

ATTACHMENT D

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT DIVISION OF HOUSING POLICY DEVELOPMENT

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July 5, 2023

William Gilchrist, Director
Planning Department
City of Oakland
250 Frank H. Ogawa Plaza
Suite 2114
Oakland, CA 94612

Dear William Gilchrist:

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

Thank you for submitting the City of Oakland (City) accessory dwelling unit (ADU) Ordinance No. 13667 (Ordinance), adopted January 18, 2022, 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 sections 65852.2 and 65852.22 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 August 4, 2023.

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

- Introduction, Chapter 17.88, 17.103.080 (A)(7) – *S-9 Fire Safety Zone* – Section 17.88.010 defines the S-9 Zone as “[l]ots located, in whole or part, within or adjacent to VHFHSZs (Very High Fire Hazard Severity Zones) and... [when] the lot is accessed by streets... with a pavement width of less than twenty-six (26) feet at any point or [where] a lot is located on a dead-end street that has a total length of size hundred (600) feet or longer from the nearest intersection.” Section 17.88.050 (A) then prohibits “One Family and Multifamily Category One Accessory Dwelling Units that are conversions of space outside the envelope of an existing Residential Facility; (2) More than one Multifamily Category One Accessory Dwelling Unit that is within the existing envelope of an existing Residential Facility per lot; (3) One Family and Multifamily Category Two Accessory Dwelling Units; (4) Multifamily Category Three Accessory Dwelling Units.” This effectively restricts new construction ADUs subject to Government Code section 65852.2, subdivision (e), and attached ADUs subject

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to Government Code section 65852.2, subdivision (a), within the S-9 Fire Safety Zone. Supporting evidence for these restrictions is provided in the introduction to the Ordinance. This restriction is repeated in section 17.103.080 (A)(7), which states that “[d]evelopment of ADUs is restricted with certain exceptions specified in Chapter 17.88 to one (1) interior conversion Category One ADU within the existing envelope of a primary structure or one (1) JADU per Single Family, Two Family or Multifamily lot.”

However, while HCD is sympathetic to concerns about fire safety and the need to ensure adequate evacuation in the event of a fire, the City has not adequately demonstrated that new ADUs will impact public safety in the VHFHSZ. The findings as presented in 17.88.020 feature no data and refer more to vehicle use and evacuation than housing, while mentioning a Local Hazard Mitigation Plan that “points out existing vulnerable and isolated populations in VHFHSZ areas” and a Vegetation Management Report that “underscores the fact that the area within the VHFHSZ is susceptible” to wildfires. Note that the VHFHSZ mapping was not intended to serve as a development moratorium. Rather, according to Cal Fire, these maps are intended to be used for planning purposes and mitigation measures such as building material requirements and zones of defensibility around structures.

Given the City’s attention to vehicle use as being a primary concern, the City does not account for the potential for ADUs to be excluded from requiring a parking space given the availability of public transit in the S-9 overlay. For example, Map 18 at the end of Appendix A shows several large sections of the S-9 overlay South of Piedmont; each of these areas is well served with bus stops for the 646, 652 and 682 bus lines within a half-mile walk. All such areas would not be required to provide parking spaces. Furthermore, occupancy of an ADU does not necessarily guarantee the presence of another car on a lot.

Per State ADU Law, ADUs are permitted in all areas zoned for residential and mixed use, and a local agency may, by ordinance, designate areas for the creation of ADUs based on the adequacy of water and sewer services and the impact of accessory dwelling units on traffic flow and public safety (Gov. Code, § 65852.2, subd. (a)(1)(A)). However, local jurisdictions may not preclude the creation of categories of ADUs altogether. In this situation, any limits on where ADUs are permitted based on the impacts of public safety should be accompanied by detailed findings of fact explaining why ADU limitations are required and consistent with these factors.

Lastly, even if the City provided adequate justification for this restriction on ADUs under Government Code section 65852.2, subdivision (a), the City may not justify a restriction, such as exists in Sections 17.88.050 (A)(1), (A)(2) and (A)(3) on ADUs created under subdivision (e). Local development standards (such as an area restriction based on VHFHSZ designation) provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a)

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through (d), do not apply to ADUs created under Government Code section 65852.2, subdivision (e). Therefore, the City must ministerially permit units created pursuant to subdivision (e).

- 17.09.040 (A) – *JADU Definition* – The Ordinance prohibits JADUs “as a conversion of detached or attached accessory structures.” However, Government Code section 65852.22, subdivision (a)(4), states that an ADU Ordinance must “[r]equire a permitted junior accessory dwelling unit to be constructed within the walls of the proposed or existing single-family residence. For purposes of this paragraph, enclosed uses within the residence, such as attached garages, are considered a part of the proposed or existing single-family residence.” Therefore, the City must allow for the conversion of enclosed uses within the residence, such as attached garages.
- 17.30.140 and 17.102.270 – *Additional Kitchen* – The Ordinance states, “No residential facility shall be permitted to have both an additional kitchen... and [an] ADU.” However, the presence of an additional kitchen cannot preclude the ministerial approval of an ADU that conforms to Government Code section 65852.2, though the presence of an ADU may preclude the creation of an additional kitchen. The City must note the exception.
- 17.33.040, Table 17.33.02 (L1) – *Existing Primary Dwellings* – The Ordinance states that in the Neighborhood Center Commercial Zone, ADUs “are permitted when there is an existing One-Family Dwelling on a lot...” The table appears to permit the development of two-family and multifamily dwellings as well. Per Government Code section 65852.2, subdivision (a)(1)(D)(ii), ADUs must be ministerially approved on any lot “zoned to allow single-family or multifamily dwelling residential use and includes a proposed or existing dwelling.” The Ordinance omits mention of proposed single-family dwellings and existing or proposed multifamily dwellings. The City must amend the language to comply with statute.
- 17.88.050 (B)(1) – *Fire Safety Parking Compromise* – The Ordinance allows for alternative ADU development options in the S-9 Fire Overlay if “[a]t least one (1) additional off-street parking space is created on the lot for the ADU in addition to any regularly required off-street parking spaces for the primary residential facility. Also, any lost parking spaces must be replaced on the lot....” The concern with the S-9 Overlay has previously been discussed. However, Government Code section 65852.2, subdivision (d), prohibits requiring parking when any of the following apply:
 - The ADU is located within one-half mile walking distance of public transit. (Gov. Code, § 65852.2 (d)(1).)
 - The ADU is located within an architecturally and historically significant historic district. (Gov. Code, § 65852.2 (d)(2).)

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- The ADU is part of the proposed or existing primary residence or an accessory structure. (Gov. Code, § 65852.2 (d)(3).)
- On-street parking permits are required but not offered to the occupant of the ADU. (Gov. Code, § 65852.2 (d)(1)(d).)
- A car share vehicle is located within one block of the ADU. (Gov. Code, § 65852.2 (d)(5).)
- Furthermore, pursuant to Government Code section 65852.22, subdivision (b)(1), a parking space may not be required under any circumstance for a JADU. Therefore, the City must remove this section.
- 17.103.080 (A)(3) – *Separate Sale* – The Ordinance currently prohibits the separate sale of an ADU or junior accessory dwelling unit (JADU). 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. The City should update the Ordinance to cite the exception.
- 17.103.080 (A)(9) – *Exterior Visibility* – The Ordinance states that “an exterior stairway proposed to serve an ADU or JADU on a second story or higher shall not be visible from the front public right of way. However, local development standards provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a) through (d), do not apply to ADUs created under Government Code section 65852.2, subdivision (e), which applies to converted units created on the second floor. Furthermore, as statute for both ADUs and JADUs require independent entry into the unit, a constraint on the location provisions necessary for independent entry may prohibit the creation of an additional housing unit. (Gov. Code, § 65852.2, subd. (e)(1)(A)(ii) (Gov. Code, § 65852.22, subd. (a)(5)) Therefore, the City must amend the Ordinance to clarify that the exterior stairway must not be visible when feasible.
- 17.103.080 (A)(10)(a) and (10)(b) – *Oakland Cultural Heritage Survey* – The Ordinance creates special restrictions for ADUs in “structures rated ‘A’, ‘B’ or ‘C’ by the Oakland Cultural Heritage Survey. Government Code section 65852.2, subdivision (a)(1)(B)(i), states that local jurisdictions may, “Impose standards on accessory dwelling units that... prevent adverse impacts on any real property that is listed in the California Register of Historic Resources.” State statute does not acknowledge *local* registers. Therefore, the City must remove these sections.
- 17.103.080 (A)(12) – *Landscaping Standards* – The Ordinance requires trees to be planted for every ADU developed, with larger units requiring more trees. However, Government Code section 65852.2, subdivision (a)(5), states, “No other local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this subdivision.” Therefore,

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ADU approval cannot be made contingent on planting trees. Moreover, local development standards provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a) through (d), do not apply to ADUs created under Government Code section 65852.2, subdivision (e). While the City may award voluntary tree planting by providing incentives, it may not make it a requirement. The City might consider creating or modifying incentive programs to encourage tree planting. Accordingly, the City must either remove the tree planting requirement from the Ordinance or clarify it as an incentive.

- 17.103.080 (A)(15)(c) – *Limited Amnesty Clause* – The Ordinance states “The Planning Code amnesty and enforcement delay programs provided in this Section are available to any property owner whose Unpermitted Accessory Dwelling Unit meets the program requirements provided within this Section.” However, Government Code section 65852.23, subdivision (a), states “(a) Notwithstanding any other law... a local agency shall not deny a permit for an unpermitted accessory dwelling unit that was constructed before January 1, 2018, due to either of the following: (1) The accessory dwelling unit is in violation of building standards pursuant to Article 1 (commencing with Section 17960) of Chapter 5 of Part 1.5 of Division 13 of the Health and Safety Code. (2) The accessory dwelling unit does not comply with Section 65852.2 or any local ordinance regulating accessory dwelling units.” The City’s amnesty program has a narrower scope than state statute requires, as an ADU permit may not be denied for units created prior to January 1, 2018, even if it conflicts with building code standards, local development standards, or Government Code section 65852.2. Therefore, the City must amend the Ordinance to comply with statute.
- 17.103.080 (A)(15)(f) – *Amnesty Clause & S-9* – The Ordinance exempts units built in the S-9 Overlay from the amnesty program. As the concerns with the S-9 Overlay have already been discussed, exempting units in this area for an amnesty program intended for all applicable unpermitted ADUs exceeds state statute. The City must remove this reference.
- 17.103.080 (A)(15)(h) – *Expiration Clause* – The Ordinance conditions the amnesty clause with “The Planning and Building Director or his or her designee shall not approve any applications for the Planning Code amnesty request or Building Code enforcement delay on or after January 1, 2030.” However, Government Code section 65852.23 has no condition for expiration. Therefore, the City must remove this section.
- 17.103.01, Table A, Note 1 – *Unit Mixture* – The Ordinance states that “A Category One or Category Two ADU may be combined on the lot with one (1) JADU. However, a lot may not contain both a Category Two ADU and a Category One ADU. A lot with a One-Family Facility may only contain two ADUs if one (1) is a JADU.” This forces a developer or homeowner to choose either a converted unit or a detached new construction unit. However, Pursuant

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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 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 subpart (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. 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.

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 JADU 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. This standard simultaneously applies to ADUs created pursuant to Government Code section 65852.2, subdivision (e)(1)(C) and (D), on lots with proposed or existing multifamily dwellings according to specified requirements. Therefore, the City must revise the table and remove the note to establish the allowable unit combination.

- Tables 17.103.01 and 17.103.02 – *Converted Size Limitations* – The Ordinance creates size limitations for converted units within the primary and accessory structures for both single-family and multifamily buildings. However, size maximums do not apply to converted units, as local development standards provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a) through (d), do not apply to ADUs created under subdivision (e), and only new construction detached in subdivisions (e)(1)(B) and (e)(1)(D) have a discrete size limit stated therein. The City must note the exception.
- Numerous References – *Height Limits* – The Ordinance refers throughout to a height maximum of sixteen feet for ADUs. However, Government Code section 65852.2, subdivision (c)(2)(D), sets ADU height maximums at 16, 18, and 25 feet, depending on the applicable provisions. The City must review current state statute and amend the Ordinance accordingly.
- Tables 17.103.01 and 17.103.02 – *Parking* – The Ordinance sets out the conditions for which parking is not required with the creation of an ADU. However, it omits reference to Government Code section 65852.2, subdivision

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(d)(1)(C), which states that no parking may be required when "...the accessory dwelling unit is part of the proposed or existing primary residence or an accessory structure." This would also include all JADUs. The City must note the exceptions.

- Table 17.103.01 – *Owner Occupancy* – The Ordinance states "Owner must occupy the JADU or the primary residence." However, Government Code section 65852.22, subdivision (a)(2), states "Owner-occupancy shall not be required if the owner is another governmental agency, land trust, or housing organization." The City must note the exception.
- Table 17.103.02 – *Unit Mixture* – The Ordinance states that a Category 3 ADU "precludes creation of any other ADU." There are three ADU types governed by Category 3. First, it includes some units created pursuant to Government Code section 65852.2, subdivision (a) – namely, new-construction attached units. However, Government Code section 65852.2, subdivision (a), permits ministerial approval of a compliant ADU with an existing or proposed primary dwelling unit, either multifamily or single-family. Subsequent to this allowance in subdivision (a), subdivision (e) begins with "notwithstanding subdivisions (a) through (d), inclusive, a local agency shall ministerially approve an application for a building permit within a residential or mixed-used zone to create any of the following..." before listing the four categories of subdivision (e) units. Therefore, the prior existence of an attached new-construction Category 3 ADU cannot preclude the development of a Category 1 or Category 2 ADU.

Secondly, another ADU type governed by Category 3 is a converted unit created to the same dimensions as a "legally existing attached accessory structure" in multifamily structures. This conforms to Government Code section 65852.2, subdivision (e)(1)(C). The Ordinance must permit the combination of such a unit with other units built subject to Government Code section 65852.2, subdivision (e), as discussed in the finding *Unit Mixture* above. The City must note the exceptions.

- Table 17.103.01, Note (5) – *Ingress* – The Ordinance states that an expansion of not more than 150 square feet (s.f.) may be permitted for the purposes of ingress if "...the ADU is no greater than eight-hundred (800) square feet." However, the allowance for expansion to accommodate ingress and egress may be for a unit that conforms to Government Code section 65852.2, subdivision (e)(1)(A)(i), which reads that the unit "...may include an expansion of not more than 150 square feet beyond the same physical dimensions as the **existing accessory structure.**" (emphasis added). Note that such expansions are not dependent on the size of the unit but are only permissible with an "existing accessory structure." Therefore, the City must remove this reference.

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- Tables 17.103.01 and 17.103.02 – *Maximum Size* – The Ordinance states that converted One-Family units be “50% of floor area of primary residence or 850 s.f., whichever is greater, but shall not exceed 1,200 sf.” It later states that detached ADUs with multifamily primary dwellings be no larger than “850 sf. for studio or one-bedroom; 1,000 sf. for 2 bedrooms or more.” However, local design standards provided by the Ordinance pursuant to Government Code section 65852.2, subdivisions (a) through (d), may not preclude a unit built subject Government Code section 65852.2, subdivision (e), which includes all converted units. Therefore, the City must amend the tables to note that no size maximums apply to any converted unit or any detached unit with a multifamily primary dwelling.
- Tables 17.103.01 and 17.103.02 – *Front Setbacks* – The Ordinance requires, for One-Family Primary dwellings, front setbacks “established by the development standards of the underlying zoning district, except when lot conditions preclude creating one ADU of no more than 800 s.f. and no more than 16 feet in height...” A similar condition exists for multifamily buildings in table 17.103.02, though two ADUs are allowed in the exception for Category 1 and 2 ADUs and one ADU is allowed in the exception for Category 3. The issues with restrictive unit allowances have already been addressed. However, the absence of alternative siting may not be a prerequisite for allowing an ADU in the front setback. Government Code section 65852.2, subdivision (c)(2)(C), does not condition placement of an 800 square foot unit on no other sites being available. Therefore, the City must remove these sections.
- Tables 17.103.01 and 17.103.02 – *Lot Coverage, FAR and Open Space* – The Ordinance allows “One JADU and One ADU of no more than 800 s.f. that is no more than 16 feet in height with at least 4 foot setbacks.” It also requires that, relative to FAR requirements for multifamily primary dwellings, “New ADUs must be consistent with the regulations contained in the underlying zoning district, except to establish one or two Category Two ADUs of no more than 800 sf.” It requires that for multifamily primary dwellings, “required open space for existing units, as established by the underlying zoning district, must be maintained...” except to allow exempted units. It has already been noted that the City must ministerially permit ADUs subject to different sections of statute in combination with one another; likewise, the height limitation has been addressed. However, be further advised that lot coverage, FAR and Open space requirements may not preclude any unit subject to Government Code section 65852.2, subdivision (e), which includes all conversions, JADUs, new construction detached units up to 800 square feet with single-family primary dwellings, and up to two detached units with multifamily dwellings. The City must amend the Ordinance to comply with statute.
- Table 17.103.02 (2) – *Nonhabitable Space Definition* – The Ordinance defines non-habitable space in multifamily primary dwellings: “Non-habitable or non-

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livable space does not include detached accessory structures, existing residential units, commercial space, community rooms, gyms, laundry rooms or any other finished spaces that are meant to be occupied by people and used communally.” However, statute defines such space much more broadly in Government Code section 65852.2, subdivision (e)(1)(C): “...including, but not limited to, storage rooms, boiler rooms, passageways, attics, basements, or garages.” There is no condition in statute to require that such spaces *not* be “any other finished spaces that are meant to be occupied by people”. Defining it in this way is potentially restrictive and thus violates State statute. The City must remove the quoted 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 provided 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) 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,

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