

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: September 8, 2017

TO: Honorable Councilmember Gomez

FROM: City Attorney

SUBJECT: Potential College Area Community Exemption to Companion Unit Ordinance

INTRODUCTION

On August 25, 2017, you submitted a memorandum to our Office asking whether the San Diego City Council (City Council) can temporarily exclude the Parking Impact Overlay Zone area in the College Area Community from the Companion Unit Ordinance, which was introduced at the City Council hearing on July 24, 2017. This memorandum discusses State law and the type of evidence required to support an exemption.

QUESTIONS PRESENTED

1. Can the City Council exempt the Parking Impact Overlay Zone area in the College Area from the Companion Unit Ordinance until the Community Plan Update is completed?
2. What type of evidence is required to exempt an area from the Companion Unit Ordinance?

SHORT ANSWERS

1. Yes, the City Council can exempt the Parking Impact Overlay Zone within the College Area. This cannot occur at the September 12, 2017, City Council hearing, since noticing requirements would not be met. The Council could, however, amend the Companion Unit Ordinance to create such an exemption at a later date.
2. In order to exempt an area from the Companion Unit Ordinance, there must be substantial evidence in the record that the area does not have adequate services to

provide for the units, that the units will have an impact on traffic flow and public safety, or similar criteria.

ANALYSIS

I. SUBSTANTIVE CHANGES TO THE COMPANION UNIT ORDINANCE MUST BE PROPERLY NOTICED AND WOULD REQUIRE REINTRODUCTION

On July 24, 2017, the City Council introduced the Companion Unit Ordinance to conform to changes in State law. At the hearing, you asked whether the City Council could exempt certain areas from the ordinance. We advised that State law does allow for such exemptions, but would require certain evidence to be included in the record. The second reading of the Companion Unit Ordinance is scheduled for the September 12, 2017, City Council meeting. Any substantive changes made to the ordinance at that time must be properly noticed under the Brown Act, and would likely require the ordinance to be reintroduced for a first reading.

Because the proposed exemption is not noticed for the September 12 hearing, it cannot be considered that day. However, the City Council could amend the Companion Unit Ordinance at some point in the future to exempt certain areas, provided there is substantial evidence in the record in accordance with State law.

II. THE CITY MAY DESIGNATE AREAS WHERE ACCESSORY DWELLING UNITS MAY BE PERMITTED

Under California Government Code Section 65852.2 (Section 65852.2), the City Council can designate areas where companion units or accessory dwelling units,¹ which are not contained within the existing space of a single-family residence or accessory structure, can be permitted or exempted. The accessory dwelling unit legislation adopted last year by the State of California, Senate Bill 1069 (SB 1069) and Assembly Bill 2299 (AB 2299), amended Section 65852.2 to reduce barriers, streamline approval, and expand capacity to accommodate the development of accessory dwelling units. While the changes set limitations on what a local agency can require for the development of accessory dwelling units, local agencies can designate areas where accessory dwelling units, which are not contained within the existing space of a single-family residence or accessory structure, may be permitted. Cal. Gov't Code § 65852.2(a)(1)(A); *see also* Cal. Gov't Code § 65852.2(e). "The designation of areas may be based on criteria, that may include, but are not limited to, the adequacy of water and sewer services and the impact of accessory dwelling units on traffic flow and public safety." Cal. Gov't Code § 65852.2(a)(1)(A).

While there is no case law interpreting the criteria to designate or exclude any areas, the plain meaning of the statute is instructive.² In determining the legislative intent of the language, courts

¹ Although the San Diego Municipal Code refers to the units as "companion units," this memorandum will use the state law terminology of "accessory dwelling units" going forward.

² The previous version of Section 65852.2 set up a three-option approach under which a local government could choose to ban all residential accessory dwelling units, previously referred to as second units, on condition of making certain findings that such units would have specific adverse impacts on public health, safety and welfare; adopt its

generally give the words of statutes their plain meaning and avoid rendering words surplusage. *McPherson v. City of Manhattan Beach*, 78 Cal. App. 4th 1252, 1260 (2000); *see also In re Rudy L.*, 29 Cal. App. 4th 1007, 1010 (1994). If the words of a statute are clear and unambiguous, a court's inquiry would end and the plain meaning of the statute would govern. *McPherson*, 78 Cal. App. 4th at 1260 ("... 'rules of statutory construction are applied only where there is ambiguity or conflict in the provisions of the charter or statute, or a literal interpretation would lead to absurd consequences' ...") (citation omitted)).

Here, Section 65852.2(a)(1)(A) provides non-exclusive categories upon which a local agency may designate areas where accessory dwelling units may be permitted. The "implication of this provision is that a local agency may forbid the creation of [accessory dwelling] units in other areas." *Desmond v. County of Contra Costa*, 21 Cal. App. 4th 330, 341 (1993). The first listed category is an area's capacity or ability to handle the addition of accessory dwelling units and references water and sewer adequacy. The other listed category mentions impacts of the accessory dwelling units on an area's traffic flow and public safety. The criteria provided is not an exhaustive list; however, if another criteria is used, it should be similar in nature to those provided in Section 65852.2(a)(1)(A).

III. THE EXCLUSION OF AREAS USING THE CRITERIA LISTED OR SIMILAR CRITERIA SHOULD BE BASED UPON SUBSTANTIAL EVIDENCE

Substantial evidence that an area does not have adequate services to provide for accessory dwelling units or the impact of the accessory dwelling units on traffic flow and public safety in an area must be in the record to support excluding an area from the City's Companion Unit Ordinance. The word "... 'substantial' . . . clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value" *Phelps v. State Water Res. Control Bd.*, 157 Cal. App. 4th 89, 99 (2007) (quoting *DiMartino v. City of Orinda*, 80 Cal. App. 4th 329, 336 (2000)). There needs to be enough relevant information and reasonable inferences from this information to support a conclusion, even if other conclusions can be made. *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco*, 102 Cal. App. 4th 656, 675 (2002) (quoting Cal. Code Regs., title 14, § 15384(a)).

own ordinance and establishing criteria for approving them; or do neither and follow a state-prescribed procedure for approving or disapproving applications for creation of second units. Under the new legislation, the three-option approach was removed and replaced with a requirement that an ordinance governing the creation of an accessory dwelling unit "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, except as otherwise provided in [Section 65852.2]." Cal. Gov't Code § 65852.2(a)(4). If an existing ordinance "fails to meet the requirements of [Section 65852.2], that ordinance shall be null and void upon the effective date of the act adding this paragraph and that agency shall thereafter apply the standards established in [Section 65852.2] for the approval of accessory dwelling units, unless and until the agency adopts an ordinance that complies with [Section 65852.2]." *Id.*

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cc: Honorable Mayor
Honorable Councilmembers
Andrea Tevlin, Independent Budget Analyst
Jeff Murphy, Planning Department Director