful nonconforming existing structure or building that is an existing ADU or proposed to be converted to an ADU... with a Zoning Certificate.”

The Ordinance states that the “review” will be completed within 60 days. The Ordinance does not specify that the review will end with an approval or denial within the 60-day period. The term “Zoning Certificate” is not defined or explained in Section 23.502.020, and it is unclear whether the review process is ministerial or discretionary. Government Code section 66317, subdivision (a) requires, that a “A permit application for an accessory dwelling unit or a junior accessory dwelling unit shall be considered and approved ministerially without discretionary review. 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.” Subdivision (b) further states that “If a permitting agency denies an application for an accessory dwelling unit or junior accessory

dwelling unit pursuant to subdivision (a), the permitting agency shall, within the time period described in subdivision (a), return in writing a full set of comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant.”

Therefore, the City must amend the Ordinance to specify ministerial approval or denial within 60 days and add provisions for a denial process according to State ADU Law.

6. 23.306.030 B – JADU Entry – The Ordinance states “A Junior ADU shall be contained entirely within an existing or proposed single family dwelling or its attached garage and have no more than 500 square feet in floor area.” However, Government Code section 66333, subdivision (e) states, that local JADU ordinances must “Require a permitted junior accessory dwelling unit to include a separate entrance from the main entrance to the proposed or existing single-family residence.” Therefore, the City must amend the Ordinance to require a separate entrance to the JADU.
7. 23.306.030 B, 23.502.020 A.4.a – *JADUs and Enclosed Uses* – The Ordinance allows JADUs “within an existing or proposed single family dwelling or its attached garage...” It is later defined in Section 23.502.020 (A)(4)(a) as, “A unit that is contained entirely within the walls of an existing or proposed single family dwelling, or a single-family dwelling unit's attached garage.” However, Government Code section 66333, subdivision (d), provides a broader allowance, stating “For purposes of this subdivision, enclosed uses within the residence, such as attached garages, are considered a part of the proposed or existing single-family residence.” The City must therefore allow JADUs in other enclosed uses not limited to an attached garage. The City must amend the Ordinance accordingly.
8. 23.306.040 A and C – *Deed Restriction* – Ordinance section 23.306.040 A states “A completed application must include evidence of compliance with this Chapter, including development standards, deed restrictions, and neighborhood noticing.” Section 23.306.040 C states, “The property owner shall file a deed restriction with the Alameda County Recorder which states... 2. The ADU shall not be sold separately from the main building unless the conditions of BMC 23.306.040(0) ADUs Developed by a Qualified Nonprofit Developer are met; 3. The ADU... shall not be rented for a term that is shorter than 30 days.”

However, Government Code section 66317, subdivision (c) states, “No local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section,” and section 66315 states “Section 66314 establishes the maximum standards that a local agency 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 Section 66314, shall be used or imposed....” Section 66314 does not require a deed restriction for a building permit; therefore, this section

of the Ordinance is not consistent with State ADU Law. The City may not give condition approval of an ADU application on the recordation of a deed restriction. Although the City may have other authority by which to require a deed restriction, this requirement may not be the basis of delay or deny an ADU application and the issuance of a building permit. Therefore, the City must amend the Ordinance accordingly.

Pursuant to Government Code section 66333, subdivision (c) the City shall, “[r]equire the recordation of a deed restriction, which shall run with the land...” The deed restriction is limited to the provisions of subdivision (c)(1) and (c)(2). The deed restriction for JADUs do not include a minimum 30-day rental term. Therefore, the City must amend the Ordinance accordingly.

9. 23.306.040 B – *Neighbor Noticing* – The Ordinance states “Notice of an ADU application shall be mailed to tenants of the subject property, and owners and tenants of the adjacent, confronting, and abutting properties, within ten working days of submission of the building permit application to the City... Notice shall provide the address of the project, allowable hours of construction, a link to the City's ADU webpage, and information for tenants of the subject property on how to contact a Rent Board Housing Counselor by e-mail or phone and any other resource information deemed relevant.”

However, Government Code section 66317, subdivision (c) states, “No local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this section,” and section 66315 states “Section 66314, establishes the maximum standards that a local agency 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 Section 66314, shall be used or imposed....” Section 66314 does not require neighbor noticing for an ADU building permit. Therefore, the City must remove this section.

10. 23.306.040 C.2 – *Separate Sale* – The Ordinance states “The ADU shall not be sold separately from the main building unless the conditions of BMC 23.306.040(D) ADUs Developed by a Qualified Nonprofit Developer are met....” Please note that Government Code section 66342 states “a local agency may also adopt a local ordinance to allow the separate conveyance of the primary dwelling unit and accessory dwelling unit or units as condominiums...” which are then subject to the standards listed in that section.
11. 23.306.040 C.3 – *JADU Terms* – The Ordinance states “The ADU and/or Junior ADU shall not be rented for a term that is shorter than 30 days....” However, Government Code section 66333 provides, “Notwithstanding Article 2 (commencing with Section 66314), a local agency may, by ordinance, provide for the creation of junior accessory dwelling units in single-family residential zones. The ordinance may require a permit to be obtained for the creation of a junior accessory dwelling unit and shall do all of the following:” The section then

lists the provisions that are required to be in the JADU ordinance. The provisions do not require a minimum rental term of 30 days. Therefore, the City must amend the Ordinance accordingly.

12.23.306.040 C.4 – *JADU Owner Occupancy* – The Ordinance requires that the “Junior ADU or the Single Family Dwelling in which the Junior ADU is located shall be owner-occupied.” However, Government Code section 66333, subdivision (b) states, “Owner-occupancy shall not be required if the owner is another governmental agency, land trust, or housing organization.” Therefore, the City must note the exception.

In response to the findings in this letter, and pursuant to Government Code section 66326, subdivisions (b)(2)(A) and (b)(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 66326, subdivision (c)(1), 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 in the preparation and adoption of the Ordinance and welcomes the opportunity to assist the City in fully complying with State ADU Law. Please contact Mike Van Gorder, of our staff, at (916) 776-7541 or at mike.vangorder@hcd.ca.gov if you have any questions or would like HCD’s technical assistance in these matters.

Sincerely,



Jamie Candelaria
Senior Housing Accountability Unit Manager
Housing Policy Development Division

Enclosure

State ADU/JADU Law Statutory Conversion Table

New Government Code Sections	Previous Government Code Sections
Article 1. General Provisions	
66310	65852.150 (a)
66311	65852.150 (b)
66312	65852.150 (c)
66313	General Definition Section 65852.2 (j) 65852.22 (j)
Article 2. Accessory Dwelling Unit Approvals	
66314	65852.2(a)(1)(A), (D)(i)-(xii), (a)(4)-(5)
66315	65852.2 (a)(8)
66316	65852.2 (a)(6)
66317	65852.2 (a)(3), (a)(7)
66318	65852.2 (a)(9), 65852.2 (a)(2)
66319	65852.2 (a)(10)
66320	65852.2 (b)
66321	65852.2 (c)
66322	65852.2 (d)
66323	65852.2 (e)
66324	65852.2 (f)
66325	65852.2 (g)
66326	65852.2 (h)
66327	65852.2 (i)
66328	65852.2 (k)
66329	65852.2 (l)
66330	65852.2 (m)
66331	65852.2 (n)
66332	65852.23.
Article 3. Junior Accessory Dwelling Units	
66333	65852.22 (a)
66334	65852.22 (b)
66335	65852.22 (c)
66336	65852.22 (d)
66337	65852.22 (e)
66338	65852.22 (f)-(g)
66339	65852.22 (h)
Article 4. Accessory Dwelling Unit Sales	
66340	65852.26 (b)
66341	65852.26 (a)
66342	65852.2 (a)(10)