



Sep 3, 2024

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**Re:** Dana Point's ADU Ordinance

Dear Dana Point City Council,

The California Housing Defense Fund ("CalHDF") submits this letter regarding agenda item 13 for the September 3, 2024 City of Dana Point ("the City") Council meeting, "CONSIDERATION OF FINDINGS BY HCD RELATED TO ORDINANCE 23-06 (ACCESSORY DWELLING UNITS)." According to the agenda, the City is considering adopting a resolution pursuant to Gov. Code Section 66326 finding that the City's accessory dwelling unit ("ADU") ordinance, Dana Point Code ("DPC") Section 9.07.210, complies with state law, notwithstanding the letter from the California Department of Housing and Community Development ("HCD") on April 5, 2023 informing the City that the HCD had found the City's ADU ordinance to not be in compliance with state law. Additionally, CalHDF submitted comment letters in 2023 informing the City that its ADU ordinance does not comply with state law (see CalHDF letters dated July 18, 2023 and June 20, 2023). CalHDF has also written close to a dozen letters regarding individual ADU applications, informing the City in each case that its process for approving the ADUs in question violated state law.

Regardless of any resolution the Council makes on Tuesday pursuant to Gov. Code Section 66326, the City's ADU ordinance violates state law for the reasons listed 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

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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.*) 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).)

## **Approval Process**

### **The City Must Return Exhaustive Written Comments**

DPC Section 9.07.210(d)(3) states that the Community Development Director will ministerially approve or disapprove an ADU application within 60 days. However, for disapproved applications, state law requires the City to return a full set of written comments to the applicant that fully describe the deficiencies in the application:

Government Code Section 66320, subd.(b): "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.

### **The City May Not Involve HOAs in Its Permitting Process**

DPC Sections 9.07.210(e)(1)(J), 9.07.210(e)(2)(H), 9.07.210(e)(3)(H), and DPC Section 9.07.210(f)(9)(K) mandate approval by an applicant's Homeowners Association ("HOA") prior to approval by the City. This is an illegal requirement.

Government Code Section 66315 forbids local agencies from imposing additional local requirements: "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 ... "

Additionally, Government Code Section 66316 only allows for ministerial approvals: "... an accessory dwelling ordinance adopted by a local agency shall provide an approval process that includes only ministerial provisions for the approval of accessory dwelling units and shall not include any discretionary processes, provisions, or requirements for those units..."

Furthermore, Government Code Section 66317, subd.(c), states: “No local ordinance, policy, or regulation, other than an accessory dwelling unit ordinance consistent with this article shall be the basis for the delay or denial of a building permit or a use permit under this section.”

Delaying issuing a permit while an HOA considers the project is therefore a clear violation of state law. If an HOA has an issue with an ADU, that is an issue for the HOA to pursue, not an issue that can be considered in the City’s permitting process.

### **The City May Not Require Site Development Permits**

DPC Sections 9.07.210(e)(3)(E) and 9.07.210(e)(4) require a site development permit for the construction of ADUs in conjunction with multifamily dwellings. DPC Section 9.07.210(e)(3)(E) requires the site development permit for an application to build up to 25% of the number of existing dwelling units in a multifamily dwelling. Section 9.07.210(e)(4) requires a site development permit to build up to two detached ADUs on the site of an existing multifamily dwelling. However, Government Code Section 66323 mandates ministerial approval of ADUs in multifamily structures up to 25% of the total number of existing units, and it also mandates ministerial approval of up to two detached ADUs in conjunction with existing or proposed multifamily dwellings.

DPC Sections 9.07.210(f)(1)(A), 9.07.210(f)(1)(C), and 9.07.210(f)(1)(E) require site development permits for ADUs in the flood plain, hillside overlay, and fire ember districts, respectively.

Finally, DPC Section 9.07.210(H) creates a discretionary site development permit process for ADUs that exceed the standards in the code.

However, the City may not require site development permits for ADUs, or allow for such a process, as it is heard by the Planning Commission and constitutes a discretionary approval. Discretionary approvals are forbidden for all ADUs under state law. (Gov. Code, §§ 66316 and 66317.)

DPC Section 9.07.210(f)(1)(D) requires a site development permit for ADUs constructed on properties with non-conforming zoning conditions. In addition to the impermissibility of a site development permit, Government Code Section 66322, subd. (b) forbids the denial of an ADU application due to nonconforming zoning conditions: “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 ...”

DPC Section 9.07.210(f)(1)(F) empowers City staff to force ADUs into the discretionary site development permit process based on “issues related to adequacy of water or sewer services, and/or the impact of the proposed ADU on traffic flow, or public safety.” In addition to the impermissibility of a site development permit, state law only permits the imposition

of objective standards on ADUs. (Gov. Code, § 66314.) This open-ended code section is a clear violation of the state requirement for objective standards, given that it means that the City can identify any “traffic flow” issues or a similar, vague, alleged problem and force an application into a discretionary process. (See *ibid.*)

### **Impermissible Permit Revocation Authority**

DPC Section 9.07.210(D)(4)(a) states “Subject to Government Code section 65852.2 (n), an Accessory Dwelling Permit may be revoked if the Accessory Dwelling Unit violates one or more requirements of this section or any other applicable portions of the Dana Point Municipal Code.” However, the City may not revoke a permit simply for violating other parts of the code. For instance, other parts of the DPC may impose more restrictive parking or setback standards, but the City may not revoke a permit simply because the ADU does not comply with those standards.

### **Impermissible Delays Based on Other Permits**

DPC Section 9.07.210(F)(9)(g) and Section 9.07.215(D)(6) forbid the issuance of ADU and JADU permits if their development triggers another permit required pursuant to the local code, until such a time as the additional permit is granted. However, Government Code Section 66316 only allows for ministerial approvals for ADUs and Government Code Section 66335, subd. (a)(1) only allows for ministerial approvals for JADUs. The only circumstance in which it is acceptable for the City to delay action on the ADU or JADU permit is when the permit application is submitted with a permit application to create a new single or multifamily dwelling on the lot. (Gov. Code, § 66317, subd. (a).)

## **Impermissible Limits on the Number of ADUs**

### **The City Places Impermissible Limits on the Number of ADUs and JADUs**

DPC Section 9.07.210(e)(1) limits an applicant to one attached ADU or one attached JADU in conjunction with a single family home. This violates Gov. Code Section 66323, subd. (a)(1), which states that a city must allow “One accessory dwelling unit and one junior accessory dwelling unit per lot with a proposed or existing single-family dwelling ...”

### **The City Must Allow Recently Built Multifamily Buildings to Build ADUs**

DPC Section 9.07.210(e)(3)(D) only allows multifamily dwellings that received a certificate occupancy on or before January 1, 2020 to develop attached ADUs. This violates Government Code Section 66323, subd. (a)(3), which allows such ADUs for any existing multifamily dwelling.

## **The City Illegal Restricts the Number of ADUs in Multifamily Buildings**

DPC Section 9.07.210(f)(4)(B) only allows a single ADU created from conversion of non-livable space. However, Government Code Section 66323, subd. (a)(3) allows such ADUs up to 25% of the number of existing dwellings.

## **Development Standards**

### **The City Places Impermissible Development Standards on ADUs and JADUs**

DPC Sections 9.07.210(c)(1) and 9.07.215(C)(3)(b) mandates that new ADUs and JADUs must conform to “the underlying development standards in the zoning district in which the lot is located, as well as any applicable overlay district ...” However, Government Code Section 66315 limits local agencies’ ability to regulate ADUs to only the aspects listed in Section 66315. ADUs may only be subject to the development standards of the underlying zoning district to the extent that they are no more restrictive than the requirements of Gov. Code Section 66314 et seq. Furthermore, as discussed above, Section 66323 establishes a class of ADUs and JADUs subject only to basic height and setback requirements - such ADUs and JADUs are not subject to local zoning requirements at any time.

DPC Section 9.07.210(e)(1)(B) only allows expansions of an existing accessory structure up to 150 square feet for ingress/egress for ADUs. State law mandates that cities allow this 150 square foot allowance for JADUs as well. (*Id.* at subd. (a)(1)(A).)

DPC Section 9.07.210(e)(1)(H) limits the total floor area of an attached ADU to 50% of living area of the primary dwelling. However, ADUs that meet the requirements of Gov. Code Section 66323, subd.(a) may not be subject to any size limitation.

DPC Section 9.07.210(e)(1)(I) limits attached ADUs to 16 feet in height; DPC Sections 9.07.210(e)(2)(D) and DPC Section 9.07.210(f)(4)(B) limit detached ADUs to 16 feet in height; and DPC Section 9.07.210(e)(4)(A) limits detached ADUs in conjunction with multifamily dwellings to 16 feet in height. However, Government Code Section 66321, subd. (b)(4)(D) mandates a 25 foot height limit for attached ADUs, or the underlying zoning height limit, whichever is lower.

DPC Section 9.07.210(e)(2)(G) mandates a 10-foot separation between a detached ADU and the primary dwelling or any accessory structure. However, ADUs that meet the requirements of Government Code Section 66323, subd. (a) may not be subject to any such requirements.

DPC Section 9.07.210(f)(9)(A) mandates that detached ADUs be developed on a permanent foundation. However, the authority to mandate a permanent foundation is not found in Government Code 66314, and Government Code Section 66315 forbids local agencies from imposing additional local requirements: "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 ... "

DPC Section 9.07.210(f)(9)(B) mandates washer/dryer hookups in detached ADUs. However, as with the above issue, the authority to mandate washer/dryer hookups is not found in Government Code 66314, and Government Code Section 66315 forbids local agencies from imposing additional local requirements.

DPC Section 9.07.210(f)(9)(F) mandates solar panels for any detached or attached ADU. However, the City may only allow the imposition of state building code, which may require solar panels; the City may not independently mandate them. As stated with the above issues, Government Code Section 66314 does not allow for local agencies to require solar panels.

DPC Section 9.07.210(f)(9)(I) forbids roof decks and balconies above or upon an ADU. However, Government Code Section 66314 does not allow the City to regulate roof decks or balconies constructed in conjunction with ADUs.

DPC Section 9.07.210(f)(9)(D) requires firewalls for attached ADUs. However, Government Code Section 66314 does not allow the City to impose such a fire wall requirement. This would unlawfully increase the development costs for the conversion of an attached garage, for example.

DPC Section 9.07.210(F)(8)(d) imposes a limitation on the number of bedrooms, specifically, "An ADU shall contain no more than two bedrooms." Limiting the number of bedrooms will create a disparate impact against families with children, people with disabilities, and other protected groups in violation of state law. (See Gov. Code § 65008.)

### **The City Has Impermissible Limitations on Historic Sites**

Section 9.07.210(F)(9)(h) states that an ADU "shall not cause a substantial adverse change on any real property that is listed in the National Register of Historic Places, and/or California Register of Historic Places, and/or the City of Dana Point Historic Architectural Resources Inventory." However, state law (Gov. Code, § 66314, subd. (b)(1)) only permits consideration of impacts on state register-listed properties, and it does not permit consideration of National Register-listed sites or locally designated landmarks.

### **The City May Not Limit the Size of ADUs in Conjunction With Multifamily Buildings**

DPC Section 9.07.210(e)(3)(G) limits the size of ADUs in multifamily buildings to “50% of the average living area of existing multi-family dwelling units.” This requirement is not permitted by Government Code Section 66323, subd. (a)(3), which does not allow for any such size requirement.

DPC Section 9.07.210(e)(4)(E) limits the size of detached ADUs on the site of multifamily ADUs to 1,200 square feet. This requirement is not permitted by Government Code Section 66323, subd. (a)(4), which does not allow for any such size limitation.

### **The City May Not Impose Non-Objective Standards**

DPC Section 9.07.210(f)(9)(B) states the following, “Any attached or detached ADU shall be architecturally consistent with the primary residential or multi-family dwelling. In addition, all ADUs shall be designed and sited to: (i) be similar to the primary dwelling with respect to architectural style, roof pitch, color, and materials; (ii) protect public access to and along the shoreline areas; (iii) protect public views to and along the ocean and scenic coastal areas; (iv) protect sensitive coastal resources; and (v) minimize and, where feasible, avoid shoreline hazards.”

However, state law only permits the imposition of objective standards on ADUs (Gov. Code, § 66314.), and the standards in DPC Section 9.07.210(f)(9)(B) are not objective. It is impossible for an applicant to know *ex ante* what a reviewing official will consider, for example to “protect public views” or to be “similar to the primary dwelling.”

DPC Section 9.07.210(d)(2) and DPC Section 9.07.215(c)(2) require that “... all changes required to building permit plans submitted to the Community Development Department have been made to the satisfaction of the Director” as a condition of ADU and JADU approval, respectively. However, “satisfaction of the Director” is not an objective standard.

### **Other Impermissible Requirements**

#### **The City May Not Impose Owner-Occupancy Regulations**

DPC Section 9.07.210(f)(2) imposes an owner occupancy requirement on ADUs beginning on January 2, 2025. Government Code Section 66315 clearly forbids such owner occupancy requirements and this section of state law has no sunset provision. The City should also update its ADU plan check submittal (available [here](#)) and remove the owner occupancy provisions in the deed restriction the City asks ADU applicants to sign.

#### **The Required Deed Restrictions Are Unenforceable**

DPC Section 9.07.210(f)(3) requires a deed restriction to be recorded against the property as a condition of developing an ADU. However, such 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.)

### **Impermissible Blanket Restriction on ADU Sales**

DPC Section 9.07.210(F)(2) prohibits all sales of ADUs separate from the primary unit. However, the City must allow ADU sales pursuant to Government Code Section 66340 *et seq.*

### **Referenced Code Sections Are Out of Date**

Finally, since the City last amended its ADU ordinance, the state law regulating ADU development has been reorganized, with the law currently resident at Government Code Section 66310 *et seq.* The City's references to state law in its code are therefore out of date.

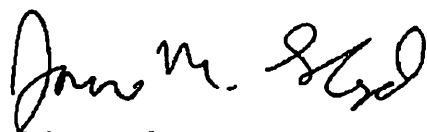


CalHDF is a 501(c)3 non-profit corporation whose mission includes advocating for increased access to housing for Californians at all income levels, including low-income households. You may learn more about CalHDF at [www.calhdf.org](http://www.calhdf.org).

Sincerely,



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