

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

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



July 28, 2023

Jeremy Tejirian, Planning Manager
Planning Division
Marin County
3501 Civic Center, Ste 308
San Rafael, CA 94903

Dear Jeremy Tejirian:

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

Thank you for submitting the Marin County accessory dwelling unit (ADU) ordinance No. 3745 (Ordinance), adopted January 26, 2021, 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 County has up to 30 days to respond to these findings. Accordingly, the County must provide a written response to these findings no later than August 25, 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 22.32.120 – *Accessory Dwelling Units* – The Ordinance states that “In all of the categories, only one Accessory Dwelling Unit is allowed on a lot restricted to single family residential development.” However, pursuant to Government Code section 65852.2, subdivisions (e)(1), “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 “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 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” nor “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), subparagraphs (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). Therefore, the County must revise the Ordinance to remove this restriction.

Additionally, this section states “An Accessory Dwelling Unit may be rented but shall not be sold or otherwise conveyed separately from the primary dwelling unit and Accessory Dwelling Units can only be rented for terms longer than 30 consecutive days.” However, Government Code 65852.26, subdivision (a)(1), which went into effect January 1, 2022, creates a narrow exception to allow separate conveyance of ADUs with the involvement of qualified nonprofit housing organizations. Therefore, the County should revise the Ordinance to allow for such an exception.

- Section 22.32.120 (A) – *Category 1* – With the exception of JADUs, Category 1 ADUs appear to mirror ADUs allowed by right under Government Code section 65852.2, subdivision (e)(1). However, the Ordinance does not explicitly state that Category 1 ADUs are to be ministerially approved notwithstanding the requirements provided under subdivisions (a) through (d). Therefore, the County must amend this section to clarify the ministerial approval of Category 1 ADUs.
- Section 22.32.120 (A)(1)(a) – *Existing Single-Family Dwellings* – The Ordinance states “The Accessory Dwelling Unit is contained entirely within the legal building area of an existing single-family dwelling.” However, Government Code section 65852.2, subdivision (d)(2), as well as Government Code section 65852.23, subdivision (a) state that nonconforming zoning conditions and unpermitted structures cannot preclude an ADU. Limiting to only existing, legal space would unlawfully restrict ADUs from being constructed within unpermitted space. Therefore, the County must revise and remove this restriction.

Additionally, under Government Code section 65852.2, subdivision (e)(1)(A), an ADU may also be permitted within the space of a proposed single-family dwelling. Restricting the construction of ADUs under this section only to existing space would preclude new construction ADUs from being proposed concurrently

with a new single-family dwelling. Therefore, the County must amend this section to allow for this exception.

- Section 22.32.120 (A)(1)(b) – *Existing Outbuildings* – The Ordinance states “The Accessory Dwelling Unit is contained entirely within the legal building area of an existing outbuilding; except that the project may include an addition of not more than 150 square feet of floor area to provide access to the unit, provided the access addition meets minimum rear and side setbacks of four feet.” However, Government Code section 65852.2, subdivision (d)(2), states that nonconforming zoning conditions and unpermitted structures cannot preclude an ADU. Additionally, the term “outbuilding” is not clearly defined. Limiting to only existing, legal space would unlawfully restrict ADUs from being constructed within unpermitted space. Therefore, the County must revise and remove this restriction, and should also clarify the definition of the term “outbuilding.”
- Section 22.32.120 (A)(1)(c) and (A)(2)(a) – *Maximum Height* – The Ordinance states “The Accessory Dwelling Unit is contained entirely within proposed new construction building area of an outbuilding that does not exceed a floor area of 800 square feet, a height of 16 feet above grade, and has minimum rear and side yard setbacks of four feet.” However, Government Code section 65852.2, subdivision (c)(2)(D)(ii), allows for a height of 18 feet on detached ADUs within one half-mile of a major transit stop or high-quality transit corridor, with an exception for an additional 2 feet to accommodate a roof pitch on the accessory dwelling unit that is aligned with the roof pitch of the primary dwelling unit. Limiting the height of detached ADUs to 16 feet would prevent otherwise eligible ADUs from being created with these incentives. As such, the County must amend the language to allow for these exceptions.

Additionally, with regard to ADUs on multifamily properties, the Ordinance states “Two detached Accessory Dwelling Units are allowed to be built on a lot that has an existing multi-family dwelling, but are detached from that multi-family dwelling and are subject to a height limit of 16 feet above grade and minimum side and rear setbacks of four feet.” However, Government Code section 65852.2, subdivision (c)(2)(D)(ii) allows for a height of 18 feet on detached ADUs within one half-mile of a major transit stop or high-quality transit corridor, with an exception for an additional 2 feet to accommodate a roof pitch on the accessory dwelling unit that is aligned with the roof pitch of the primary dwelling unit. Limiting the height on detached ADUs to 16 feet would prevent otherwise eligible ADUs from being created with these incentives. As such, the County must amend the language to allow for these exceptions.

- Section 22.32.120 (B), (C), and (D) – *Accessory Dwelling Unit Approval* – The Ordinance states “Accessory Dwelling Units in this category shall comply with the criteria listed below and shall be subject to Accessory Dwelling Unit approval.” However, it is unclear what is meant by this, and it is important to

state that under Government Code section 65852.2, subdivision (a)(3)(A), these applications must be ministerially reviewed, and approved or denied within 60 days, without discretionary review. Therefore, the County should clarify this language to ensure ministerial approval.

- Section 22.32.120 (B)(1) – *Front Yard Setback* – The Ordinance states “The Accessory Dwelling Unit does not exceed a floor area of 800 square feet, a height of 16 feet above grade, has a minimum front yard setback of 25 feet and has minimum side and rear yard setbacks of four feet.” However, Government Code section 65852.2, subdivision (c)(2)(C), precludes any local jurisdiction from establishing by ordinance any zoning restriction which could restrict the placement of an ADU of at least 800 square feet, including a restriction on Front Setbacks. Imposing this restriction on front setbacks would preclude ADUs on lots where the only means to create an 800 square foot ADU would encroach upon that setback. Therefore, the County must remove this restriction entirely.
- Section 22.32.120 (B)(2), (C)(5) and (D)(3) – *Sensitive Habitat Areas* – The Ordinance states “The Accessory Dwelling Unit shall be located outside of any sensitive habitat areas.” The County has not designated the sensitive habitat areas in the Ordinance. Pursuant to Government Code section 65852.2, subdivision (a)(1)(A), a local agency may only designate where ADUs may be permitted based on the adequacy of water and sewer services, or the impact of ADUs on traffic flow and public safety. This does not include special overlay districts or locally designated sensitive areas. Subdivision (c)(2)(C) also precludes local jurisdictions from performing any additional discretionary or zoning reviews. Allowing for special overlay districts or locally designated sensitive areas, or performing any additional discretionary reviews is in violation of State ADU Law. Therefore, the County must remove these restrictions.
- Section 22.32.120 (B)(3), (C)(6) and (D)(4) – *Very High Fire Hazard Severity Zone (VHFHSZ)* – The Ordinance states “If an Accessory Dwelling Unit is to be located on a property in a very high fire hazard severity zone, then it must have direct vehicle access to a street network with a continuous minimum paved width of at least 20 feet from the property to an arterial street.” However, Government Code section 65852.2, subdivision (a)(1)(A), states that ADUs may be created in zones which allow for single-family or multifamily residential dwellings, and it does not allow for local agencies to include special overlay districts or locally designated sensitive areas. Additionally, Government Code section 65852.2, subdivision (e)(1), precludes a local agency from imposing standards on ADUs and JADUs which are created under subdivisions (e)(1)(A) through (e)(1)(D). Therefore, the County must remove 22.32.120(B)(3), (C)(6), and (D)(4) and rely on the application of the building code to address fire safety.

Further, while the California Department of Forestry and Fire Protection (CALFIRE) maps establish the VHFHSZ boundaries, the purpose of these maps

is not to limit the locations where ADUs or other dwellings may be permitted. Rather, the CALFIRE maps identify areas in which hazard mitigating building design standards will apply.

- Section 22.32.120 (C)(2) – *Size Restrictions* – The Ordinance states “A detached Accessory Dwelling Unit shall not exceed a floor area of 1,200 square feet. A detached one-bedroom unit that is up to 850 square feet shall be allowed and a detached two or more-bedroom unit that is up to 1,000 square feet shall be allowed.” However, Government Code section 65852.2, subdivision (e)(1), provides that “notwithstanding subdivisions (a) to (d), inclusive, a local agency shall ministerially approve an application for a building permit” for an ADU that, according to Government Code section 65852.2, subdivision (e)(1)(A)(i), “is within the proposed space of a single-family dwelling or existing space of a single-family dwelling or accessory structure.” An existing detached accessory structure may be converted without limitations on size or height pursuant to subdivision (e)(1)(A)(i). Therefore, the County must add this exception.

This section also identifies 1,200, and 1,000 square feet as maximum unit sizes. Therefore, the County must amend the Ordinance to clarify which set of criteria they are using for the size restrictions outside of the exemption above.

- Section 22.32.120 (C)(3) – *Zoning Districts* – The Ordinance states “An Accessory Dwelling Unit in a conventional zoning district shall comply with all development standards for that district and shall be located within any applicable building envelopes. Notwithstanding any floor area restrictions, a one-bedroom unit that is up to 850 square feet shall be allowed and a two or more-bedroom unit that is up to 1,000 square feet shall be allowed.” However, it is unclear what is meant by “conventional zoning district.” Government Code section 65852.2, subdivisions (a)(1)(B)(ii) and (a)(1)(D)(iii) preclude local jurisdictions from imposing subjective standards, and specify that an ADU may be attached to, detached from, or within the primary dwelling. The restriction against ADUs in these areas would prevent otherwise eligible ADUs from being constructed altogether. Therefore, the County should clarify this language and amend it to match State ADU Law.
- Section 22.32.120 (C)(4) – *Planned Zoning District* – The Ordinance states “An Accessory Dwelling Unit in a Planned zoning district shall comply with all the development standards for the R1:B3 zoning district except that a numerical development restriction established by a Master Plan shall govern where applicable, and the unit shall be located within any applicable building envelopes. Notwithstanding any floor area restrictions, a one-bedroom unit that is up to 850 square feet shall be allowed and a two or more-bedroom unit that is up to 1,000 square feet shall be allowed.” However, under Government Code section 65852.2, subdivision (c)(2)(C), a local agency may not impose limits on open space, front setbacks, or minimum lot size which would preclude an ADU

of 800 square feet or less. Additionally, under Government Code section 65852.2, subdivision (e)(1), a local agency may not impose design standards on ADUs created under subdivisions (e)(1)(A) through (e)(1)(D). Imposing design standards which would preclude an ADU of 800 square feet or less, or which would apply to an ADU created under subdivision (e) would violate State ADU Law. Therefore, the County must amend the Ordinance to allow for these exemptions.

- Section 22.32.120 (D)(1) – *Additions* – The Ordinance states “An attached Accessory Dwelling Unit contained entirely within an addition to an existing single-family residence shall not exceed 50 percent of the floor area of the existing residence.” However, it is unclear how this is different than (C)(1). Therefore, the County should clarify this language and differentiate it from that of (C)(1).
- Section 22.32.120 (D)(2) – *Size Limitations* – The Ordinance states “A detached Accessory Dwelling Unit shall not exceed a floor area of 1,200 square feet.” However, Government Code section 65852.2, subdivision (e)(1), provides that “notwithstanding subdivisions (a) to (d), inclusive, a local agency shall ministerially approve an application for a building permit” for an ADU that, according to Government Code section 65852.2, subdivision (e)(1)(A)(i), “is within the proposed space of a single-family dwelling or existing space of a single-family dwelling or accessory structure.” Subdivisions (a) to (d) include the entirety of local standards that jurisdictions may require for new construction ADUs. Subdivision (e)(1)(A) exempts such ADUs as are created out of such converted space from local design standards beyond those within the base building code. Therefore, the County should clarify this exemption.
- Section 22.32.120 (D)(5) – *Discretionary Review* – The Ordinance states “The development of the Accessory Dwelling Unit shall comply with all applicable zoning requirements, including Master Plan criteria and discretionary review.” However, Government Code section 65852.2, subdivisions (a)(3)(A) and (c)(2)(C) preclude local jurisdictions from performing any additional discretionary or zoning reviews. This would violate State ADU Law. Therefore, the County must amend the Ordinance to comply with State ADU Law.
- Section 22.32.125 (B) – *Kitchenette* – The Ordinance states “The unit shall have a kitchenette but shall not have a kitchen.” However, the definition of “kitchenette” written in the Ordinance as “An interior area that accommodates a bar sink and small food preparation appliances, such as a toaster, microwave, hotplate, coffee maker, and mini refrigerator. The bar sink shall not exceed a maximum dimension of 12-inches by 12-inches, and adjoining cabinets and counters shall not exceed an aggregate length of six feet. Kitchenettes are not considered kitchens” does not meet the criteria for an “efficiency kitchen” as described in statute under Government Code section 65852.22, subdivision

(a)(6). Therefore, the County must amend this section and allow for an efficiency kitchen, as defined in State ADU Law.

- Section 22.32.125 (C) – *JADU Interior Entrance* – The Ordinance states “The unit shall have a separate entrance from the main entrance to the building, with an interior entry to the main living area. The unit may include a second interior doorway for sound attenuation.” However, under Government Code section 65852.22, subdivision (a)(5)(B), an interior entry is only required if the JADU does not have its own separate bathroom. The County may not require a JADU to have an interior entry if the JADU does not share a bathroom facility with the primary dwelling. Therefore, the County must amend this section.
- Section 22.52.030 (C), 22.52.040, 22.52.050 – *Discretionary Review* – The Ordinance states “Accessory Dwelling Units that meet the applicable standards set forth in Section 22.32.120. A (category 1), B (category 2), and C (category 3) ...” are exempt from Site Plan Review. However, this does not include category 4. The Ordinance further covers various review processes which are discretionary in nature, including design review, planning, commission action, and director approval. Government Code section 65852.2, subdivision (a)(3)(A), requires ministerial approval, without a discretionary review process. Restricting those units, especially those which fall under category 4, with a discretionary review and not reviewing them ministerially as with others violates State ADU Law. Therefore, the County must amend these sections to remove any and all discretionary review standards.
- Section 22.56.030 (B) – *Nonconforming Conditions* – The Ordinance states “If a discretionary permit related to the Accessory Dwelling Unit development is required, findings of consistency with the Countywide Plan and applicable community plan shall be made as part of the approval of the discretionary permit.” However, Government Code section 65852.2, subdivision (a)(3)(A), requires ministerial approval, without a discretionary review process. Additionally, subdivision (d)(2) states that a local agency shall not deny a permit for an ADU based upon nonconforming zoning conditions, building code violations, or unpermitted structures. While a discretionary review may be required for the primary residence, the County must clarify that an ADU application must not be subject to a discretionary approval.
- Section 22.56.030 (C) – 22.56.040 – *Director Approval* – The Ordinance states “The Director shall **act upon** the Accessory Dwelling Unit Permit after any discretionary permits related to the development have been issued and any appeals related to those discretionary permits have been acted upon.” (emphasis added). Additionally, the Ordinance states “The Director may only approve or conditionally approve an application for an Accessory Dwelling Unit if the project is consistent with all of the applicable standards listed in section

22.32.120.” However, Government Code section 65852.2, subdivision (a)(3)(A), requires that the permitting agency shall either ministerially approve or deny the application, without a discretionary review process, within 60 days. Therefore, the County must revise this section to change “act upon,” as emphasized in the foregoing quote, to “approve or deny.”

- Section 22.130.030 (J) – *Junior Accessory Dwelling Unit* – The Ordinance defines “Junior Accessory Dwelling Unit” as “A type of Accessory Dwelling Unit that is no more than 500 square feet in size, has a kitchenette but not a kitchen, is contained entirely within the existing single-family dwelling, and has been certified as a Junior Accessory Dwelling Unit by the Director.” However, Government Code sections 65852.2, subdivision (e)(1)(A), and 65852.22, subdivision (a)(4), state that the JADU may be created with a proposed single-family dwelling. Therefore, the County must amend this definition.

Additionally, the definition of a “kitchenette,” defined as “An interior area that accommodates a bar sink and small food preparation appliances, such as a toaster, microwave, hotplate, coffee maker, and mini refrigerator. The bar sink shall not exceed a maximum dimension of 12-inches by 12-inches, and adjoining cabinets and counters shall not exceed an aggregate length of six feet. Kitchenettes are not considered kitchens” is not aligned with statute’s definition of “efficiency kitchen” which is described in Government Code section 65852.22, subdivision (a)(6), to include only a cooking facility with appliances, and a food preparation counter and storage cabinets of reasonable size. These are the minimum allowable requirements for a JADU kitchen. Therefore, the city must amend the definition of JADUs to require only an efficiency kitchen as defined in statute.

- Section 22.130.030 (M) – *Ministerial Permit* – The Ordinance defines “Ministerial Permit” as “A permit granted to a project after applying fixed, objective standards with little or no subjective evaluation as to the wisdom or manner of carrying out the project.” However, ministerial approvals are, by definition, done without any subjective evaluation. Under Government Code section 65852.2, subdivisions (a)(1)(B), (a)(3)(A), require ministerial approval based upon objective standards, without a discretionary review process. Applying subjective evaluation would potentially preclude ADUs or JADUs from being permitted. Therefore, the County must amend this definition to remove the possibility of subjective evaluation.

In response to the findings in this letter, and pursuant to Government Code section 65852.2, subdivision (h)(2)(B), the County must either amend the Ordinance to comply with State ADU Law or adopt the Ordinance without changes. Should the County choose to adopt the Ordinance without the changes specified by HCD, the County must include findings in its resolution that explain the reasons the County believes that the Ordinance complies with State ADU Law despite the findings made by HCD.

Accordingly, the County'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 County fails to take either course of action and bring the Ordinance into compliance with State ADU Law, HCD may notify the County and the California Office of the Attorney General that the County is in violation of State ADU Law.

HCD appreciates the County's efforts provided in the preparation and adoption of the Ordinance and welcomes the opportunity to assist the County in fully complying with State ADU Law. Please feel free to contact Tyler Galli, of our staff, at (916) 776-7613 or at Tyler.Galli@hcd.ca.gov.

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