

Switzer, Donna

From: Fikes, Cathy
Sent: Tuesday, February 21, 2023 12:54 PM
To: Agenda Alerts
Subject: FW: Notice of Potential Violation
Attachments: HuntingtonBeachNOPV-ADU-022123.pdf

From: Heaton, Brian@HCD <Brian.Heaton@hcd.ca.gov>
Sent: Tuesday, February 21, 2023 12:16 PM
To: CITY COUNCIL <city.council@surfcity-hb.org>
Cc: Zelinka, Al <Al.Zelinka@surfcity-hb.org>; David Pai <David.Pai@doj.ca.gov>; Gates, Michael <Michael.Gates@surfcity-hb.org>; Strickland, Tony <Tony.Strickland@surfcity-hb.org>; Zisser, David@HCD <David.Zisser@hcd.ca.gov>
Subject: Notice of Potential Violation

Huntington Beach City Council,

Attached please find a Notice of Potential Violation regarding the City's intent to cease processing Accessory Dwelling Unit (ADU) permits.

Regards,



**HOUSING
IS KEY**

Brian Heaton, AICP

Senior Housing Accountability Manager, Housing Accountability Unit
Housing and Community Development
2020 W. El Camino Avenue, Suite 500 | Sacramento, CA 95833
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**SUPPLEMENTAL
COMMUNICATION**

Meeting Date: 2/21/2023

Agenda Item No. #26 (23-172)

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

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February 21, 2022

Mayor and City Council
City of Huntington Beach
Via: City.Council@surfcity-hb.org
2000 Main Street
Huntington Beach, CA 92648

Dear Mayor Tony Strickland; Mayor Pro Tem Gracey Van Der Mark; and City Councilmembers Rhona Bolton, Pat Burns, Dan Kalmick, Casey McKeon, and Natalie Moser:

**RE: City's Intent to Cease Processing Accessory Dwelling Unit (ADU) Permits –
Notice of Potential Violation**

The California Department of Housing and Community Development (HCD) is aware that today, the City Council of the City of Huntington Beach (City) will consider a proposal to "direct the City Manager to cease the processing of all applications/permits brought to the City by developers under SB 9, SB 10, or State law related to ADU projects, until the courts have adjudicated the matter(s)."¹

The purpose of this letter is to notify the City that refusing to process ADU permits would be unlawful and in violation of state law, including but not limited to State ADU Law (Gov. Code, §§ 65852.150, 65852.2, 65852.22) and the Housing Crisis Act (HCA) of 2019 (Gov. Code, § 66300), and raises concerns under Affirmatively Furthering Fair Housing (AFFH) requirements (Gov. Code, § 8899.50) and State Housing Element Law (Gov. Code, § 65583 et seq.).²

¹ Agenda for City Council/Public Financing Authority Regular, and Special Meeting of the Housing Authority, February 21, 2023, Item 26, File # 23-172, available at <https://huntingtonbeach.legistar.com/LegislationDetail.aspx?ID=6028468&GUID=EBF79AC4-60E3-4BC4-BC9F-34115765B077>.

² In addition, although it is outside the scope of this letter, HCD notes that cessation of processing applications for proposed SB 9 projects would be in violation of SB 9 itself (Gov. Code, §§ 65852.21, 66411.7) and may constitute a violation of other laws, including but not limited to the HCA (Gov. Code, § 66300), Housing Accountability Act (Gov. Code, § 65589.5), and Permit Streamlining Act (Gov. Code, §§ 65905.5, 65913.10, 65940 et seq.). HCD has notified the California Office of the Attorney General of these potential violations. For more information about SB 9, please refer to HCD's SB 9 Fact Sheet, available at <https://www.hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf>.

State ADU Law

The City Council's action would be an unlawful attempt to preempt the application of State ADU Law. Specifically, State ADU Law requires local governments to process ADU applications ministerially. For example, Government Code section 65852.2, subdivisions (a)(3)(A) and (b)(1), require permitting agencies to approve or deny ADU applications ministerially and without discretionary review within 60 days of a complete application's submittal. Under both provisions, "If the local agency has not acted upon the completed application within 60 days, the application shall be deemed approved." In addition, Government Code section 65852.2, subdivision (e)(1), states "a local agency shall ministerially approve an application for a building permit within a residential or mixed-use zone to create" ADUs that meet specific requirements.

Moreover, the City, upon denying an ADU or junior ADU (JADU) application, must provide "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" (Gov. Code, § 65852.2, subd. (b)(2)).

Notably, Government Code section 65852.2, subdivision (a)(7), 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."³ The City Council's direction to cease application and permit processing, therefore, cannot preclude the City from acting to approve or deny a permit to create an ADU.

Housing Crisis Act of 2019

The proposed action would also constitute a violation of various provisions of the HCA. For example, the HCA prohibits a local government from "enact[ing] a development policy, standard, or condition" that would have the effect of "[c]hanging the general plan land use designation, specific plan land use designation, or zoning of a parcel or parcels of property to a less intensive use or reducing the intensity of land use within an existing general plan land use designation, specific plan land use designation, or zoning district in effect at the time of the proposed change, below what was allowed under the land use designation or zoning ordinances ... in effect on January 1, 2018." (Gov. Code, § 66300, subd. (b)(1)(A).) The statute defines "reducing the intensity of land use" to include "any other action that would individually or cumulatively reduce the site's residential development capacity." (*Ibid.*)

³ For more information about State ADU Law, please refer to HCD's Accessory Dwelling Unit Handbook (Updated July 2022), available at <https://www.hcd.ca.gov/sites/default/files/2022-07/ADUHandbookUpdate.pdf>.

Clearly, refusing to process ADU permits would have the effect of reducing the residential development capacity of sites across the city, in violation of the HCA.

The HCA also prohibits a local government from “[i]mposing a moratorium or similar restriction or limitation on housing development ... within all or a portion of the jurisdiction ... other than to specifically protect against an imminent threat to the health and safety of persons residing in, or within the immediate vicinity of, the area subject to the moratorium ...” (Gov. Code, § 66300, subd. (b)(1)(B)(i).) Moreover, the local government shall not enforce such “a moratorium or other similar restriction on or limitation of housing development until it has submitted the ordinance to, and received approval from, [HCD].” (Gov. Code, § 66300, subd. (b)(1)(B)(ii).) If HCD denies approval, “that ordinance shall be deemed void.” (*Ibid.*)

A resolution directing the cessation of ADU permits would function like an ordinance doing the same and would therefore be in violation of the HCA. HCD will not approve such a significant limitation on housing development, and the ordinance will be deemed void.

Affirmatively Furthering Fair Housing

The City Council’s decision to deny ADU permits would be at odds with the City’s AFFH obligations. ADUs can provide more affordable housing opportunities for low- and moderate-income households and provide access to higher-resource communities, helping to “overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” (Gov. Code, § 8899.50, subd. (a)(1).)

Indeed, the City’s own draft housing element notes that the provision of ADUs is a strategy for addressing the needs of senior residents, single-parent households, and extremely low-income households, and 98 percent of the 563 projected ADUs in the draft housing element are allocated for very low-, low-, and moderate-income households.⁴

Housing Element Compliance

Finally, while the City’s housing element is currently out of compliance with State Housing Element Law, on September 30, 2022, HCD found that the draft housing element met statutory requirement at the time of review. HCD remains eager to see the City achieve compliance. However, the City Council’s direction to cease processing

⁴ Huntington Beach Housing Element Update (Draft July 2022), p. B-51, available at <https://www.hcd.ca.gov/housing-elements/docs/huntington-beach-6th-draft080122.pdf>.

ADU applications would represent a new – and significant – governmental constraint to the production of housing that would need to be addressed in the housing element, and impact the adequacy of the sites inventory, jeopardizing the City's pursuit of housing element compliance.

Indeed, the City's current draft housing element projects the development of 563 new ADUs in the planning period to meet its regional housing needs allocation⁵ and includes several policies and programs related specifically to ADUs, including Policy 2.7⁶ and Programs 2D and 2E.⁷

Conclusion

HCD would like to remind the City that HCD has enforcement authority of State ADU Law, the HCA, AFFH, and State Housing Element Law, among other state housing laws. Accordingly, HCD may review local government actions and inactions to determine consistency with these laws. If HCD finds that a city's actions do not comply with state law, HCD may notify the California Office of the Attorney General that the local government is in violation of state law (Gov. Code, § 65585, subd. (j)).

HCD will continue to monitor the City's actions regarding the proposed resolution, and if the City approves a resolution that violates state housing law, HCD will respond in order to remedy those violations. In addition, please be advised that the California Office of the Attorney General is also aware of this matter.

If you have any questions or would like to discuss the content of this letter, please contact Brian Heaton at Brian.Heaton@hcd.ca.gov.

Sincerely,



David Zisser
Assistant Deputy Director
Land Use and Local Government Relations

cc: Al Zelinka, City Manager
Michael E. Gates, City Attorney
David Pai, Supervising Deputy Attorney General

⁵ *Id.*, pp. 4-15, B-48, B-49, B-51.

⁶ *Id.*, p. 4-4.

⁷ *Id.*, p. 4-15.