ITEM 2

Apr 28, 2025

City of Dana Point
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Re: Application PLN25-0003 for a proposed ADU at 33861 Malaga Drive.

Dear Dana Point Planning Commission,

The California Housing Defense Fund ("CalHDF") submits this letter on behalf of appellant Travis Mellem, regarding agenda item 2 for the April 28, 2025 City of Dana Point ("the City") Planning Commission meeting, the appeal of the denial of application PLN25-0003 for a proposed ADU at 33861 Malaga Drive.

The City's position on this appeal is based on a clear misreading of state ADU law. Since 2016, state law has established two categories of ADUs that cities must accommodate. First, cities are granted authority to enact local ADU ordinances with limited objective development standards, including designations of areas in the city where the local ordinance prohibits ADUs based on the availability of water and sewer service and impacts on traffic flow and public safety. (Gov. Code, §§ 66314 through 66322.) Second, state law requires approval for a more limited subset of ADUs *notwithstanding* anything in the city's local ordinance. (Gov. Code, § 66323.) Originally applying to only ADUs created by converting existing space in a single-family home, these "Exemption ADUs" were expanded in 2020 to cover additional types of ADUs, including ADUs converted from existing space in multifamily buildings. 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.*) SB 1211, effective January 1, 2025, made this even more explicit: Gov. Code, § 66323, subdivision (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)."

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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).)

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."

Here, the City has denied a ministerial permit application that proposes to convert existing space in a multifamily building into an ADU. The proposed ADU clearly qualifies for mandatory ministerial approval under Gov. Code Section 66323(a)(3) because it is proposed "within the portions of existing multifamily dwelling structures that are not used as livable space." The City has no authority to apply provisions of its local ADU ordinance to this permit application under state law. The Planning Commission should therefore reverse the denial and grant this appeal.

Staff Report's Justification of Project Denial

The staff report justifies the denial of the project application as follows:

> With respect to the instant ADU project, since the property is non-conforming as to driveway length (providing only 5 feet where 20 feet is required) and parking (providing only three (3) stalls in a garage where three (3) covered stalls, two (2) uncovered stalls, and one (1) visitor stall are required), the ADU is prohibited pursuant to Section 9.07.210(F)(1)(c), unless the applicant applies for and obtains a Site Development Permit. As noted earlier, this project was analyzed under ADU Ordinance No. 23-06 that was in effect on the date of the application submittal, but if the analysis occurred under Ordinance No. 25-04, the same conclusion results since the site is located within the boundary of Map Area #1 and has a nonconforming driveway and parking supply which creates public safety and traffic flow issues, thus prohibiting the proposed ADU in the absence of a [Site Development Permit].

As outlined above, the proposed ADU qualifies for mandatory ministerial approval under Section 66323. The City is therefore prohibited from applying provisions of its local ordinance relating to pre existing nonconforming conditions on the site.

Furthermore, Government Code sections 66322, subdivision (b), and 66323, subdivision (c) explicitly prohibit conditioning ADU approval on the correction of non-conforming zoning conditions. Making health and safety findings to deny a project due to nonconforming

zoning conditions is substantially equivalent to requiring a project to correct nonconforming zoning conditions in order to be approved. The City is requiring the applicant to correct the nonconforming zoning conditions as a precondition of a successful ADU application, and this violates Government Code sections 66322, subdivision (b), and 66323, subdivision (c).

Finally, Government Code sections 66316, 66317, subdivision (a), and 66323, subdivision (a) quite explicitly prohibit the City from requiring ADU applications to go through any type of public review. Additionally, the January 2025 HCD Handbook, in contrast to previous editions, no longer advises that cities may include discretionary processes.

Staff justifies forcing applicants into the discretionary Site Development Permit process by noting that Government Code section 66325, subdivision (b) allows local ADU ordinances to be less restrictive than state law. The suggestion here seems to be that the city's blatantly illegal site development permit process is somehow less restrictive than the ministerial approval required by state law. This suggestion is clearly wrong, as the site development permit process gives the City discretion to deny the project and takes much longer than the 60 days process mandated under state law. The City has already denied this very project under the SDP process once, it is clearly not a "less restrictive" standard than state law.

Comments on Staff Response to Appeal

In response to appeal point 1, that the director's denial violated Government Code sections 66322, subdivision(b) and 66323, subdivision (c), the staff report provides the following substantive response:

> ... the Director did not (1) require the approval of the project on the correction of non-conforming conditions; or (2) deny the project based on the failure to correct nonconforming conditions. Rather, the application was denied because the proposal would have a negative impact on public safety and traffic flow; provided however, the applicant was advised that pursuant to DPZC § 9.07.210(f)(1)(C) it was nevertheless possible that the application could be approved, using less restrictive criteria, with the approval of a Site Development Permit.

As discussed *supra*, the Director denied the project because the property is nonconforming with zoning, using the excuse of "public safety and traffic flow." Denying a project because the property is noncompliant with zoning is substantially equivalent to conditioning approval on correcting noncompliant conditions. The City is requiring the applicant to correct the nonconforming zoning conditions as a precondition of a successful ADU application, and this violates Government Code sections 66322, subdivision (b), and 66323, subdivision (c).

In response to appeal point 2, that the City shall not apply any provision of its local zoning ordinance to the subject permit, because the project complies with Section 66323, the staff report provides the following substantive responses:

> As discussed in detail above, the City has incorporated the development standards related to Government Code 66323 or "mandatory ADUs" into its ADU Ordinance. Those provisions can be located at DPZC 9.07.210(E). One of the development standards required for mandatory ADUs is that the ADU must comply with the location requirements set forth in DPZC 9.07.210(F)(1). (See, DPZC 9.07.210(E)(3).)

"Incorporating" state law into a local ordinance is not the same as obeying the plain language of the law. Moreover, the city's local ordinance, particularly its treatment of section 66323 ADUs, does not comply with state law, as discussed *infra*.

Government code section 66323, subdivision (a) plainly states: "Notwithstanding Sections 66314 to 66322, inclusive, a local agency shall ministerially approve an application for a building permit within a residential or mixed-use zone to create any of the following …" The project is in a residential zone, so the City is obligated by state law to approve a building permit for the project. Moreover, Government code section 66323, subdivision (b) states "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)." The City therefore may not impose development standards (e.g. requiring the existing property to be zoning compliant) other than the basic height, setback and square footage requirements provided in section 66323, subdivision (a).

HCD has issued guidance under its authority in Government Code section 66327 (that guidance is located in the January 2025 HCD ADU Handbook, page 18) regarding section 66323 ADUs:

> For multifamily lots, local agencies must permit at least one ADU constructed from existing non-livable space (or up to 25 percent of the number of multifamily units), and two detached ADUs.

This means that the City must allow the appellant's ADU, as it is constructed from non-livable space on a multifamily lot.

From page 20 of the ADU Handbook:

> **What design, zoning, or other local standards can be imposed on 66323 Units?**
> A local agency may not impose development or design standards, including both local standards and standards found in State ADU Law, on 66323 Units that are not

> specifically listed in Government Code section 66323. (Gov. Code, § 66323, subds. (a), (b).) This includes, but is not limited to, parking, height, setbacks, or other zoning provisions (e.g., lot size, open space, floor area ratio, etc.).

The City therefore may not apply any local development or design standards to the project.

The staff report justifies the SDP process as follows:

> In accordance with State Law, the City Council took repeated actions designating areas within the City where ADUs would be permitted (and areas where ADUs are not permitted) based upon "the impact of traffic flow and public safety." The City Council also took action to "adopt less restrictive requirements for the creation of an [ADU]" by establishing an SDP process as a means by which otherwise prohibited ADUs may be approved.

As discussed *supra* and *infra*, the power to designate areas of the City where ADUs are permitted (or not) is limited to the ADUs proposed under the City's local ordinance. (See Gov. Code, § 66314, subd. (a).) Because this ADU is proposed under Government Code Section 66323, the City is required to approve of the permit notwithstanding contrary provisions in its local ordinance. Furthermore, Government Code sections 66316, 66317, subdivision (a), and 66323, subdivision (a) explicitly prohibit the City from requiring ADU applications to go through any type of public review. Additionally, the January 2025 HCD Handbook, in contrast to previous editions, no longer advises that cities may include discretionary processes.

Government Code section 66325, subdivision (b) allows local ADU ordinances to be less restrictive than state law. Here, the City argues that its discretionary permitting process is less restrictive than state ADU. But the City is wrong. Discretionary permitting adds uncertainty to the permitting process for ADU builders. This is clearly demonstrated by the City's prior denial of this very ADU proposal under the SDP process. Most importantly, Section 66323 requires ministerial approval of this ADU notwithstanding requirements of the local ordinance, so insisting on applying a local discretionary permitting process is more restrictive than state law.

In response to appeal point 3, that the ADU Site Development Permit process violates Government Code Section 66316, 66317, subdivision (a), and 66323, subdivision (a), the staff report provides the following substantive response:

> Government Code § 66314 provides that "A local agency may, by ordinance, provide for the creation of accessory dwelling units in areas zoned to allow single-family or multifamily dwelling residential use." Moreover, Government Code § 66314(a) allows the City to "Designate areas within the jurisdiction of the local agency where accessory dwelling units may be permitted. The designation of areas may be based

> on the adequacy of water and sewer services and the impact of accessory dwelling units on traffic flow and public safety." The basis for the City Council's determination as to where ADUs would be permitted (and thus, where they would be prohibited) based on impacts to "traffic flow and public safety" are outlined in detail in Resolutions 20-06-20-01 and 25-02- 04-01 first finding that constructing an ADU on any property that contains nonconforming parking and/or a nonconforming driveway length would negatively impact traffic flow and public safety, and subsequently making the same finding in six (6) geographic areas within the City (including the subject property location).

As discussed throughout this letter, the CIty is fundamentally misreading state law. Government Code section 66323, subdivision (a), states (emphasis added):

> **Notwithstanding Sections 66314 to 66322, inclusive**, a local agency shall ministerially approve an application for a building permit within a residential or mixed-use zone to create any of the [four types of section 66323 ADUs]

The City obviously cannot cite a provision of Government Code section 66314 to justify the prohibition of ADUs eligible for the provisions of Government Code section 66323, subdivision (a). By including the clause "Notwithstanding Sections 66314 to 66322, inclusive," the Legislature made it clear that the City is obligated to approve a certain class of ADUs regardless of what it is otherwise authorized to regulate pursuant to section 66314.

The staff report justifies the SDP requirement as follows:

> Government Code § 66325(b) allows cities to "adopt less restrictive requirements for the creation of an accessory dwelling unit." The City Council took action to "adopt less restrictive requirements for the creation of an [ADU]" by establishing an SDP process as an optional means by which an applicant can seek approval under less restrictive standards of otherwise prohibited ADUs. This option was offered to the applicant, who declined to pursue it.

As discussed *supra*, the obvious interpretation of Government Code section 66325, subdivision (b) is that the City could, for instance, allow ADUs beyond the bare minimum of what state law mandates by allowing them to be larger in square footage, more numerous, taller, etc. But the City may not disregard three different sections of the same law to force applicants to undergo discretionary review when they are only seeking the bare minimum of what state law mandates.

Additionally, as discussed *supra*, the applicant already tried to receive approval via the SDP process and was denied. And if the applicant did attempt to again go through the SDP process, he could forfeit his right to challenge a disapproval of his application in court. (See

Mellem v. City of Dana Point, Orange County Superior Court case no. 30-2024-01377025-CU-WM-NJC, Minute Order issued Aug. 21, 2024.) To put it bluntly, the offer to pursue an SDP is a trap.

The City's ADU Ordinance Does Not Comply with State Law

The staff report cites HCD guidance heavily to justify the City's municipal code and practices regarding ADUs. However, the fact is that HCD has determined that the City's ADU regulations and practices regarding ADU permitting are in violation of state law.

On June 28, 2024, HCD determined that the City's ADU ordinance did not comply with state law; HCD's June 28, 2024 letter is linked here. On December 10, 2024, HCD issued the linked Notice of Violation to the City, detailing the many ways in which the City's ADU ordinance and practices around ADU permitted violate state law. CalHDF has also informed the City numerous times that both current and previous versions of the City's ADU ordinance violate state law. See CalHDF's most recent letter to the City regarding its ordinance here [a joint letter submitted by both CalHDF and Californians for Homeownership].

In fact, by the plain language of state law, the City may not enforce its own ADU ordinance as it fails to meet the requirements of Government Code section 66310 et seq. Government Code section 66316 "... If a local agency has an existing accessory dwelling unit ordinance that fails to meet the requirements of this article, that ordinance shall be null and void and that agency shall thereafter apply the standards established in this article for the approval of accessory dwelling units, unless and until the agency adopts an ordinance that complies with this article." The City's ordinance is therefore, in its entirety, void under state ADU law, and cannot be applied to this project even if it weren't otherwise exempt.

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CalHDF, on behalf of Mr. Mellem, urges the City to abandon its obstructionist posture and instead approve application PLN25-0003 for a proposed ADU at 33861 Malaga Drive, in accordance with its duties under state ADU Law. (Gov. Code, § 66310 et seq.)

Sincerely,

Dylan Casey
CalHDF Executive Director
Attorney for Applicant Travis Mellem