



Jan 27, 2025

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Re: Proposed amendments to the City's Accessory Dwelling Unit and Junior Accessory Dwelling Unit Regulations

Dear Costa Mesa Planning Commission,

The California Housing Defense Fund ("CalHDF") submits this letter as a public comment concerning item 1 on the agenda for the Planning Commission meeting scheduled for January 27, 2025, an amendment to the City's regulations for ADUs and JADUs. This proposed ordinance fails to comply with state law in several ways, and the City should address these problems before approving the ordinance.

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, Government Code section 66323 establishes a narrower set of ADU types that local governments have a ministerial duty 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.*) Local governments may not impose their own standards on such ADUs. (Gov. Code, § 66323, subd. (b) ["A local agency shall not impose any objective development or design standard that is not authorized by this section upon any accessory dwelling unit that meets the requirements of any of paragraphs (1) to (4), inclusive, of subdivision (a)."].)

In addition, ADUs that qualify for the protections of Government Code section 66323, like other ADUs, must be processed by local governments within 60 days of a complete permit application submittal. (Gov. Code, § 66317, subd. (a).)

State law also prohibits creating regulations on ADU development not explicitly allowed by state law. Government Code Section 66315 states, “No additional standards, other than those provided in Section 66314, shall be used or imposed, including an owner-occupant requirement, except that a local agency may require that the property may be used for rentals of terms 30 days or longer.”

Impermissible Underlying Standards

City code section 13-35(b)(2) imposes all underlying city zoning standards on ADUs, except as modified by that section. City code section 13-35(b)(7) applies underlying city zoning standards on additions to existing dwellings to facilitate the conversion of space to ADUs. Neither of these provisions are allowed by state law.

As discussed *supra*, Government Code section 66323 mandates that the City approve a specific class of ADUs subject only to specified height and setback requirements, notwithstanding any local code requirements to the contrary. This means, for example, that the City cannot impose landscaping regulations, floor area ratio regulations, parking requirements, front setbacks, etc. on ADUs that qualify for the protections of Government Code section 66323.

Furthermore, Government Code section 66323, subdivision (a)(1) provides for an expansion of 150 square feet for the purposes of ingress and egress. As discussed *supra*, the City may not impose any zoning requirements on such an expansion.

Impermissible Size Limitations

City code section 13-35(b)(5)(a)(1) limits detached ADUs in conjunction with a single-family home to 1,200 square feet, and code section 13-35(b)(5)(b)(1) limits detached ADUs in conjunction with multifamily dwellings to 850 square feet or 1,000 square feet for an ADU that provides more than one bedroom.

However, these limits are not allowed for ADUs subject to the protections of Government Code section 66323, subdivisions (a)(1) and (a)(4). In the case of section 66323, subdivision (a)(1), state law does not allow a maximum unit size for a conversion of a portion of an existing structure into an ADU on a single-family property. For section 66323, subdivision (a)(4), state law does not allow a size limitation for any detached ADUs constructed on multifamily properties, provided they comply with the specified height and

setback requirements.

Impermissible Deed Restriction Requirement

City code section 13-35(d)(5) requires a deed restriction to be placed on the property prior to final inspection and occupancy of an ADU. This is a clear violation of Government Code section 66323, which prohibits any standards not explicitly authorized in that section. Deed restrictions are also not permitted by Government Code section 66315, which forbids standards not listed in section 66314, and it is unclear why the City would want applicants to go through the trouble of filing such a deed restriction, other than to discourage ADU development by increasing development cost.

The California Department of Housing and Community Development (“HCD”) has communicated that such deed restrictions are unlawful. The January 2025 HCD ADU [Handbook](#) specifically forbids deed restrictions as a condition of ADU development (see page 22).

Additionally, such deed restrictions imposed on ADUs (or on other accessory structures) are unenforceable. This is due to the absence of horizontal privity between the Town and the applicant. In other words, since the Town 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 Development Standards

CalHDF notes that City code section 13-35(d) states, “The following standards shall not preclude a unit built subject to Government Code section 66323 (a), which includes all converted ADUs, all converted JADUs, 800-square-foot, new-construction, detached ADUs with four-foot setbacks with single-family primary dwellings, and detached units with multifamily primary dwelling structures. Otherwise, all ADUs and Junior ADUs must comply with the following requirements:”

However, “shall not preclude” does not have the same meaning as “shall not apply to.” The wording of this paragraph strongly implies that the standards in section 3-35(d) apply to all ADUs, unless they would prohibit an ADU covered by Government code section, 66323 subdivision (a). This is not permissible. The City must explicitly exempt ADUs eligible for the protections of Government Code section 66323, subdivision (a) from all development standards other than the basic height and setback standards contained in state law.

This means that the following development standards cannot be imposed on ADUs subject to the protections of Government Code section 66323, subdivision (a):

- **Setbacks.** City code section 13-35(d)(8)(b) requires all ADUs to comply with front setbacks based on the underlying zoning district, and second floor portions of ADUs to comply with all setback requirements of the underlying zoning district. City code section 13-35(d)(9)(a) separately imposes a 25 foot front setback and the underlying zoning setback requirements on the second floor of an ADU. City code section 13-35(d)(9)(a)(4) imposes fenestration requirements on the 2nd floor portion of ADUs. None of these requirements are permitted for ADUs eligible for the protections of Government Code section 66323, as discussed *supra*. Government Code section 66323 requires that local agencies allow ADUs up to 20 feet in height in some circumstances. If the applicant can create two stories out of such a structure, then the City may not impose any regulations on the second floor other than what is explicitly allowed by section 66323. See page 18 of the ADU [Handbook](#) for further information.
- **Building-to-Building Separation.** City code section 13-35(d)(8)(c) requires all ADUs to be six feet from all other structures on the property. This requirement is not permitted for ADUs eligible for the protections of Government Code section 66323, as discussed *supra*. See page 18 of the ADU [Handbook](#) for further information. Additionally, building-to-building separation is separately regulated by the building code.
- **Architectural Standards.** City code sections 13-35(d)(11), 13-35(d)(12)(a), and 13-35(d)(13) impose design standards on all ADUs and new construction JADUs. However, as discussed *supra*, if the ADU or JADU qualifies for the protections of Government Code section 66323, subd. (a)(1), then the city must approve it ministerially, via building permit only, and cannot impose any such design regulations, as this section of state law only permits specified height and setback regulations, as discussed *supra*. Additionally, section 13-35(d)(12)(a) is phrased as a design “consideration.” Regardless of how this is phrased, a city official may not deny an application for a section 66323 ADU based on this standard.
- **Landscaping.** City code section 13-35(d)(17) imposes landscaping requirements on all ADUs that exceed 800 square feet. However, such requirements may not be imposed on any ADUs that qualify for the protections of Government Code section 66323, subdivision (a). It should be noted that while Government Code section 66323, subdivision (a)(2) has a size limit of 800 square feet, there are no size limits for ADUs described in subdivisions (a)(1), (a)(3), and (a)(4). The City therefore may not impose landscaping requirements on ADUs that qualify for the protections of those subdivisions, whether or not they exceed 800 square feet in size.



CalHDF appreciates the City's effort to implement state law governing ADU construction. However, the City should amend its ordinance to ensure that it complies with state 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 blue ink, appearing to read "Dylan Casey".

Dylan Casey
CalHDF Executive Director

A handwritten signature in black ink, appearing to read "James M. Lloyd".

James M. Lloyd
CalHDF Director of Planning and Investigations