



Are California Community Associations Required to Allow Owners to Add Accessory Dwelling Units and Junior Accessory Dwelling Units (AKA ADUs and JADUs)? Possibly!

By the Community Association Attorneys of SwedelsonGottlieb

As we all know, California is facing a serious housing crisis. High property values and rents make it difficult for the state's residents to afford homes, while the high costs of building leaves little profit incentive for home builders to construct homes priced at or below the median price.

The McKinsey Global Institute estimates that 3.5 million additional homes will need to be built in California over the next ten years, or 350,000 new homes each year (180,000 just to keep up with population growth). The housing crisis is estimated to cost the state roughly \$140 billion annually in lost economic output.

However, the California Department of Housing and Development recently reported that that the state is only adding 80,000 new homes annually. The disparity between these two figures means that a deepening of the housing crisis is all-but-certain in the near-future, and the state will not be able to avoid this outcome merely by building more homes.

As a result of the state not having enough homes to house its growing population, community associations will likely also experience an increase in resident occupancy, with more families living together in multi-generational homes, as well as an increase in home-sharing.

Additionally, for those planned development communities with lots that are large enough, there will likely be an increase in architectural requests to make more room for additional family members or roommates needed to offset increased living expenses. SwedelsonGottlieb has already seen an increase in requests to build Accessory Dwelling Units (ADUs) and Junior Accessory Dwelling Units (JADUs).

Not sure what an ADU or JADU is? You may know them by their more familiar names of "granny flats," in-law units, second units, etc. ADUs and JADUs offer the benefit of allowing for affordable new construction on existing land.

An ADU is defined in Government Code § 65852.2 as an attached or detached residential dwelling unit which provides complete independent living facilities for one or more persons and is located on a lot with a proposed or existing primary residence, including permanent provisions for living, sleeping, eating, cooking, and sanitation. This definition of an ADU also includes an efficiency unit and a manufactured home (as these terms are defined in the Health and Safety Code).

A JADU by contrast is defined in Government Code § 65852.22 as a unit of no more than 500 square feet in size that is contained entirely within an existing or proposed single-family residence, which may include sanitation facilities or shared sanitation facilities.

Government Code §§ 65852.2 and 65852.22 provide that a “local agency,” meaning a city, county, or combined city and county, may if it so chooses adopt ordinances providing for the creation of ADUs and JADUs in areas that are zoned for residential single-family dwelling residential use (or multifamily dwelling residential use ,for ADUs specifically).

The Government Code provides that it is the California Legislature’s intent that local agencies adopt such ordinances in a way that does not “unreasonably restrict the ability of homeowners to create accessory dwelling units in zones in which they are authorized by local ordinance.”

However, despite the Government Code’s broad public policy statements in favor of “local agencies” issuing permits for ADUs and JADUs, up until recently we had typically taken the position that these statutes nevertheless did not contain any express prohibitions against *private* covenants in a common interest development’s governing documents that sought to prohibit the construction of ADUs or JADUs.

In addition, we had typically taken the position that a common interest development association’s board and architectural committee were certainly not required to approve applications for ADUs or JADUs if approval of such an application might otherwise violate that association’s governing documents, including its architectural rules.

However, the California legislature’s recent enactment of AB 670, which was signed by California Governor Gavin Newsom on August 30, 2019 and went into effect on January 1, 2020, changes all that.

AB 670 adds § 4751 to the Civil Code. Civil Code § 4751 is similar to other provisions of the Davis-Stirling Common Interest Development Act that seek to override the provisions of an association's governing documents. There are murmurs of potential challenges to the constitutionality of the new law, but for the time being it appears to be on the books.

Civil Code § 4751 states that any covenant, restriction, or condition in a deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest in a planned development, and any provision in a governing document (which would include an association's CC&Rs and architectural rules) that effectively prohibits or unreasonably restricts the construction or use of an ADU or JADU on a lot zoned for single-family residential use that otherwise meets the requirements of Government Code §§ 65852.2 or 65852.22 is void and unenforceable.

However, Civil Code §4751 also states that provisions imposing "reasonable restrictions" on ADUs and JADUs are permissible. "Reasonable restrictions" are those that do not unreasonably increase the cost to construct, effectively prohibit the construction of, or extinguish the ability of owners to otherwise construct an ADU or JADU that is otherwise compliant with the Government Code's requirements.

Therefore, the enactment of Civil Code § 4751 does not mean that associations boards and architectural committees are automatically required to permit ADUs and JADUs.

In evaluating owners' requests to build ADUs or JADUs, the first step is to find out whether the local zoning map classifies the lots in your community as zoned for single family residential use, or some variant thereof. (Civil Code § 4751 only applies to planned developments, so condominium associations are not affected by the new law.)

Next, check to see whether the applicable local agency actually has enacted an ordinance permitting ADUs or JADUs, or both.

Government Code § 65852.2 provides for certain standards that a local agency's ADU ordinance must impose on the construction of ADUs, including but not limited to standards relating to location, density, use, parking, height, setback, landscaping, architectural review, maximum size, transferability, and prevention of adverse impacts to properties listed in the

California Register of Historic Resources. However, a local agency's standards cannot include a requirement for a minimum lot size where a proposed ADU may be constructed. The standards must be objective, so that an owner's application to the local agency for a permit to construct an ADU is considered by that agency without the need for discretionary review or a hearing.

If a local agency has not adopted an ADU ordinance, then it is required to approve or disapprove an owner's application to construct an ADU under the "default" standards for ADUs provided in the Government Code. These default standards are also the maximum standards; that is, a local agency can adopt an ordinance with less restrictive standards for ADUs, but it cannot adopt one with more restrictive standards.

Similarly, Government Code § 65852.22 provides for certain standards that a local agency's JADU ordinance must impose on the construction of JADUs, including requirements that:

- Only one JADU may be built per lot zoned for single-family residential dwelling use.
- The owner must occupy the single-family residence in which a JADU will be built.
- There must be a recorded deed restriction prohibiting the sale of the JADU separate from the sale of the primary residence, and restricting the size and attributes of the JADU so as to conform with the Government Code's provisions.
- A JADU must be constructed within the walls of a proposed or existing single-family residence.
- A JADU must include an entrance that is separate from the main entrance to a proposed or existing single-family residence.
- A JADU must include an efficiency kitchen with a cooking facility with appliances, a food preparation counter, and storage cabinets of reasonable size in relation to the size of the JADU.

If a local agency has not adopted a JADU ordinance, then it is similarly required to approve or disapprove an owner's application to construct a JADU under the "default" standards for JADUs provided for in the Government Code.

We imagine that most well-governed cities, particularly in expensive areas, have adopted or will adopt their own custom-tailored ADU and JADUs ordinances that are suited for that city's particular needs and concerns, rather than choosing to be bound by the "default" standards in the Government Code.

In addition, and notwithstanding whether a local agency has adopted an ADU or JADU ordinance, or what the standards are in such ordinances, a local agency *must* approve, for a lot zoned for residential or mixed-use, the following types of applications:

- One ADU or JADU per lot, if it will be contained within the proposed space of a single-family dwelling or the existing space of a single-family dwelling or accessory structure (including an expansion of not more than 150 square feet beyond the same physical dimension as the existing accessory structure), if the space will have exterior access from the proposed or existing single-family dwelling, if the side and rear setbacks will be sufficient for fire safety, and (if a JADU) if it complies with the requirements of Government Code § 65852.22.
- One detached, new construction ADU that does not exceed four-foot side and rear yard setbacks for a lot with a proposed or existing single-family dwelling, provided that a local agency may impose conditions limiting the total floor area of an ADU to not more than 800 square feet and the height to not more than 16 feet.
- Multiple ADUs within the portions of existing multifamily dwelling structures that are not used as livable space, including without limitation, storage rooms, boiler rooms, passageways, attics, basements, or garages, if each unit would comply with state building standards for dwelling units.
- At least one ADU within an existing multifamily dwelling, up to 25% of the existing multifamily dwelling units
- Not more than two ADUs on a lot with an existing multifamily dwelling, but detached from that multifamily dwelling, subject to a height limit of 16 feet and subject to 4 foot rear yard and side setbacks.

As an aside, Government Code § 65852.2 provides that nothing in it is to be construed to supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976, so if your community is subject to regulation by the California Coastal Commission, it is possible that your association is not required to allow for ADUs even if they comply with a local agency's ordinance or the Government Code's "default" standards, although you will want to confer with your association's counsel to determine whether that is the case.

In any case, because community associations are only prohibited from denying applications for ADUs and JADUs that meet the standards that local agencies are allowed to impose on their construction under the Government Code, it should be a prerequisite that owners first obtain building permits from the applicable local agencies before boards spend time and energy reviewing their applications.

As stated, associations are still allowed under Civil Code § 4751 to impose “reasonable restrictions” on ADUs and JADUs that do not unreasonably increase the cost to construct, effectively prohibit the construction of, or extinguish the ability of owners to otherwise construct them. These restrictions will likely be in an association’s architectural guidelines (You do have architectural guidelines, don’t you? If not, now is the time to get some in place).

The devil, as always, being in the details, whether an association’s restriction is “reasonable” or “unreasonable” is going to depend on the circumstances.

On the one hand, restrictions regarding the quality of workmanship and materials; restrictions requiring owners to obtain all necessary approvals and permits and to comply with all laws, codes and ordinances; and restrictions prohibiting owners from damaging or interfering with utilities or drainage channels in the construction of ADUs or JADUs will quite possibly be considered reasonable if challenged by an owner.

On the other hand, restrictions that outright prohibit ADUs or JADUs will likely be considered unenforceable on their face. In addition, restrictions regarding high-value items such as view restrictions, as well as subjective aesthetic criteria, will be subject to challenge because they have the great potential to increase the cost of construction of ADUs or JADUs, to the point of effectively prohibiting them, which Civil Code § 4751 does not allow associations to do.

The truth is, at this early stage, we simply do not know what types of architectural restrictions regarding ADUs or JADUs are going to be deemed unenforceable under this new law. We can imagine much litigation will result from owners challenging these restrictions if they are prevented from constructing ADUs or JADUs.

SwedelsonGottlieb represents California community associations. Please contact our office if your HOA or condo association needs legal assistance complying with this new law or otherwise.