#18 181156

From: Michael Murphy
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To: San Francisco Board of Supervisors

Re: Proposed ADU ordinance: failure to comply with state law

Responding to the housing crisis, many cities have adopted ordinances authorizing accessory dwelling units (ADUs) as means of encouraging additional housing in neighborhoods of single-family homes. Portland, Oregon, a city of single-family homes, has experienced great success with this mode of in-filling.[1] In 2016, the California legislature enacted legislation mandating local ordinances following the general pattern of the Portland ordinance. San Francisco acknowledged certain provisions of the state law in an ordinance adopted in 2017 but took no meaningful action to comply with the law by expanding the options for ADUs.[2]

Ironically, San Francisco took a notably progressive step in 2015 by adopting an ADU Manual that anticipated the 2016 state law by providing clear and detailed guidelines for construction of a limited range of ADU prototypes.[3] Unlike most city ordinances, the Manual authorized ADUs in both single-family homes and multi-unit buildings. A Planning Department report in June 2018 found that the city had experienced a surge in construction of ADUs in multi-unit buildings but construction of ADUs in single-family homes had lagged – amounting to only 12% of ADU permit

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[1] See (http://sfcommunityalliance.org/news/neighbors-speak-why-has-portland-led-the-way-on-adus/

[2] Ordinance 95-17.

[3] SF-ADU, a guide for homeowners, designers, and contractors considering adding an Accessory Dwelling Unit to an existing residence in San Francisco, sponsored by the San Francisco Planning Department, July, 2015 (hereafter ADU Manual).

filings the previous four years.[4] There were only two filings in the Richmond District where I live.

In this memo, I will show that the stalled progress of ADU construction in single-family homes reflects the practical consequence of failure to comply with state law.

[An ordinance approved by the Land Use Committeeon June 3, 2019 would cure certain discrepancies with state law. (file No. 181156) I will describe the significance of this proposed 2019 amendment in brackets.]

1. The definition of ADU

The San Francisco Planning Code defines ADUs in a manner that drastically restricts options for single-family homes. Section 102 provides:

(An ADU is) ... a Dwelling unit that is constructed either entirely within the existing built envelope, the 'living area' as defined in State law, or the buildable area of an existing building in areas that allow residential use; or is constructed within the existing built envelope of an existing and authorized auxiliary structure on the same lot.

First, the definition illegally restricts *free-standing* ADUs to "the existing built envelope of an existing and authorized auxiliary structure." In contrast, Government Code section 65852.2(i)(4) broadly defines an ADU to include any "detached residential dwelling unit" meeting certain requirements.[5] Subdivision

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[4] Accessory Dwelling Unit (ADU) Tracking and Monitoring Report, May 31, 2018, San Francisco Planning Department.

[5] Government Code section 65852.2(i)(4) provides in part: "Accessory dwelling unit means an attached or detached residential dwelling unit which provides complete independent living facilities for one or more persons." See also Government Code section (a)(1)(D)(iii), which states simply that an accessory dwelling may be "detached from the existing dwelling and located on the same lot as the existing dwelling."

(a)(1)(D)(v) adds: "The total area of floor space for a detached accessory dwelling unit shall not exceed 1,200 square feet.[6] Neither provision contains any reference to the "built envelope."

On its face, the restrictive definition of an ADU in section 102 would go far toward precluding free-standing ADUs in San Francisco. Quite apart from the flimsy nature of most "auxiliary structures," such as garages and storage sheds, the footprint of an auxiliary structure is ordinarily too small for a tenantable dwelling. A recent amendment to section 207 of the Planning Code adds some needed flexibility but still falls well short of compliance with state law. The amendment provides that a garage converted to an ADU may "add dormers" and a garage or storage shed on a corner may add an additional story to be consistent with the "street wall."[7] The Government Code provisions, cited above, do not tie free-standing ADUs to conversion of an existing structure and permit architectural creativity beyond the limited concessions in the amendment.[8]

[A perplexing provision in the proposed 2019 amendment provides:

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[6] Another provision, Government Code section (a)(1)(B)(i), permits some reasonable adjustment of this maximum, as construed by the Accessory Dwelling Unit Memorandum, December 2016, pp. 8-9, of the Department of Housing and Community Development.

[7] Section 207(c)(6)(B)(x), as amended in 2018, provides: "When a stand-alone garage or other auxiliary structure is being converted to an ADU, an expansion to the envelope is allowed to add dormers ... (xi) On a corner lot, a legal stand-alone nonconforming garage, storage structure or other auxiliary structure may be expanded within its existing footprint by up to one additional story in order to create a consistent street wall and improve the continuity of buildings on the block." See also Section 207(c)(4)(B)(iii).

[8] Free-standing ADUs in Portland at times display charming architectural creativity – a quality that surely has much to do with their popularity. See examples in Jumpstarting the Market for Accessory Dwelling Units, by Karen Chapple, Jake Wegmann, Farazd Mashhood, and RebeccaColman, Terner Center for Housing Innovation (2017)

When the ADU involves ...an expansion of the built envelope of an existing and authorized stand-alone garage, storage structure, or other auxiliary structure on the same lot, or the construction of a new detached auxiliary structure on the same lot, the total floor area of the ADU shall not exceed 1,200 square feet.[9]

The provision expresses a policy of liberality, but it is inconsistent with the language of section102, which defines ADUs in terms of the "existing built envelope"; it does not explain how a free-standing ADU of this size can be built on the typically small San Francisco lot without overcrowding (see section 6 herein); or explain how the "buildable area" restriction in section 102 can accommodate such a large ADU (see discussion of "buildable area" below.]

The strange reference to "the 'living area' as defined in State law" in section 102 should be mentioned in passing. The notion that the "living area" as defined in state law is equivalent to the "built envelope" in local ordinance may be derived from a very loose reading of section 65852.2(a)(1)(D)(iii),[10] but the following subdivision (a)(1)(D)(iv) uses the term to provide the base point for calculating the authorized extension of an attached ADU *beyond* the primary dwelling. It provides: "The increased floor area of an attached accessory dwelling unit shall not exceed 50 percent of the existing living area, with a maximum increase in floor area of 1,200 square feet." This subdivision – a key provision in the state law – thus employs the term living area in a sense directly opposed to that attributed to it in section 102.[11]

The term "buildable area of an existing building" was added to section 102 as a concession to the 2016 state law. Since the City's contention that it complies with

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[9] Section 207(c)(6)(B)(xii).

[10] Government Code section 65852.2(a)(1)(D)(iii) states: The accessory dwelling unit is either attached to the existing dwelling or located within the living area of the existing dwelling or detached from the existing dwelling and located on the same lot as the existing dwelling.

[11] The same peculiar misreading of the Government Code is found in section 207(c)(6)(B)(iii).

the law hangs largely on this phrase, it merits close examination. The phrase has direct reference to Zoning Administrator Bulletin No. 5, which summaries the setback requirements of Planning Code sections 132, 133 and 134 for particular zoning districts, including RH residential districts.[12]

The obvious legal flaw of the "buildable area" provision is that it subordinates state law to local ordinances. The 2016 legislation provides a comprehensive scheme to which local ordinances must comply; it states that "no other local ordinance, policy, or regulation shall be the basis for denial of a building permit."[13] If a local government fails to enact complying ordinances, a homeowner may apply for an ADU permit in reliance on the state law.[14] The "buildable area" provision turns this legislative scheme on its head by restricting ADUs to the scope allowed by local ordinances demarcating a buildable area.

This legal error is not purely theoretical: Bulletin No. 5 does not in fact fit within the legislative scheme of the 2016 legislation. First, looking at the Bulletin itself, it may be noted (1) the rear yard setbacks are not adaptable to free-standing ADUs;[15] (2) these setbacks vary with the dimensions off the adjoining property, a concept not found in state law; (3) the rear yard setbacks may be as much as 45% of the total lot depth, thereby obstructing the construction of an ADU; (4) the Bulletin assumes narrow rectangular lots, a configuration that is typical but not universal in San Francisco; (5) the side yard setbacks will impinge on certain ADU designs; and

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[12] Zoning Adminstrator Bulletin No. 5 is subtitled "Buildable Area for Lots in RH, RM, RC, and RTO Districts."

[13] Government Code section 65852.2(a)(5).

[14] Government Code section 65852.2(b)

[15] The ADU Manual, p.74, adheres to Bulletin 5 in presenting prototype F, thereby undermining the practical value of this prototype.

(6) the "pop out" provision conflicts dramatically with Government Code section 65852.2(a)(1)(D)(iv).

Secondly, by referring to the local setback restrictions summarized in Bulletin No. 5, the "buildable area" provision bypasses state legislation affecting setbacks. Government Code section 65852.2(a)(1)(D)(vii), restricts setbacks so as to provide a vital leeway for construction of an ADU involving a garage conversion.

Thirdly, while the "buildable area" provision appears to offer an expansion of the area of permitted ADU construction, it conceals a significant contraction of this area. Prior to the amendment adding this provision, section 307(l) of the Planning Code gave the zoning administrator discretion to grant relief from setback requirements "when modification of the requirement would facilitate construction of an Accessory Dwelling Unit." Section 102 now hardens the setback restrictions by embedding them in the definition of an ADU.

But the mostly harmful consequence of the "buildable area" provision is that it has impeded development of feasible prototypes in the ADU Manual for free-standing and attached ADUs. It is true that prototype "F" envisions construction of a free-standing ADU along a rear alley, but there are few such alleys and the construction on subject to drastic setback requirements. The ADU Manual has no prototype at all for attached ADUs. The "buildable area" provision defeats the development of such prototypes because it makes relatively little change in previous restrictions and offers an ill-fitting gantlet of setback requirements designed for other purposes. In contrast, the state legislation provides a template for ADU construction in subsection (a)(1)(D), centering on the size and location of ADUs in relation to the primary dwelling, which opens the door for creative ADU design.

The greatest potential for ADUs in single-family homes in San Francisco lies in attached ADUs consisting of a wing or backyard extension of the primary dwelling. Particularly in the common 25 by 100 foot lots in the western

neighborhoods, an ADU can join redundant or little used space in a primary dwelling with a modest extension into the yard, affording added living room as well as light and ventilation. Such extensions can be combined with improvements to the primary dwelling such as a porch, deck, or additional rooms above the ADU.

The most serious defect of the "buildable area" provision is not its obvious illegality or restrictive character but the manner in which it ossifies regulations, intended for other purposes, to obstruct creative use of urban space.

[The proposed 2019 amendment contains two references to ADUs "attached to" the primary dwelling. See proposed amendments to sections 2079 (c)(4)(B)(iii) and 207(c)(6)(B)(iii). Again, the proposed section 207(c)(6)(B)(xii) is prefaced by the phrase "when an expansion of the built envelope of an existing primary structure..." In the absence of an amendment to section 102 authorizing attached ADUs or an unambiguous reference to the provisions of the government Code relating to attached ADUs, the intended effect of these incidental phrases scattered in three places in the proposed ordinance is unclear. Perhaps they represent tentative half-steps toward compliance with state law relating to attached ADUs or perhaps not.]

2. Proposed Single-family Homes

An amendment to Government Code 65852.2 in 2017 expanded the reach of the statute to "*proposed* or existing single-family homes."[16] As the citation to section 102 above reveals, the San Francisco Planning Code currently limits authorization of ADUs to an "existing building."[17] This discrepancy, however, has minor practical

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[16] Government Code section 65852.2(a)(1)(D)(ii) authorizes local governments to provide for the creation of ADUs where a "lot is zoned for single-family or multifamily use and contains a proposed or existing single-family dwelling."

[17] The provisions relating to ADUs in Planning Code section 207 also refer consistently to "existing" structures. See section 207(c)(4)(B)(ii) ('existing single-

importance in San Francisco where there is relatively little new construction of single-family homes.

[The proposed 2019 amendment would cure this conflict with state law (See proposed amendment of section 102 and sections 207(c)(4)(B) and 207(c)(6)(B).). but it creates another discrepancy. Government Code section 65852.2(a)(1)(D)(iv) and(v) *limit* the size of an attached ADU to "50 percent of the existing living area, with a maximum increase in floor area of 1,200 square feet" and *limit* the size of detached ADU to 1,200 square feet. Turning these provisions on their head, the proposed section 207(c)(6)(B)(xii) provides: "The total area of floor space of an accessory dwelling unit proposed to be constructed with a proposed single-family dwelling *shall not be less than* 50 percent of the proposed primary dwelling living area..." The parameters *limiting* the size of ADUs thus become a requirement creating a *minimum* ADU size for proposed single-family homes. The practical effect of this provision to create a back-door route to build a duplex – a notion not contemplated by state legislation.]

3. The Ministerial Approval Requirement

Three provisions of Government Code section 65852.2 mandate ministerial approval of ADU permit applications. Thus subdivision (a)(4) provides in pertinent part:

"...an accessory dwelling ordinance ... shall provide an approval process that includes only ministerial provisions for the approval of accessory dwelling units and shall not include any discretionary processes, provisions, or requirements for those units,... (See also subdivisions (a)(3) and (e).)

The San Francisco ADU ordinance divides ADU permit applications into two tracks. Applications that pass a gantlet of restrictions qualify for expedited review

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family home", (c)(4)(C)(ii)('existing building ... existing structure), (c)(6)((A) ("existing single-family home"), (c)(6)(B)(iii) (existing single-family home").

under section 207(c)(6)(C), which, as explained below, may qualify as ministerial approval. Those that fail to pass remain subject to discretionary waiver under section 207(c)(4)(G). The plain language of section 65852.2(a)(4) requires ministerial approval of *all* ADU applications, not only those that come within a defined category. To the extent that it retains a category of applications subject to discretionary review, the ordinance is obviously in violation of state law.[18]

The established legal definition of the term "ministerial" refers to a nondiscretionary duty to do a specific act. In this case, the duty would be to approve an ADU application complying with specific guidelines. The 2015 ADU Manual lends itself to such ministerial approval of ADU applications. I will refer to it as the Ordinary Definition. But the parlance of the zoning world may employ a looser definition, such as staff-level approval. It is at least arguable that the statute reflects this popular usage rather than the definition found in decisional and statutory law. I will refer to it as the Loose Definition. But if this definition is to have any meaning, it still must presuppose that an application will be approved in an over-the-counter review by planning department staff *free of input from third parties.* Third-party intervention in the permitting process, if expressly allowed or encouraged as a matter of right, necessarily involves discretion in processing the permit application; otherwise it would be a sham.

The expedited review provision of the San Francisco ordinance was drafted to provide ostensible compliance with state law by requiring approval of qualifying applications within 120 days "without modification or disapproval" following

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[18] At the Planning Commission hearing on March 7, 2019, the Director of Planning testified that only 2% of ADU applications for single-family homes have come within the discretionary waiver provision of section 207(c)(4). But this percentage understates the actual impact of (c)(4) approvals. Applications coming within (c)(4) are also subject to neighborhood notification under section 311. (See p. 9 herein) These dual procedural hurdles operate to strongly discourage ADU applications that do not fall with in section 201(c)(6)(C).

architectural review to ensure "architectural compatibility with existing buildings."[19] The application must also meet a short list of restrictions that falls far short of providing any comprehensive guidelines for approval. This context of broad architectural review and fragmentary requirements strongly suggests that the provision complies, if at all, with the Loose Definition of the term ministerial approval.

Other provisions have in fact allowed San Francisco to continue to exercise discretion over the approval of ADU applications going counter to even the Loose Definition of ministerial approval. In particular, permit applications for attached ADUs and free-standing ADUs are subject to a discretionary review procedure under section 311 that cannot be reconciled with any definition of ministerial approval.[20] Homeowners must give notice of their application to neighbors residing within 150 feet and to "relevant neighborhood associations." These third parties then have the right to request the Planning Commission "to exercise discretionary review" of the application in a public hearing.[21]

[The proposed 2019 amendment would henceforth exempt applications under 207(c)(6) from the discretionary review procedure of section 311. Permit applications under 207(c)(4) would remain subject to discretionary review.]

The discretionary review procedure has gone hand-in-glove with a requirement of a pre-application meeting that serves to solicit input from third parties. The requirement, which is found in the permit application form, applies to

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[19] Section 207(c)(6)(B)(vi) provides. "The Department shall apply any design guides in the Code to the proposed project and review the design of the proposed project to ensure architectural compatibility with buildings."

[20] See Planning Code section 311(b) ("new construction") and (b)(1) ("increase in exterior dimension of a residential building").

[21] Planning Code section 311(c)(2) and (d).

ADUs involving "new construction" – an expression that covers "detached" ADUs other than those within the footprint of an existing structure – and any "horizontal addition of 10 feet or more" – a phrase to extends to most attached ADUs. Applicants must give notice of the meeting to "neighbors and neighborhood organizations" and submit a prescribed forms attesting to their good faith in conducting the meeting and recording concerns raised by participants. The Planning Department will refuse to accept an application without evidence that the meeting was held and conducted as directed.[22]

[The proposed 2019 amendment takes a step backward by adding a *new* notice requirement.[23] A lengthy notice of the ADU application must be posted on the property, mailed to the project sponsor and any tenants, and placed on a publicly accessible website. Among other things, the notice must "describe the project review process." In the case of ADU permit applications for single-family homes this notice can serve no purpose since such applications are entitled to ministerial review, exempt from section 311, in an over-the-counter setting. The effect of the notice, however, may be to encourage notice recipients to intercede informally with a planning administrator.]

In addition, the possibility of appeal to the Board of Permit Appeals creates a further level of discretionary review. The pertinent appeal procedure is not found in the Planning Code but rather in the general provisions of Article 1 of the Business and Tax Regulations Code. Section 26(a) of Article 1 states that the Board of Appeals may exercise "its sound discretion as to whether said permit should be granted, transferred, denied, or revoked."

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[22] See also Planning Code section 207(c)(4)(C)(ii) as amended in 2018.

[23] Section 207(c)(6)(H).

[The proposed 2019amendment would cure this discrepancy with state law for permit applications under section 207(c)(6) but not those under 207(c)(4).. See section 2, adding subsection (f) to Business and Tax Regulation Code section 26.]

4. Historic Preservation

The ADU Manual and certain application forms raise the specter of a burdensome obstacle to ADU approval under the historic preservation provisions of the California Environmental Quality Act (CEQA).[24] The Manual cautions. "if your project involves alteration to a structure ...[that is 50 years old or greater, then there will most likely be additional materials and process involved in order to determine if the proposed work is appropriate."[25] CEQA contains, however, a provision expressly exempting any project subject to ministerial approval.[26] As noted above, an application for an ADU permit for a single-family home comes squarely within this exemption. San Francisco has not yet included such ADU applications in its listing of ministerial actions exempt from CEQA.[27] This failure subjects applicants to a step in the approval process that is not required, but expressly precluded, by state law. The processing of ADU applications under the ministerial approval exemption, however, should not affect the outcome of environmental review.[28] The Planning Department bulletin outlining categorical exemptions from CEQA contains other

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[24] Public Resources Code section 21084.4. Articles 10 and 11 of the Planning Code will seldom involve a single-family home.

[25] ADU Manual, p. 19. See also Environmental Review Process Summary, Planning Department, p. 2 (50-year-old buildings); Application Packet for Environmental Evaluation, Planning Department, p. 2 (45 year-old buildings).

[26] See Public Resources Code section 21080(b).

[27] See Non-physical and Ministerial Projects not Covered by the California Environmental Quality Act, Planning Department, March 9, 1973.

[28] Administrative Code sections 31.06, 31.08 and 31.09.

provisions that track the provisions of state law pertaining to both attached ADUs and free-standing ADUs.[29]

While state law exempts ADU applications for single-family homes from CEQA review, Government Code section 65852.2(a)(1)(B)(i) does allow consideration of the value of historic preservation. First, in a provision that will seldom affect single-family homes in San Francisco, it allows local governments to guard against adverse impacts on property "listed in the California Register of Historic Places." More importantly, this subsection allows local government to impose standards on ADUs relating to "architectural review." Such architectural review may – and should – take historic preservation into consideration, but, as explained in part 6 herein, local governments are prohibited from adopting standards of architectural review that unreasonably burden, or unreasonably foreclose, opportunities for construction of ADUs in single-family homes. In a hearing on March 6, 2019, the Historic Preservation Commission approved a motion establishing six architectural standards for ADU permit applications. The standards appear to extend, perhaps inadvertently, to ADU permit applications for single-family homes. This motion, which made no mention of section 65852.150(b), falls short of meeting the test imposed by state law, if indeed it was intended to apply to single-family homes.[30]

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[29] Compare Categorical Exemptions from the California Environmental Quality Act, Planning Commission resolution 14952, August 17, 2000, Class 1 (e)(1) and Class 3 with Government Code sections (a)(1)(D)(iv) and (v).

[30] Historic Preservation Commission Draft Motion, hearing date March 6, 2019, Exhibit B.

[The proposed 2019 amendment addresses property "listed in the California Register of Historic Places, or a property designated individually or as part of a historic or conservation district pursuant to Article 10 or Article 11." We do not need to consider the relevance of this provision since properties within these categories contain very few single-family homes in San Francisco.]

5. Prohibited Restrictions

Government Code section 65852.2(a)(5) provides that "[n]o other local ordinance, policy, or restriction shall be the basis for the denial of a building permit or a use permit under this subdivision." There may be gray areas in applying this provision, but section 207(c)(4)(C)(i) of the San Francisco Planning Code comes squarely within its prohibition. The provision directs the Planning Department to deny a permit application if the applicant has a record of evictions covered by specified provisions of the rent control ordinance.[31] (Some single-family homes may be covered by the just cause eviction provisions of rent control ordinance.)[32]

A related provision in section 207 of the Planning Code, coming within the same prohibition, requires the Planning Department to deny a permit for an ADU for a residence that is then rented unless the applicant enters into a "regulatory agreement," approved by the City Attorney, asserting compliance with an exemption provision of the Costa-Hawkins Act.[33] The provision is of highly questionable

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[31] Specifically Administrative Code sections 37.9(a)(8) through 37.9(a)(14).

[32] See Administrative Code 37.2(h), (r) and (t)(definitions), and section 37.3(d) (referencing Civil Code section 1954.50 et seq); San Francisco Rent Board Topic 017: Overview of Covered and Exempt Units.

[33] Planning Code Section 207(c)(4)(G) and (H).

validity on additional grounds. If the ADU comes inescapably within the Costa-Hawkins Act, it is hard to see what good the blessing of the City Attorney will do.[34]

These provisions both have the character of political gestures rather than policy measures, but they again represent evidence that the City Attorney did not advise the Board of Supervisors of the requirements of state law when they enacted an ordinance addressed to ADUs in single-family homes.

6. Open Space and Exposure

We have seen that the "buildable area" language of section 102 leads to setback requirements, adopted before the 2016 ADU legislation, that predictably do not conform to its standards.[35] (The 2017 amendment of section 136 adds to the problem.[36]) To this bad fit with state law, one must add the zoning regulations, predating 2016, for usable open space and exposure. The open space requirements of section 135 vary by zone – a pattern not permitted by the state legislation.[37] The section makes no accommodation or reference to ADUs but does refer to a seldom used zoning category, RH-1(S), which allows a second minor unit, not larger than 600 square feet, within the envelope of a residence that otherwise conforms to the

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[34] See Palmer/Sixth Street Properties, L.P. v. City of Los Angeles, 175 Cal.App. 4th 1396 (2009), and Bullard v. San Francisco Residential Rent Stabilization Board, 106 Cal.App.4th 488 (2003).

[35] The Setback requirements of Planning Code sections 132, 133, and 134 are summarized in Zoning Administrator Bulletin No. 5.

[36] Planning Code section 136(c)(32).

[37] See Government Code section 65852.2(a)(1)(D)(ii) which extends the coverage of the statute to all lots containing a single-family homes in areas zoned for single-family or multifamily use. Only single-family homes that constitute nonconforming uses are excluded from the legislation.

RH-1(D) classification.[38] The state law, as we have seen, is more lenient as to square footage and allows attached and free-standing units. The exposure regulation, was, in fact, amended in 2018 to make some accommodation to ADUs but in language that directly conflicts with the state law. The Planning administrator is given discretionary authority to "modify or waive" the applicable exposure restrictions – a violation of the ministerial approval provisions of the state law.[39]

The existing regulation of setbacks, usable open space, and exposure will often present obstacles for the construction of ADUs in single-family homes, which will vary in importance depending on lot size and configuration, the dimensions of the primary dwelling, and the design of the ADU itself. Free-standing ADUs are likely to be most drastically affected. Open space requirements are also a matter of particular concern. Nevertheless, these regulations serve a legitimate interest in avoiding overcrowding that is recognized by Government Code section 65852.2(a)(1)(B)(i). This section gives local governments authority to "[i]mpose standards on accessory dwelling units that include ... lot coverage,..." The term "lot coverage" may reflect simple provisions that restrict ADUs to a certain percentage of the lot area. With its more complex housing patterns, San Francisco has found it necessary to deal with overcrowding with a composite of rules relating to setbacks, usable open space, exposure and architectural review. Subsection (a)(1)(B)(i) can reasonably be construed to authorize these regulations – or other regulations serving the same function in some form.

Section 65852.2(a)(1)(B)(i), however, is in tension with the succeeding provisions of subsection (a)(1)(D) and, for that matter, with much of the 2016

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[38] See Planning Code section 209.1 and Summary of the Planning Code Standards for Residential Districts (corrected to 2008).

[39] See Planning Code section 140(c)(2). Section 307(l)(1) provides a guideline for exercise of this discretion that mitigates, but does not cure, the violation of state law.

legislation. If carried to a logical extreme, it would effectively nullify many of the carefully crafted sections of the legislation. To determine the reasonable limits of subsection (a)(1)(B)(i), we must turn to the statement of legislative purpose in Government Code 65852.150. Subsection (a) enumerates the benefits of ADUs and concludes that they are "an essential component of California's housing supply." Subsection (b) adds that the intention of the legislature is that the provisions of ADU ordinances must not be "so arbitrary excessive or burdensome so as to restrict the ability of homeowners to create accessory dwelling units."

The Accessory Dwelling Unit Memorandum (December 2016) of the California Department of Housing and Community Development harmonizes section 65852.2(a)(1)(B)(i) with other provisions of the ADU legislation in a manner consistent with the statement of legislative purpose in section 65852.150(b). It states that local standards "must not be designed or applied in a manner that burdens the development of ADU" or "unreasonably restricts opportunities" for ADU construction. Specifically, standards relating to lot coverage "should not burden the development of ADUs." As an example of the flexibility of state law, it states that the maximum unit size of 1200 square feet may reasonably be reduced to as little as 800 square feet (a dimension surely more appropriate for San Francisco). This interpretation is entirely reasonable on its merits and carries weight as the interpretation of an administrative agency of a matter within its purview, consistent with the statement of legislative purpose.

As so construed, the planning code sections relating to setbacks, usable open space, and exposure require some recasting as they apply to ADUs in single-family homes. As a practical matter, this can only be accomplished with clarity and predictability by designing additional prototypes in the ADU Manual for free-standing and attached ADUs. The goal should be to allow creative use of available space without overcrowding. Exactly how this goal can be realized – and precisely what modifications of existing ordinances are needed – is a matter for architects and

planners, not lawyers.[40] The role of legal analysis is to ensure that housing professionals enjoy the latitude allowed by state law in designing appropriate prototypes.

Conclusion

The path to realizing the considerable potential for new housing appurtenant to single-family homes lies in developing appropriate prototypes for attached and free-standing ADUs in a revised and expanded ADU manual with clear guidelines facilitating ministerial approval of permit applications in the Ordinary Definition of the term. The Planning Department should not be criticized for the failure to develop these prototypes; it has in fact done admirable work in beginning the process of developing a comprehensive ADU Manual. The fault lies entirely with the City Attorney's office, which has constrained the work of the Planning Department and the Board of Supervisors with erroneous interpretations – and simple neglect – of state law.

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[40] The ADU Manual was prepared by an architectural firm, Openscope Studio.

APPENDIX

Author's Professional Qualifications

Legal Education

Harvard College, 1964

Stanford Law School, 1967

Relevant Work Experience-

Judicial attorney, California State Court of Appeal, First District, 1987-2006

Initially hired by Justice William Newsom, 1987-1994

Some Recent Scholarly Publications

Dispelling TINA'sGhost from thePost-Enron Corporate Governance Debate, 43 Santa Clara Law Review 63 (2002)

The ESOP atThirty: A democratic Perspective, 41 Willamette Law Review 655 (2005)

Pension Plans and the Prospects of Corporate Self-regulation, 5 DePaul Business & Commercial Law Journal 503 (2007)

The Nominating Process for Corporate Boards of Directors: A DecisionMaking Analysis, 5 Berkeley Business Law Journal 131 (2008)

Restoring Trust in Corporate America: Toward a Republican Theory of Corporate Legitimacy, 5 NYU Journal of Law and Business 415 (2009)

Attacking the Classified Board of Directors: Shaky Foundations for Shareholder Zeal, 65 The Business Lawyer 441 (2010)

Assuring Responsible Risk Management in Banking: The Corporate Government Dimension, 36 The Delaware Journal of Corporate Law121 (2011)

The SEC and the District of Columbia Circuit: The Emergency of a Distinct Standard of Judicial Review, 7 Virginia Law & Business Review 125 (2012)