

Shayna Sharke

From: Scott Skinner <sskinner@sfoxtax.com>
Sent: Tuesday, July 11, 2023 6:14 PM
To: Shayna Sharke
Subject: Public comment for proposed ADU ordinance amendment and coming city council meeting on July 18
Attachments: HDF ADU site development permit objection.pdf; picture of property parking adequacy.png

Hello my name is Scott Skinner,

I am unable to attend the city council meeting scheduled for July 18. Please accept this as written public comment as a stakeholder to the ADU permit process. This email is a business communication so please interpret it as such. This is not an emotional bend of an uninformed citizen. Please read this email as an objective communication of my views. The letter attachment and past HCD comments show that the CalHDF, HCD, and I have a keen understanding of the mandatory approval parameters associated with my particular ADU. A Site Development Permit ("SDP") requirement for my ADU application is unlawful. The planning department continues to require a SDP for my ADU submission.

I was out of town for the recent city council meeting on June 8 but if you look back to the recorded testimony my wife and I presented to the planning commission on May 15, you will hear and echo of the attached HDF letter discussion of the SDP. I thank you for posting the CalHDF letter as I am now in touch with them directly. I think the city council is leading into a litigious position with regard to the SDP and the ½ mile coastal zone buffer for parking discretion. My attorney had informed me I have a winning case pertaining to my complaint against the city over the exercise of an SDP requirement for my plans. In fact the city is changing the rules in the midst of my submission. State law mandates there is no ordinance in place until the state approves of the ordinance. Absent final approval of the ordinance state law prevails and the ordinance is null and void. Although, I could have capitulated and submitted for a SDP and paid the fee almost a year ago, I have refused to do so on legal principal. I am hopeful to avoid a legal battle but if your legal representatives do not embrace their legal responsibility to give you correct legal representation, what is a citizen to do to but enforce their rights and make precedent for all others that follow.

I listened to the city council hearings, which gave me the impression that your legal representatives are drinking their own cool aid or perhaps being instructed to fabricate parking discretion in cases that are mandatory approval by state law. I'll explain. Within the current proposed ordinance, my plans for 34361 Via San Juan would be subjected to a discretionary SDP and fee. I have 6 existing off street parking spots, set back from the public sidewalk, onsite of a legal duplex with a nonconforming two car garage. Please open the attached picture of the site parking configuration for reference. Current building code requires only 4 spots for a duplex. Further, my planned ADU is within existing legal accessory space for which no additional parking can be mandated by state law similar to a JADU. So, where is the discretion sought by the city in my case? Parking should not be the basis for discretion over my ADU submission where the city cannot impose additional parking. The accessory space is currently unused but represents a ready affordable housing unit. The ordinance should not require a discretionary SDP for my situation. An unfounded or unobjective health and safety concern that is not an explicit standard is not the holy grail for discretion and SDP fees. Drawing a ½ mile zone is completely arbitrary and discriminatory. My ADU submission is especially representative of the objective standard mentioned in the attached comment letter from CalHDF. As such, my ADU plan is uniformly verifiable and should not involve personal or subjective judgement by a public official over an unjustifiable health or safety concern.

On a more general note:

Drawing a one-half mile buffer area from the coastal zone for SDP submittal will capture the vast majority of multifamily properties in the entire city of Dana Point and is completely arbitrary. Your own legal representatives have testified on record that the ½ mile was derived from the state law prohibiting additional parking requirements for ADU's within ½

mile from public transportation access. These matters are completely unrelated and inapposite. The states ½ mile yardstick for mandating a lack of parking discretion is not the city's yardstick to create discretion through an arbitrary health and safety zone to restrict parking. This is exposed by objective thought. Further, how will the city deal with the intersection of ADU submittals that are within ½ mile of the coastal zone and within ½ mile of access to public transportation. Lastly, to write a ½ mile SDP buffer zone over Capo Beach to benefit visitor serving uses is rather interesting since Capo Beach is absent of visitor serving use impact that would require homeowners to leave street parking available for visitors. There is no existing parking problem in Capo Beach like there is in the Lantern District. If there is an occurrence that visitor's want to watch fireworks at Terrace Park, the city should offer shuttles on that day out of concern for them. Parking overlay in Capo Beach is overreaching.

Your attorneys are claiming Dana Point is being more flexible than state mandates to allow ADU's . Patrick Munoz testifies to the SDP process being a more expansive approval regime for ADU's which makes Dana Point sanctimoniously less restrictive than state law. That is a ruse to be called out. The SDP may give Dana Point discretion to permit ADU's that are not mandated by state law but that is only if such discretion is exercised in favor of more ADU's. The fact remains, an ordinance to require an SDP for legal existing accessory space captures mandated ADU's into a nonmandatory discretionary process that is more restrictive than state law. There simply is no right to do so.

Thank you for your consideration.

Scott Skinner
Skinner Fouch & Olson LLP
PLEASE NOTE NEW ADDRESS
38 Discovery, Suite 250
Irvine, CA 92618
tel 949-260-1434
fax 949-260-9824





Jun 20, 2023

City of Dana Point
33282 Golden Lantern St.
Dana Point, California 92629

By Email: comment@danapoint.org; jgabbard@danapoint.org, mpagano@danapoint.org,
jfederico@danapoint.org, mfrost@danapoint.org, mvillar@danapoint.org

CC: ssharke@danapoint.org

Re: Proposed Modified ADU Ordinance

Dear Dana Point City Council,

The California Housing Defense Fund ("CalHDF") submits this letter as a public comment concerning item 19 on the agenda for tonight's City Council meeting. This item – a zoning text amendment to attempt to bring the City's legislation into compliance with state law regarding accessory dwelling units, or ADUs – presents a number of legal problems. CalHDF urges the Council to address these problems before approving the ordinance.

Deed Restrictions Imposed on ADUs Cannot be Enforced

The deed restrictions imposed on ADUs 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.) The City is fully capable of enforcing zoning regulations contained in the deed restrictions through normal zoning enforcement procedures. The additional requirement to record a document in property records does nothing to enhance this enforcement power, as it would not be an enforceable restriction under property law. The City should remove this requirement from the ordinance or replace it with a notice of restriction to homeowners and ADU permit applicants.

360 Grand Ave #323, Oakland 94610
hi@calhdf.org

(Added as attachment to
Mr. Skinner's email)
Agenda Item No. 19
6/20/2023

The City May Not Impose Broad Requirements for a Discretionary Site Development Permit

State law makes clear the ADU approval process must be ministerial, not discretionary. (Gov. Code § 65852.2, subs. (a)(3)(A) ["A permit application for an accessory dwelling unit or a junior accessory dwelling unit shall be considered and approved ministerially without discretionary review or a hearing, notwithstanding Section 65901 or 65906 or any local ordinance"], (b)(1) ["the local agency shall approve or disapprove the application ministerially without discretionary review"].) Moreover, "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." (*Id.* at subd. (d)(2).) The City nevertheless attempts to require a site development permit, which the municipal code makes clear is discretionary, in some cases. It justifies this requirement by referencing "health and safety," but this mere incantation does nothing. As the ADU ordinance makes clear, in subdivision (d)(2), many cases where the proposed ordinance requires a special development permit will not implicate public health and safety.

The City must cabin its requirement of special development permits to specific circumstances, delineated by objective criteria for what constitutes a public health and safety issue. Such criteria should be narrowly drawn, pursuant to state law. (*Cf.* Gov. Code 65589.5, subd. (a)(3).) "Traffic flow," "driveway length," or the mere presence of a non-conforming use or structure on the property are not sufficient.

The Height Limits Fail to Acknowledge Special Rules for ADUs Near Transit

Under state law, an ADU may reach a height of 18 feet if it lies "within one-half of one mile walking distance of a major transit stop or a high-quality transit corridor." (Gov. Code 65852.2, subd. (c)(2)(D)(ii).) Further, "an additional two feet in height to accommodate a roof pitch" is allowed. (*Ibid.*) The proposed ordinance does not allow for this possibility and should therefore be updated.

Some Design Standards in the Proposed Ordinance Are Not Objective

Only "objective" standards may be imposed on ADUs. (Gov. Code § 65852.2, subs. (a)(1)(B)(i), (e)(7); *see also* Gov. Code § 66300, subd. (b)(1)(C).) "Objective standards" are those that "involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark." (Gov. Code § 65852.2, subd. (j)(7).) Section 9.07.210(F)(8)(f) of the proposed ordinance violates this rule. Virtually all of its language is imprecise and subjective, allowing room for rejections of ADU applications that should be approved. The following offending provisions should be struck or re-worked to be objective:

- "consistency between the buildings"

- “similar to the primary dwelling with respect to architectural style, roof pitch, color, and materials”
- “protect public access to and along the shoreline areas”
- “protect public views to and along the ocean and scenic coastal areas”
- “protect sensitive coastal resources”
- “minimize and, where feasible, avoid shoreline hazards”
- “contain the size, scale, access and amenities that are accessory in nature to the primary dwelling”



CalHDF appreciates the Council's attention to its ADU ordinance. As the Council knows, our state faces an acute housing crisis, and ADUs are a crucial part of the solution. It is important, then, that local implementing ordinances follow the law, and CalHDF urges the Council to correct the problems described above before approving the ordinance.

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,

A handwritten signature in black ink, appearing to read "Dylan Casey", written over a circular stamp.

Dylan Casey
CalHDF Executive Director

A handwritten signature in black ink, appearing to read "Courtney Welch", written over a circular stamp.

Courtney Welch
CalHDF Director of Investigations and Enforcement



Attachment 2 to
Mr. Skinner's email



Jul 14, 2023

City of Dana Point
33282 Golden Lantern St.
Dana Point, California 92629

By Email: DGIOMETTI@DanaPoint.org; adhingra@danapoint.org; mopel@danapoint.org;
lboughen@danapoint.org; enelson@danapoint.org

CC: ssharke@danapoint.org; PMunoz@rutan.com

Re: Proposed Accessory Dwelling Unit at 34361 Via San Juan

Dear Dana Point Planning Staff and Planning Commission,

The California Housing Defense Fund ("CalHDF") writes regarding the application to construct an accessory dwelling unit ("ADU") at 34361 Via San Juan. In sum: the City must process the application in accordance with state law, and its failure to do so exposes it to liability.

California law sets clear rules for ADU applications. (*See* Gov. Code § 65852.2.) These rules apply even in the absence of a local zoning ordinance that complies with them. The ADU here is proposed to be built "within the portions of existing multifamily dwelling structures that are not used as livable space." (*Id.* at subd. (e)(1)(C).) Thus, the City has an absolute duty to process the application ministerially, and no local rules – whether or not they comply with state law – can disturb that duty. (*Id.* at subd. (e) ["Notwithstanding subdivisions (a) to (d), inclusive, a local agency **shall ministerially approve** an application [...]"] [emphasis added].)

On top of this, "A local agency **shall not require**, as a condition for ministerial approval of a permit application for the creation of an accessory dwelling unit or a junior accessory dwelling unit, the correction of **nonconforming zoning conditions**." (*Id.* at subd. (e)(2) [emphasis added]; *see also id.* at subd. (d) ["The local agency shall not deny an application for [...] an accessory dwelling unit due to the correction of nonconforming zoning conditions"].)

Here, the City, citing section 9.07.210(f)(1) of the zoning code, has refused to process the ADU application because of an existing nonconforming condition on the site. The City believes this nonconforming condition requires the applicant to seek a Site Development Permit ("SDP") before building an ADU. The City is very obviously mistaken: its position directly

360 Grand Ave #323, Oakland 94610
hi@calhdf.org

Attachment 3 to Mr.
Skinner's email.

conflicts with the state ADU law summarized above. That law requires the City to process the application ministerially, regardless of existing nonconforming conditions and regardless of any local rules.

CalHDF notes the city, in adopting its new ADU ordinance, tries to evade this obligation by distinguishing between denying an ADU application for failure to correct a non-conforming zoning condition and *ex ante* making it impossible for an ADU applicant to receive permits if non-conforming zoning conditions exist. (See Section 7 of the associated Resolution.) Whether or not this sleight-of-hand does anything, it carries no relevance for the application at hand. That is because – again – Government Code section 65852.2, subdivision (e), imposes an absolute duty on the City to ministerially process the application at issue here. (Compare Section 7 of the Resolution [citing Gov. Code § 65852.2, subd. (a) for authority] with Gov. Code § 65852.2, subd. (e) [**“Notwithstanding subdivisions (a) to (d), inclusive, a local agency shall ministerially approve...”**] [emphasis added].)


Furthermore, the City must obey strict timelines in processing the application. The City “shall either approve or deny the application to create [...] an accessory dwelling unit [...] within 60 days” of receiving the application. (Gov. Code § 65852.2, subd. (b)(1).) That deadline is now long gone – and this means the application is deemed approved, regardless of any other City rules, regulations, or procedures. (*Id.*) The City’s contention that the applicant’s refusal to apply for a SDP means “at this time we have no pending application” comes off as amateur, and it will not save the City in court.

CalHDF reminds the City that state law does not look kindly on jurisdictions that play games to suppress housing construction (*see, e.g.*, Gov. Code § 65589.5), and courts will award attorneys’ fees for a successful challenge to a bad-faith disapproval (*see id.*; *see also* Code of Civ. Proc. § 1021.5). The City of Huntington Beach, for example, recently had to pay \$600,000 in attorneys’ fees to housing organizations, including CalHDF, that sued the City for improperly denying a housing development project. CalHDF would not mind taking free money if Dana Point insists on giving it to us, but we would prefer to see the City simply follow the law in the first place.

We urge the City to process the application to construct an ADU at 34361 Via San Juan – now deemed complete – in accordance with the law.

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,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Dylan Casey
CalHDF Executive Director

A handwritten signature in black ink, appearing to be 'CW' or similar initials, written in a cursive style.

Courtney Welch
CalHDF Director of Investigations and Enforcement



Jul 18, 2023

City of Dana Point
33282 Golden Lantern St.
Dana Point, California 92629

By Email: comment@danapoint.org; jgabbard@danapoint.org, mpagano@danapoint.org, jfederico@danapoint.org, mfrost@danapoint.org, mvillar@danapoint.org

CC: ssharke@danapoint.org; PMunoz@rutan.com

Re: Proposed Modified ADU Ordinance

Dear Dana Point City Council,

The California Housing Defense Fund ("CalHDF") submits this letter to, once again, remind the Council of its obligation to abide by all relevant state laws when considering the proposed zoning text amendment to attempt to bring the City's legislation into compliance with state law regarding ADUs. On June 20th, 2023, CalHDF submitted a letter informing the city that the proposed standards do not adhere to state ADU laws. We write again for tonight's meeting to remind the Council that the proposed ordinance presents a number of legal problems, and they must be amended to comply with the state housing laws regarding Accessory Dwelling Units.

Deed Restrictions Imposed on ADUs Cannot be Enforced

The deed restrictions imposed on ADUs 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.) The City is fully capable of enforcing zoning regulations contained in the deed restrictions through normal zoning enforcement procedures. The additional requirement to record a document in property records does nothing to enhance this enforcement power, as it would not be an enforceable restriction under property law. The City should remove this requirement from the ordinance or replace it with a notice of restriction to homeowners and ADU permit applicants.

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Agenda Item No.

8
7/18/2023

The City May Not Impose Broad Requirements for a Discretionary Site Development Permit

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The City must cabin its requirement of special development permits to specific circumstances, delineated by objective criteria for what constitutes a public health and safety issue. Such criteria should be narrowly drawn, pursuant to state law. (*Cf.* Gov. Code 65589.5, subd. (a)(3).) "Traffic flow," "driveway length," or the mere presence of a non-conforming use or structure on the property are not sufficient.

Furthermore, certain ADUs cannot be constrained by special development permits *at all*. The City has an absolute duty to ministerially process ADUs that fall under Government Code section 65852.2, subdivision (e) ("**Notwithstanding subdivisions (a) to (d)**, inclusive, a local agency **shall ministerially approve** an application for [specified ADU types]." [emphasis added]). The City's ordinance must reflect this, and even if it does not, the City must still process such ADUs ministerially or risk legal sanction.

The Height Limits Fail to Acknowledge Special Rules for ADUs Near Transit

Under state law, an ADU may reach a height of 18 feet if it lies "within one-half of one mile walking distance of a major transit stop or a high-quality transit corridor." (Gov. Code 65852.2, subd. (c)(2)(D)(ii).) Further, "an additional two feet in height to accommodate a roof pitch" is allowed. (*Ibid.*) The proposed ordinance does not allow for this possibility and should therefore be updated.

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CalHDF appreciates the Council's attention to its ADU ordinance. As the Council knows, our state faces an acute housing crisis, and ADUs are a crucial part of the solution. It is important, then, that local implementing ordinances follow the law, and CalHDF urges the Council to correct the problems described above before approving the ordinance. We are re-submitting this letter, as the proposed ordinance has not been amended since we submitted it in June.

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



Courtney Welch
CalHDF Director of Investigations and Enforcement