

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

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January 22, 2024

Chadrick Smalley, Community Development Director
Community Development Department
City of Emeryville
1333 Park Ave.
Emeryville, CA 94608

Dear Charles Bryant:

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

Thank you for submitting the City of Emeryville (City) accessory dwelling unit (ADU) Ordinance No. 20-027 (Ordinance), adopted December 15, 2020, 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 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 February 22, 2024.

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

- **Section 9-5.1404 – Height Requirements** – The Ordinance states: “Nothing in this Article shall be construed to prohibit an Accessory Dwelling Unit with an area of up to 800 square feet, height of up to 16 feet, side setbacks of no less than three feet...” This appears to reference Government Code 65852.2, subdivision (c)(2)(C). However, Government Code 65852.2, subdivision (c)(2)(D), specifies minimum height allowances for different ADU developments, several of which exceed 16 feet. Therefore, the City must amend its ordinance to allow the same by adjusting its height requirements.
- **9-5.1404.5 (a) – Junior Accessory Dwelling Unit (JADU) Single-Family Zones** – The Ordinance states that JADUs “are permitted only in the Residential zones, and in the MUR Mixed Use with Residential and MURS Mixed Use with Residential South zones. However, Government Code section 65852.22, subdivision (a), states that JADUs may only be created in single-family residential zones. The City must amend the Ordinance to comply with State ADU Law.

- Section 9-5.1407(a) and (b) – *ADU Allowances* – The Ordinance states: “On a lot with one existing or proposed Single Unit, up to one Accessory Dwelling Unit and one Junior Accessory Dwelling Unit are allowed...” before enumerating two types of Accessory Dwelling Units. The sections appear to reference Government Code section 65852.2, subdivision (e)(1)(A) and (B). Pursuant to Government Code section 65852.2, subdivision (e)(1), “Notwithstanding subdivisions (a) to (d), inclusive, a local agency shall ministerially approve an application...to create any of the following: (A) One accessory dwelling unit and one junior accessory dwelling unit (JADU) 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.” Moreover 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 lots with existing or proposed single-family dwellings. Statute does not use ‘or’ nor “one of” to indicate only one or another would be applicable to the exclusion of the other.

Thus, if the local agency approves an ADU that is created from existing (or proposed) space of a single-family dwelling, or created from an existing accessory structure, and the owner subsequently applies for a detached ADU permit (or vice versa), which meets the size and setback requirements, pursuant to the subdivision, the local agency cannot deny the applicant, nor deny a permit for a ADU under this section. This permits a homeowner, who meets specified requirements, to create one (1) converted ADU, one (1) detached, new construction ADU, and one (1) JADU, in any order without prejudice, totaling three units. Therefore, the City must amend its Ordinance to clarify the appropriate ADU allowance according to State ADU statute.

- Section 9-5.1407(b) – *Multi-family ADUs* – The Ordinance allows for ADUs “On a lot with more than one existing dwelling unit,” that meet certain qualifications. This language appears to be a reference to Government Code section 65852.2, subdivision (e)(1)(C) and (D). However, ADUs built pursuant to Government Code section 65852.2, subdivisions (e)(1)(C) and (D), may only be built on lots containing primary dwellings that contain more than one dwelling unit, such as a duplex. The Ordinance language “On a lot with more than one existing dwelling unit” could also include, for example, a non-conforming zoning lot with two single-family homes. As this type of lot could not allow for ADUs built pursuant to Government Code section 65852.2, subdivisions (e)(1)(C) and (D), the City must amend its ordinance to correctly reflect ADU allowance on lots with multi-family dwellings.

- Section 9-5.1408(a) – *ADU Size* – The Ordinance states: “An Accessory Dwelling Unit may not have a floor area less than 150 square feet nor greater floor area than the largest principal Single Unit with which it is associated or 1,200 square feet, whichever is greater. If an Accessory Dwelling Unit is created inside an existing accessory structure, the structure may be expanded by up to 150 square feet for ingress and egress.” However, converted units, created in detached accessory structures and within the primary residence, as well as new construction detached ADUs created with an existing or proposed multifamily dwelling do not have size limitations (Gov. Code § 65852.2, subs. (e)(1)(A), (e)(1)(C)(i), and (e)(1)(D)). Therefore, the City should amend the Ordinance to comply with statute.
- Section 9-5.1410 (b) – *Setbacks* – The Ordinance states: “Except as provided in Section 9-5.1404, an Accessory Dwelling Unit shall be subject to the same setback requirements as the existing residential structure(s)...” However, Government Code section 65852.2, subdivision (c)(2)(C), prevents jurisdictions from imposing (emphasis ours): “... any requirements for a zoning clearance or separate zoning review... based on... **front setbacks**... that does not permit at least an 800 square foot accessory dwelling unit with four-foot side and rear yard setbacks to be constructed in compliance with all other local development standards. As “the same setback requirements” could include front setbacks along with side and rear setbacks, the City must amend its ordinance to clarify that local front setback standards will not preclude the development of an accessory dwelling unit pursuant to Government Code section 65852.2, subdivision (c)(2)(C).
- Section 9-5.1410(c) – *ADU Height* – The Ordinance states: “The maximum height limit of an Accessory Dwelling Unit shall be 30 feet, except that it shall step down at an angle from a maximum height of 30 feet at 15 feet from the rear lot line to a maximum height of 16 feet at four feet from the rear lot line.” However, maximum height requirements of 16 feet are not lawful for certain ADUs. The maximum height for detached and attached ADUs may range from 16, 18, 20, or 25 feet pursuant to Government Code section 65852.2, subdivision (c)(2)(D). Therefore, the City must amend its ordinance to meet the maximum height requirements for ADUs that are determined by State ADU Law.
- Section 9-5.1410 (e) – *Useable Open Space* – The Ordinance states that: “For lots with an Accessory Dwelling Unit attached to or detached from the principal unit (adding to the building footprint on the lot), a common open space accessible to both the principal unit and the Accessory Dwelling Unit must be provided. However, Government Code section 65852.2, subdivision (c)(2)(C), prevents jurisdictions from imposing (emphasis ours): “... any requirements for a zoning clearance or separate zoning review... based on... **open space**... that does not permit at least an 800 square foot accessory dwelling unit with four-foot side and rear yard setbacks to be constructed in compliance with all other local development standards. Therefore, the City must amend its

ordinance to clarify that open space requirements will not preclude the development of ADUs pursuant to Government Code section 65852.2, subdivision (c)(2)(C).

- Section 9-5.1412(a) – *Separate Conveyance* – The Ordinance states: “An Accessory Dwelling Unit and its associated residential structure may not be sold separately by conversion to condominiums, division of the lot on which they are located, or by other means.” However, Government Code section 65852.26, creates a narrow exception to allow separate conveyance of an ADU to a qualified buyer if the property was built or developed by a qualified nonprofit corporation, among other things. Therefore, the City must amend its ordinance to note this exception. Please note that recent amendments to the statute now provide for a local agency to allow the separate sale or conveyance of a primary dwelling and an ADU as condominiums pursuant to Government Code section 65852.2, subdivision (a)(10).
- Section 9-5.1412 (b); section 9-5.2103 – *Short-term Rental* – The Ordinance states: “Short-term Rentals are prohibited in Accessory Dwelling Units and Junior Accessory Dwelling Units, even if they are single detached units.” This appears to reference Government Code 65852.2 subdivisions (a)(8)(C) and (e)(5), which require or provide the option to require rental terms of greater than 30 days for ADUs. However, “short term rental”, as mentioned in the ordinance, is not further defined, leaving room for subjective judgement as to what constitutes such a rental. According to Government Code section 65852.2, subdivision (a)(1)(B)(i), local agencies are only authorized to impose “objective standards” for ADU development, which must “...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” (Gov. Code § 65852.2, subd. (j)(7)). Therefore, the city must clearly define: “short term rentals”. Further, Government Code section 65852.22 that governs the creation of JADUs by ordinance states that “Notwithstanding Section 65852.2, a local agency may, by ordinance, provide for the creation of junior accessory dwelling units in single-family residential zones...” The short-term rental prohibition in Government Code section 65852.2, subdivisions (a)(8)(C) and (e)(5), is not applicable to JADUs. JADUs do not have a similar requirement in Government Code section 65852.22. Therefore, the City must remove this short-term rental requirement for JADUs.
- Section 9-5.1412(d) – *Fire Sprinklers* – The Ordinance states: “Fire sprinklers are only required for the Accessory Dwelling Unit if they are required for the principal unit or largest unit on the site.” However, Government Code section 65852.2, subdivision (a)(1)(D)(xii) states, “Accessory dwelling units shall not be required to provide fire sprinklers if they are not required for the primary residence.” As there is no statutory requirement for fire sprinklers based on “the largest unit on site”, the City must amend its ordinance to remove this language.

In response to the findings in this letter, and pursuant to Government Code section 65852.2, subdivision (h)(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 65852.2, subdivision (h)(3)(A), 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 feel free to contact Nicholas Green of our staff, at (916) 841-6665 or at Nicholas.Green@hcd.ca.gov.

Sincerely,

A handwritten signature in cursive script that reads "Jamie Candelaria".

Jamie Candelaria
Senior Housing Accountability Unit Manager
Housing Policy Development Division