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September 12, 2016

Herb J. Wesson, Jr., Council President
Los Angeles City Council
200 North Spring Street, Room 350
Los Angeles, California 90012

Re: CF 14-0057-S8, Code Amendment regarding Second Dwelling Units

Dear Council President Wesson,

I write on behalf of Los Angeles Neighbors in Action (LANA) regarding the Council's adoption on August 31, 2016, of agenda item 19A, which, among other things, directs the Department of City Planning to "consider and report on ways to provide an interim solution, including issuing a new Zoning Administrator Interpretation (ZAI) or a new ordinance, in substantial conformance with the Inter-Department Correspondence entitled 'Second Dwelling in Single Family Zone Pursuant to AB 1866' dated June 23, 2003 (and attached to the File) that maintains the buildings standards set forth in Ordinance No. 159,599 . . . to sever those portions of Sections 12.24.W.43 and 12.24.W.44 of the Los Angeles Municipal Code that do not comply with Government Code Section 65852.2 and thereby bring the City's Second Dwelling Unit policies and practices into compliance with State law." LANA is encouraged that the Council is finally bringing this matter to a conclusion by directing the Planning Department to maintain in force the City's adopted ordinance, as permitted by state law and by the Los Angeles Superior Court ruling that lead to the instant debate. LANA is concerned, however, about certain remarks made by Planning Director Vince Bertoni regarding the manner in which the Planning Department intends to implement the Council's direction. The Council must ensure that the Department does not, once again, misinterpret and misapply state law, or improperly seize the legislative power that may only be exercised by the Council.

The Council's August 31, 2016, Motion 19A invoked the very limited local government power established by Government Code section 65852.2, relied upon by the June 23, 2003 memo, by administrative action to strip out from section 12.24 W. 43 and W.44 as "null and void," particular discretionary procedures and standards related to the former CUP process. As the Superior Court in its February 25, 2016, ruling described, AB 1866's early drafts (as the bill went through the legislative process in early 2002) initially required local governments to formally amend their second unit ordnances to delete the CUP discretionary procedures that had been uniformly used to administer second unit permits throughout the state. But many cities complained that such formal amendments were unnecessary and could cause substantial unnecessary cost and delay. In response, the legislature changed the bill to simply require localities to administer their second unit ordinances in a ministerial way without formally

amending them. Because this would leave some now obsolete language in the local ordinance regarding the discretionary CUP process previously used to administer second unit permits, this obsolete language would have to be disregarded. That is precisely what the State Housing and Development Department (HCD) explained should occur in its August 2003 technical advisory: rather than formally amend their local second unit ordinance, local governments have the option to, by administrative action, simply treat those obsolete discretionary CUP provisions as "null and void." The Superior Court ruling in LANA's concluded that the 2003 administrative memo had been issued in conformity with this limited AB 1866 authority.

In spite of the limited authority granted to the Planning Department merely to excise the discretionary provisions in the municipal code, the Planning Director Bertoni appears to view his charge as far broader. Following the closed session, Director Bertoni specifically stated on August 31st that he did not expect that he, the City Attorney and the CZA would limit their consideration only to nullifying the discretionary CUP provisions of section 12.24 W. 43 and 44. To the contrary, he asserted that that a principal reason it would take "several weeks," not just a few days, to present a CZA "interpretation" memo back to the Council was that they would review and examine sections 12.24 W. 43 and W.44 to determine whether, in their view, there might be some other provisions in those sections that might not be able to pass muster as sound, legal policy. For example, he said, section 65582.2 contains a subsection that provides a city "can't completely prohibit SDUs overall in the City or in geographical areas." In this regard, Mr. Bertoni referenced section 12.24 W 43's requirements of a minimum lot size of 7,500 SF to be eligible for a second unit, claiming that it is his understanding that cities can exclude second units from "large geographic areas" only if they can make very specific findings about the possible negative impacts of second units in those areas. Accordingly, Mr. Bertoni suggested that he has a concern that, because most LA zoning is for smaller lots, and some single family residential areas have relatively few lots zoned for 7,500 SF or larger, section 12.24 W 43's 7,500 SF minimum lot size section may not meet the requirements of section 65582.2 and thus should not be retained in the interpretive memo as a second unit standard that would continue to be administered and enforced. Although Mr. Bertoni did not exhaustively review all of the provisions in the existing ordinances that he considered to raise potential concerns, in previous communications from the Planning Department, the prohibition on second dwelling units in designated Hillside areas has also been raised as an example of a "large geographic area" in which second dwelling units are prohibited by the City's adopted standards.

Mr. Bertoni's August 31st testimony seriously misstates the law. Government Code section 65852.2, subdivision (c), provides that "[n]o local agency shall adopt an ordinance which *totally precludes* second units within single-family or multifamily zoned areas unless the ordinance contains findings acknowledging that the ordinance may limit housing opportunities of the region and further contains findings that specific adverse impacts on the public health, safety, and welfare that would result from allowing second units within single-family and multifamily zoned areas justify adopting the ordinance." It does not refer to "large geographic areas;" rather, it refers to the "*total preclusion*" of second dwelling units within a city's single or multi family zoned areas, neither of which is true of the City's municipal code provisions. There is absolutely no legal reason that the Planning Department should be allowed to re-examine the 7,500 sf lot size requirement, or any other non-discretionary "yes or no" requirements in the current law.

Indeed, Government Code, section 65582.2 clearly states that a city can establish broad planning/environmental criteria for determining where SDUs may or may not be located. Thus, section 65582.2(a)(1) states that a local second unit ordinance "may do any of the following: (A) designate areas within the jurisdiction... where second units may be permitted. The designations 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 second units on traffic flow." Under this broad authority, local governments may appropriately designate areas, large or small, where second units are allowed, and correspondingly, where they are not allowed, under a broad set of criteria that they may establish, of which two possible criteria are mentioned in the statute. Other criteria, for example, could include (a) areas where the terrain is especially sensitive to geological and construction issues or to aesthetic impacts, (b) areas where the public streets are predominantly substandard or otherwise might present public safety problems, (c) areas where various public services and facilities are already near or over capacity, (d) areas where existing lot sizes are determined to be too small to generally be able to handle the development of second units without unduly impacting the surrounding neighborhoods, and a host of other sensible planning criteria.[1]

It is a fundamental aspect of the American legal system that bureaucrats to do not have the authority to pick and choose which ordinance provisions they think are unsound or "illegal" and refuse to enforce them. They take an oath of office to defend and enforce the laws that are on the books and, if they disagree with some of those laws, or have doubts about their legality, there are legally acceptable ways for that determination to be made, rather than issuing unilateral fiats. (See e.g., *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 [holding that local administrative personnel cannot decide for themselves that certain regulatory mandates are legally invalid because it is the province of the courts to adjudicate such issues and observing that courts are trained to analyze legal issues and do so in public proceedings after the interested parties are allowed to present their arguments]; *Voices for Rural Living v. El Dorado Irrigation District* (2012) 209 Cal.App.4th 1096 [holding that a public agency charged with implementing certain land use conditions imposed by a higher body could not simply declare that the conditions were legally invalid and refuse to follow them, observing that the public agency had other avenues available by which it could raise and adjudicate such legal issues].) AB 1866 provides only the most limited exception to this basic division of authority, to permit a local government's administrative officials to enforce its ordinance on a ministerial basis by severing, or disregarding, existing discretionary provisions. Chief Zoning Administrator Robert Janovici and Chief Zoning Engineer Patrick Kim did this when they issued the June 2003 memorandum which is specifically referenced in adopted Motion 19A and which the Superior Court cited with approval in its ruling.

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[1]The City of Pasadena, where Planning Director Bertoni most recently served, has a citywide minimum lot size for SDUs of 15,000 SF (See Pasadena Municipal Code section 17.50.275 B1.). The inclusion of such a limitation in Pasadena's code demonstrates that a 7,500 SF lot size restriction is clearly legal in Los Angeles, and exposes the seemingly arbitrary manner in which Mr. Bertoni has identified provisions that purportedly raise to him legal concerns.

The Superior Court was clear that the Zoning Administrator did not have legislative authority to excise the City's second dwelling unit standards. The Court's February 25, 2016 ruling expressly stated that "[t]he City Council or the ZA may properly evaluate LAMC 12.24.W.43 and attempt to *sever the ministerial provisions from discretionary provisions*." Mr. Bertoni's commentary regarding the lot size limitation and potentially other provisions included among the ministerial standards in the ordinance indicates an intent to do far more than simply determine whether a provision may be implemented ministerially. The Council did not instruct the City Planning Department to undertake this sort of fishing expedition into the City's adopted standards. To the contrary, section (3) of Motion 19A makes it clear that, if there are changes to any of the existing standards other than deleting the discretionary CUP provisions, the Council itself will make such changes only after "comprehensive, open, transparent review and process of, and proposed revisions to" the current standards. This is the precise opposite of Mr. Bertoni's proposed behind-closed-doors "pick and choose" fishing expedition by which the Department appears to plan to review and potentially change, by administrative fiat, the existing adopted standards.

The Council should quickly notify and instruct Mr. Bertoni that the Department of City Planning should not pursue any "reexamination" of section 12.24 W 43's adopted standards outside of the very narrow question of which provisions are discretionary CUP procedures and which standards are ministerial. The Council should have a monitoring representative, perhaps from the Office of the Chief Legislative Analyst, attend the Planning Department/City Attorney meetings to ensure that this instruction is carried out, to avoid any violation of the Superior Court's judgment and its underlying legal principles.

Very truly yours,

Beverly Grossman Palmer

cc: **Councilmember Cedillo**
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Councilmember Blumenfield
Councilmember Ryu
Councilmember Koretz
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