

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

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** August 5, 2020  
**TO:** Shauna Lorance, Director, Public Utilities Department  
**FROM:** City Attorney  
**SUBJECT:** Application of Water and Sewer Fees for Accessory Dwelling Units

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**INTRODUCTION**

This memorandum addresses your request for legal advice relating to application of California Government Code section 65852.2 (Section 65852.2) to the construction of Accessory Dwelling Units (ADUs) in San Diego. As part of its response to California's housing crisis, the Legislature passed Senate Bill 13 (SB 13) (Sen. Bill 13 (2019-2020 Reg. Sess.)), which amended Section 65852.2. SB 13 went into effect on January 1, 2020 and is intended to relax local restrictions on ADUs.

An ADU is a legal and regulatory term for a secondary house or apartment that shares the building lot of a larger, primary house and is also known as an in-law or mother-in-law unit, secondary dwelling unit, granny flat or carriage house. An ADU may be attached to a house or garage, or it can also be built as a stand-alone unit, but it generally uses the water and energy connections of the primary house. After the housing boom that followed World War II, most U.S. residential areas were zoned to set limits on population density as well as the size and separation of single-family dwellings. More recently, zoning changes in a growing number of areas around the country allow for the addition of accessory dwelling units to address the housing crisis.

Specifically, you have asked us to address a customer complaint regarding sewer and water capacity fees charged for the construction of an ADU located on 45th Street in San Diego, CA (Property). The owner-applicant (Applicant) argues that the square footage of his proposed ADU is less than 750 square feet and therefore exempt from sewer and water connection fees.

### **QUESTIONS PRESENTED**

1. Does Section 65852.2, as amended by SB 13, prohibit the City of San Diego (City) from charging sewer and water connection fees and/or sewer and water capacity charges (sewer and water fees) when an applicant seeks to construct an ADU that is 750 square feet (sf) or smaller?

2. Is the City allowed to charge sewer and water fees against the ADU being constructed at the Property?

### **SHORT ANSWERS**

1. No. While SB 13 does not restrict the assessment of sewer and water fees on ADUs based upon the total square footage of the proposed ADU, there are other construction features that may restrict or guide the calculation of sewer and water fees assessed against an ADU. These construction features are discussed in the second question.

2. Yes, because the proposed ADU expands the footprint of the existing structure by more than 150 sf, sewer and water fees can be charged under Section 65852.2(f)(5).

### **BACKGROUND**

Sometime after January 1, 2020, the Applicant submitted an application to the Development Services Department (DSD) to convert an existing garage into an ADU. The conversion includes demolishing an existing detached 158 sf garage and building a 350 sf ADU in the same place. Based upon the architectural plans provided by Applicant, the ADU expands the existing footprint of the garage by 192 sf; DSD advised that the ingress/egress and setbacks appear to be in compliance with the Government Code. As part of the permit process, the City sent an invoice of \$3,585.50 to Applicant for water and sewer fees, which Applicant paid under protest. Applicant believes that the fees are not allowed under SB 13.

### **ANALYSIS**

The total square footage of an ADU is not relevant in determining whether or not sewer and water fees can be charged to a property for construction of an ADU. The square footage restriction under SB 13 only applies to “development impact fees,” which are different than sewer and water fees. However, there are other restrictions under SB 13 that impact how sewer and water fees can be assessed against a newly constructed ADU.

Section 65852.2(f), as amended by SB 13, sets forth the rules and regulations relating to imposition of all fees for ADUs. Section 65852.2(f)(3)(A) states that the City “shall not impose any impact fee on ADUs less than 750 square feet.” Section 65852.2(f)(3)(B) clarifies that this size restriction does not apply to sewer and water fees. Cal. Gov’t Code § 65852.2(f)(3)(B) (“‘Impact fee’ does not include any connection fee or capacity charge charged by a local agency,

special district, or water corporation”). Therefore, Applicant’s position that he cannot be charged water and sewer fees simply because the total square footage of his proposed ADU is smaller than 750 sf is incorrect.

While the assessment of water and sewer fees is not determined by total square footage, there are other portion[s] of Section 65852.2 that impact the assessment of these fees. Whether or not sewer and water fees are legal will depend on the specific construction features of the proposed ADU provided in the permit application. Sections 65852.2(f)(4) and (5) discuss restrictions on sewer and water fees:

(4) For an accessory dwelling unit described in subparagraph (A) of paragraph (1) of subdivision (e), a local agency, special district, or water corporation shall not require the applicant to install a new or separate utility connection directly between the accessory dwelling unit and the utility or impose a related connection fee or capacity charge, unless the accessory dwelling unit was constructed with a new single-family home.

(5) For an accessory dwelling unit that is not described in subparagraph (A) of paragraph (1) of subdivision (e), a local agency, special district, or water corporation may require a new or separate utility connection directly between the accessory dwelling unit and the utility. Consistent with Section 66013, the connection may be subject to a connection fee or capacity charge that shall be proportionate to the burden of the proposed accessory dwelling unit, based upon either its square feet or the number of its drainage fixture unit (DFU) values, as defined in the Uniform Plumbing Code adopted and published by the International Association of Plumbing and Mechanical Officials, upon the water or sewer system. This fee or charge shall not exceed the reasonable cost of providing this service.

Cal. Gov’t Code § 65852.2(f)(4,5).

Sections 65852.2(f)(4) and (5) both state the applicability of these sections is based upon whether or not the ADU falls within the description of Section 65852.2(e)(1)(A), which provides:

(e)(1) Notwithstanding subdivisions (a) to (d), 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:

(A) One accessory dwelling unit or junior accessory dwelling unit per lot with a proposed or existing single-family dwelling if all of the following apply:

(i) The accessory dwelling unit or junior accessory dwelling unit is within the proposed space of a single-family dwelling or existing space of a single-family dwelling or accessory structure and **may include an expansion of not more than 150 square feet beyond the same physical dimensions as the existing accessory structure.** An

expansion beyond the physical dimensions of the existing accessory structure shall be limited to accommodating ingress and egress.

(ii) The space has exterior access from the proposed or existing single-family dwelling.

(iii) The side and rear setbacks are sufficient for fire and safety.

(iv) The junior accessory dwelling unit complies with the requirements of Section 65852.22.

Cal. Gov't Code § 65852.2 (e)(1)(A)(emphasis added).

Because Applicant's proposed ADU expands the soon-to-be converted garage's footprint by more than 150 sf, the ADU does not fall within the descriptions of Sections 65852.2(e)(1)(A) or 65852.2(f)(4). Accordingly, the City should determine whether Applicant is responsible for the payment of water and sewer fees under Section 65852.2(f)(5).

### CONCLUSION

For purposes of assessing sewer and water fees for ADUs, the total square footage of the proposed ADU is not relevant. Rather, the Public Utilities Department and DSD should review each permit application to identify the construction features that impact the application of Section 65852.2. The specific features of each ADU will determine the restrictions on or application of water and sewer fees for ADUs.

MARA W. ELLIOTT, CITY ATTORNEY

By           /s/ Christine M. Leone          

Christine M. Leone

Chief Deputy City Attorney

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cc: Johnnie Perkins, DCOO, Public Utilities

Elyse Lowe, Director, Development Services Department